

A C and S, Inc. and Eugene Bertrand. Case 18-CA-3297

FINDINGS AND CONCLUSIONS

I THE BUSINESS OF RESPONDENT

April 5, 1972

DECISION AND ORDER

BY MEMBERS JENKINS, KENNEDY, AND PENELLO

On February 10, 1972, Trial Examiner Alba B. Martin issued the attached Decision in this proceeding. Thereafter, the Respondent 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 Trial Examiner's Decision in light of the exceptions and brief and has decided to affirm the Trial Examiner's rulings, findings,¹ and conclusions 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 Trial Examiner and hereby orders that Respondent, A C and S, Inc., its officers, agents, successors, and assigns shall take the action set forth in the Trial Examiner's recommended Order.

¹ We agree with the Trial Examiner, for the reasons set forth by him, that the Respondent was unlawfully motivated in selecting Bertrand for layoff first and recalling him last. In addition, however, we note that Bertrand was the first journeyman employed on the job; hence, even if there were no industry or area practice of laying off a steward last, it is most likely that the layoff would have occurred in the order of seniority, in which event Bertrand would have been the last laid off and the first recalled.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

ALBA B. MARTIN, Trial Examiner: This case was heard in Minneapolis, Minnesota, on December 9, 1971, pursuant to a charge duly filed and served,¹ and a complaint issued on October 6, 1971. The issue litigated was whether a union steward, Eugene Bertrand, was selected for layoff because of his activity as a union steward, in violation of Section 8(a)(3) and (1) of the Act. After the hearing the General Counsel and Respondent each filed short memoranda, which have been duly considered.

Upon the entire record in the case and my observation of the witnesses, I hereby make the following:

¹ Eugene Bertrand, an individual, filed the charge on August 9, 1971.

A C and S, Inc., Respondent herein, is a Delaware corporation engaged in insulation contracting in several States throughout the United States. Its principal office is in Lancaster, Pennsylvania. The insulation contracting involved herein is in connection with a 57-story office building (the IDS job) currently under construction in Minneapolis, Minnesota. During 1970, a representative period, Respondent had gross revenues from its operations in excess of \$50,000 and purchased goods and materials valued in excess of \$50,000 originating outside the respective States in which it carried on its said operations. The complaint alleged, the answer admitted, and I find, that Respondent is now and has been at all times material herein engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II THE LABOR ORGANIZATION INVOLVED

International Association of Heat and Frost Insulators and Asbestos Workers, Local No. 34, AFL-CIO, herein called the Union, is a labor organization within the meaning of Section 2(5) of the Act.

III THE UNFAIR LABOR PRACTICES

In connection with its preparations to do the insulating work on the IDS job, in the fall of 1970 high officials of Respondent from its Chicago branch met with the Union's business agent, Hugo Anderson, to discuss manpower. The parties agreed that Respondent would obtain its employees through the Union, and that Respondent would abide by the Union's local trade agreement. In the early days of the job Respondent agreed further with Anderson to permit the employees to use the intercom "squawk box" to talk with the Union's steward² on the job.

In April 1971 Superintendent Preschnik and Business Agent Anderson agreed that at starting time at 8 a.m. the men would be on the floors where they were working at the gang toolboxes. At that time the toolboxes were on the "lower level" and on the ground floor.

Eugene Bertrand, a journeyman asbestos worker considered by Respondent to be one of the best workers on the job, worked steadily for Respondent on the IDS job from April 1971³ until his layoff on August 6, 1971. Early in his employment he served as a foreman for about 6 weeks until Respondent's regular foreman, Donald Rutkowski from Respondent's Chicago branch, returned from an illness. Bertrand was the first journeyman on the job. After a few others were hired, the Union's business agent appointed Bertrand the union steward.

Bertrand took his duties as union steward seriously, and was vigorous and outspoken in his efforts to uphold the interests of the workers. On several subjects he took strong positions counter to those of management, and on several occasions, when provoked by Rutkowski's strong language, Bertrand used strong language in return.

Shortly after Rutkowski returned in about May 1971, Bertrand reported to the Union's business agent, Hugo Anderson, that valves were being covered in a manner contrary

² The local trade agreement was silent as to the presence of a union steward on the job, but Respondent understood from this agreement about the intercom that the Union would have a steward on the job.

³ Bertrand had worked for Respondent on other projects about six times in the previous 10 to 15 years. He had worked for Respondent several days on the IDS job in November 1970.

to the International Union's code of workmanship. Anderson went to the job and threatened to prefer charges with the International Union against Rutkowski if the work wasn't done right.⁴ As a result the work was redone. Rutkowski was irritated at Bertrand for "turning him in" to Anderson.

Numerous times from May to August Bertrand took vigorous exception to Foreman Rutkowski's practice of loudly "hollering" and "screaming" and cursing at the men in a "hard way" over something. Disturbed at this treatment by Rutkowski, the men asked Steward Bertrand to intercede for them and he did so. He asked and told Rutkowski not to shout and scream and curse at the men. After each encounter between Rutkowski and Bertrand, Foreman Rutkowski would send Bertrand to the basement of the building to work alone away from the other men, for a while.

The "rules of the job" required that no man work alone in a shaft, because of the danger involved. A man who had worked alone in a shaft for a couple of days asked the assistance of the steward. As Bertrand was going to the shaft to speak to the man and learn his story, Foreman Rutkowski saw him and wanted to know what he was doing away from his duty post. Rutkowski then went with Bertrand to the man in the shaft. In the colloquy Bertrand insisted that another man be assigned in the shaft. Soon thereafter Rutkowski sent Bertrand to the basement.

On June 25 when one Ed Johnson and several others were being laid off Rutkowski and his superior, Job Superintendent Preschnik, were going to discharge Johnson for being insubordinate with Rutkowski. Having talked with Johnson, Bertrand took the position that Rutkowski's harsh approach to Johnson had provoked Johnson and justified the latter's reply in kind. Bertrand called Business Agent Anderson, who came and persuaded Preschnik and Rutkowski just to lay Johnson off for lack of work and not to discharge him for insubordination.

Once when Bertrand was urging Job Superintendent Preschnik not to lay off a man with a large family for whom there was plenty of work, Preschnik told Bertrand that it wasn't the job of the job steward to secure employment. Then as Bertrand was telling the man he couldn't save his job for him, Rutkowski came up shouting loudly and asking if this was another one of those work stoppages. Rutkowski added that if Bertrand didn't like this job he knew where the door was.

During the several days just preceding his layoff on August 6, Bertrand strongly supported the men in a dispute with Respondent over where the men should report for work at the starting time, 8 a.m. Sometime during this long dispute Preschnik told Business Agent Anderson that Bertrand was the only one who was "pushing" this issue and that the men didn't care about it. Anderson talked with some of the men and found that what Preschnik said was not true. Respondent expected the men to be on the floor where they were working at starting time, as they always had been on this job. Bertrand, and later Business Agent Anderson, took the strong position that they should be required to be only on the ground floor ready to ride up on the elevators. They based their arguments on the facts that some of the men were then working as high as the 14th and 15th floors, that some of the men were older men and could not be expected to walk up the stairs to where they then worked, and that the men were at the elevators well before 8 a.m. and were held up in getting to their floors by too few elevators for too many riders (including the other crafts then working). At this time the Minneapolis Building Trades

Council had decided that as all the trades were then working too high at the building to walk up, that they should be at the ground floor at 8 o'clock.

On Wednesday, August 4, Rutkowski "chewed out" and "screamed" at an asbestos worker, Thomas McGlade,⁵ for not being at his duty post on the 14th floor at 8 a.m. Then as McGlade was reporting the incident to Bertrand at the latter's duty station, Rutkowski came in cursing, asked if they were on another of their work stoppages, and threatened to lay somebody off. Among other things Rutkowski said he did not want the men to leave their duty posts to come to see Bertrand. He said the men could call Bertrand on the "squawk box." Bertrand protested that the men wouldn't want to state their grievances over the "squawk box" because Rutkowski listens in and then men who file grievances get into all kinds of trouble.⁶ Then Rutkowski asked Bertrand the procedure for laying men off and how much notice he had to give them. Several times he said he was sick and tired of Bertrand. At the end Bertrand told Rutkowski that they could not themselves settle the issue of where the men should be at starting time, and that Bertrand was going to a meeting of the executive board of the Union that evening and would get its view on the question.

The following morning shortly before 8 o'clock Rutkowski again shouted at the men for being on the ground floor waiting for elevators instead of at their duty stations up in the building. Bertrand countered by threatening to prefer charges against Rutkowski with the International Union for working against the best interests of the trade by harassing the men. Rutkowski replied that he had already beaten Bertrand to the punch, but declined to elaborate. Later that day Rutkowski went to where Bertrand was working and told Bertrand he had made some "pretty hard threats down there in front of the men." Then, and shortly again, Rutkowski sat nearby twice and stared at Bertrand for 15 minutes or so as the latter was working.

After work that Thursday, the day before the layoff, Rutkowski and the Union had a meeting and a long discussion on the issue of where the men should be at starting time. Respondent was represented by Branch Manager Hoover, Job Superintendent Preschnik, Foreman Rutkowski. The Union was represented by Business Agent Anderson and Steward Bertrand. No resolution of the issue was reached at this meeting, although a solution was reached the following week after Bertrand's layoff. Preschnik testified that this meeting was triggered by Bertrand, and that on this day or the day before Preschnik told Anderson that Bertrand was agitating the men on this issue. At this meeting the participants discussed Rutkowski's harassment of the men, and also the fact that sometimes Preschnik and Rutkowski gave contradictory orders to the men. At the end of the meeting Preschnik told Business Agent Anderson that the Company would be laying off some men the following day but he didn't know who they would be.

On Friday, August 6; Respondent laid off 5 employees, 4 journeymen and one apprentice, from among the 13-15 employees on the job. The first to be laid off was the steward, Bertrand, whereas the area practice, known to Respondent, was that the steward would be laid off last. Rutkowski laid off Bertrand about 9:30 that morning, and told him to

⁵ The transcript of the hearing erroneously shows this name as "McClud." Wherever "McClud" appears, it is hereby corrected to "McGlade."

⁶ The fact that the men and Bertrand sometimes left their duty posts to discuss grievances did not make their activity unprotected. Respondent could have taken this matter up with Anderson, with whom the use of the intercom had been arranged. In any case Respondent never contended it selected Bertrand for layoff because he or the men sometimes left their duty posts to discuss grievances.

⁴ Rutkowski was a member of the International Union.

leave the job then although he would pay him for the rest of the day. The other four were laid off near the end of their day's work that afternoon.

When Business Agent Anderson phoned Job Superintendent Preschnik shortly after Bertrand's layoff, Preschnik gave him as the reason for Bertrand's layoff that there was no work for him in the area of the building where he was working, and that transferring him elsewhere in the building would have involved too much paperwork. Anderson, whose experience qualified him to know, credibly testified that very little paperwork, only about 5 minutes' worth, would have been involved. During this conversation Preschnik also told Anderson that there would probably be some more layoffs later in the day, but he didn't know yet who they would be.

Respondent recalled two of the laid-off employees on August 17, two more on August 23, and didn't recall Bertrand until September 20. It recalled them all through the Union. When Preschnik called Business Agent Anderson for men about August 16, and Anderson suggested Preschnik take back Bertrand, Preschnik replied that he didn't want Bertrand "because of all the trouble . . . he's a good worker but if he could keep his mouth shut I would take him back."

When Preschnik called Anderson for more men a few days later and Anderson again suggested Bertrand, Preschnik replied that he was not taking Bertrand back, on orders from Respondent's home office, because Bertrand had filed the charge herein.

Before Respondent rehired Bertrand on September 10 it had hired 15 employees for the IDS job after the August 6 layoffs, most of whom were new to that job. When he rehired Bertrand on September 20, Preschnik required as a condition of his returning that Bertrand could not be the union steward. In the interest of getting Bertrand back to work, Business Agent Anderson agreed to this condition. Bertrand has continued to work for Respondent since September 20, 1971, but not as steward.

Conclusions: The layoffs of August 6 were for business reasons: because Respondent was temporarily out of work for the men in the area where they were working,⁷ and because Respondent was temporarily out of the proper material for them to work with. At that time Job Superintendent Preschnik told Business Agent Anderson that he expected to recall most of those laid off. The only issue presented herein is whether Bertrand was selected for layoff first and rehired last (after constant insistence by Anderson) because of his activities as union steward. Upon consideration of the entire record I conclude that this was the case.

The practice in the industry, as well as in most of the building trades, was that the steward was laid off last. This certainly was known to Job Superintendent Preschnik and Foreman Rutkowski, who were part of Respondent's cadre that went from city to city and helped manage jobs. Also, Rutkowski surely knew this as a member of the International Union and Preschnik testified that he discussed with Rutkowski whom to lay off.

If Rutkowski had followed the industry and area practice Bertrand would not have been laid off at all in this layoff, for on this occasion Respondent laid off only 5 out of 13-15

employees. It ignored industry and area practice and laid off the steward at the time that the starting place issue was at its peak and was not resolved; an act which strongly suggests that Respondent's motive in selecting the steward was to weaken the Union's resolve and weaken the Union's bargaining position on this issue and to affect the results thereof.

By his activities as steward and the strong positions he took and maintained as steward on behalf of the employees, which was protected activity under the Act, Bertrand irritated Rutkowski. But Bertrand was simply reflecting the reaction of the men to Rutkowski's constant approach to them. In Anderson's language, Rutkowski "shouted first and asked questions later." The men clearly would not stand for the way Rutkowski, an outsider from Chicago in their view, addressed himself to them and treated them. As steward Bertrand tried to make Rutkowski see the error of his approach.

Bertrand was the first one laid off on August 6 even though he was one of the two union representatives at the meeting with management late the previous afternoon on the starting place issue, at which time Respondent said nothing about laying him off first. When Rutkowski laid off Bertrand the following morning he gave him no reason for having him leave the job then while paying him for the rest of the day. Preschnik told Anderson he didn't transfer Bertrand to somewhere else on the job because of the paperwork involved. In his pretrial affidavit Preschnik denied he told Anderson this, although in his testimony he admitted he told Anderson this. Only 5 minutes of paperwork was involved in making the transfer.

The record established that Preschnik considered that Bertrand was the only employee who was "pushing" the starting place issue, the issue then pending and at its peak between management and the Union. Preschnik admitted that he told Anderson that Bertrand was "agitating" the men on that issue. Thereafter Preschnik told Anderson he did not want Bertrand back "because of all the trouble," but that he would take him back "if he could keep his mouth shut." Finally, and conclusively, when Respondent did take Bertrand back, Respondent insisted that he could not be the union steward.

Upon the above facts and considerations, and upon the entire record considered as a whole, I conclude that Bertrand was selected as the first employee to be laid off because of his activities as the union steward, Respondent thereby discriminating in regard to tenure of employment to weaken the Union's bargaining position on this issue and other grievances, Respondent thereby discouraging membership and activity in the Union, and thereby violating Section 8(a)(3) and (1) of the Act.

CONCLUSIONS OF LAW

1. A C and S, Inc., is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. International Association of Heat and Frost Insulators and Asbestos Workers, Local No. 34, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.
3. By discriminatorily laying off Eugene Bertrand on August 6, 1971, because of his protected activity as a union steward and to weaken the Union's bargaining position, thereby discouraging membership and activity in the Union, Respondent violated Section 8(a)(3) and (1) of the Act.
4. The aforesaid labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

⁷ I credit Respondent's testimony in this regard, although the General Counsel showed that in one instance it was not true. McGlade was one of those laid off August 6. On the next workday an apprentice used the same ladder McGlade had used and continued working at the very same work McGlade had been performing when he was laid off.

REMEDY

In order to effectuate the policies of the Act, I recommend the customary broad cease-and-desist order and the affirmative relief conventionally ordered in cases of this nature, where Respondent's unfair labor practices were of a character which struck at the roots of employee rights safeguarded by the Act.

To remedy its discriminatory layoff of Eugene Bertrand Respondent will be required to pay Bertrand backpay for the period that he was laid off, from August 6, 1971, until September 20, 1971, and to write to Bertrand and to the Union that it has no objections to the Union's appointing Bertrand as job steward on the IDS job or any other of Respondent's jobs. Bertrand's backpay, less net interim earnings, plus interest at 6 percent per annum, shall be computed as prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

Upon the foregoing findings of fact and conclusions of law, upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:⁸

ORDER

Respondent, A C and S, Inc., of Lancaster, Pennsylvania, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discriminatorily discharging employees because of their protected union affiliation and activity and to weaken the Union's bargaining position, to discourage union membership and activity.

(b) In any other manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action, which I find will effectuate the policies of the Act:

(a) Pay Eugene Bertrand backpay for the period he was laid off, August 6, 1971, to September 20, 1971, in the manner prescribed in the portion of the Trial Examiner's Decision entitled "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 under the terms of this recommended Order.

(c) Write to Eugene Bertrand and to the Union, that it has no objection to the Union's appointing Bertrand as job steward on the IDS job or any other of Respondent's jobs.

(d) Post at its IDS job in Minneapolis, Minnesota, copies of the attached notice marked "Appendix."⁹ Copies of said notice, on forms provided by the Regional Director for Region 18 (Minneapolis, Minnesota), after being duly signed by Respondent's authorized representative, shall be posted by it immediately upon receipt thereof, and be main-

tained by it for 60 consecutive days thereafter, in conspicuous places, including its job office, on or near all gang toolboxes, and 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.

(e) Notify said Regional Director, in writing, within 20 days from the receipt of this Decision, what steps have been taken to comply herewith.¹⁰

¹⁰ 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 18, 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 pay to Eugene Bertrand backpay for the period he was laid off, August 6, 1971, until September 20, 1971, in accordance with the recommendations of the Trial Examiner's Decision.

WE WILL notify Eugene Bertrand and the Union, in writing, that we have no objection to the Union's appointing Bertrand as job steward on the IDS job or on any other of our jobs.

WE WILL NOT discriminatorily lay off or discharge any employee because of his union membership and activity and to weaken any Union's bargaining position, to discourage membership and activity in a Union.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the right to self-organization, to form labor organizations, to join or assist International Association of Heat and Frost Insulators and Asbestos Workers, Local No. 34, AFL-CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activity, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act, as amended.

All our employees are free to become, or to refrain from becoming, members of any labor organization.

A C AND S, INC
(Employer)

Dated By (Representative) (Title)

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, 316 Federal Building, 110 South Fourth Street, Minneapolis, Minnesota 55401, Telephone 612-725-2611.

⁸ 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.

⁹ 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 be changed to read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."