

**Kiechler Manufacturing Company and Windell L. Akers.** Case 9-CA-11758

September 26, 1978

**DECISION AND ORDER**

BY MEMBERS JENKINS, MURPHY, AND PENELLO

On June 9, 1978, Administrative Law Judge Marion C. Ladwig issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,<sup>1</sup> and conclusions 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 Respondent, Kiechler Manufacturing Company, Cincinnati, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

<sup>1</sup> The 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 were incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

In sec. B(1)(a) of his Decision, the Administrative Law Judge adverts to "The remaining items in Jordan's earlier complaint . . ." It should read ". . . in Akers' earlier complaint . . ." This mistake was clearly an inadvertent error having no adverse effects on the Administrative Law Judge's results.

**DECISION**

**STATEMENT OF THE CASE**

MARION C. LADWIG, Administrative Law Judge: This case was heard at Cincinnati, Ohio, on February 28 and March 1, 1978. The charge was filed on September 22, 1977, and the complaint was issued on November 17, 1977. On June 20, 1977,<sup>1</sup> the Company discharged a second union steward who had filed a complaint with OSHA, the Occupational Safety and Health Administration. The primary issue is whether the Company, the Respondent, unlawfully discharged and failed to reinstate Union Steward Windell

<sup>1</sup> All dates are from September 1976 through June 1977 unless otherwise stated.

Akers, the Charging Party, for engaging in the protected concerted activity of filing and pursuing complaints with OSHA concerning working conditions in the plant, in violation of Section 8(a)(1) of the National Labor Relations Act, as amended.

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

**FINDINGS OF FACT**

**I. JURISDICTION**

The Company, a Delaware corporation, is engaged in the manufacture of store shelving and related products at its plant in Cincinnati, Ohio, where it annually ships goods valued in excess of \$50,000 directly to points outside the State. The Company admits, and I find, that it is engaged in commerce and in operations affecting commerce within the meaning of Section 2(6) and (7) of the Act and that the Union, Sheet Metal Workers International Association, Local Union No. 183, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

**II. ALLEGED UNFAIR LABOR PRACTICES**

**A. Discharge of First Union Steward**

Once in 1972 and twice in 1974, the Company was issued OSHA citations for numerous alleged safety and health violations.

In September 1976, Union Stewards Eugene Jordan and Windell Akers filed separate additional complaints of alleged unsafe and unhealthy conditions at the plant. (Other than writing up grievances, Jordan's main duty as a union steward was to make safety checks. As steward for the welding department, Akers' duties were "to look out for safety," as well as handling grievances and other union matters.) Akers requested OSHA not to reveal his name as a complainant to the Company, but Jordan did not attempt to keep his contacts with OSHA a secret. Before filing the OSHA complaint, Jordan personally discussed 10 of the 12 items (which he later listed in his complaint) with the plant manager, Luther Stevens, Jr. About the first week in October, after filing the complaint, Jordan informed Supervisor Harry Buhrmaster that he had discussed the safety hazards with Stevens "to no avail" and had "filed a charge with OSHA." (Buhrmaster, the quality control manager for Myers Industries, Inc., the parent company, was working at the plant, planning a new warehouse facility and supervising three of the employees.) In Jordan's words, "That is when my problems started."

About October 11, as Union Steward Jordan credibly testified, Plant Manager Stevens walked up to where Jordan was working and told him, "Now, all these things that you are trying to get me to fix, I can't afford to fix them." Stevens then called Jordan a "troublemaker" and said, "I'm going to fire you." (This testimony is uncontroverted, the Company not having called any defense witnesses.) Later, about October 15, when Jordan was in the office with an employee who was being given a reprimand, Stevens undis-

putedly told Jordan "I was 90 percent of his labor problems," and again told Jordan he was a "troublemaker."

On November 15 (a few days before the OSHA inspection), Union Steward Jordan was hanging some 6-foot, 22-pound verticals on an overhead conveyor when one of the verticals fell back off the hang line. (One item in his complaint to OSHA was that "Material falls from hang line.") Jordan tried to avoid being hit, but the vertical fell on his shoulder and arm. As he was struck, he threw the vertical in his hand down on the floor. Although no damage was caused, the Company proceeded to prepare his discharge papers—before calling him into the office—and in the presence of Supervisor Buhmaster, discharged him. (In contrast to the Company's discharge of this union steward, when no damage was done, the Company had not disciplined two employees who damaged company property. A few months earlier, when employee Barnett Washington was hanging shelves on the hang line and one shelf dropped, making him angry, he threw the shelf back on the load of shelves, damaging the shelf. The foreman merely "told him to calm down and stop throwing shelves back down on the load." Still earlier that same year, employee Louis Bartlett "got mad at my safety glasses and I threw them down on the floor and broke the earpiece." The foreman said, "You shouldn't lose your temper," and got him a new pair of glasses.) After the Regional Director issued a complaint in an earlier proceeding, Case 9-CA-10745-3, alleging the unlawful discharge of Union Steward Jordan for engaging in OSHA activity, the case was settled.

In accordance with well-established Board precedent, I rely on the foregoing undisputed presettlement conduct, showing animus toward a union steward for filing a complaint with OSHA, "to establish the motive or object of Respondent in its postsettlement activities." *Local Union 613 of the International Brotherhood of Electrical Workers, AFL-CIO (National Electrical Contractors Association)*, 227 NLRB 1954, fn. 1 (1977), citing *Steves Sash & Door Company v. N.L.R.B.*, 401 F.2d 676, 678 (C.A. 5, 1968).

## B. Discharge of Second Union Steward

### 1. Company knowledge or suspicion

#### a. Copies of OSHA complaints

On November 18 (3 days after Union Steward Jordan's discharge), OSHA began conducting an inspection at the plant. Before then, Union Steward Akers had told some of the other employees that "OSHA would be in," and "Some of the employees had talked about it," as Akers credibly testified on cross-examination. He did not notify any of the supervisors.

On December 7, OSHA issued additional citations against the Company for numerous alleged violations, including such repeat items as missing barriers or screens in the welding area. The proposed penalties (later reduced) were \$5,725. At this time the Company had not been served with copies of the union stewards' September complaints to OSHA. Apparently, the Company was not then aware of any of the talk connecting Akers with the OSHA inspection.

In January, the Company did receive copies of the

OSHA complaints filed in September by Steward Akers (G.C. Exh. 9d) and Steward Jordan (G.C. Exh. 9e). As acknowledged by Myers Industries Vice President Leonard Kamer, the Company's counsel at the trial, "This [G.C. Exh. 9d] was not served on Respondent, Kiechler; this was handed to me by [OSHA Area] Director some time in January of 1977. I do have a copy of this. . . . Well, what I just stated for 9(d) is appropriate for (e)." Both OSHA complaints had the name of the complainant deleted, but an examination of them would reveal to the Company that they were filed by different persons, indicating that somebody other than the recently-discharged union steward had filed one of the complaints. The Company could discern from the face of the later complaint, bearing the number "1092 (added)," that it was the one filed by Jordan, who had discussed all but 2 of the 12 listed items with Plant Manager Stevens. Akers' complaint, bearing the earlier number "1092," included three items ("Gloves not provided for handling hot steel," "Insufficient toilet facilities," and "No sanitary eating facilities") which were not included in Jordan's list of 12 items. The remaining items in Jordan's earlier complaint ("Water runs around electrical equipment when it rains" and "restrooms provided are unsanitary") were included in Jordan's more comprehensive list. The Company would obviously realize that the latter complaint was not a supplementary complaint filed by the same person, but a more comprehensive complaint filed by a different person, containing some but omitting other items on the first complainant's list.

Thus the Company learned from the copies of the OSHA complaints which it received in January that it was still confronted with another "troublemaker." Its actions in issuing a belated reprimand to Akers in January and a second reprimand in February indicate that the Company at least suspected Akers of being the other person complaining to OSHA.

#### b. Belated reprimand

Union Steward Akers was a certified welder. He had been employed since 1969 and had never been issued a reprimand—although in November he was tardy twice and absent twice. The Company has a written rule (posted at times in the past) that an employee will be given a reprimand for two separate days of unexcused absences or a combination of four unexcused tardinesses and absences, in any one month. Akers was tardy on November 2 and 11, each time for 1.2 minutes (.02 hour). He was absent on November 15 and 30—once to take his children to school after moving to a new home, and the other time when he ran out of fuel oil during the night. Each time he notified his foreman through employee Bartlett. (It is undisputed that when Bartlett told Foreman Charles Alsip that Akers would be absent "because of something to do with his furnace," Alsip said, "Okay.") The foreman did not inform Akers on either occasion that the absence was considered unexcused, and said nothing after the second absence about giving him a reprimand for the two tardinesses and two absences in November. Akers had a good attendance record.

Despite the mandatory wording of the reprimand rule, the giving of reprimands for tardinesses and absences was *not* automatic. It was apparently left to the Company's discretion whether to consider the tardiness or absence "excused" and whether to issue a reprimand. When the Company did decide to give reprimands, as indicated by the reprimands in evidence, it issued them shortly after the last absence or tardiness, usually on the same day or the following workday.

Akers' first reprimand was an exception to the Company's practice. The Company waited over 6 weeks (until January, the month in which the Company's counsel admittedly received copies of the September OSHA complaints) to issue a reprimand on January 12 for the November absences and tardinesses. Nowhere does the Company attempt to give any nondiscriminatory explanation, despite the testimony at the trial questioning the Company's motivation for belatedly issuing the reprimand. Akers testified that he thought he was being given the belated reprimand "over the OSHA thing," explaining "I never got one" before, and "this happened in '76 and why did they wait until January of '77 to come out with" the reprimand. As elicited by the Company's counsel, Akers testified, "I think it leaked through other people. Some of the employees had talked about it." (Akers did not challenge the reprimand because "I figured that would be all the reprimand I would get while I was there because I had never got none in the other seven years I was with the Company.") Still the Company called no defense witnesses to explain or justify the delay (or to deny knowledge of Akers' contacts with OSHA), and the Company ignored the delay in its brief.

After considering all the circumstances, including (1) Akers' good attendance record, (2) the apparent decision at the time not to reprimand him for the two short tardinesses (totaling less than 2-1/2 minutes) and his two absences in November for nonrecurring, defensible reasons, (3) the unexplained decision on January 12 to belatedly reprimand him, and (4) the recently demonstrated animus toward Union Steward Jordan for causing the Company trouble with OSHA, I infer that even if the Company did not learn from one of the employees that Union Steward Akers was connected with the OSHA inspection, the Company at least suspected that he was the remaining employee involved in reporting plant conditions to OSHA. I therefore find that the real reason for issuing him the January reprimand was to begin building a case against him. (I consider this background conduct of the Company in determining its motivation for later discharging Akers.)

### c. February reprimand

At the time the Company issued Union Steward Akers the first reprimand on January 12 (to build a case against him, as found above), severe weather was being experienced. During this time, the Company was either excusing repeated tardinesses and absences, or deciding not to give reprimands for them. As shown by timecards in evidence, employee James Jackson, Jr. (also working in the welding department) was tardy five times in a 1-month period, on November 29 and December 2, 17, 20, and 22, without being given a reprimand. In the next 1-month period, he was tardy 11 times (on December 30 and January 4, 5, 7,

10, 11, 14, 17, 19, 20, and 21) and absent once on January 24, again without being given a reprimand (although a year earlier, on January 12, 1976, he was given a reprimand for four tardinesses and one absence).

Union Steward Akers was absent on January 5, a day that "There was a bulletin that everybody who hadn't started to work not to go because of the road conditions." (He lived 20 miles from the plant.) On January 17 ("the coldest day of the year"), Akers was absent when his car broke down and he had no other way to work. He was absent on February 9, after telling his foreman the day before that his car broke down again and he probably would be absent to take the car to the garage to get the transmission fixed. He was absent on February 14 when "the transmission they put in . . . went out again on me and broke down in the middle of town." He immediately advised his foreman (through another foreman who was at work). The next day, February 15, the Company gave him a reprimand for these four absences, and for two tardinesses, on January 19, when he was late 3.6 minutes (as compared to employee Jackson being late 28.8 minutes that same day), and on February 2, when he was again late 3.6 minutes—both times when the roads were hazardous. Thus, the Company was reprimanding him for being late for less than 4 minutes on each of two occasions during bad weather, and for being absent three times in the 1-month period because of car trouble. The Company added the fourth absence (on January 5 when Akers stayed off the roads pursuant to a traffic bulletin), even though it was outside the 1-month period.

This time Akers protested, telling Foreman Alsip "I didn't think I should have [the reprimand] because he knew why I was off. My car was broken down at that time and he knew about it." Alsip responded, "Well, I knew it but I have still got to give you a reprimand. I know about your circumstances but I still have to give you a reprimand."

Under all the circumstances, I find that again the real reason for issuing him the reprimand was to build a case against him in the hopes of ridding the plant of the remaining "troublemaker."

## 2. Another OSHA inspection

The Company's first opportunity to discharge Union Steward Akers (by giving him a third reprimand under the tardy-absent rule and then discharging him for three reprimands in 1 year) came on June 7 when he was late the fourth time in a 1-month period. (He was late on May 10 and 31 for only 2.4 and 1.2 minutes, respectively, but he was late 40.8 minutes on May 11 and 43.2 minutes on the fourth time, June 7.) However, there was no mention of a reprimand on June 7, nor later on June 10, 13, or 16, when he was late 1.2, 2.4, and 1.2 minutes, respectively.

Although, in the absence of any defense witnesses, the Company has failed to offer any explanation for not promptly reprimanding Akers for being late four times between May 10 and June 7, or five times between May 31 and June 16, the evidence does indicate a reason for the Company's hesitation, or change of mind, regarding discharging him as it had planned. There had been no more OSHA inspections, despite the fact that the Company had moved a welding machine back into the welding department in January without putting up a screen between it and

the next machine. (The Company had been issued citations in October 1972, April 1974, and December 1976 for failing to install such required screens or curtains in the welding area, and the Company had installed a screen in December—the previous month—pursuant to the last citation.) Thus, notwithstanding the Company's knowledge or suspicion that Akers had caused the Company "trouble" with OSHA in 1976, it had no indication that Akers—as steward in that department—was again reporting such alleged violations to OSHA.

In fact, Union Steward Akers had filed a new complaint with OSHA on May 2, listing the no-screen problem in the welding department and various other alleged violations.

By June 16, when the OSHA inspectors arrived, there still had been no mention of issuing Akers a third reprimand. About 10 o'clock that morning, Welding Foreman Alsip "came back and said to pull all the curtains . . . and get on your safety glasses because OSHA was in the plant." The OSHA inspectors were going through the plant with Plant Manager Stevens and Chief Steward Charles McCaughan. When they got to the welding department, Inspector Murphy asked for "the safety man" in that department. McCaughan introduced him to Steward Akers. At that point, the inspectors conferred with Akers for about 15 or 20 minutes, outside the hearing of Stevens and McCaughan. (In contrast, the inspectors spent only about 1 or 2 minutes, or "Five minutes at most," at the other places in the plant where violations had been reported.) Later in the day, Foreman Alsip informed Akers that "they had been cited by OSHA," and instructed him to "get a shield or a curtain to put between the two machines."

### 3. The discharge

Between the time of the inspection on Thursday, June 16, and the following Monday morning, June 20, the Company had decided belatedly to give Union Steward Akers his third reprimand, for "Habitual tardiness." Foreman Alsip signed the reprimand, dated June 20, and listed all seven of the tardinesses, extending over a 38-day period. Alsip asked Akers if he wanted to sign it and Akers answered that he did not, pointing out that "that would be three of them." Not acknowledging that he was aware of this fact, Alsip said, "If you have three reprimands you will be dismissed right now," and stated that he would go to the office and check. Upon returning, he immediately discharged Akers, at 10:30 a.m. Akers signed the reprimand, but he informed the foreman that he wanted to file a grievance for being discriminated against "because I filed a report with OSHA."

Although Foreman Alsip treated the third reprimand in a year as an automatic discharge, the collective-bargaining agreement (art. XVI, sec. 1) provides merely that the Company "may" discharge an employee for just cause. (Habitual tardiness, repeated absence, and three written reprimands within 12 months are listed as just causes for discharge.) The unrefuted testimony is that discharge for three reprimands in 1 year is *not* automatic. Chief Steward McCaughan credibly testified that to his knowledge one employee (Barnett Washington) was not discharged after his third reprimand in 1 year, and not until his *fifth* reprimand. As elicited by the company counsel on cross-exami-

nation, Akers testified that if the Company "wanted to get rid of you for another reason," it would "go back on" the three reprimands for tardiness and absence rule.

After filing his grievance, Akers left the plant and filed a charge with OSHA, and then charges with EEOC and the State Civil Rights Commission alleging religious discrimination. (Foreman Alsip had been making insulting remarks about Akers' Holiness religion. I note that an unsigned attachment to his Civil Rights Commission charge states that Akers had never received a reprimand for tardiness before. Inasmuch as he impressed me as being an honest witness, I credit his testimony that he meant that he had never been reprimanded for tardiness alone.) Akers was not able to prove the charges. Upon advice of counsel, the Union decided not to take his grievance to arbitration—the collective-bargaining agreement providing that "The Union agrees that where any" of the listed offenses is "established . . . the Union shall not demand that the dismissed employee be reinstated." (Akers did not deny the accuracy of the attendance records.)

### C. Contentions and Concluding Findings

The General Counsel contends that the evidence reveals that the Company realized on June 16 that it was Akers who reported the violations to OSHA, and that the Company acted swiftly "in getting rid of Akers for his OSHA activity" as it had Union Steward Jordan the year before.

The Company contends that "It is very clear that no one had specific knowledge that Akers had filed a complaint, or complaints, with OSHA"; that "it is impossible to infer that anyone in management could have logically suspected that Akers filed such complaint"; that "the only possible manner in which the Company could have knowledge that Akers filed charges with OSHA is through guesswork"; and (ignoring the undisputed testimony that the OSHA inspectors spent much time with Akers, after asking for the safety man in that department), that "If, through some mystical crystal ball technique, Kiechler could determine that the complaint had been filed by someone in the Welding Department, Akers was but one of several possibilities. By his admission, there were at least 10 other employees in the Department." Concerning the General Counsel's relying "on evidence with respect to [former Union Steward] Jordan to attempt to establish animus" toward union stewards for filing complaints with OSHA, the Company contends that "Simply stated, there is a complete lack of probative evidence which would possibly establish the required finding of animus." I disagree.

After considering all the evidence and circumstances, I find that the Company belatedly gave Union Steward Akers his third reprimand, and discharged him, on the second workday after OSHA's return to the plant, upon concluding that he was the remaining person complaining to OSHA after the earlier discharge of Union Steward Jordan. Accordingly, I find that the Company's real reason for discharging and failing to reinstate Akers was his engaging in the protected concerted activity of filing and pursuing complaints with OSHA concerning working conditions in the plant and that the discharge violated Section 8(a)(1) of the Act as alleged. *Alleluia Cushion Co., Inc.*, 221 NLRB 999, 1000 (1975).

## CONCLUSIONS OF LAW

By discharging Windell Akers on June 20, 1977, and thereafter failing to reinstate him, for engaging in protected concerted activity, the Company engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

## REMEDY

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

The Respondent having unlawfully discharged an employee, I find it necessary to order it to offer him full reinstatement, with backpay for lost earnings, less net interim earnings, in accordance with the formula set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), plus interest as computed in *Florida Steel Corporation*, 231 NLRB 651 (1977),<sup>2</sup> from date of discharge to date of proper offer of reinstatement. Inasmuch as Respondent's unlawful conduct goes to the very heart of the Act, I find it necessary to issue a broad Order, requiring the Respondent to cease and desist from infringing upon employee rights in any other manner.

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

ORDER<sup>3</sup>

The Respondent, Kiechler Manufacturing Company, Cincinnati, Ohio, its officers, agents, successors, and assigns, shall:

## 1. Cease and desist from:

(a) Discharging or otherwise discriminating against any employee for engaging in protected concerted activity.

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

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

<sup>2</sup> See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

<sup>3</sup> 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.

(a) Offer Windell Akers full reinstatement to his former job or, if his job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of pay and other benefits in the manner set forth in the remedy section.

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

(c) Post at its plant in Cincinnati, Ohio, copies of the attached notice marked "Appendix."<sup>4</sup> Copies of the notice, on forms provided by the Regional Director for Region 9, after being duly signed by the Respondent's authorized representative, shall be posted by the 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 the Respondent to insure that the notices are not altered, defaced, or covered by any other material.

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

<sup>4</sup> 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."

## APPENDIX

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

WE WILL offer Windell Akers immediate and full reinstatement to his former job or, if his job no longer exists, to a substantially equivalent job, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of pay or other benefits since his discharge, plus interest.

WE WILL NOT discharge or otherwise discriminate against any of you for filing a complaint with OSHA.

WE WILL NOT in any other manner interfere with your rights under Section 7 of the Act.

KIECHLER MANUFACTURING COMPANY