Acme Die Casting Corporation *and* Local 456, Service Employees International Union. Case 13-CA-20350

July 9, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND HUNTER

On February 22, 1982, Administrative Law Judge Robert T. Wallace issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in answer to Respondent's 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[2] of the Administrative Law Judge and to adopt his recommended Order, as modified herein.[3]

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, as modified below, and hereby orders that the Respondent, Acme Die Casting Corporation, Northbrook, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Insert the following as paragraph 1(c):

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

2. Insert the following as paragraph 2(c) and reletter the subsequent paragraphs accordingly:

"(c) Expunge from its files any reference to the layoffs of Nicholas Valenzuela and Jose Reynosa on September 8, 1980, and notify them in writing that this has been done and that evidence of their unlawful layoffs will not be used as a basis for future personnel actions against them."

3. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

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

WE WILL NOT discharge, lay off, or otherwise discriminate against any of you for supporting Local 456, Service Employees International Union, or any other labor organization.

WE WILL NOT coercively question you about union support or activities.

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

WE WILL offer Nicholas Valenzuela immediate and full reinstatement to his former job as setup man 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, and WE WILL make him and Jose Reynosa whole for any loss of earnings or other benefits resulting from their layoffs, plus interest.

WE WILL expunge from our files any references to the layoffs of Nicholas Valenzuela and Jose Reynosa on September 8, 1980, and WE WILL notify them that this has been done and that evidence of their unlawful layoffs will not be used as a basis for future personnel actions against them.

ACME DIE CASTING CORPORATION

[1] Respondent 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] The Administrative Law Judge concluded that Respondent violated Sec. 8(a)(1) and (3) of the Act by laying off employees Nicholas Valenzuela and Jose Reynosa in retaliation for their union activities and to deter employees from selecting the Union in the then forthcoming representation election. We note, however, that the Union's petition for an election was not filed until the day after the layoffs. In adopting the Administrative Law Judge's conclusion, we find that the layoffs, in addition to being retaliatory, were designed to deter employees from supporting the Union generally.

Member Hunter finds it unnecessary to pass on the Administrative Law Judge's reliance on Respondent's post-layoff campaign literature and statements by Respondent's president to establish that animus existed at the time of the layoffs. In so doing, he notes that Respondent's unlawful interrogation of Valenzuela in July 1980 provides independent evidence of animus preceding the layoffs on September 8, 1980, and he further relies on the Administrative Law Judge's findings regarding the pretextual nature of Respondent's economic defense.

[3] We shall modify the Administrative Law Judge's recommended Order so as to require Respondent to expunge from its files any reference to the unlawful layoffs of Nicholas Valenzuela and Jose Reynosa on September 8, 1980, and to notify them in writing that this has been done and that evidence of these unlawful layoffs will not be used as a basis for future personnel actions against them. See *Sterling Sugars, Inc.*, 261 NLRB No. 71 (1982).

We also shall modify the recommended Order so as to include a general cease-and-desist provision.

DECISION

STATEMENT OF THE CASE

ROBERT T. WALLACE, Administrative Law Judge: This case was heard in Chicago, Illinois, on June 18 and 19, 1981. The charges were filed by Local 456, Service Employees International Union, herein called the Union, on September 10, 1980, and the complaint was issued on November 20, 1980.[1] The issues are whether Acme Die Casting Corporation, herein called Respondent: (a) unlawfully interrogated an employee and (b) discriminatorily laid off or discharged two employee organizers, in violation of Section 8(a)(1) and (3) of the National Labor Relations Act.

Upon the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs filed by the General Counsel and Respondent, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent, a Delaware corporation, manufactures aluminum and zinc castings at its facility in Northbrook, Illinois, from which it annually ships goods valued in excess of $50,000 directly to customers at points outside the State. 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 the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The Union began its drive to organize 120 nonsupervisory employees at Respondent's plant in July 1980; and, in furtherance of that objective, its representatives appeared regularly in Respondent's parking lot and distributed literature to employees entering and leaving the plant, and numerous meetings with employees were held at locations away from the plant.

Nicholas Valenzuela,[2] an employee in the secondary aluminum department, worked a shift beginning at 7 a.m., and on several occasions in early July he stopped to talk with the organizers before entering the plant.[3] Later he attended several meetings at the union hall, and toward the end of August he opted for representation by the Union by signing an authorization card. He then began actively to solicit other employees to support the Union and he distributed to them between 50 to 60 blank authorization cards. Approximately 25 of those were signed and returned to him by September 8. His solicitation and distribution of cards was done in the cafeteria, restroom, and work areas of the plant, usually during his breaktimes, within view of passing supervisors, and without any attempt at concealment.

On Monday morning, September 8, Valenzuela was told by Department Head Stoner to go to the office and there assist two newly hired Spanish-speaking employees in filling out employment forms. That task took about 1 hour during which Valenzuela, in Spanish, told the new employees about the Union, and he obtained their signatures on authorization cards. All the while Plant Manager Harold Georgeson was about 3 feet away from Valenzuela seated at his desk and alternately talking on the phone and writing. After leaving the office Valenzuela escorted the new employees to their assigned work area where he showed one how to wash parts and taught the other how to cut parts using a saw machine. At the end of the workday, he was told to report to the office. When he arrived there, Georgeson gave him two checks and told him he was laid off because "we have many, many set-up men and the work is slow." Valenzuela then offered to work as a drill machine operator, but Georgeson replied: "I'm sorry, Nicholas. The work is too slow. I will call you. Thank you."

Valenzuela was never recalled. He had worked for Respondent for over 9 years; and he was a setup man for the last 3 years, a job he had obtained upon the recommendation of Supervisor Stoner. He knew how to operate all machines in his department, and to "set up" machines to do particular jobs, and did whatever was necessary to assure maximum utilization of equipment.

Two other nonsupervisory employees did setup work as of September 8. Of those, one (Faustino Ontiveros) had 1-1/2 years' experience and worked regulary as a setup man, and the other (Samuel Aguirre) was an assistant who Valenzuela had helped to train during the 3-week period just prior to September 8.

Up to the time of his layoff, Valenzuela had not noticed any lack of work. Like other employees, he regularly put in 9 hours a day, 6 days a week, an often worked on Sundays. In fact, he worked on the day before he was laid off, a Sunday. During his 9 years with Respondent, he had never been given any verbal or written warnings, nor had he ever been laid off.

Jose Reynosa also talked to the union organizer in the parking lot and, after attending at least five meetings in the union hall, signed an authorization card on or about August 30, 1980. Although he did not pass out cards at the plant, he explained to other employees what the Union was all about, with the aid of a "white paper" and a sample authorization card supplied by the Union. He had those items in hand while talking with a group of employees just outside the cafeteria during a lunch break on or about August 27. Stoner passed by and said, "Break is over." That was unusual because the group had 4 or 5 minutes left, and Stoner had not interrupted his breaktime before even when he had exceeded the authorized period. At the end of the workday on September 8, Stoner told him to report to the office. There he met Georgeson who gave him two checks and told him he was laid off. No reason was given. Reynosa had worked for Respondent for nearly 10 months as a gener-

[1] Another case (Case 13-RC-15565) involving objections to an election held on November 14, 1980, had been assigned to be heard with Case 13-CA-20350. However, at the outset of the hearing the Union requested, and was granted, permission to withdraw the objections.

[2] Five witnesses, including Valenzuela, were called by counsel for the General Counsel. Their primary language is Spanish, and all testified through an interpreter.

[3] Valenzuela claims that during this period the head of his department (Larry Stoner) approached him while he was alone at work and asked: "Nicholas, do you know something about the Union," to which he replied: "I don't know."

al laborer which involved, among other things, operating a punch press machine; and he had never received an oral or written reprimand, nor had he been told that his work was not satisfactory. During the month prior to his layoff, he had worked 9 hours a day, 5 days a week, and some Saturdays, and it appeared to him that plenty of work was available. He had more seniority than a number of other employees within his job classification, including the two employees hired on the day of his layoff.

Other than Valenzuela and Reynosa, no other employees were laid off by Respondent on September 8, nor does it appear that any layoffs were effected during the several months before and after that date.

Reynosa was recalled after 6 weeks and resumed performing essentially the same tasks and working the same number of hours as before, except for a "short time" when he worked a 40-hour week.

Reynosa and three other employees[4] of Respondent also described two meetings at the plant on successive days just prior to the representation election on November 14.[5] At those meetings (each of which lasted at least an hour), Respondent's president (LeRoy Hagner), through an interpreter, assertedly told the assembled workers that they would lose profit sharing, free uniforms, and coffeebreaks if the Union won the election and, if it lost, that he would improve communications and rectify complaints concerning matters such as salary, insurance, and job supervision.

In a series of undated notices posted at the plant prior to the election, Respondent vigorously opposed the Union. Taken together, the notices reflect a calculated effort to evoke fear and insecurity in employees through frequent references to the likelihood and dire consequences of a *strike* in the event the Union was chosen as bargaining agent. Among other things, the notice: (1) depicted the Union as "a group of outsiders, interested first in their own financial success," (2) characterized the Union as prone to calling strikes, and (3) emphasized the "financial and mental agony" of having to go through a strike, i.e., the consequent loss of wages, unavailability of unemployment compensation in Illinois, possible inability of the Union to provide strike benefits, and loss of jobs in the event the Union's demands were unreasonable.

President Hagner testified briefly. He denied having told the assembled employees that they would lose profit sharing, free coffee, and uniforms if the Union won the election or having made any promises of benefits if the Union lost. I find his testimony unpersuasive, particularly in light of the patent hostility to the Union displayed in the notices to employees. Instead, I find that he did in fact make threats of retaliation and promises of benefits depending on the outcome of the election, as per the testimony of Reynosa and the three other witnesses who, as employees of Respondent, appeared at some risk to themselves.

During July and August 1980, Department Head Stoner had no "direct" knowledge that a union campaign was going on, but he was aware of rumors to that effect. Also, he had no recollection of having inquired of Nicholas Valenzuela in July concerning the Union, nor did he recall having told Reynosa to return to his job after a work break in August. His lack of recall, however, falls short of a denial, and I find probable and credit the accounts of Valenzuela and Reynosa. Moreover, from his admitted knowledge of the rumors and the openness of solicitation by the organizers in the parking lot and by Valenzuela and Reynosa in the plant, I conclude that he was well aware of the campaign and the activism of the two employees, and that his awareness prompted both the inquiry to Valenzuela and the premature termination of Reynosa's lunch break.

Stoner also stated that he told Valenzuela that he did not deserve a raise in response to a request by the latter made during the week before his layoff. Valenzuela claimed that the conversation ended at that point. But Stoner contended that he went on to criticize Valenzuela for not being at his proper work area when needed and because other employees had complained to him (Stoner) that Valenzuela was not "working properly" and "favoring some people." I accept Valenzuela's version. Further, I view the criticisms themselves as having no validity and as an effort by Stoner to bolster the layoff action. In this respect Stoner admitted that he never gave Valenzuela any verbal or written warnings and that he made no attempt to approach him about any perceived dereliction, with one possible exception.[6] Instead, he stated that he asked "management" for advice and was told that "they would look into it and see what they would recommend." I find that explanation disingenuous and incredible.

At the time of the hearing, setup operations in Stoner's department were being performed regularly by two employees with another assisting; and that amount of staffing had continued without change from when Valenzuela worked his last day as a regular setup man on September 8.

Plant Manager Georgeson spends 75 percent of his time in the work areas of the plant every day. He claimed that Stoner had not advised him of union organizing efforts and that he had no knowledge of the campaign until after he laid off Valenzuela and Reynosa.

Assertedly, he decided to lay off two employees on September 8 because a recession had started about that time and he felt it was beginning to affect his Company. In that regard, he had seen a computer printout of purchase orders which showed "fewer and fewer jobs to be run in the future." Also, he had noted that the volume of aluminum ingots purchased during the third quarter of

[4] Marcelino Lopez, Miguel Paez, and Frederico Valenzuela, brother of Nicholas. As of the date of hearing, they had worked for Respondent for approximately 2, 2-1/2, and 3 years, respectively.

[5] Testimony concerning those meetings was received for the purpose of estabishing possible animus of Respondent toward the Union, and not to establish independent uncharged violations of the Act.

[6] Although Stoner averred that on at least four occasions he spoke to Valenzuela about fixing his (Valenzuela's) car in the parking lot during duty time, he conceded having given him permission a number of times so as not to inconvenience as many as seven employees in Valenzuela's carpool; and he could recall only one instance during 1980 (in the summertime) when Valenzuela may have lacked permission. On that occasion he simply told Valenzuela to let him know "where he was at."

1980 was down by 38 percent from the volume purchased during the second quarter of that year.[7]

He determined that one of the two employees should be a setup man because the Company had invested approximately $250,000 in new presses and drill/mill machines since 1979, many of which had a "memory" capability and did not have to be reset to continue jobs that had been interrupted when machines were temporarily diverted to other tasks. Also some of the work performed in Valenzuela's department had been transferred to a "precision machine center" established in another area of the plant in June.

Over a 5-year period prior to September 8, he had "laid off" between 15 and 20 employees, but some of those had actually been discharged for disciplinary reasons. Seniority was not an important factor in decisions regarding who should be laid off. Instead, he relied on his assessment of the relative value of employees to the Company. Further, when he determined that a higher paid employee was not needed he did not offer any option of taking a lesser paying job because an employee who accepted that option would be "unhappy . . . and of little value to the company."

Georgeson provided various reasons for his selection of Valenzuela for layoff and none for Reynosa. He stated that Valenzuela had taken two extended leaves of absence (6 and 4-1/2 weeks, respectively) over a 36-month period, and that during those periods setup operations had been performed satisfactorily by Ontiveros aided by Supervisor Stoner and one "Dan Bassgar," an individual described by Valenzuela as a "boss set-up man." Also, it seemed to him that Valenzuela had become "disinterested" in his job after returning from the second leave on August 13. He formed that opinion because "I had observed him many times talking to individuals in other departments, not doing his job and keeping other people from working . . . ." Also, he had observed Valenzuela in the parking lot before quitting time sitting in his automobile with his engine running 5 or perhaps 10 minutes before quitting time, and he had "observed him taking unauthorized breaks . . . [spending] a lot of time in the lunchroom that was unauthorized." Under cross-examination, Georgeson conceded that Valenzuela had received prior approval for his leaves of absence, that he was not aware whether other employees, including setup man Ontiveros, took extended leaves, and that he never mentioned the perceived derelictions to Valenzuela. In connection with the latter, he felt that it was a supervisor's responsibility to impose discipline and he was surprised to learn at the hearing that Stoner had not said anything to Valenzuela.

For a "short period of time" after the layoffs Georgeson reduced the workday from 9 to 8 hours for the day shift and from 10 to 9 hours for the night shift. As of the date of hearing no further layoffs had been effected and four or five new employees had been hired. Although Georgeson stated that Valenzuela was not replaced he was not aware that Aguirre had been trained to do setup work during the 3-week period of Valenzuela's layoff. Nor did he know whether Aguirre did setup work subsequent to September 8.

[7] Neither the printout nor the source from which he derived material purchase data was made available at the hearing. Also, no data was provided concerning the asserted decline in orders; and, as to material purchases, no annual totals are given and the third quarter of 1980 is not compared with the third quarter of 1979.

Analysis and Conclusions

As found above, Respondent (at least through Supervisor Stone) had knowledge of the union campaign and of the fact that Valenzuela and Reynosa were actively soliciting other employees on its behalf. Also, I have found that Respondent (through President Hagner) evinced animus toward the Union in its campaign literature and by making threats of retaliation and promises of benefits dependent on the outcome of the representation election. Those circumstances, coupled with the undisputed facts (a) that Valenzuela had worked for Respondent for over 9 years and Reynosa for 10 months during which neither received any verbal or written reprimands; (b) that they were the only employees laid off on September 8, 1980, and abruptly so because they were laid off at the end of that day (a Monday), whereas Respondent's workweek ended on Saturday; and (c) that they were the only employees laid off during at least a 1-year period extending from July 1980 when the union drive began, persuade me that their layoffs on September 8 were motivated by a desire to punish them for engaging in protected activities and to deter other employees from opting for the Union in the then forthcoming representation election.

In reaching that conclusion, I have carefully considered Respondent's claim that the layoffs were prompted by economic considerations, but I find that defense to be entirely pretextual. *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980). In that regard Respondent offered only the sketchiest of data to support its claim that a production slowdown had occurred or was impending (see fn. 7). Plant Manager Georgeson chose not to offer Reynosa that or any other explanation for his layoff. Indeed, on the very day the two employees were laid off, two others were hired to work in the same job classification as Reynosa; and, despite Georgeson's impression to the contrary, it appears that another employee in fact replaced Valenzuela as a setup man.

But even if there had been a real economic reason, I am persuaded that Valenzuela and Reynosa would not have been the ones selected for layoff absent their activities on behalf of the Union. Here again I find significant the circumstance that neither had ever been reprimanded either verbally or in writing, and I find singularly unimpressive Georgeson's stated reasons for selection of Valenzuela and note that he offered no reason at all for selecting Reynosa.

Stoner's inquiry to Valenzuela in July 1980 was patently coercive. *Continental Chemical Company*, 232 NLRB 705 (1977); *American Freightways Co. Inc.*, 124 NLRB 146 (1959).

Conclusions of Law

1. By discriminatorily laying off Nicholas Valenzuela and Jose Reynosa because of their support of the Union, Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

2. By coercively interrogating Nicholas Valenzuela concerning his knowledge of the Union, Respondent engaged in an unfair labor practice within the meaning of Section 8(a)(1) of the Act.

3. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices, I find it necessary to order it to cease and desist from engaging in those practices and to take certain affirmative action designed to effectuate the policies of the Act. Such affirmative action will include an offer to reinstate Nicholas Valenzuela in the position of setup man (or to a substantially equivalent position if that job is no longer in existence) and to make the latter and Jose Reynosa whole for any loss of earnings or other benefits resulting from their layoff on September 8, 1980. Any backpay is to be computed on a quarterly basis from the date of layoff to the date of reinstatement in the case of Reynosa and to the date of a proper offer of reinstatement in the case of Valenzuela, in accordance with *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest thereon as established in *Florida Steel Corporation*, 231 NLRB 651 (1977); see, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

Pursuant to Section 10(c) of the Act, I issue the following recommended:

ORDER[8]

The Respondent, Acme Die Casting Corporation, Northbrook, Illinois, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Laying off, discharging, or otherwise discriminating against any employee for supporting Local 456, Service Employees International Union, or any other union.

(b) Coercively interrogating any employee about union support or union activities.

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

(a) Offer Nicholas Valenzuela immediate and full reinstatement to his former job as setup man, and make him whole, with interest, for any loss of earnings or benefits resulting from his layoff on September 8, 1980, in the manner set forth in "The Remedy."

(b) Make Jose Reynosa whole, with interest, for any loss of earnings or benefits resulting from his layoff on September 8, 1980, in the manner set forth in "The Remedy."

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its plant in Northbrook, Illinois, copies of the attached notice marked "Appendix."[9] Copies of said notice, on forms provided by the Regional Director for Region 13, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 13, in writing, within 20 days from the date of this Order, what steps it has taken to comply herewith.

[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 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."