Hunter Saw Division of Asko, Inc. *and* Lonnie H. Keener, Jr. Case 6–CA–5976

March 12, 1973

DECISION AND ORDER

BY CHAIRMAN MILLER AND MEMBERS FANNING AND JENKINS

On October 17, 1972, Administrative Law Judge Robert E. Mullin issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief, and the General Counsel filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings and conclusions[1] of the Administrative Law Judge and to adopt his recommended Order.[2]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that Hunter Saw Division of Asko, Inc., Pittsburgh, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Administrative Law Judge's recommended Order.

[1] In reaching our conclusion herein, we find it unnecessary to pass on the Administrative Law Judge's findings and conclusions with respect to the legality of the November 5, 1971, layoff and the General Counsel's exceptions to his findings and conclusions The record shows that the original charge filed March 23, 1972, only related to the failure to recall in January 1972 and made no reference, direct or indirect, to any other unlawful conduct The amended charge, alleging, for the first time, the illegality of the November layoff was filed on July 19, 1972 In these circumstances, and since more than 6 months had elapsed prior to the filing of the amended charge, further proceedings with respect to the November layoff are precluded by the provisions of Sec. 10(b) of the Act.

[2] Respondent, in its exceptions to the Decision of the Administrative Law Judge, contends for the first time herein that we ought to defer to the available contractual grievance and arbitration machinery pursuant to the policy announced in *Collyer Insulated Wire, A Gulf and Western Systems Co*, 192 NLRB No 150 Such a *Collyer* defense was not raised or litigated at the hearing In Chairman Miller's view, a respondent seeking to assert this defense has the burden of establishing it by pleading and proving facts sufficient to show the applicability of the principles established in the *Collyer* line of cases Respondent, in his opinion, has not met that burden here. Members Fanning and Jenkins would in any event, in accordance with their dissents in *Collyer*, not defer this case to arbitration, even had Respondent shown the applicability of *Collyer*

DECISION

STATEMENT OF THE CASE

ROBERT E. MULLIN, Administrative Law Judge: This case was heard in Pittsburgh, Pennsylvania, on September 8, 1972, pursuant to charges duly filed and served.[1] The original complaint was issued on May 26, 1972. Thereafter, an amended complaint and a notice of hearing were issued on July 20, 1972. In its answers, duly filed, the Respondent conceded certain facts as to its business operations, but denied all allegations that it had committed any unfair labor practices.

At the trial, the General Counsel and the Respondent were represented by counsel. All parties were given full opportunity to examine and cross-examine witnesses, and to file briefs. A motion to dismiss, made by Respondent at the close of the hearing, is disposed of as appears hereinafter in this Decision. The parties waived oral argument and, on September 25, 1972, both the General Counsel and the Respondent submitted briefs.

Upon the entire record in the case, including the briefs of counsel, and from my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent, a Pennsylvania corporation with its principal office and plant located in Pittsburgh in that State, is engaged in the manufacture and nonretail sale of industrial saws and spacers for the steel industry. During the 12-month period preceding the issuance of the complaint, the Respondent shipped goods and materials valued in excess of $50,000 from its Pittsburgh plant directly to points outside the Commonwealth of Pennsylvania. Upon the foregoing facts, the Respondent concedes, and I find, that Hunter Saw Division of Asko, Inc., is engaged in commerce within the meaning of the Act.

II. THE LABOR ORGANIZATION INVOLVED

United Steelworkers of America, Local 3714, AFL–CIO, herein called the Union, or Steelworkers, is a labor organization within the meaning of the Act.

[1] The original charge was filed on March 23, 1972. An amended charge was filed on July 19, 1972.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background and Sequence of Events*

The Respondent has a small plant in the Pittsburgh area with about 25 employees. It has had collective-bargaining relations with the Union for many years. Shortly after his employment in September 1971, Lonnie H. Keener, Jr., the Charging Party herein, joined the Steelworkers. Early in November, the Respondent laid off Keener and two other recent hires. In January, the latter were recalled, but Keener was not. The General Counsel alleges that this was because Keener had invoked the Union's grievance procedures during the course of his employment and further that his original layoff was also discriminatory. These allegations are denied by the Respondent in their entirety.

B. *The Facts*

Keener went to work for the Respondent as a laborer on or about September 13, 1971. He had previously had several job interviews with Bernard F. Carroll, plant superintendent, and, after his employment, Carroll assigned Keener to work as a "holdup" man in what was known as the holdup room.[2] Subsequent to Keener's employment, the Respondent hired Stanley Lingelbach and Thomas Milanek.

Not long thereafter, the Respondent experienced a business downturn and Superintendent Carroll found that to keep all the employees occupied during the day it was necessary that he assign some of the men to work outside their classification. During the course of this period, Lingelbach and Milanek were both assigned to various jobs, some of which, apparently, were less arduous than the holdup work which Keener was performing. Late in October, or early in November, Keener complained to Carroll about his continued assignment as a laborer while others, hired subsequent to his employment, were getting lighter work. Carroll's answer was that there was not much work for anybody and that he hoped that the situation in the shop at that time would be only temporary.

Keener was not satisfied with Carroll's response. At this time, having become a union member,[3] Keener filed an oral grievance with the Union. Shortly thereafter, Robert Stenett, president of Local 3714, and Donald Brown, Bartley Riley, and Edmund Budziszewski, members of the Steelworkers' grievance committee, met with the plant superintendent to discuss Keener's complaint. At that time, Carroll repeated, in substance, what he had told Keener previously, namely, that the lack of work in the shop was, he believed, a temporary matter and that up to that point he had endeavored to avoid a layoff by assigning the employees wherever he could use them. Before concluding the conference, however, Carroll expressed his irritation at having to justify his effort to provide employment for everyone and announced that if the men were going to engage in petty bickering as to what men should be cleaning which machine, he would lay off the three youngest men. The collective-bargaining agreement required that the Union receive at least 1 week's notice of any reduction in force. Carroll told the committee that he was giving the Steelworkers the requisite notice. That Friday, Carroll notified Keener, Milanek, and Lingelbach that they would be laid off the following Friday. At the hearing, Carroll conceded that he made this decision at the time that the Union's committee came to him with Keener's grievance. A short while later, he laid off Carl Cervice, another employee.

In January, Keener learned that both Lingelbach and Milanek had been rehired. Thereafter he telephoned Carroll to inquire as to when he could return to work. Carroll offered no encouragement.[4] According to the latter, he told Keener that under the contract he was no longer obligated to recall any who had been laid off,[5] and that, in any event, he could not use Keener because of absenteeism and because Keener had had trouble doing the job assigned to him. Carroll testified that, at this point in their conversation, Keener declared that he was appealing the matter to the NLRB and that he needed reasons as to why he was not being reemployed. According to Carroll, he thereupon told Keener that he would not take him back because of his unreliability, incapability, and "attitude."[6] Carroll testified, in connection with the latter term, that he also told the employee that he did not like the way in which Keener had involved the Union's grievance committee in his problems. According to the superintendent, he stated to Keener that "when things were tough and I was trying to keep everybody occupied . . . You had to come in with a committee . . . when I explained to you like a gentleman what the conditions were . . . the committee bounces on my back . . . at this time I don't need aggravation."

C. *Concluding Findings*

The General Counsel alleged that the November layoff was triggered by the Union's action in connection with Keener's grievance and, therefore, discriminatory. This was denied by the Respondent, according to whom the layoff was dictated solely by economic considerations.

Carroll, a longtime employee of the Respondent, who had been superintendent for over 5 years, testified that he could not recall any earlier layoff, although in 1968 it had been necessary to put the shop employees on a 4-day week. However, he testified that for sometime before the layoff in

[2] The "holdup man" was an assistant to a sawsmith The latter was a skilled workman responsible for removing irregularities on the surface of saw blades after they had received heat treat processing The holdup man held the saw blade on a large, flat anvil and kept it level while the sawsmith, or hammerman, hammered and flattened the blade

[3] A union shop clause in the Steelworkers contract required new employees to join the Union on the 31st day of their employment

[4] The General Counsel did not establish a specific date as to when this conversation occurred. The witnesses were in substantial accord as to the approximate time Carroll testified that he talked with Keener late in January or early in February, and the latter testified that he made the telephone call in February

[5] This appears to have been correct The seniority clause in the collective-bargaining agreement provided that a laid-off employee retained seniority only for so long a period after the layoff as he had been employed by the Respondent In Keener's case this was approximately 2 months, a period that expired at the latest, in mid-January Of course, Lingelbach and Milanek had even less seniority than Keener

[6] The quotation is from Carroll's testimony

November 1971, the shop had little work and that it was his effort to spread the available work which precipitated the Union's grievance. Arien Metzelaar, assistant to the president, and Richard T. Williams, the corporate director of industrial relations, credibly testified that before the Union came into the picture they had discussed the likelihood of a layoff with Carroll. According to Williams, about 2 weeks before the layoff was effectuated, he had a conversation with Carroll in which the necessity of a cutback was discussed. Williams testified that he told the plant superintendent at this time that the decision as to a layoff would be left entirely to him.

The "management clause" in the collective-bargaining agreement clearly accorded to the Respondent the right to relieve employees from duty for lack of work. The testimony of Carroll, Metzelaar, and Williams as to the work shortage in mid-November was credible. The General Counsel offered no refutation of this line other than surmise and speculation. In his brief, the General Counsel contends that Carroll laid off Lingelbach and Milanek solely to reach Keener who had the most seniority. This argument, however, ignores the fact that shortly after the three above named were laid off, the Respondent also laid off another employee, Carl Cervice, who was senior to all three of them.[7] Consequently, it is my conclusion that not only does the record establish that the Respondent had an economic justification for the layoff, but that when faced with a choice between a make-work program that required using employees outside their classifications in order to keep them busy and a reduction in force in accordance with shop seniority, the Respondent could elect, as it did, to follow the latter course. As a result I conclude that the General Counsel has not proved that the layoff in November was ordered for discriminatory reasons.

The Respondent's refusal to recall Keener, however, presents a different question. According to Carroll, he did not wish to recall Keener because of his absenteeism, his stature, and his attitude. Neither of the first two reasons withstands scrutiny. Keener testified, credibly and without contradiction, that he had never been reprimanded while on the job, either orally or in writing. He also testified credibly that his absences from work were necessitated largely because of an automobile accident which he had had and because of the serious illness of one of his children. Apparently, his explanations, made at the plant during the period of his employment, were satisfactory, for as found earlier, he had never been reprimanded for absenteeism or for any other reason. Moreover, his absenteeism was not as great as at least two other employees who were retained.[8] At the hearing, Carroll testified that because Keener was not a tall man, but short of stature, a special platform, or skid, had to be built in the holdup room to enable Keener to perform his work for the sawsmith. According to Carroll, this decreased the employee's utility to the Respondent. As found above, Carroll had hired Keener when the latter was seeking employment. Keener's stature, manifestly apparent then, had not been considered a handicap to his employment at that time by the superintendent, a man with many years experience in every phase of the Respondent's operations.[9] Moreover, if, in fact, Keener's stature had constituted a problem it would have been evident during his 30-day probationary period and Keener would have been either discharged or reassigned. Since neither action was taken, the logical conclusion must be that the Respondent kept him after the completion of the probationary period because he had proved himself, physically, as well as otherwise, to be capable of doing the job assigned him. It is my conclusion that Carroll's criticism of Keener's physique was an afterthought which developed after the charges in the instant case were filed.

Carroll openly disdained Keener for having resorted to the union grievance procedure in protesting the superintendent's methods for assigning work in the shop. This was evident in his conversation with Keener in February and it was patently clear at the time he testified. In November 1971, Carroll had been making every effort to avoid a layoff in the shop by having even the more highly skilled employees perform routine maintenance work when there was nothing else for them to do. At this juncture, Keener, a brash newcomer, filed a grievance which confronted Carroll with the necessity of becoming involved in a breach of contract problem or of effectuating a reduction in force. As he testified, Keener's action was an "aggravation . . . I don't need. . . ."

The guarantee in Section 7 of the Act of the right to engage in protected concerted activities for the purpose of mutual aid and protection establishes not only the right of employees to engage in union-related activities but also the fundamental right of employees to present grievances to their employers over terms and conditions of employment. *N.L.R.B.* v. *Washington Aluminum Company,* 370 U.S. 9, 14; *Hugh H. Wilson Co.* v. *N.L.R.B.,* 414 F.2d 1345, 1347–48 (C.A. 3), cert. denied, 397 U.S. 935. Keener's complaint to Carroll that he was not being assigned any lighter work in the shop and the subsequent action of the Union's grievance committee in protesting, on Keener's behalf, about the superintendent's method of assigning work, clearly constituted concerted activity. Carroll's dismay with Keener for having frustrated the superintendent's well-intentioned efforts to keep all the employees on the payroll is understandable. Nevertheless, Keener was entitled to exercise his right to invoke the Union's grievance procedure and, under the Act here involved, that right was a protected concerted activity. *John Klann Moving and Trucking Company* v. *N.L.R.B.,* 411 F.2d 261, 263 (C.A. 6), enfg. 170 NLRB 1207, 1212; *N.L.R.B.* v. *Pruden Products Co.,* 422 F.2d 855, 856 (C.A. 7); *Bowman Transportation, Inc.,* 134 NLRB 1419, 1420 (Reeves), enfd. as to this point, 314 F.2d 497, 498 (C.A. 5); *Interboro Contractors, Inc.,* 157 NLRB 1295, 1301–02, enfd. 388 F.2d 495 (C.A. 2).

When Keener sought reemployment, Carroll refused to rehire him, alleging, *inter alia,* that Keener did not have the

[7] Cervice was reemployed in December 1971 This recall was in accordance with the terms of the contract because Cervice had over a year's seniority at the time of the layoff

[8] *E g*, Cervice and Astronich, both of whom had been absent for extended periods due to illness

[9] Carroll testified that he had been working at the plant for almost 35 years

right "attitude." As he described it, Keener's complaint, voiced both by the employee himself and through the Union's grievance committee, had been an "aggravation . . . I don't need. . . ." These remarks to Keener reveal the true motive for the Respondent's failure to recall the employee.[10] It is my conclusion that Carroll's refusal to reemploy Keener was motivated by his antipathy for the latter which developed when Keener exercised his right, before the layoff, to engage in protected concerted activity. Such action by the Respondent's plant superintendent constituted discrimination within the meaning of Section 8(a)(3) and (1) of the Act. It is so found.

CONCLUSIONS OF LAW

1. The Respondent is engaged in commerce and the Union is a labor organization, all within the meaning of the Act.
2. By discriminating in regard to the hire and tenure of Lonnie H. Keener, Jr., thereby discouraging union or concerted activities, the Respondent has engaged, and is engaging, in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.
3. By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, the Respondent has engaged, and is engaging, in unfair labor practices within the meaning of Section 8(a)(1) of the Act.
4. The General Counsel did not prove by a preponderance of the evidence that the Respondent's layoff of employees in November 1971 was violative of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I will recommend that the Respondent be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent discriminatorily refused to reemploy Lonnie H. Keener, Jr., I will recommend that the Respondent be ordered to offer Keener immediate and full reinstatement without prejudice to his seniority or other rights and privileges, and make him whole for any loss of earnings that he may have suffered from the time that the Respondent failed to reemploy him[11] to the date of the Respondent's offer of reinstatement. The backpay for the above-named employee shall be computed in accordance with the formula approved in *F. W. Woolworth Company*, 90 NLRB 289, with interest thereon computed in the manner and amount prescribed in *Isis Plumbing & Heating Co.*, 138 NLRB 716, 717–721. It will also be recommended that the said Respondent be required to preserve and make available to the Board, or its agents, on request, payroll and other records to facilitate the computation of backpay due.

Since a discriminatory discharge, or refusal to reemploy, "goes to the very heart of the Act" (*N.L.R.B.* v. *Entwistle Mfg. Co.*, 120 F.2d 532, 536 (C.A. 4)), it will be recommended that the Respondent be ordered to cease and desist from infringing in any manner upon the rights guaranteed in Section 7.

Upon the foregoing findings and conclusions and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[12]

Respondent, Hunter Saw Division of Asko, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to reemploy or otherwise discriminating against any employee because of his concerted or union activity.

(b) In any other manner interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purpose of collective bargaining or other mutual aid, or to refrain from any or all such activities.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Offer to Lonnie H. Keener, Jr., immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges and make him whole in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Preserve, and upon request, make available to the Board, or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary, or appropriate, to analyze the amount of backpay due.

(c) Notify immediately the above-named individual, if he is presently serving in the Armed Forces of the United States of his right to full reinstatement, upon application, after discharge from the Armed Forces, in accordance with the Selective Service and the Universal Military Training and Service Act.

(d) Post at its plant in Pittsburgh, Pennsylvania, copies of the attached notice marked "Appendix."[13] Copies of the notice, on forms provided by the Regional Director for Region 6, after being duly signed by the Respondent's

[10] As for Carroll's words to Keener on this occasion, it may be said, as the Fifth Circuit Court of Appeals said in another case: "If the words attributed to those authorized to speak for management are credited as having been said, their form and content and context eliminate all doubt on motive." *N L R B* v *Ferguson*, 257 F 2d 88, 90 (C A 5, 1958).

[11] Other than ascribing it to sometime in February 1972, the record does not establish a more accurate date of the telephone conversation in which Superintendent Carroll refused to rehire Keener Carroll testified that he hired a new employee, one Dan Brown, in the latter part of February The Respondent's backpay liability as to Keener is found to begin no later than the date on which Brown was hired

[12] In the event no exceptions are filed, as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[13] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted pursuant to a judgment of the United States Court of Appeals enforcing an Order of the National Labor Relations Board."

authorized representative, shall be posted by it for a period of 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 6, in writing, within 20 days from the date of the receipt of this decision, what steps the Respondent has taken to comply herewith.[14]

IT IS ALSO ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found.

[14] In the event that this recommended Order is adopted by the Board after exceptions have been filed, this provision shall be modified to read "Notify the Regional Director for Region 6, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT discourage union or concerted activities by refusing to reemploy or otherwise discriminating against our employees.

WE WILL NOT in any other manner, interfere with, restrain, or coerce employees in the exercise of their right to self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities.

WE WILL offer Lonnie H. Keener, Jr., immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of pay suffered as a result of the discrimination against him.

HUNTER SAW DIVISION OF
ASKO, INC.
(Employer)

Dated By
(Representative) (Title)

We will notify immediately the above-named individual, if presently serving in the Armed Forces of the United States, of the right to full reinstatement, upon application after discharge from the Armed Forces, in accordance with the Selective Service Act and the Universal Military Training and Service Act.

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 1536 Federal Building, 1000 Liberty Avenue, Pittsburgh, Pennsylvania 15222, Telephone 412–644–2977.