United States Metals Refining Company *and* David Rubin. Case 22–CA–6005

June 25, 1975

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND KENNEDY

On February 25, 1975, Administrative Law Judge Julius Cohn issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, General Counsel filed an answering brief, and Charging Party filed a brief in support of the Administrative Law Judge's Decision.

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 of the Administrative Law Judge and to adopt his recommended Order.

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 Respondent, United States Metals Refining Company, Carteret, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

DECISION

STATEMENT OF THE CASE

JULIUS COHN, Administrative Law Judge: This case was heard at Newark, New Jersey, on November 25 and 26, 1974. The charge in this proceeding was filed on July 30 and served on July 31, 1974. Thereafter on October 16, 1974, the Regional Director for Region 22 issued a complaint alleging that United States Metals Refining Company, herein called the Respondent or the Company, violated Section 8(a)(1) and (3) of the Act by unlawfully terminating David Rubin,[1] herein called the Charging Party. Respondent filed an answer denying the commission of unfair labor practices.[2]

Issues

Whether the Charging Party was engaged in concerted, protected activity on July 3, 1974.

If so, whether the Respondent discharged the Charging Party because of the protected activity in which he had been engaged.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. All parties submitted briefs which have been carefully considered.

Upon the entire record of the case,[3] and from my observation of witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE COMPANY

The Company, a New Jersey corporation, maintains an office and plant at Carteret, New Jersey, where it is engaged in smelting, refining, and shipping nonferrous metals and related products. During the 12 months preceding the issuance of the complaint herein, the Company caused to be manufactured at and distributed from its Carteret plant products valued in excess of $50,000, of which products valued in excess of $50,000 were shipped from said Carteret plant in interstate commerce directly to States of the United States other than New Jersey. The parties have stipulated and I find that the Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Local 837, United Steelworkers of America, AFL–CIO, herein called the Union, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

The Company operates a refinery in Carteret, New Jersey, where it is engaged as a smelter and refiner of nonferrous metals, principally copper. The various processes are divided among 17 different departments, of which the electrolytic department, located in the tankhouse and described by company officials as the "heart of the plant," is the department involved in this case. The Company employs some 1,600 hourly employees, 300 in the tankhouse. As indicated by the name of the department, the

[1] The name of the Charging Party appears as amended at the hearing.

[2] In its answer and at the hearing, Respondent urged that the complaint be dismissed and the charge be deferred to arbitration in accordance with the grievance and arbitration procedures of the collective-bargaining agreement. Subsequent to the hearing, by letter dated December 12, 1974, addressed to counsel for the General Counsel, and in its brief, Respondent withdrew any plea in bar to the complaint based on the arbitrability of the Charging Party's discharge under the collective-bargaining agreement.

[3] After the close of hearing, by motion dated January 13, 1975, Respondent moved to correct the transcript of this proceeding. By letter dated January 23, 1975, counsel for the Charging Party objected to four items of the many proposed changes. Finally by letter dated January 28, 1975, counsel for the Respondent replied to the objections set forth in the Charging Party's letter. I have marked these documents ALJ Exhs. 1, 2, and 3, respectively, and hereby make them part of the record. I shall grant Respondent's motion to correct the transcript except as to the four items to which objection has been made. In agreement with counsel for the Charging Party, I find that those suggested changes appear to involve a desire to change testimony rather than a correction of erroneously transcribed testimony.

operation conducted there is an electrolytic-plating one in which 500-pound anodes of impure copper are placed in tanks containing an acid solution. Copper from the anodes goes into the electrically charged acid solution and is deposited on a starting sheet which becomes a cathode. The floormen in the tankhouse are responsible for placing the anodes into the tanks, positioning, and finally removing them. Section men insert the starting sheets, line them up, and generally service the tanks so that short circuits do not occur. The operation is a constant one, and to properly service it, overtime is required daily in the tankhouse.

The hourly employees of Respondent have been represented since 1941 and the Union has been the collective-bargaining representative since 1967.

During the morning of June 3[4] it became apparent that the employees in the tankhouse were refusing to work overtime. Employees were aggrieved by the Company's omission of certain classifications from the overtime work scheduled on the Saturday following the Memorial Day holiday, and, as a result, during the week of June 3 all tankhouse employees refused overtime work. Efforts to resolve the grievance that week were fruitless and, on June 11, company officials met with the officers and executive board of the Union and pointed out that the concerted boycott was a contract violation which could render the Union liable for damages.[5] Officials of the Union then met with the employees in the tankhouse and urged them to discontinue the boycott of overtime which was violative of article XXI of the contract. The Union took further action by removing the tankhouse steward, Slater, from his position. Slater apparently opposed the Union's view and advocated continuation of the ban on overtime. The background and the facts in this case are in the main uncontroverted but there is some difference among the witnesses as to the duration of the boycott. A distillation of the testimony indicates that, after the meeting of union officials and rank-and-file, the floormen began accepting overtime assignments while many section men continued their refusal. The Charging Party, Rubin, asserts that section men refused to work during the first and third weeks in June, while he admits personally refusing overtime during the second and fourth weeks as well. There is no question, however, that the boycott was over by July 1.

The collective-bargaining agreement expired June 30. Negotiations for a new contract commenced in May and culminated in agreement on June 29. A memorandum of agreement was signed providing for ratification by the membership of the Local on July 3 and, further, that upon ratification the new agreement be effective as of July 1. The agreement was first approved by the steering committee of the International and then ratified by the membership on July 3. At the time of signing of the memorandum, William Moran, district director of the Union's International and John Schein, Respondent's director of industrial and public relations, orally agreed that the old contract would be continued in effect until the ratification.[6]

B. *Facts*

David Rubin was employed since January 3 as a section man in the tankhouse. After several months he became active with a group or caucus called "Fighting Times." This is a group of employees having no formal organization or membership; there are no elected officers; meetings are held but not according to a particular schedule. No dues are collected and expenses are defrayed by donations received from employees. The participants write and distribute pamphlets and leaflets among the employees. According to Rubin, the purpose is to obtain a better contract and create a fighting, democratic union. Rubin testified that, during the month of June, he brought copies of four leaflets into the plant and distributed them among tankhouse employees. The first three of these leaflets clearly advocate the overtime boycott and exhort employees to refuse overtime. The fourth leaflet, dated June 28, does not refer to the overtime question and relates to the ongoing contract negotiations. While Rubin stated that, in addition to his distributions, he urged people not to work overtime, neither he nor any other employee received discipline for their refusal to work overtime. Nor was Rubin or anyone else involved in the distribution of leaflets urging the boycott of overtime disciplined for their participation. On at least one occasion, June 20, Rubin was observed by Refinery Superintendent Ziro in the tankhouse distributing leaflets.[7] During his distribution of the June 28 leaflet, Foreman Osolinski asked Rubin for a leaflet and was given one.[8]

Rubin worked on a shift commencing at 9:30 a.m. On July 3, he went to the union hall, voted in the ratification referendum, and, at 9 a.m., went through the plant gates carrying a brown paper shopping bag which contained 300 leaflets. A security guard stopped him and asked to look into the bag.[9] Rubin showed him the bag and its contents and was then detained while Chief of Security Sanders brought one of the leaflets to F. R. Whiting, assistant director of industrial and public relations. Whiting testified that, after the second leaflet had been distributed in June, he instructed Sanders to look for men bringing in leaflets. Rubin was the first to be apprehended. After reading the leaflets, Whiting directed Sanders to inform Rubin he was suspended for 5 days subject to discharge. This was done and confirmed by telegram and thereafter Rubin was advised by telegram dated July 8 of his discharge. Whiting stated that he made the decision in this regard after discussion with Ziro and Schein. There is no conflict as to

[4] All dates hereinafter will refer to 1974 unless otherwise specified.

[5] Art. XXI of the collective-bargaining agreement is a broad no-strike provision which includes, "work stoppage, slowdown, boycott or any other interference with the Company's business."

[6] This according to the uncontradicted testimony of Schein. Counsel for the General Counsel and the Charging Party contend that no contract was in effect after June 30 and consequently art. XXI would not operate. However, I credit Schein in this connection as there is no contrary evidence and his statement is very plausible. Oral understandings of this nature are not uncommon and the parties thereto were not exactly neophytes. Accordingly, I find that art. XXI was effective from July 1 until ratification on July 3.

[7] Ziro so testified.

[8] This uncontradicted testimony of Rubin is credited; Osolinski did not testify at the hearing.

[9] Company witnesses testified that this was standard procedure because of problems with alcohol and drugs.

the essential facts and circumstances of Rubin's discharge as related above.

The leaflet brought into the plant by Rubin on July 3 is a single sheet headed by the words "VOTE NO!". The first paragraph castigates the union leaders upon the results obtained in the proposed contract. The second paragraph compares the gains achieved with what Fighting Times believed should have been obtained. The next portion of the leaflet is headed by the words "FIGHT FOR A GOOD CONTRACT" and then reads as follows:

> It is becoming clearer and clearer where the union leaders stand. They kept us in the dark all through the negotiations and refused to let us get involved. *When the Tank House workers started the contract fight early by banning overtime, the union leaders jumped to the company's defense.* And at Local 365 (ASARCO) it was the same story. The union gave the company a 2 week extension, knowing that extensions only benefit the company, the workers there wildcatted. To win a good contract the rank and file has to be involved, and it's not too late for us to do that. VOTE NO! Turn down this sell out! [Emphasis supplied.]
>
> We must stand united against this company and any sellout union leaders. We must go on strike!! We can only win real gains if we rely on our own strength.
>
> Because of lack of time, this is our first and hopefully last leaflet that's not in Spanish.
>
> FIGHTING TIMES

Whiting testified that the leaflet, particularly as it contained a reference to the overtime ban, provided him with sufficient evidence "to tie an individual in with aiding and abetting encouraging . . . overtime boycott in the plant." He decided that he had proof of a violation of article XXI of the contract and ordered Rubin's suspension and finally his discharge.

C. *Analysis*

Section 7 of the Act guarantees employees the right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection." The initial question presented is whether Rubin's activity on July 3 in distributing the leaflet entitled "VOTE NO" was protected under the Act. It has been held that attempts by union members to bring about changes in a union's attitude concerning negotiations for a contract or to urge the union to seek greater benefits constitute concerted activity protected by the Act.[10] Respondent not only recognizes this to be so, but also does not contend that Rubin violated any rule with respect to distribution of literature. Respondent does contend, however, that the leaflet in question contained material which rendered its distribution unprotected. It relies on the sentence in the leaflet referring to the overtime ban which reads "When the Tank House workers started the contract fight early by banning overtime, the union leaders jumped to the company's defense." Respondent argues that this is an "approving" reference to the overtime boycott, a call for its renewal. In addition, it contends that a further reference in the leaflet to a wildcat strike at a competitor's plant constitutes encouragement of a wildcat at Respondent. To urge employees to engage in a concerted refusal to boycott overtime and, in addition, to call upon them to engage in a wildcat strike, would be violations of article XXI of the contract,[11] and therefore the distribution of a leaflet containing such material would not be a protected activity. I have read the leaflet carefully and do not so construe its language. The leaflet strongly appeals to the employees to "vote no" and reject the proposed contract. In doing so, it engages in a diatribe against the union leaders. The quoted reference to the overtime ban is only in connection with the claim of "Fighting Times" that the union leaders support the Company rather than the employees. There is no language in the leaflet calling for a revival of the overtime boycott. Indeed, all parties agree that this activity had ceased by July 1, and Refinery Superintendent Ziro testified that by July 3 it was over and dead. The issue before the employees at this point was the proposed agreement, not overtime. Nor do I deem the reference to a wildcat at a competitor a call for illegal strike activity at Respondent's plant. The leaflet does, in fact, call for a strike. But in the chronology of events as they were scheduled in this case, a strike would not be illegal. The leaflet appeals for a "No Vote" in the referendum on July 3. While I have found that the parties agreed to a continuance of the contract until the ratification vote, the old contract would expire at the conclusion of the poll in either event. Thus a no vote would leave the Union free to strike.[12] Of course, if the proposed agreement were ratified, article XXI would be viable as it carried over and a strike would be illegal. The appeal to strike, in the context of the language as used in the leaflet is the result of a no vote, its principal theme. Accordingly, I find that the material and subject matter contained in the leaflet is not such as to render its distribution unprotected. Rubin, therefore, was engaged in protected activity on July 3.

The principal contention of Respondent does not, however, rest on whether Rubin was engaged in an unprotected activity on July 3, but rather that such activity, coupled with the substance of the leaflet, provided the evidence of his responsibility for the ban on overtime earlier in the month. Thus, Respondent claims that it discharged Rubin for his participation and his appeals to other employees to join in the boycott of overtime during the month of June. It states that, while supervisors and managers suspected Rubin before, it now had concrete evidence of his involvement in activity violative of article XXI. I am not persuaded by this argument.

Respondent admits that it was long suspicious of Rubin's activity and that of other employees in promoting the overtime ban. It claims it could not proceed against them because its information was based on hearsay from employees and it would be unwise to rely on them as witnesses in any proceeding. However, the testimony of Respondent's witnesses goes beyond this. Thus, Refinery

[10] *N.L.R.B.* v. *Nu-Car Carriers, Inc.*, 189 F 2d 756, 760 (C.A 3, 1951); *Samsonite Corporation*, 206 NLRB 343 (1973).

[11] I have previously found the contract to have continued in effect on July 3.

[12] The Union had been previously authorized to strike if agreement was not concluded.

Superintendent Ziro personally saw Rubin pass out three or four copies of the June 20 "Fighting Times" leaflet and thereafter Osolinski, his foreman, observed Rubin with a quantity of the June 28 leaflet and obtained a copy from him. This evidence is direct, not hearsay. Moreover, these leaflets, particularly the one of June 20, specifically advocated the ban on overtime. Respondent did not seek to punish Rubin after those occasions, nor did it discipline any employee for either advocating or engaging in the June boycott. Indeed, none of Respondent's witnesses could recall any instance of an employee being disciplined for refusal to work overtime although all remembered overtime boycotts which occurred prior to June. It is quite clear, therefore, that the Respondent for its own reasons had determined not to invoke article XXI with respect to the employees' refusal to work overtime in June, and I do not credit the assertions of its witnesses that such decision was based on insufficiency of evidence. In view of its reluctance to use the direct evidence of Rubin's involvement, Respondent's later reliance on the language of the leaflet of July 3, which I have found to be concerned with ratification, to provide evidence of his involvement in the overtime boycott, appears somewhat strained.

I have already found that the activity in which Rubin engaged on July 3 was protected; I now find, in view of the above, that Respondent discharged him because he sought to bring into the plant 300 leaflets urging employees to vote against ratification of the proposed contract, rather than a belated reaction to his conduct in distributing leaflets earlier in June which advocated the ban on overtime. By so doing, Respondent violated Section 8(a)(1) and (3) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with the operations of Respondent described in section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

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

Having found that Respondent discharged David Rubin in violation of Section 8(a)(3) and (1) of the Act, I shall recommend that Respondent be ordered to offer him reinstatement and make him whole for any loss of pay resulting from his discharge, by payment to him of a sum of money equal to the amount he normally would have earned as wages from the date of his discharge to the date on which reinstatement is offered, less net earnings during that period. Such backpay shall be computed on a quarterly basis in the manner prescribed in *F. W. Woolworth Company,* 90 NLRB 289 (1950), and shall include interest at 6 percent as provided in *Isis Plumbing & Heating Co.,* 138 NLRB 716 (1962).

It is further recommended that Respondent be ordered to 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 to analyze the amount of backpay due.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By discharging and discriminating against David Rubin because of his union or other concerted activities, Respondent violated Section 8(a)(3) of the Act.
4. By the foregoing conduct, Respondent has interfered with, restrained, and coerced employees in the exercise of their rights guaranteed to them by Section 7 of the Act, in violation of Section 8(a)(1) of the Act.
5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

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

ORDER[13]

Respondent, United States Metals Refining Company, Carteret, New Jersey, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging or otherwise discriminating against any employee because of his union or other concerted activities.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed to them in Section 7 of the Act.

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

(a) Offer David Rubin immediate and full reinstatement to his former job or, if his job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for his loss of earnings 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 to analyze the amount of backpay due.

[13] 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.

(c) Post at its Carteret, New Jersey, plant copies of the attached notice marked "Appendix."[14] Copies of said notice, on forms provided by the Regional Director for Region 22, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 22, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

[14] 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."

APPENDIX

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

After a hearing at which all sides had a chance to give evidence, it has been found that we violated the National Labor Relations Act, as amended, and we have been ordered to post this notice.

WE WILL NOT discharge or otherwise discriminate against any employee for engaging in union or other concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in Section 7 of the Act.

WE WILL offer full reinstatement to David Rubin with backpay plus 6-percent interest.

UNITED STATES METALS
REFINING COMPANY