Whiting Roll Up Door Mfg. Corp. ***and*** **Local 8-748, Oil, Chemical & Atomic Workers International Union, AFL-CIO.** Case 3-CA-9570

August 14, 1981

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS JENKINS AND ZIMMERMAN

On April 16, 1981, Administrative Law Judge Bruce C. Nasdor issued the attached Decision in this proceeding. Thereafter, the General Counsel and the Charging Party filed exceptions and supporting briefs, and Respondent filed an answering 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,[1] and conclusions[2] 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 the complaint herein be, and it hereby is, dismissed in its entirety.

[1] The Charging Party has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] Although we agree that Respondent did not violate Sec. 8(a)(5) of the Act by refusing to arbitrate Colopy's grievance, we find it unnecessary to rely on the Administrative Law Judge's conclusion that the Union had clearly and unequivocally waived any recourse to arbitration in view of the Board's established position that refusal to arbitrate is not, in itself, a refusal to bargain in violation of the Act. *Airport Limousine Service, Inc.*, 231 NLRB 932, 934 (1977); *Central Illinois Public Service Company*, 139 NLRB 1407, 1418 (1962).

DECISION

STATEMENT OF THE CASE

BRUCE C. NASDOR, Administrative Law Judge: This case was heard in Buffalo, New York, on August 4 and 5, 1980.

The charge in this proceeding was filed by the Union (the Charging Party), on February 4, 1980. The complaint, which issued on March 6, 1980, alleges that Respondent committed unfair labor practices within the meaning of Section 8(a)(1), (3), and (5) of the National Labor Relations Act (herein called the Act). Respondent, in its answer, denies commission of the alleged violations.

Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs,[1] I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent, a New York corporation, at all times material herein, has maintained its principal office and place of business at 113 Cedar Street, Akron, New York, herein called the Akron plant, and various other plants, places of business, warehouses, and other facilities in the States of Missouri, and California. At all times material herein, Respondent has engaged at said plants and locations, in the manufacture, sale, and distribution of roll up doors, and related products. Respondent annually, in the course and conduct of its business operations, purchases, transfers, and delivers to its Akron plant goods and materials valued in excess of $50,000, which goods and materials are transported to said plant directly from States other than the State of New York. Respondent also annually, in the course and conduct of its business operations, manufactures, sells, and distributes at said Akron plant products valued in excess of $50,000, from which products valued in excess of $50,000 were shipped from said plant directly to States of the United States other than the State of New York. Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Local 8-748, Oil, Chemical & Atomic Workers International Union, AFL-CIO (herein called the Union), is, and has been, at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Issues*

1. Whether Melvin Colopy was engaged in protected activity.
2. Whether the basis for Colopy's discharge was legal.
3. Whether Respondent's refusal to arbitrate the discharge was in violation of Section 8(a)(5) of the Act.

Melvin Colopy was employed by Respondent for 16 years. At the time of his discharge, he was classified as a press operator. Colopy had been president of the Union since 1974. His duties included reviewing grievances, which were processed to the second step, and filing grievances in writing, enforcing safety matters, and participating in negotiations.

During the course of its business, Respondent makes deliveries from Akron to its other facilities including the St. Louis facility, which is 762 miles away. It utilizes two drivers, Mark O'Connor and Angelo Rampino. Usu-

[1] Counsel for the General Counsel submitted a letter in lieu of a brief.

ally, Rampino, as the senior driver, takes a load out first, and if there is further driving to do, O'Connor gets the opportunity. Both truckdrivers are compensated on the basis of 15 cents a mile, and when they are not driving they work in the plant at the rate of $5.41 an hour. Record testimony establishes that drivers earn less money when working in the plant, compared to when they are on the road driving.

On December 10, 1979,[2] Rampino was instructed to make a trip to Respondent's St. Louis plant. Prior to his departure, Colopy testified that he heard Earl Smith, the plant superintendent and supervisor of Rampino, tell Rampino that the delivery had to be made by 8 a.m. the next day, December 11. The trip to St. Louis from the Akron, New York, plant usually takes 3 days. The record reflects that Respondent's trucks contained sealed governors restricting the truck to a maximum of 59 miles per hour or 55 miles per hour with a full load.

On December 12, Rampino returned to the Akron plant.

On December 18, 6 days later, Colopy advised International Representative Henry T. Schiro that Rampino had taken a trip too fast, returned to the plant too quickly, and that Rampino should have taken longer to make the trip. Schiro advised Colopy that there was nothing they could do about it, but if Rampino was doing the trip in too short a timespan, obviously the mileage rate was what he was interested in. They might have to put him on an hourly rate through the process of negotiations. They were both aware of the fact that placing drivers on an hourly rate would remove the incentive for making a trip as quickly as possible.

Rampino testified that on December 20, between 7:45 and 8 a.m., while he was working in Respondent's garage at Akron, he was approached by Colopy. According to Rampino, Colopy stated , "I told you before and I tell you once again that you are going too fast making too soon of a trip." He testified further that Colopy went on to state "and, therefore, you're cutting somebody else out of a job. So you better slow down." Rampino allegedly responded, "I do whatever I have to do, to do my job. I know my job. I went to school for it and I know what I have to do." Thereafter, Rampino left the area.

Rampino testified further that later the same morning, at approximately 9 a.m., during the coffeebreak, he was again approached by Colopy who stated "remember what I told you before, if you don't slow down I want you to get a hold of all your motel receipts where you sleep at night on the road, the logbooks, so I know that you [sic] breaking the law on the highway. If you don't slow down I'll cut your pay down, I'll put you on an hourly rate." Rampino also testified that in the past, on several occasions in 1979, he was similarly admonished by Colopy, and in 1975 Colopy told him he was loading too much steel on the truck, and that he should cut the load in half so that the other drivers could get a load.

Colopy flatly denied that the first conversation ever took place. He testified that he took his coffeebreak at 9 o'clock near the vending machine at a picnic type table. When he got to the table, other employees were present, including Rampino. According to Colopy they were discussing things they wanted in negotiations. Colopy testified that he made reference to Rampino's fast 48-hour trip to St. Louis and he told Rampino that he had discussed it with Schiro and suggested that the matter be taken up in negotiations. They were also to review some of the Union's contracts with other trucking companies. Colopy testified, "Angelo did get very perturbed, so I asked him what he could particularly—I asked if he would show me his logs, and he said that he wouldn't that it was none of my business. I asked him could he produce—this was wintertime-if he could produce any place where he had berthed [sic] for the night or a motel, and he declined to show any or say that he had even berthed [sic] there." Colopy testified that he also stated it was the Union's business because it involved safety on the road, and he, Rampino, was observing the rules and regulations set forth by the Department of Transportation.

Mark Wilson, the Union's chief steward, testified that he was present with other employees during the coffeebreak, and they were discussing contract negotiations, vacations, wages, and cost of living. According to his testimony, while in the midst of this discussion, Colopy entered and sat down at the table. He stated that during negotiations they were going to discuss an hourly rate for the truckdrivers instead of the present mileage rate. Colopy allegedly stated that he wanted to drop the cents per mile and make it strictly an hourly rate. Then, according to the testimony of Wilson, Rampino asked, why did Colopy want to do this, he did not want him to take food off of his, Rampino's, table. Colopy allegedly responded that he was not taking food off of Rampino's table, but he would like him to start driving safely, because the last trip he made to St. Louis, he made in 48 hours and he did not think that Rampino had the proper rest at that time. According to Wilson, he heard Colopy ask Rampino to show him motel receipts or a logbook in which he took a rest. Rampino responded that that was none of his business, and he did not have to show him anything. At lunchtime, on that same day, Rampino approached Colopy at the coffee vending machine. He asked Colopy, "Why are you doing all this?" Rampino testified that Colopy responded by pointing to the other driver, O'Connor, and stating, "For you going so fast with the truck and making short trips in time, you're cutting out that man's work. You're taking two jobs. You actually put him out of work. If you don't slow down our contract is due and I'll put you on an hourly rate. Somehow we will cut your pay down." Colopy also allegedly stated that by slowing down it would make room for O'Connor to go on the road.

Sometime during the same day, Rampino approached Superintendent Smith and related to him what Colopy had allegedly told him and what had transpired between them, regarding the discussions of the hourly, versus the mileage rate.

After lunch, at approximately 1:30 p.m., Rampino went to see Respondent's secretary, Lauren Whiting. Rampino advised him of his conversations with Colopy

[2] All dates are in 1979, unless otherwise indicated.

during the day, including the alleged statement by Colopy that he, Rampino, should slow down.

Whiting then went to Smith and asked what was going on with employees telling other employees (a good employee) to slow down.

About 3:30 p.m. that day, Smith called Colopy and union steward Wilson to his office and advised them of what Rampino had reported to him. Colopy did not deny Rampino's charges. He testified that he told Smith of the discussion with Rampino and about the fast trip that Rampino had made on December 10. Furthermore, he told Smith that the last trip violated Department of Transportation regulations and that he had told Rampino he would put him on an hourly rate during the next negotiations. Rampino was then called to Smith's office and reiterated the day's events which again were not denied by Colopy. Smith then discharged Colopy and handed him the discharge notice which is in evidence, and states, *inter alia*, "deliberate violation of Article XVI section 1, union agreement, and Section 2, Whiting work rules, discharge." Article XVI, section 1 of the contract provides:

> During the period of this agreement, there shall be no strikes, stoppages, slow downs, picketing or other interference with the operations of the corporation (all of which are hereinafter referred to as "strikes").
>
> No officer or representative of the Union shall authorize, instigate, aid or condone any strikes, and no employee shall participate in any strike.
>
> There shall be no lock-outs during the term of this agreement.
>
> The Company shall be under no obligation to bargain with the Union concerning employees who are on strike or concerning the subject of any strike so long as the strike continues.
>
> The Company may discipline or discharge any employees who engage in a strike, and such action shall not be subject to review upon any ground other than that the employee did not take part in the strike.
>
> The foregoing provisions shall not constitute grounds on which either party hereto may demand arbitration of any dispute not covered by the explicit terms of this agreement.

Whiting's work rules provide for discharge for a first offense, when an employee engages in a concerted or deliberate restriction of output (slowdown, delaying other workers.)

B. *The 8(a)(5) Allegation, Respondent's Refusal To Arbitrate*

On December 21 Colopy filed a grievance over his discharge. Suffice it to say, initially, Whiting agreed with Schiro to request the Federal Mediation and Conciliation Service to furnish a panel of arbitrators. On February 4, 1980, Whiting changed his mind and advised the Union, "after a diligent study of the contract, we can find no section that would indicate the matter of Mr. Colopy's discharge arbitrable" and advised the Union that it did not intend to arbitrate the matter.

Respondent's position was based on article XVI, section 1, of the collective-bargaining agreement which is set forth in relevant part *supra.*

Conclusions and Analysis

I am convinced by the weight of the credible evidence that Colopy was discharged for cause, not because he engaged in any protected activity. Rampino and Whiting testified in a manner worthy of belief. They were responsive in their answers and direct without attempting to embellish. Rampino, in particular, testified honestly in certain areas which could potentially adversely affect his employment relationship with Respondent.

Colopy's demeanor and a review of his record testimony reveal a witness who was unreliable and unworthy of belief. He was argumentative and defensive and on many occasions was completely unresponsive to the questions put to him. On one occasion, he refused to answer a question I propounded to him, and looked over to counsel for the General Counsel sitting at the hearing table for some instruction. He never did answer the question. Moreover, he was prone to changing his testimony.

Colopy, in his testimony, attempted to put his remarks to Rampino in the context of his concern for safety and the posture the Union might take in future negotiations. He had experience in the past with filing and processing grievances, and filing charges with the Department of Transportation and OSHA, yet, when faced with what he perceived to be a problem, he disregarded all of this and confronted Rampino on an individual basis. I also note that, in subsequent negotiations for a new contract, the Union proposed no change in the basis of drivers' pay but negotiated an increase in the mileage rate.

It is clear to me that Colopy attempted to interfere with Rampino in the performance of his job by encouraging him to engage in a work slowdown, and this was the basis for his discharge.

A situation similar to the facts involved in the instant case occurred in two cases, *Midwest Precision Casting Company*, 244 NLRB 597 (1979), and *International Wire Products Company, a Division of the Carlisle Corporation*, 248 NLRB 1121 (1980). In *Midwest Precision*, a union steward was discharged for suggesting, albeit in a joking manner, that an employee slowdown. The Board dismissed the 8(a)(3) allegation finding that it was not unreasonable for a Respondent to view the steward's comments to the employee in a more serious manner than similar comments made by regular employees, i.e., employees; not holding union office.

Board Member Penello concurred separately emphasizing his view that an employer can lawfully hold the steward to a higher standard of conduct than other employees because of the steward's responsibility under the contract. An employer can therefore lawfully discipline a steward for participating in an unprotected strike or slowdown by not attempting to bring it to an end. *A fortiori*, whereas in this case, the steward has deliberately shirked his responsibilities by actively urging a fellow

employee to engage in unprotected activity (slowdown), the steward can be lawfully disciplined by the employer.

In *International Wire Products*, the union president told an employee to operate 8, rather than 12, machines. The employee reported to his supervisor that "the Union had complained to him about the number of machines he was running." The union president was discharged. The Board found that the union president "lawfully was discharged for having attempted to interfere with the production of another employee." Furthermore, the Board concluded that the union president had violated plant rules and the no-strike clause in the contract. In my view, Colopy was guilty of the same conduct engaged in by the union president in that case.

The differences in the cases cited by counsel for the General Counsel and the instant case is that in those cases the individuals involved were engaged in protected concerted activity. In this case, Colopy was not engaged in protected concerted activity, rather he engaged in conduct which was in violation of the contract and Respondent's work rules.

I find counsel for the General Counsel's "shifting reason" contention to be irrelevant, because that[3] was not the basis for the discharge.

The record establishes a history of amicable relations between the Union and Respondent. There is no evidence of any antiunion animus or independent 8(a)(1) conduct. Moreover, Respondent and the Union processed grievances, settled grievances, and in some cases went to arbitration. Respondent's position not to go to arbitration in this case is based on the contract language and the Employer's work rules. Of equal significance is the record evidence that in Respondent's investigation of Colopy's conduct he never denied Rampino's charges or allegations. Furthermore, under these circumstances, the Union has clearly and unequivocably waived any recourse to arbitration. I therefore conclude that Respondent's refusal to arbitrate is made in good faith based on the terms of the contract and the facts it adduced, prior to discharging Colopy.

In view of my foregoing conclusions, I recommend that the alleged violations of Section 8(a)(1), (3), and (5) in the complaint be dismissed.

[3] The allegations of theft.

Conclusions of Law

1. Respondent is 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. The allegations of the complaint that Respondent engaged in conduct violative of Section 8(a)(1), (3), and (5) of the Act have not been supported by substantial evidence.

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[4]

It is recommended that the complaint herein be, and it hereby is, dismissed in its entirety.

[4] 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.