Chambers Development Company, Inc. *and* International Union of Operating Engineers, Local 66, AFL-CIO. Case 6-CA-15320

26 August 1983

DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

On 8 December 1982 Administrative Law Judge Thomas A. Ricci issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and Respondent filed an answering brief.

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

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order, as modified herein.

The General Counsel excepts to the Administrative Law Judge's failure to find an 8(a)(1) violation in Superintendent Rangos' statement to employee Edmundson regarding Respondent's stricter policy for documenting work rule violations. On or about 25 February 1982, after a representation petition had been filed and an unfair labor practice charge had been filed by a discharged employee, Rangos told Edmundson that disciplinary letters would be given out for "any mistake that was made" and the letters would be used "if anyone went to file a grievance against the Company." The General Counsel asserts that, in similar situations, the Board has found such threats to violate Section 8(a)(1) of the Act. See, e.g., *Fidelity Telephone Co.*, 236 NLRB 166 (1978).

The Administrative Law Judge found that this statement did not constitute a violation of the Act. He noted that it was uttered after the representation petition had been filed and after the unfair labor practice charge had been received. He therefore reasoned that Respondent was justified in making the statement and in making a provable record of faulty work performance. He further suggested that circumstances involving "competing unions"—apparently as opposed to a situation with a single union engaged in organizational activities—somehow lent justification to Respondent's statement.

We agree that an employer has every right to document employee shortcomings. However, an employer may not intimidate employees by telling them that *because* an employee has filed a charge or a grievance or sought assistance from the National Labor Relations Board, it plans to increase documentation of rule infractions and to broaden the bases warranting disciplinary action. Respondent was, in effect, informing employees that it was adopting a stricter policy of documenting errors in retaliation for the employees having engaged in Section 7 activities. Its statements would clearly have the effect of coercing and intimidating employees because of their exercise of their Section 7 rights. We find, therefore, that Respondent violated Section 8(a)(1) of the Act in communicating to employees that, in response to their protected activities, it would impose more onerous working conditions by more strictly enforcing and documenting violations of the existing work rules.

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, Chambers Development Company, Inc., Monroeville, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

[1] The General Counsel 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*, 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 inadvertently stated that Dale Morrow was discharged on 11 August 1982. The record shows that Morrow was discharged on 17 February 1982. The Administrative Law Judge also indicated that Greg Edmundson's affidavit stated that John Rangos, Jr., had a conversation with him on 21 February concerning the Company's stricter policy of using letters to document mistakes. The affidavit states that this conversation occurred on 27 February. As the Administrative Law Judge based his finding on the assumption that this conversation had occurred after 24 February, the error is a technical one without significance.

The Administrative Law Judge dismissed the 8(a)(1) allegation concerning Superintendent Rangos' statement, made during the critical period, that "66 will never be here." The Administrative Law Judge noted that, in other circumstances, such a statement would be considered "a classic Section 8(a)(1) statement." He reasoned, however, that, inasmuch as Local 66 of the Operating Engineers already represented certain employees at the jobsite, the statement could not be considered antiunion. In excepting to this finding, the General Counsel argues that the Administrative Law Judge's underlying premise—that Local 66 was an incumbent union—is incorrect. In this regard, we note the Administrative Law Judge failed to delineate the relationship between Local 66 and Chambers. The record indicates that Chambers leases some of the equipment which it uses in its operation from U.S. Utilities Corporation. U.S. Utilities has a collective-bargaining agreement with Local 66 which covers the mechanics who repair the equipment. There is common ownership and control of both companies. Under these circumstances, the Administrative Law Judge's statement that Local 66 was "already there" and his reasoning therefrom are correct.

1. Add the following as paragraph 1(b) and reletter the subsequent paragraph accordingly:

"(b) Retaliating against employees' exercise of their Section 7 rights by threatening employees that any rule violations or wrongdoings by an employee will be documented and recorded."

2. 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

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT interrogate our employees concerning their union activities or concerning the union activities of fellow employees.

WE WILL NOT retaliate against employees' exercise of their Section 7 rights by threatening to document the slightest rule violations.

WE WILL NOT in any like or related manner interfere wtih, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act, as amended.

CHAMBERS DEVELOPMENT COMPANY, INC.

DECISION

STATEMENT OF THE CASE

THOMAS A. RICCI, Administrative Law Judge: A hearing in this proceeding was held in Pittsburgh, Pennsylvania, on October 21, 1982, on complaint of the General Counsel against Chambers Development Company, Inc., here called the Respondent or the Company. The complaint issued on June 18, 1982, based on a charge filed on February 24, 1982, by International Union of Operating Engineers, Local 66, AFL-CIO. The main issue presented is whether the Respondent discharged employee Dale Morrow in violation of Section 8(a)(3) of the Act. Briefs were filed after the close of the hearing by the General Counsel and the Respondent.

Upon the entire record and from my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent, a Delaware corporation, with its principal office in Monroeville, Pennsylvania, is engaged in the collection of refuse and the construction and operation of sanitary refuse landfills. During a 12-month period ending January 31, 1982, in the course of its business the Respondent provided services valued in excess of $50,000 for other enterprises in the Commonwealth of Pennsylvania, including the city of Pittsburgh, which are directly engaged in interstate commerce. I find that the Respondent is engaged in commerce within the meaning of the Act.

II. THE LABOR ORGANIZATION INVOLVED

I find that International Union of Operating Engineers, Local 66, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICE ALLEGATIONS

In Monroeville this Company does what is called a landfill operation, to which refuse and coal is moved in various kinds of vehicles, and where it is spread out and rearranged for future use as a regular site. For a number of years some of the employees—men who drive vehicles in and about the landfill and who bring materials there from other locations—have been represented by Refuse and Salvage Drivers and Helpers Local Union No. 609 of the International Brotherhood of Teamsters. Others of the employees who work there—mechanics and repairmen, as best the record shows—have been, and still are, represented by the Operating Engineers Local 66, which filed the charge in this case. In the summer of 1981 the Company hired four additional equipment operators at its landfill, who worked with rather specialized moving vehicles. A question arose as to whether the new men appropriately belonged in the Teamsters bargaining unit, and were therefore covered by that contract, or in the bargaining unit represented by the Operating Engineers. Apparently the question was a nebulous one. In fact one of the top management representatives, Edward Brittner, the secretary-treasurer, himself a longtime member of Local 66, thought they belonged to that union, while John Rangos, the operations superintendent, felt they belonged to the Teamsters.

The uncertainty was such that on November 25, 1981, Local 66 filed a representation petition with the Board, asking for an election to establish a separate unit for these four employees only. At a Board hearing in that case in December, the Respondent took the position they fell in the Teamsters unit and that therefore its contact with the Teamsters was a bar to any election. Although it participated in that proceeding as intervenor, the Teamsters, for reasons that defy understanding, remained neutral, took no position at all on the basic question of where the four employees belonged. It is difficult to comprehend that posture by the Teamsters that day. In any event, 3 months later, on March 12, 1982, the Board's Regional Director dismissed the petition on the ground of contract bar, holding the new men were appropriately included in the Teamsters unit.

Dale Morrow, one of the four employees in question, testified at the hearing in support of the position taken by Local 66. On August 11, 1982, he was discharged. The complaint says he was fired for having tried to

obtain representation by Local 66; i.e., because of his union activities, a violation of Section 8(a)(3) of the Act. Denying any illegal purpose, the Respondent asserts Morrow was dismissed because of his continuing errors on the job and disregard of duties, but especially his total indifference to either coming to work on time or staying until the end of his established shift, reached the point where his behavior could no longer be tolerated. On the day of his discharge Morrow was told, and was served a written statement to that effect, that the reason was because the day before he had left work early without permission and without advance notice to management. There is presented therefore an inference case. In the light of certain relevant facts of record, plus testimony—some believable and some not—can it be said that the manager's reason was unlawful as alleged in the complaint.

I think the evidence does not support the complaint. However it be phrased—*prima facie* case or convincing affirmative proof in support of the complaint—the burden is on the General Counsel to prove his conclusionary assertion of illegal motive.

The one clear thing on this record is that Morrow had an almost incredibly bad record coming to work late, going home whenever he felt like it, and being absent for entire days. He worked for 6 months—from August to February. During that period—as his timecards in evidence show—he was late in arriving 21 times by at least 20 minutes; of these, once it was over 3 hours, twice over 2 hours, and once 1 hour late. In addition he came late but by less than 20 minutes, 13 times. Morrow jumped around in his testimony as a witness called by the General Counsel. But Greg Edmundson, who is still in the Respondent's employ, said straight the hours were from 7 a.m. to 4:30 p.m. Morrow left early no less than 20 times: once at 9:30 in the morning, once 5 hours too soon, five times 4 hours before quitting time, and the rest of the times between 1 and 3 hours ahead of time. And he was absent on 9 separate full days.

Rangos, the superintendent, admitted that on occasion Morrow did ask for and was given permission to leave early, and even to be absent a full day. But Rangos, as well as Brittner, said that many of the times Morrow came late or left early without being given permission in advance. Morrow testified that each and every time he left early or was absent he did get express permission. I cannot believe him, for it happened too many times.

How much does an employer have to tolerate merely because he knows a man is trying to get into one union of the two established in the plant, while the employer thinks he should be in the other instead? The argument is often made that if the employee's insufferable behavior was that bad over so long a period of time, why did the employer not get rid of him sooner, why did he wait until the critical moment? But this theory does not fit here, because there was no suspicious timing. What inquiry management made as to who was behind the Local 66 representation petition had taken place months earlier. The hearing before the Board was back 2 months ago, and everybody was just waiting to see what the Regional Director would do.

But a significant timing of another sort there was. The day before he was fired Morrow left early again, this time about 2-1/2 hours before quitting time. The discharge decision was made by Brittner and Rangos, the top management agents over the location. Morrow said he had obtained permission to leave early the day before from Brittner. Brittner said the opposite. Credibility must rest on the totality of a man's testimony. Early in his story Morrow testified that "I requested permission on every occasion" that he left early, and that he had never been criticized for having done that. Later he admitted on cross-examination that there had been "complaints" against him for late arrival. How often? "Just about every time I was late." Again: "Were there ever complaints lodged to you by Chambers supervisory personnel regarding leaving the job early? A. Yes. Q. Okay. And how often did that occur? A. Maybe two or three times." While it is understandable that Morrow would want to portray a good picture about himself at this hearing, it is obvious he was not being honest. I find he was not given permission to leave early that last day on the job.

I do not think it quite necessary to give every jot and tittle of Morrow's other failings as an employee, because by the time he was through he admitted just about every mistake for which he was criticized again and again. Twice he was reprimanded for putting dirty water rather than clean water in the radiator of the very expensive vehicle he was operating. He was reprimanded for a collision he caused, which resulted in the Company having to pay a substantial amount to repair another company's truck. Morrow as questioned further.

> Q. . . . were you ever reprimanded by any supervisor of Chambers Development for any other actions you have taken, or failure to act on the job.
>
> A. Yeah, I was reprimanded before.
>
> Q. Can you tell us generally what that was about?
>
> A. They ranged from everything to going up the wrong road to telling me that I had been responsible for breakdown of equipment.
>
> Q. Going up the wrong road is not a serious complaint, but responsibility for breakdown of equipment can be serious?
>
> A. Oh. Yeah.

Finally, there was a rule that to be absent the employee had to obtain permission, or at least advise management, the day before. First Morrow said he had always done that, then he shifted and said "possibly two or three times" he did not, but called in the morning of his absence instead. By that time it was very difficult, if not impossible, for the Respondent to obtain the necessary replacement.

With all this, I must believe the testimony of the two management witnesses that the reason why they discharged Morrow was because they could no longer put up with his general conduct as an employee.

To prove that Rangos instead acted with a different motive, the General Counsel relies heavily on a statement appearing in the pretrial affidavit of one of his wit-

nesses, Edmundson. It is dated March 17, 1982, the month after Local 66 filed its charge saying Morrow had been dismissed because of his union activities. At the hearing, Edmundson several times said he could not remember what had been said or what had happened. He looked at his affidavit and repeated he could not remember whether what was written there really took place. Whatever his reasons, he was playing games. In his affidavit, received into evidence with hesitancy, there is the following statement:

> Rangos said the Company has been having trouble with employees who have been fired and who have been going to the Labor Relations Board, and filing grievances against the Company. Rangos said, the letters would help back up the Company if they had to go to court . . . Rangos said, Dale was fired because he was late for work lots of times, he missed a lot of days, he left early and didn't tell anyone and for trying to get into 66.

The affidavit sets this conversation as having taken place on February 21. The date has to be wrong, because if Rangos referred to employees having filed grievances with "Labor Relations Board," and the Company needing records of wrongdoing to defend its position "if they had to go to court," it means the conversation occurred after February 24, when the charge was filed. Would the superintendent, with a charge in his hands accusing him of dismissing Morrow in retaliation for union activities on behalf of Local 66, say to any other employee that that was the reason why he dismissed the man? But more important, there is a second affidavit the General Counsel placed into evidence of another of his witnesses, Charles Grigas. This one quotes Rangos as saying: "I don't care if you're in 66, as long as you run the equipment." If one affidavit rejected by a General Counsel witness can be used for a factual finding in these hearings, so can another. The General Counsel cannot pick and choose. Rangos said clearly his only reason for discharging Morrow was the man's poor work record. He could not have said both that he was indifferent as to which union employees joined and that he discharged employees for joining one instead of another. Edmundson's added reason—illegal, attributed to Rogers in his affidavit, fitted the purpose of his once pro-Local 66 sentiment. He rejected it at the hearing. I do not credit that pinpointed phrase in his affidavit. It just does not jibe with the rest of the facts of record.

Another tidbit stressed in the General Counsel's brief to prove union animus is the fact Brittner referred to Morrow as a "queer," "the queer is gonna go, the first one to go." But Brittner also said, as the same witness testified, "If 66 got in there, it would make his job easier." Could Brittner both have liked and hated Local 66? I suppose there can be an employer who considers any staunch unioneer to be queer. The trouble is that many of Morrow's absences, or early departures from work, were necessitated by his frequent visits to "a psychologist, a doctor." Without further comment, I do not think that one word helps prove this complaint one wit. I find wanting the argument in the General Counsel's brief that while using words that clearly stated "he truly favored having Operating Engineers 66 to represent" the employees, Brittner really meant the opposite of his words; i.e., "that he was threatening adverse consequences if the employees chose Operating Engineers 66."

There came a time when the superintendent told employee Edmundson that from that day on all the rule violations or wrongdoings by an employee would be documented and recorded. Taken out of context, such a statement in the middle of a self-organization campaign can be viewed as an antiunion phrase, sort of an intimidation technique. But Rangos said that after Local 66's representation petition had been filed, indeed, it came after the unfair labor practice charge had been received. Faced with the possibility of competing unions taking it to the Labor Board, and the increasing possibility of having 1 day to justify its management activities, can an employer be faulted for making a provable record of faulty work performance? I think not.

There was another statement by Rangos that cannot be given meaning out of context. After Local 66's representation petition had been filed he said "66 will never be here." In other circumstances, this would be a classic 8(a)(1) statement. But Local 66 already was "here," because it in fact represented one of the groups of employees at the same jobsite. Besides, the statement came during the very period that the Respondent was saying that the Teamsters contract was an impediment to Local 66 insofar as these four employees were concerned. And he was right, as the Board's decision later held. The statement therefore cannot be considered antiunion as such.

There was one unfair labor practice Rangos did commit. After the representation petition had been filed he went out of his way to talk with Morrow, and asked him "who the people were. And he knew there were four of them and he wanted to know their names, that were involved in this NLRB case, and had signed cards with 66 . . . . He wanted to know who the leader was . . . ." Rangos explained this talk as no more than an inquiry as to why the employees had not brought their problems to him instead of going to Local 66, or going to the Labor Board. It is an excuse that has been heard before, but rejected by the Board. I find that Rangos improperly interrogated the employee that day and thereby violated Section 8(a)(1) of the Act.

In the light of Morrow's entire record as an employee, and the provocative violation of the work rules committed the day before his discharge, a single violation of Section 8(a)(1) will not do to prove illegal motive in the man's later dismissal. Even though he was lying then, Morrow told Rangos he had no knowledge about the activities of Local 66.

All things considered, I shall recommend dismissal of the 8(a)(3) allegations of this complaint.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent set forth in section III, above, occurring in connection with its operations described in section I, have a close, intimate, and sub-

stantial relationship to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

CONCLUSIONS OF LAW

1. By interrogating an employee concerning his union activities or concerning the union activities of other employees, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

2. The above-described unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

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

ORDER[1]

The Respondent, Chambers Development Company, Inc., Monroeville, Pennsylvania, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interrogating employees about their union activities or about the union activities of fellow employees.

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

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

(a) Post at its Monroeville, Pennsylvania, place of business, copies of the attached notice marked "Appendix."[2] Copies of said notice, on forms provided by the Regional Director for Region 6, after being duly signed by its representative, shall be posted by the Respondent immediately upon receipt thereof, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by it to ensure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 6, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

[1] 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.

[2] 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."