

United Steelworkers of America, Local 8093, AFL-CIO-CLC (Kennecott Copper Corporation, Ray Mines Division) and Donald R. Holland. Case 28-CB-1003

August 2, 1976

DECISION AND ORDER

BY MEMBERS FANNING, PENELLO, AND WALTHER

On May 24, 1976, Administrative Law Judge James T. Rasbury issued the attached Decision in this proceeding. Thereafter, Respondent Union filed exceptions.

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,¹ and conclusions 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 the Respondent, United Steelworkers of America, Local 8093, AFL-CIO-CLC, its officers, agents, and representatives, shall take the action set forth in the said recommended Order.

¹ In affirming the Administrative Law Judge's Decision that Respondent violated Sec 8(b)(1)(A), we rely solely on his finding that the Local's president told Holland that his grievance would not be taken to arbitration because he was not a union member.

² The Administrative Law Judge, at fn 3, inadvertently referred to the State of Utah and its right-to-work statute. This proceeding arose in Arizona, which also has a right-to-work statute.

DECISION

STATEMENT OF THE CASE

JAMES T. RASBURY, Administrative Law Judge: This case was heard at Globe, Arizona, on April 13, 1976. The complaint and an amended complaint were issued by the Regional Director for Region 28 on January 30 and March 31, 1976, respectively, based on a charge filed by Donald R. Holland on December 1, 1975.¹ The complaint alleged

¹ The relevant events herein occurred during the calendar year 1975 and all dates hereinafter will be in the year 1975 unless otherwise indicated.

that the United Steelworkers of America, Local 8093 (herein Respondent or Union), violated Section 8(b)(1)(A) of the Act in that Respondent unlawfully restrained or coerced Donald Holland in the exercise of his Section 7 rights by failing to represent him in an arbitration matter arising under the union contract because he was not a member of the Union at that time.

Upon the entire record, including my observation of the demeanor of the witnesses and after giving due consideration to the oral argument by Respondent and the brief filed by the General Counsel, I make the following:

FINDINGS OF FACT

I. JURISDICTION

The Kennecott Copper Corporation (herein Employer) is a New York corporation maintaining its principal office and place of business at 161 East 42d Street, New York City, New York, and operating facilities in several States of the United States, among which is a copper mine and smelter at Hayden, Arizona, known as the Ray Mines Division, the facility involved in this proceeding, where it is engaged in mining and reduction of copper ores and related activities. During the most recent calendar year, which period is generally representative of its annual operations, the Employer, in the course and conduct of its business operations at the Ray Mines Division in Hayden, Arizona, purchased goods and materials valued in excess of \$50,000 and caused same to be shipped in interstate commerce and delivered to its Hayden, Arizona, place of business directly from suppliers located outside the State of Arizona. During the same period of time, in the course and conduct of its business operations, the Employer sold and shipped goods and materials valued in excess of \$50,000 in interstate commerce from its Hayden, Arizona, facility directly to customers located in States of the United States other than the State of Arizona. On the basis of these undenied facts, I find the Employer to be, and at all times material herein to have been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

The Respondent, United Steelworkers of America, Local 8093, AFL-CIO-CLC, is now, and at all times material hereto has been, a labor organization within the meaning of Section 2(5) of the Act.²

² In his opening statement Representative Smith seemed to have been raising the question of whether or not the appropriate party had been charged in this case, or had been served in this case, because the certified bargaining representative is the (International) United Steelworkers of America and not Local 8093. I find no merit or real substance to Mr Smith's observations because regardless of the certification there can be no doubt that Local 8093 is the agent for the United Steelworkers of America in carrying out the terms and conditions of the labor-management agreement.

III. THE ALLEGED UNFAIR LABOR PRACTICE

A. Background Events

Donald Holland has been employed by the Employer for approximately 8 years. During the first 5-1/2 or 6 years he was a member of the Union but for some reason, unexplained in the record, he dropped out of the Union.³ In February, Holland was transferred from the mill to the binman area of the smelter department. During the first month that Holland worked as a binman, Mr. Reese, an employer safety representative, advised him that the low-cut leather shoes he was wearing were inappropriate for work in the smelter department. Following this admonition Holland changed his footwear to rubber boots which had been issued to him in the mill. Holland received no further complaints or objections to the type of footwear until April 18.

B. The Facts Concerning Holland's Grievance

A day or two before April 18, a representative of Respondent's safety committee, named Manuel Ortega, visited the binman area of the smelter department and there discussed safety and working conditions with the Charging Party, Holland. Holland pointed out several situations which he believed to be unsafe and Ortega indicated that he would talk to Mr. Halcorn, a company safety representative, concerning these safety hazards. Later that same day Holland was called to the office of his immediate supervisor, Foreman Ponce, and the general foreman, Mr. Dietzel, where he was reprimanded for complaining to Ortega regarding the safety hazards. Holland was sufficiently upset by this conversation that on his way home at the end of his shift he related the incidents to David Mendoza, who was the president of the Respondent.⁴ Holland advised Mendoza that Dietzel had reprimanded him because he had reported safety hazards to his union safety representative rather than reporting them to his foreman first. Mendoza viewed this treatment as some sort of union harassment.

A day or two later, on April 18, Foreman Ponce called Holland to his office and told him that by wearing rubber boots Holland was violating company safety regulations. Ponce advised Holland to wear leather boots in the future. This was the first time that anyone had objected to the rubber boots which Holland had been wearing. On that same day Holland reported Ponce's shoe request to Mendoza. Again Mendoza suggested that Ponce could be motivated by a desire to harass Holland in view of his cooperation with Respondent's safety inquiry. Holland then asked Mendoza to check on the rules regarding the wearing of rubber boots and to advise him of what he learned.

Mendoza testified that he reviewed the collective-bar-

gaining contract, as well as the Company's rules and regulations, and was unable to find any provision forbidding the use of rubber boots in the area where Holland worked. Moreover, Mendoza testified that he asked Mr. Reese, the company safety representative, and Mr. Stoker, the smelter department superintendent, if there were any rules against wearing rubber boots in the area where Holland worked and was told by each of them that there were no such rules. On April 20, Mendoza informed Holland of the results of his inquiries.⁵ Shortly after reporting for work on April 20, Holland was suspended and sent home for the remainder of his shift by his supervisor, Foreman Ponce, because he had reported to work wearing rubber boots. Holland received no pay for any part of his April 20 shift. Holland purchased leather boots on April 21 and thereafter wore them working as a binman. Holland immediately advised Mendoza over the telephone of his suspension and on May 5 Mendoza on behalf of the Charging Party filed a grievance which requested that Holland be paid for the loss of wages on the day that he was sent home and that the Employer cease and desist from harassing Holland. (See G.C. Exhs. 2(a), (b), and (c).)⁶

The labor-management agreement (G.C. Exh. 4) contains a typical grievance-arbitration procedure providing for three successively higher level meetings on the part of the union grievance committee with representatives of management in which each side is given an opportunity to explain its views of the matter and then if it cannot be amicably resolved, the fourth step provides submission of the dispute to an arbitrator.

Holland testified that just shortly before July 27,⁷ he was advised by Mendoza that the Employer had denied his grievance at the third step and that Mendoza told him, "Of course, you know that's all I can do for you on this one since you're not a union member."

Q. Did he say anything else?

A. He [Mendoza] said that he had tried to get the grievance committee to go ahead and arbitrate this one for me anyway, but they refused, saying that if they did this for me that it would be like giving the union members a license to drop out the Union and still have their grievances arbitrated.

* * * * *

Q. Do you remember if, in that conversation, Mr. Mendoza invited you to join Local 8093?

A. Yes. He said—he asked me if I would want to

³ The calendar for 1975 indicates that April 18 was on a Friday. Holland worked wearing rubber boots on April 19, but nothing was said to him. Holland's next shift began at 11 30 p m on April 20 and it was then he was sent home.

⁴ There was no explanation and I shall not speculate, but I am at least curious as to why this matter was not handled in accordance with the provisions of art VI, sec 8(a), at p 14 of the labor agreement (G C Exh 4) which requires a union representative to be notified and given an opportunity to be present before the employee leaves the company property. While this was not a discharge, it certainly was discipline involving suspension.

⁷ This date was fixed by Holland because he went on his vacation on July 27. The fixing of the date also appears to be reasonably accurate inasmuch as the third step denial, as reflected by Yagmin's letter to Mendoza, was dated July 23. F A Yagmin, Jr, is the industrial relations director for the Employer.

³ The State of Utah has a right-to-work statute and there was nothing in the evidence to indicate that the employees were required to pay a dues equivalency (agency shop) which has been held to be legal in some States which have right-to-work statutes.

⁴ The labor-management agreement provides that the president may also be a member of the grievance committee (G C Exh 4).

join and he thought it would be better for both me and the Union if I did.

Q. I see. And what did you tell him?

A. I said, "All right. I'll join."

As indicated earlier, Mendoza, who was subpoenaed to testify by the General Counsel, confirmed Holland's testimony concerning the fact that he (Mendoza) had contacted Reese, the safety representative, and Stoker, the smelter superintendent, and advised Holland that those employer representatives had informed him there were no rules against rubber boots in the smelter. However, under cross-examination questioning by Respondent, Mendoza testified that he had never informed Holland that he "would not take a case to arbitration because he [Holland] was not a member of the Steelworkers Union."

There was additional testimony—which I regard as being unworthy and unnecessary of repeating here in detail—tending to show that Respondent had processed other grievances on behalf of Holland, some of which had been satisfactorily settled prior to arbitration; and also testimony indicating that after Holland became a member of the Union, the Union agreed to take a grievance regarding his qualifications for a higher rated job to arbitration. I regard this testimony as being insufficient to show a pattern from which reasonable inferences can be drawn and not directly relevant to the issues before me in this case.

Analysis and Conclusions

The law is clear that once a collective-bargaining representative has been designated or selected by a majority of employees in a unit appropriate for such purposes, that it shall be the exclusive representative of all the employees in such unit.⁸ The collective-bargaining representative has the same obligation to represent nonmembers as it has to represent members of the Union.

A resolution of this dispute turns on the credibility of the only two witnesses, Mendoza and Holland, each of whom I feel in most instances was endeavoring to relate the facts as honestly as each could recall them. However, as regards the reason why Holland's grievance was not taken to arbitration, I am disposed to believe the testimony of Holland. First of all, the answer or reason which Mendoza gave to Holland for not taking the grievance to arbitration is entirely logical and economically sound. Looking at the problem strictly from an economical viewpoint, why should the Union spend some \$400 to \$1,000⁹ in order to recover 1 day's pay for an employee who was not a member of the Union, unless required to do so by law. I believe Holland's testimony and am of the opinion that Mendoza gave Holland an honest and truthful answer when he told him that he had tried to persuade the other members of the grievance committee to consent to take the matter to arbitration and that he (Mendoza) could thereby persuade Holland to

become a member of the Union, but that the committee would not agree.

Even if I were not certain that Mendoza had truthfully advised Holland that the grievance would not be taken to arbitration because Holland was not a member of the Union, nevertheless the Respondent is guilty of an 8(b)(1)(A) violation of the Act because its actions appear arbitrary, discriminatory, and in bad faith when viewed in the broad light of the facts of the grievance. After Holland was advised that his footgear was not in conformance with safety regulations, he turned to a logical source of information in order to ascertain if his foreman's interpretation of the regulations had been a correct one. Mendoza made a thorough check of the contract and company rules, including the opinions of two substantial and qualified representatives of the Employer, regarding the safety regulations of the footgear in the smelter department. Having done so, he (Mendoza) had a right to rely on his information and in turn Holland had a right to rely on the information provided by Mendoza. The dispute was precipitated by misleading or erroneous information furnished by responsible agents of the Employer. I find nothing in this case to indicate that Holland was deliberately seeking to violate the safety regulations or "bait" the Employer. In view of these responsible representations by management, I am disposed to feel that Holland had a right to rely on this information and continue to wear his rubber boots unless or until he was further warned or advised by the Employer that the rubber boots were against safety regulations and that he would be sent home if he continued to wear them. This is not to say that in every instance a union is required to process an employee's grievance to arbitration. If, in good faith, it believes the grievance is without merit, it may refuse to entertain it without running afoul of its duty of fair representation.¹⁰ However, where all of the evidence tends to indicate that the grievance has merit and that the opportunities for being successful in arbitration are substantial, then it does not seem unreasonable to conclude that the Union's action was arbitrary, invidious, and in bad faith. Respondent's actions in this instance were so unreasonable as to be something more than poor judgment. I find the Union to have violated its duty of fair representation toward the Charging Party, Donald Holland, thereby interfering with, restraining, and coercing him in the exercise of his Section 7 rights.¹¹

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICE UPON COMMERCE

The activities of the Respondent as set forth in section III, above, occurring in connection with the business operations of the Employer, have a close, intimate, and substantial relationship 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.

¹⁰ *Carpenters, Local Union No 1104 (The Law Company, Inc)*, 215 NLRB 537 (1974).

¹¹ *Local Union No 2088, International Brotherhood of Electrical Workers, AFL-CIO (Federal Electric Corporation)*, 218 NLRB 396 (1975)

⁸ See Sec. 9(a) of the Act Also *Vaca et al v Sipes*, 386 U.S. 171 (1967).

⁹ Arbitrators normally receive sums ranging from \$150 to \$300 per day for each day of hearing plus each day required in writing the decision. Based on my experience and personal knowledge in the area of arbitration, I would estimate that this grievance would have taken from a day and a half to 3 days' time on the part of an arbitrator

V. THE REMEDY

Having found that Respondent has engaged in an unfair labor practice within the meaning of Section 8(b)(1)(A) of the Act, I shall recommend that it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. The Union's misconduct caused Donald Holland to lose a day's wages and I shall direct that it reimburse him for lost wages plus interest at 6 percent per annum.

CONCLUSIONS OF LAW

1. The Union is a labor organization within the meaning of Section 2(5) of the Act.

2. The Employer is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

3. The Respondent Union by its refusal to process a meritorious grievance through arbitration because the affected grievant was not a member of the Respondent Union did thereby interfere with, restrain, and coerce an employee of the Employer in violation of the employee's Section 7 rights.

4. The aforesaid unfair labor practice is an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act.

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

ORDER ¹²

United Steelworkers of America, Local 8093, AFL-CIO-CLC, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Discriminating in the representation of Donald Holland, or any other employee, within a collective-bargaining unit wherein said Union is the collective-bargaining representative because said employees are not members of the Union.

(b) In any like or related manner restraining or coercing employees in the exercise of their rights as guaranteed in Section 7 of the Act because said employees are not members of the Union.

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

(a) Make Donald Holland whole for the earnings lost by him on April 20, 1975, including interest as set forth in the section of this Decision entitled "The Remedy."

(b) Post at its union office and meeting hall copies of the attached notice marked "Appendix." ¹³ Copies of said notice, on forms provided by the Regional Director for Region 28, after being duly signed by an authorized represen-

tative, shall be posted immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Union to ensure that said notices are not altered, defaced, or covered by any other materials.

(c) Additional copies of Appendix shall be signed by a representative of the Respondent Union and forthwith returned to the Regional Director for Region 28. These notices shall be posted, the Employer willing, at places where notices to the Employer's employees are customarily posted.

(d) Notify the Regional Director for Region 28, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

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."

APPENDIX

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

The National Labor Relations Act gives all employees these rights:

To engage in self-organization

To form, join, or help unions

To bargain collectively through a representative of their own choosing

To act together for collective bargaining or other aid or protection

To refrain from any or all of these things.

WE WILL NOT do anything that interferes with these rights.

WE WILL represent all employees in the collective-bargaining unit regardless of membership or nonmembership in the Union equally and fairly.

WE WILL make Donald Holland whole for wages lost by him when we failed to adequately represent him because he was not a union member.

UNITED STEELWORKERS OF AMERICA, LOCAL 8093,
AFL-CIO-CLC