

**American Industrial Container Corporation d/b/a
Aminco and United Electrical, Radio and Ma-
chine Workers of America, Local 637 (UE).**
Case 6-CA-27474

September 19, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND
HIGGINS

On December 4, 1996, Administrative Law Judge Arthur J. Amchan issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified and set forth in full below.

We agree with the the judge's finding that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging employee Joseph Welch. We note, however, that the judge slightly mischaracterized the extent of Welch's union activities as compared with other employees who, like Welch, were serving their 90-day probationary period during the Union's organizational campaign. Specifically, the judge found that, while other probationary employees openly supported the Union, Welch was the only probationary employee who passed out union leaflets at the plant gate and regularly attended organizing meetings. The record shows that Welch was not the only probationary employee who engaged in these activities. Nevertheless, the record supports the judge's conclusion that Welch engaged in more union activity than other probationary employees. In addition, Plant Manager Shepherd conceded that he saw Welch distributing prounion materials at the plant gate, and that he observed Welch engaging in a greater amount of activity on behalf of the Union than the average employee. Accordingly, we find ample support in the record for the judge's finding that the General Counsel established that the Respondent knew of Welch's numerous union activities and knew that he was among the most active union supporters.

The judge also mistakenly stated that other probationary employees who were discharged between January 1, 1994, and August 30, 1995, had committed some work-related transgression "immediately before" their discharges. In fact, the record indicates that these transgressions occurred at various times during the terminated employees' 90-day probationary period. This misstatement, however, does not undercut the judge's findings that the Respondent's asserted reasons for dis-

charging Welch were pretextual, and that Welch was treated disparately as compared with other probationary employees. Thus, the record shows that, unlike Welch, all the other probationary employees who were discharged between January 1994 and August 1995 for failing to comply with the Respondent's "call-in" requirement had multiple failures to call in to report off of work, or had many more absences than did Welch. In addition, the record demonstrates that during this time period, the Respondent gave permanent employee status to at least three other probationary employees who had significantly worse attendance/call-in records than Welch, and that one of these employees had been given a 5-day suspension for stealing during his probationary period but nonetheless was afforded permanent status.

Further evidence that Welch's discharge was motivated by his union activities is evidenced by Plant Manager Shepherd's response to Welch's request on June 7, 1995, for his performance review which would allow him to become a permanent employee. After initially telling Welch that there were not going to be any reviews at that time "because of all the union bullshit going on," Shepherd summoned Welch to his office 3 hours later and told him that he was being discharged because of poor attendance. Thus, it is clear that in reversing his course and giving Welch the review that he had asked for, Shepherd had linked Welch to union activity and decided that he should be discharged because of that activity. In sum, we agree with the judge's conclusion that the Respondent failed to carry its burden to establish that Welch would have been discharged even in the absence of his union activities.

ORDER

The National Labor Relations Board orders that the Respondent, American Industrial Container Corporation d/b/a Aminco, Meadville, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for supporting United Electrical, Radio and Machine Workers of America, Local 637 (UE), or any other union.

(b) Threatening to impose stricter standards on probationary employees because the Union has been selected by the employees as their collective-bargaining representative.

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

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

(a) Within 14 days from the date of this Order, offer Joseph Welch full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Joseph Welch whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the judge's decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Joseph Welch, and within 3 days thereafter notify him in writing that this has been done and that the discharge will not be used against him in any way.

(d) Preserve and, within 14 days of a 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 Order.

(e) Within 14 days after service by the Region, post at its Meadville, Pennsylvania facility copies of the attached notice marked "Appendix."¹ Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 16, 1995.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

¹ If this 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

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting United Electrical, Radio and Machine Workers of America, Local 637 (UE), or any other union.

WE WILL NOT threaten to impose stricter standards on probationary employees, because the Union has been selected by you as your collective-bargaining representative.

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

WE WILL, within 14 days from the date of the Board's Order, offer Joseph Welch full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Joseph Welch whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the discharge of Joseph Welch and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

AMERICAN INDUSTRIAL CONTAINER
CORPORATION D/B/A AMINCO

David L. Shepley, Esq., for the General Counsel.
James A. Prozzi, Esq. (Jackson, Lewis, Schnitzler & Krupman), of Pittsburgh, Pennsylvania, for the Respondent.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. The General Counsel and the Charging Party allege that the Respondent, American Industrial Container Corporation (Aminco), violated Section 8(a)(1) and (3) of the National Labor Relations Act when it discharged Joseph Welch on June 7, 1995.

They also allege that Aminco violated Section 8(a)(1) on June 14, 1995, in threatening to impose stricter discipline standards on probationary employees, approximately 3 weeks after the Charging Party's successful organizing campaign.

The Respondent contends that Welch was fired solely for poor attendance and engaging in horseplay at work. It also denies that it made a threat as alleged, on June 14, 1995. This matter was tried before me on September 16, 1996, in Meadville, Pennsylvania. For the reasons stated below, I find that the General Counsel has established the violations set forth in the complaint.

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, manufactures racks used in the automobile industry at its facility in Meadville, Pennsylvania, where it annually sold and shipped goods valued in excess of \$50,000 directly to points outside the State of Pennsylvania. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE DISCHARGE OF JOSEPH WELCH

Joseph Welch began working at Aminco's Meadville, Pennsylvania plant on January 26, 1995, as a welder on an assembly line. All new hires at Aminco serve a probationary period of 90 working days. At the end of this period, an employee who is made permanent is entitled to medical insurance, a company uniform, and in some cases receives a modest raise in salary.

In late March or early April 1995, the Charging Party (the UE) commenced an organizing campaign at the Respondent's plant. Welch signed an authorization card and took an active role in the campaign, which culminated in the Union prevailing in an NLRB election conducted on May 26, 1995.

Many of the activities engaged in by Welch were also engaged in by many, and possibly a majority of the 40-45 employees at the plant (Tr. 19). These included wearing union buttons on his welding vest, union stickers on his welding hood, wearing a UE baseball cap (backwards) under his welding hood, and for a week, a union T-shirt over his welding vest.

However, Welch was 1 of about 8 or 10 employees who regularly attended union organizational meetings which were held in the plant lunchroom in the middle of the workday (Tr. 114-116). He was also 1 of 8-10 employees who regularly distributed pronoun materials at the plant gate before and after work (Tr. 19-20, 58, and 115). Moreover, Welch was the only probationary employee who regularly attended organizational meetings and distributed material at the gate (Tr. 88, compare names at Tr. 119-120 with those at Tr. 128-129 and in R. Exhs. 8 and 9). Plant Manager Steve Shepherd, the individual who fired Welch on June 7, observed him distributing these materials on approximately 15-20 occasions and often glared at Welch, indicating his displeasure at Welch's activity (Tr. 19-20).¹

¹ Shepherd concedes that he observed a greater amount of activity for the Union by Welch than the average employee. At hearing

On May 5, 1995, Welch and fellow employee Brett Cunningham were playfully pushing and shoving each other at the assembly line. They were observed by Plant Manager Steve Shepherd who issued both employees written disciplinary warnings (G.C. Exh. 3 and R. Exh. 7). This is the only negative feedback Welch received during his employment at Aminco, prior to June 7, 1995. The feedback he received regarding the quality of his work from his foremen, Ben Lewis and Ron McGill, was complimentary (Tr. 27-28).

Shepherd testified that he observed Welch and employee Todd Barry pushing each other on the assembly line on or about May 24, 1995 (Tr. 234-236). Welch denies that such an incident occurred (Tr. 37). I credit Welch. Shepherd said nothing to either employee (Tr. 234-235). Given the fact that Barry was a line leader and therefore entrusted with some degree of responsibility by the Respondent, I think it unlikely that Shepherd would ignore conduct by Welch and Barry that posed a threat to employees or the Respondent's property.²

Welch missed work on three occasions between January 26 and June 7, 1995. On March 10, Welch's wife was treated at a hospital for pregnancy complications. Welch followed the Respondent's procedures in calling once before his shift and leaving a message on an answering machine. As required by these rules, he also called back later to explain to Foreman Lewis the reason for his absence (Tr. 29-31). On March 31, he missed work due to the flu or a cold and followed the same procedure (Tr. 31-32). On April 21, Welch's wife was treated at the hospital again. Welch left a message on the Respondent's answering machine informing management that he was at the hospital. He did not call later to talk to a supervisor (Tr. 32-33). Prior to June 7, nothing was said to Welch by management concerning these absences and he was never reprimanded for failing to call a second time on April 21. Nevertheless, Welch's daily attendance record indicates these absences as well a failure to call in on April 21. It also indicates that Welch was late to work on April 13 and 27, 1995 (G.C. Exh. 2 and Tr. 206-207).

On June 7, 1995, shortly after noon, a forklift driver hit a gas line at the plant, causing a small fire. The plant was evacuated. A half hour to an hour later, employees were told to return to work. Welch and several other employees discussed their concern that the Respondent had not tested the plant atmosphere for gas. Welch then approached his foreman, Ron McGill, and stated that the plant should be tested for gas. McGill went to Plant Manager Steve Shepherd, who paced around in an angry manner (Tr. 37-39).³ The record does not reflect whether gas tests were performed; the employees returned to work.

At about 2 p.m. Welch approached Shepherd and asked if he could have the performance review that would allow him to become a permanent employee (Tr. 40). Welch asked other supervisors for his review previously. He was under the erroneous impression that the probationary period was 90

Shepherd stated that Welch "was more vocal in the meetings and stuff than some of the people" (Tr. 247). I regard this as corroboration of Welch's testimony that Shepherd saw him distributing union materials.

² Barry, who testified at the hearing in this matter, was not asked about this alleged incident.

³ It is not clear that McGill mentioned Welch's name to Shepherd or that Shepherd saw Welch talking to McGill just before McGill came to him (Tr. 37-39).

calendar days, rather than 90 working days. June 7 was only his 81st day on the job.

Shepherd responded by saying that there weren't going to be any reviews at this time "because of all the union bullshit going on" (Tr. 41). However, at the end of the shift he summoned Welch to his office. Shepherd told Welch that he was discharging him because of his poor attendance. He did not mention the horseplay warning or Welch's failure to call in a second time on April 21. Foreman Ron McGill was present at this meeting but apparently said nothing (Tr. 43-46, 220-223, 244 and R. Exh. 10). There is no indication that Shepherd consulted McGill or any other supervisor in deciding to terminate Welch, although this was his normal practice (Tr. 217, 220-221, 224, and 239).⁴

Many probationary employees were involuntarily terminated by the Respondent. However, all of these employees except for Welch, had committed significant violations of the Respondent's attendance rules, been insubordinate, or had demonstrated unsatisfactory work performance immediately before their discharge (Tr. 230-235).

The June 14, 1995 Threat to Impose Stricter Standards on Probationary Employees

On June 14, 1995, Foremen Ben Lewis and Ron McGill conducted a meeting with the plant's line leaders, which has held every Wednesday. Somebody mentioned Welch's discharge. McGill responded that since the employees got the Union, henceforth probationary employees who "fucked up" once would be terminated (Tr. 95-97, 124-125).⁵ The meeting then broke up.

Analysis and Conclusions

A. Alleged 8(a)(3) Violation

Pursuant to *Wright Line*, 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), the General Counsel must demonstrate in all discrimination cases that protected concerted activity or union activity was a substantial factor in the employer's adverse personnel decision. Then the burden shifts to the employer to prove that the same action would have taken place regardless of the protected conduct.

In the instant case the General Counsel has shown that Joseph Welch engaged in union activity. He signed a union authorization card, wore the Union's insignia conspicuously, handed out union leaflets at the plant gate, and attended all the Union's organizational activities. It is uncontroverted that the Respondent was aware of Welch's activities in the Union's organizing campaign. Steve Shepherd, the plant manager, who fired Welch, observed him at the plant gate and was aware that Welch was more active in the Union's organizing drive than some other employees (Tr. 247).

Welch's activities with regard to the gas leak a few hours before his discharge were concerted, *Walter Brucker & Co.*, 273 NLRB 1306, 1307 fn. 8 (1984), and *Myers Industries*,

281 NLRB 882 (1986), but have not shown to have been protected under the Act. The General Counsel has not met its burden set forth by the Board in *Amelio's*, 301 NLRB 182 (1991), of showing that the Respondent was aware of the concerted nature of Welch's complaint.

Nevertheless, Shepherd's reaction to the gas leak is relevant to assessing the relationship between Welch's union activity and his discharge. Shepherd's angry pacing about after being informed of employees' hesitancy to return to work and his remark to Welch about "all the union bullshit going on" demonstrates that the events surrounding the gas leak had at the very least rekindled Shepherd's hostility to the Union and its activities.

Welch's discharge only 2 weeks after the Union's success in the NLRB election is close enough in time to draw the inference that Welch's union activities played a substantial role in his discharge. This is particularly so when the paucity of nondiscriminatory reasons for the discharge is considered. However, the reawakening of Shepherd's hostility toward the Union on June 7 makes the inference even stronger. Finally, Foreman McGill's threat on June 14, 1995, of stricter standards for probationary employees also indicates that the Respondent's management harbored a substantial degree of animus toward the Union at least 3 weeks after the NLRB election.

B. Respondent's Case

Aminco argues that Welch was fired for his poor attendance record, his failure to follow company procedure when informing the company about one absence and horseplay. The Respondent also contends that no inference of discrimination can be drawn from Welch's termination, because he was a probationary employee. Many other probationary employees were terminated for similar reasons. Aminco also argues that as no disciplinary action was taken against any other union activists, antiunion motivation cannot be inferred with regard to Welch's discharge.

I conclude that the General Counsel's case is in no way undercut by the absence of evidence that Aminco discriminated against any other union adherents, see *Nachman Corp. v. NLRB*, 337 F.2d 421, 423-424 (7th Cir. 1964). This is particularly true in the instant case in that Welch was one of the 8-10 employees most active in the union organizing campaign and the only probationary employee among these activists.⁶ As such he was much more vulnerable to retaliation than other employees who vigorously participated in the campaign. Aminco's procedure in determining whether to retain or discharge an employee at the end of the probationary period provided an opportunity to retaliate against Welch that it did not have with regard to the other union activists.

Welch's status as a probationary employee underlies a major element of the Respondent's contention that his discharge was nonretaliatory. However, the only relevance of Welch's status to this case is the opportunity it provided to Aminco for retaliation. There is no evidence that the Company had different disciplinary standards for probationary employees as opposed to permanent employees. In the absence of such evidence, I conclude that the same standards

⁴McGill was apparently asked to attend the June 7 meeting with Shepherd and Welch so that he could escort Welch to his locker afterwards (Tr. 44, 223 and 240-241).

⁵Employees Chuck Fuller and Todd Barry testified with regard to this statement. Since McGill did not testify and there is no contradictory evidence, I conclude that the statement by McGill was made as Fuller and Barry testified.

⁶Other probationary employees openly supported the Union. However, no other probationary employee passed out union leaflets at the gate or regularly attended organizing meetings.

of conduct applied to Welch as to permanent employees, *Cagus Asphalt*, 296 NLRB 785 (1989), and *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 532–534 (1995).

The Respondent is unable to point to any objective standard for its discharge of Welch (Tr. 170 and 225). There is no specific number of absences or incidents of tardiness that Aminco regards to be grounds for termination. Indeed, the attendance records of three other probationary employees, who became permanent in the summer of 1995, were no better than Welch's (G.C. Exhs. 4, 5, and 6 and Tr. 177–202). Two of these employees, John Duralia and Andrew Humes, also failed to comply with Aminco's call-in procedures at least once during their probationary period.⁷

Moreover, Welch appears to have had valid reasons for his absences. The fact that management never chastised Welch for his attendance record prior to June 7 leads me to conclude that its reliance on it for his discharge is pretextual. Similarly, Welch's failure to call in a second time on April 21 was never made an issue by Aminco until it discharged him. Given the fact that Welch effectively informed his supervisors of his absence and the reasons for his absence, his departure from the Respondent's procedure had no adverse effect on Aminco's operations. I conclude that reliance on this delict to justify his termination is also pretextual.

Finally, the Respondent relies on the fact that Welch received a written warning for horseplay on May 5. I find this to be pretextual for a number of reasons. First, Steve Shepherd told Welch on June 7, that he was being terminated for poor attendance; he said nothing at all about horseplay. Second, Aminco's shop rules list a number of offenses which are deemed to be grounds for immediate dismissal. Horseplay is not one of the offenses listed (Tr. 176). Indeed, these rules state that the disciplinary action for a first offense of horseplay is a written warning (R. Exh. 3, pp. 1 and 3–4).

⁷The Respondent objected at hearing and in its brief (Br. 10–12) to my consideration of any evidence relating to events after Welch's discharge. The Respondent is correct that "[a]n employer's motives must be tested at the time of an employee's termination, not afterwards." However, it does not follow that anything that happened after the termination is irrelevant to discerning those motives. For example, if an employee is discharged for violation of a company rule, it is relevant if a week after this termination, the employer knowingly ignored the rule in the case of another employee who did not engage in protected activity. In the instant case, it is relevant to discerning Aminco's motives in discharging Welch that shortly thereafter it made employees permanent who had attendance records no better than Welch's. This evidence, however, played a very minor role in my conclusion that Aminco violated Sec. 8(a)(3).

Cases in which the Board has relied on postdiscrimination events to establish a violation include *South Nassau Communities Hospital*, 262 NLRB 1166, 1173 (1982), and *Lynn's Trucking Co.*, 282 NLRB 1094, 1097 (1987). In *South Nassau Communities Hospital* the Board relied on the fact that an employee received only an oral reprimand the day after two union supporters received written warnings for the same conduct.

Thus, termination of Welch for horseplay is inconsistent with the Respondent's own rules.

The Respondent also failed to follow its normal procedures in determining whether to make Welch a permanent employee or terminate him. Shepherd testified that his normal procedure is to discuss the employee with his supervisor (Tr. 217). It is evident that he did not do this in Welch's case, but rather fired him without asking anyone else's opinion (Tr. 171, 220–221, and 239).

In the month prior to Welch's discharge there were no blemishes on his employment record. This fact alone makes it difficult to credit the Respondent's contention that it fired him for these delicts on June 7, 1995. All other probationary employees who were involuntarily terminated by Aminco had committed some work-related transgression immediately before their discharge (Tr. 230–235).

C. The Respondent Violated Section 8(a)(1) in threatening to Impose More Stringent Standards on Probationary Employees

Supervisor McGill at the leadmen's meeting on June 14, 1995, stated that since Aminco employees had got their Union, any probationary employees who "fucked up" once would be terminated. This remark was coercive in light of Joseph Welch's discharge a week earlier. McGill's statement would tend to intimidate employees, particularly probationary employees, from exercising their rights under the Act. I, therefore, conclude that the Respondent violated Section 8(a)(1) as alleged.

CONCLUSIONS OF LAW

1. By discharging Joseph Welch because of his union activity, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.
2. By threatening to impose stricter standards on probationary employees at the leadman's meeting of June 14, 1995, the Respondent violated Section 8(a)(1).

REMEDY

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

The Respondent, having discriminatorily discharged Joseph Welch, must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]