

Wabash Alloys, Inc. and Fred Lee Miller and Donald James Richmond. Cases 25-CA-15331, 25-CA-15544, and 25-CA-15364

9 December 1986

DECISION AND ORDER

BY MEMBERS JOHANSEN, BABSON, AND STEPHENS

On 30 September 1986 Administrative Law Judge Karl H. Buschmann issued the attached supplemental decision. The Charging Party filed exceptions and a supporting statement and the Respondent filed cross-exceptions, a supporting statement, and an answering brief. The General Counsel filed an answering brief to the Respondent's cross-exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Wabash Alloys, Inc., Wabash, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's conclusion that the Respondent did not violate Sec. 8(a)(1) by Supervisor Charles Foster's alleged threat to employee Donald James Richmond on 16 January 1983, we do not rely on the judge's comment that, "Richmond did not impress me as an employee who was easily intimidated."

Richard J. Simon, Esq., for the General Counsel.
John T. Neighbours and John D. Hoover, Esqs. (Roberts, Ryder, Rogers & Scism), of Indianapolis, Indiana, for the Respondent.

SUPPLEMENTAL DECISION

KARL H. BUSCHMANN, Administrative Law Judge. On 3 June 1986 the National Labor Relations Board issued an order remanding proceeding to the administrative law judge for a supplemental decision. Pursuant to the Board's 13 June 1984 Order, my decision should have been analyzed under *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984), rather than *Meyers Industries*, 268 NLRB 493 (1984). The order also requires a credibility

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resolution raised by the testimony of Charging Party Donald James Richmond, and Donald Blair, the first-shift superintendent with Wabash Alloys, Inc. (the Respondent), as well as a reconsideration of my alternative finding that "there is little persuasive evidence that the Respondent retaliated against Richmond and Miller because of the former's frequent complaints." Having been permitted to file supplemental briefs, the General Counsel filed a supplemental brief on 30 July 1986, the Company filed its brief on 1 July 1986, and the Charging Party sent a letter, dated 21 July 1986, which will be treated as a supplemental brief.¹

The complaint in this case alleges that the Respondent violated Section 8(a)(1) of the Act by threatening its employees, by assigning an employee to more arduous work, and by discharging employees Fred Lee Miller and Donald James Richmond because the latter had complained about safety conditions at the plant.

The record contains the collective-bargaining agreement between the Respondent and Local Lodge No. 120, International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers, and Helpers effective from 15 March 1982 to 15 March 1985, which, inter alia, provides for employees' safety and a safety committee. The committee was authorized to receive safety complaints and to inspect plant equipment and to report to management its findings or observations concerning employee safety.

Donald Richmond was a member of the Union and worked as a furnace room helper on the midnight shift. In that capacity, his duties included the cleaning or "raking" of furnaces, sweeping and cleaning the furnace room area, and jackhammering the interior of the furnace. Since 1982 Richmond had made numerous complaints about safety in the plant, including the presence of chlorine gas in the workplace, objects that were too heavy to lift, a furnace door that malfunctioned and was unsafe without a safety bar, and smoke from a conveyor that irritated his eyes. Between January 1982 to 1983, Richmond filed about 20 safety-related complaints either with the safety committeeman of his Union or with his supervisors, Charles Foster and Donald Blair. On 4 November he filed a grievance in which he protested the disallowance of pay when he left work for the treatment of his exposure to smoke.

The record supports a finding that Richmond's safety concerns and his safety-related complaints constitute concerted activity within the meaning of Section 7 of the Act. *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984). Although Richmond acted alone in making the safety-related complaints, his invocation of a right provided by the collective-bargaining agreement qualifies this conduct to be concerted activity protected by Section 7 of the Act. Indeed, the Respondent has admitted for the sake of this discussion, "that the safety complaints made by Donald James Richmond . . . constitute concerted activity" (R. Br. 2).

¹ One attachment to the letter (ref. B) will be disregarded because it is not part of the record that was closed 23 July 1983 and the other attachment is already part of the record.

The next issue is whether the Employer unlawfully interfered with this employee's Section 7 rights by threatening its employees and assigning Richmond to more arduous work because of his safety complaints. In this regard, the record shows that on a day in October 1982 Richmond was jackhammering inside furnace number 12. When he noticed chlorine gas, he complained to Keith Christian, the safety committeeman, who immediately contacted Donald Blair, the first-shift superintendent. As both men walked towards the furnace to inspect the complaint, Blair wanted to know who had complained about the chlorine. Christian refused to disclose Richmond's name, as was customary under the union policy. Blair then turned towards Christian and expressed his suspicion that it was Richmond, stating: "It was Richmond wasn't it?" Blair went into the furnace with Richmond and told him that he did not consider the situation that serious, but if the chlorine got worse simply to get out of the furnace. Blair further said: "If you don't quit your complaining about it, you could be jackhammering for a few more days." Richmond was subsequently assigned to 2 more days in furnace 12.²

On 16 January 1983 Richmond and several other employees were assigned to stack ingots. They experienced difficulties in removing the hot ingots from the conveyor. Richmond complained to Supervisor Charles Foster that the ingots were too hot to handle. Foster said that there were three men over there who should be able to get them out. Richmond replied: "Why don't you come over there and show us because we cannot do it." Foster said: "If I have to show you how to do it we do not need you over there." Richmond retorted: "That be fine with me, I'd rather be doing something else anyways." At that point Foster stated: "That could be arranged."

In addition to these episodes, the record shows that Richmond was involved in at least three safety-related complaints prior to this incident in January and after the event in October involving chlorine gas. In November, Richmond complained about smoke from a conveyor. Foreman Shaw attempted to alleviate the problem with a fan. Nevertheless, Richmond got smoke in his eyes. He went to the hospital for medical help, but because he had not received permission from his supervisor, the Company refused to pay for the lost time. The matter became the subject of a grievance that the Company ultimately denied. Richmond also complained about the lack of safety because a furnace door lacked a safety bar. Foreman Shaw responded by getting someone to assist in replacing the safety bar. In December 1982 Richmond complained to his safety committeeman that chunks of material were too heavy to lift. Foreman Shaw resolved the matter when he permitted Richmond to use a tow motor.

There is no dispute that in each of these instances the Company attempted to correct any unsafe conditions brought to its attention by Richmond's complaints. Moreover, Richmond did not impress me as an employee

who was easily intimidated. To the contrary, Richmond did not hesitate in speaking to his supervisors in a manner likely to provoke a supervisor's verbal retort. Miller testified that Richmond had a habit of agitating foremen by talking back to them. An illustration of this was the verbal exchange with Supervisor Charles Foster in January. Foster's final statement to Richmond suggested that a change in his duties could be arranged if Richmond were unable or unwilling to stack the ingots. Under these circumstances, Foster's statement was not coercive, nor can it be considered a veiled threat of any reprisals. Foster's remark appeared to be an appropriate response to Richmond's expressed reluctance to perform the assigned task. I would, therefore, dismiss this allegation of the complaint.

The other episode about the chlorine gas was different. Blair's remark that further complaints by Richmond would result in his assignment of more jackhammering, commonly considered the roughest job of a furnace room helper, could be regarded as an unlawful threat, particularly if it is followed up by a subsequent assignment to that work. Richmond was assigned to furnace 12 for the next 2 consecutive days. The record is extensive but not entirely clear to what extent the assignment of jackhammering for 3 consecutive days was considered unusual. Richmond's testimony indicates that such an assignment was unusual. Wendell Smith, another furnace room helper, testified that jackhammering for 3 consecutive days was not out of the ordinary. Christian testified that jackhammering for more than 1 day was not unusual, but he qualified it by saying that such an assignment in the same furnace was unusual.

Because the evidence shows that jackhammering is considered the roughest assignment of a furnace room helper, and because I find that Richmond was assigned to that duty in the same furnace for 2 consecutive days following the remark made by Superintendent Blair, I conclude that Blair's statement was not an idle remark but a threat based on Richmond's protected concerted activity. Therefore I find that the Respondent violated Section 8(a)(1) of the Act by unlawfully threatening its employee and assigning him to more arduous work as a result of his safety complaint, a protected concerted activity.

The final allegation of verbal interference occurred several weeks after the two employees Miller and Richmond had been discharged. Foreman Hannah commented to the employees "that he hated to see them get rid of Fred Miller just so they could get Don Richmond . . . [that] everybody knew that they were out to get Don Richmond?" Employee James Eberle's testimony in this regard was not denied by Foreman Hannah who elaborated in his testimony that he "also told them that Fred [Miller] shouldn't have been with Richmond, because Richmond was bad about going [sic] his job when you left him." Hannah's testimony made it clear that his comment about Miller was not related to Richmond's safety complaints but to his reputation as a poor laborer or one with whom other employees "didn't like to work with." The General Counsel's suggestion that Hannah's remark constituted a threat based on Richmond's reputation for

² Richmond's testimony in this regard was generally corroborated by the testimony of Christian. I have, therefore, credited their testimony rather than Blair's denial of the specific comments attributed to him. Although Blair generally recalled the episode in his initial testimony, his subsequent denials of those remarks appeared unconvincing.

initiating frequent safety-related complaints is not supported by the record. In view of Hannah's unrefuted and credible testimony, I find that his comments related to the episode on 19 January when both Richmond and Miller failed to promptly perform their assigned work. Accordingly, I conclude that this allegation of the complaint should be dismissed.

The discharges of Fred Miller and Donald Richmond

Richmond and Miller were discharged effective 25 January 1983. The Company's letter, dated 31 January 1986, informed Miller (Richmond apparently received a similar letter) that the reason for the discharge was his violation of rule 35 that refers to "insubordinate conduct or refusal to follow supervisor's orders." Similarly, letters sent by the Respondent to the Indiana Employment Security Division explained that the reasons for the employees' terminations were their violations of rule 35. Plant Manager Thomas R. Aviles who testified that he made the final decision explained that his reasons were the employees' insubordination, that they remained for too long in the lunchroom, and that they lied about their version of the crucial events on 19 January.

The General Counsel contends that the Respondent discharged Richmond and Miller because the former had engaged in protected concerted activity when he filed numerous safety-related complaints with supervisors and the safety committeeman. It is the General Counsel's theory that the events on 19 January were pretextual. In this regard, the General Counsel points to Richmond's record of filing numerous safety complaints and the alleged threats by Supervisors Blair and Foster, as well as Hannah's remark that the Respondent was trying to get rid of Richmond. The General Counsel argues that the Respondent offered several or shifting reasons for the discharges, exhibited its hostility about the safety complaints, and precipitously discharged the employees without prior warning.

The Respondent contends that the Company has received hundreds of safety complaints from other employees and has not shown any hostility in this regard, and that its treatment of Richmond and Miller was consistent with company policy that insubordinate conduct or refusal to work subjected employees to discharge.

The issue is one of motivation. If the Board concludes that an employee's protected activity was a motivating factor in its discharge decision, the Board can find such discharges to have violated the Act, unless the employer can show that the discharge would have occurred even in the absence of the employee's protected activity. *Wright Line*, 251 NLRB 1083, 1089 (1980). Here, the record shows that there is little or no evidence of any pretextual motive in discharging Richmond and Miller. Even if it were assumed that the General Counsel had been able to establish a prima facie case, the record shows that these employees would have been discharged even in the absence of Richmond's protected conduct.

The episode that triggered the discharge occurred on 19 January after Miller and Richmond reported for work as usual at 11 p.m., the beginning of the first shift. After the men had performed some initial cleaning in the fur-

nace room for about 15 to 20 minutes, but no more than 30 minutes, they went to the breakroom to await their work assignments. Donald Blair came into the breakroom and instructed Richmond to clean furnace 15 and left. Around 11:30 p.m., Supervisor Foster appeared and ordered the men to sweep. Richmond replied that he had been instructed to clean the furnace. Foster explained that that assignment had been changed and that both men were to sweep. Foster left and returned several minutes later with two brooms, again telling them to sweep. Richmond said: "Well, if the company wants to pay us almost \$8.00 an hour for sweeping them dirty floors, then we'll do it and sweep." Foster then said: "Well, that's what the company's paying you to do is work, not to sit." Richmond replied: "Well, where do you want us to sweep at? The furnace room runs from No. 1 furnace to No. 17 furnace." Foster told them: "You go out there in front of the foreman's office and start sweeping." Foster left. About 5 or 10 minutes later Miller and Richmond finally appeared with their brooms in the furnace room. At that point, it was several minutes after midnight and Foster inquired, "[w]hat took you so long." An argument ensued between Richmond and Foster about the time delay in performing the assigned work.

According to the extensive testimony on this point, opinions differed concerning the times involved, particularly the time delay between the orders to work and the actual appearance of the two employees in the furnace room. Richmond's testimony indicated that there was a 15- or 20-minute interval between Blair's first order to clean the furnace and Foster's subsequent order to sweep. Richmond further indicated that several minutes elapsed while Miller finished his cigarette until they finally appeared shortly after 12 midnight. By Richmond's own estimate, the employees were idle in the breakroom for at least a half an hour and during that time Supervisor Foster appeared repeatedly urging them to work. Miller's testimony differed with Richmond's estimate of the times. According to Miller, he was in the breakroom from 11:35 p.m. to sometime after 12 midnight. Rick Gaines, the union steward, testified that he heard Foster's instructions to the employees to sweep around 11:30 or 11:35 p.m.. John Maggot, another furnace room employee, testified that he first saw Richmond and Miller sitting in the breakroom at 11:10 p.m. and that he subsequently overheard Blair's instructions to the employees to clean the furnace about 11:25 p.m. The sequence of events as recalled by Foster and Blair that the employees were idle in the breakroom for more than 30 minutes is, therefore, plausible and also that 30 minutes elapsed between the time they were told to sweep and the time they finally appeared ready for work. In any case, although the witnesses disagreed on the precise time intervals, they generally agreed about the sequence of events.³

Significantly, on 25 January the Respondent's plant manager, Thomas Aviles, held a meeting in his office. In addition to the Charging Parties, also present were sever-

³ It would be futile to attempt a credibility resolution in determining the specific times, because it appears that all witnesses made an honest attempt to recall the incident.

al union officials and Supervisors Blair and Foster. The decision to discharge was made by Aviles after the meeting, at which all parties related their version of the incident. Aviles testified that his decision to discharge the employees was not solely based on their infraction of rule 35, namely insubordination, but "for the refusal to do the work, for staying in the lunch room too long, and overall, for continuing to lie all the way through on their story" (Tr. 129-130).

Aviles, contrary to the General Counsel's suggestion, impressed me as an honest witness who, although unsophisticated at times, made a sincere effort in his testimony to be responsive to counsels' questions and who attempted to deal fairly in his 25 January meeting with the employees. He gave all participants an opportunity to explain their observations and the extent of their own participation in the incident. Richmond explained his conduct and insisted that his actions were appropriate; Miller had little to add to Richmond's version of the events on 19 January. Yet there was no disagreement that the employees had remained in the breakroom for too long and had ignored their supervisor's repeated requests to report for work. The General Counsel's suggestion that "sweeping was not critical to the operation of the plant" misses the point. Sweeping may appear to be unimportant but it is up to management to decide whether the employees work for their pay or sit idle. Aviles, in his attempt to appraise the employees' conduct and to reconcile the reports of supervisors, union officials, and the employees' own version of the incident, could plausibly conclude that the employees, notably Richmond, had been insubordinate not only by failing to report for work promptly but also subsequently by arguing with his foreman about it. Aviles could easily believe that they malingered or sat idly in the breakroom for too long, and he could understandably have given more credence to his supervisors' reports than those of the affected employees and decide that they had lied about the times. The fact that the formal reason for the discharges was their infraction of rule 35 should not put into question the Company's true motive under the circumstances here. There was no direct evidence that the Company had an ulterior motive for the discharges. Insubordination sufficed to discharge the employees under company policy. By anyone's standard, the employees should have been disciplined for their conduct on that day. The only issue was the degree of the discipline. Although discharge seemed severe in view of the seniority of the employees, nevertheless, taking into consideration Richmond's self-righteous conduct, his dispute with Supervisors Foster and Blair, and his subsequent attempt to justify his performance as appropriate or typical employee conduct at the plant could give rise to a perception by management that the degree of insubordination justified the Respondent's action.

The General Counsel suggests a pretextual motive because the Respondent asserted more reasons than insubordination for the discharges, and Miller quarrels with the Respondent's characterization of their conduct as insubordination but concedes "lingering." Nonetheless, the episode must be considered in its entirety. When an employee fails to follow a supervisor's directions, remains in

the breakroom in spite of a foreman's directions to perform a task, and when he finally appears reluctantly in the furnace room and when asked "what took you so long" challenges that remark to the point of a heated argument with his supervisor, insubordination is, in my opinion, an appropriate description for such conduct. This may also explain Supervisor Hannah's remark after the employees were discharged that the Respondent had wanted to get rid of Richmond, yet Miller was part of the incident. Moreover, the Union's position at that time is also relevant. Although the Union filed a grievance on behalf of the employees, it advised the employees to admit guilt and to ask for their jobs back. Union Committeeman Rich Gaines explained: "We felt that if we arbitrate it, we would have lost, because they were fired for just cause, loitering or lingering in the lunch room, and we just didn't think we would win it if we did arbitrate it." (Tr. 689.)

I disagree with the General Counsel's characterization of the 25 January meeting as "a kangaroo court" and his argument that the Respondent's asserted reasons were pretextuous. Although it may be assumed that Aviles was aware of Richmond's protected concerted activity, the record does not support a finding of the Respondent's hostility to safety-related complaints nor that the discharge was sudden and based on shifting reasons. To the contrary, the record shows in great detail that the Respondent had received numerous safety complaints in the past from various employees, and had attempted to correct the deficiencies. Other employees, including safety committeemen, had repeatedly brought safety complaints to the attention of management, yet there is no evidence that the Company retaliated against them. Similarly, any suggestion that Richmond's grievance may have motivated the Respondent's decision is without any evidentiary support. The record contains multiple employee grievances and no evidence of any employer hostility. The sole incident of employer hostility was the Company's violation of Section 8(a)(1) of the Act relating to Richmond's assignment to more arduous work as a result of his complaint about chlorine gas. However, that incident occurred in October 1982, several months prior to the discharge, and involved one of the supervisors rather than Aviles. Indeed, Richmond's own testimony relating to the Respondent's conduct in response to his numerous safety complaints indicates the Company's cooperation by the Company in rectifying the complaints rather than a demonstration of hostility. It would be far-fetched, given the Company's record of past dealings with other employees and their safety complaints and its prior reaction to Richmond's complaints with one exception that the employees were fired because of the Respondent's reaction to Richmond's protected conduct. In any opinion, the record does not show a prima facie case of unlawful discharges motivated by Richmond's protected concerted activities and, even if there were support for such a finding, the Respondent has shown that the employees would have been discharged even in the absence of an unlawful motive.

CONCLUSIONS OF LAW

1. Wabash Alloys, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, Local Lodge No. 120, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, is a labor organization within the meaning of Section 2(5) of the Act.

3. By threatening its employee Donald James Richmond with more arduous work and by assigning him to a more arduous, less desirable work task, because of his protected concerted activity, Respondent violated Section 8(a)(1) of the Act.

4. All other allegations in the complaint have not been substantiated. On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴

ORDER

The Respondent, Wabash Alloys, Inc, Wabash, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unlawfully threatening its employees with more arduous work or other reprisals or assigning them to more arduous and less desirable work tasks because they complain about safety conditions at the plant or engage in other protected concerted activity.

(b) 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) Post at its Wabash, Indiana plant copies of the attached notice marked "Appendix."⁵ Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized shall be posted by the Respondent immediately upon receipt and for 60 consecutive days in conspicuous places including all places notices to employees are customarily posted. Reasonable steps shall be taken by the Respond-

ent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER RECOMMENDED that the amended complaint be dismissed insofar as it alleges violations of the Act other than those found in this Decision.

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.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT unlawfully threaten our employees with more arduous work or other reprisals or assign them to more arduous and less desirable work because they complain about safety conditions at the plant or engage in other protected concerted activity.

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.

WABASH ALLOYS, INC.

⁴ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board all objections to them shall be deemed waived for all purposes.

⁵ 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."