

**International Distribution Centers, Inc. and Raymond Johnson. Case 22-CA-11772**

8 March 1984

**DECISION AND ORDER**

**BY CHAIRMAN DOTSON AND MEMBERS  
ZIMMERMAN AND HUNTER**

On 6 June 1983 Administrative Law Judge Joel P. Biblowitz issued the attached decision. The General Counsel filed exceptions and a supporting brief, and Respondent filed a reply brief.

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 briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions<sup>2</sup> and to adopt the recommended Order.

**ORDER**

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

<sup>1</sup> The General Counsel 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), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

<sup>2</sup> In adopting the judge's conclusion to dismiss the complaint, we rely specifically on the credited evidence that shop steward Johnson initiated an unprotected unauthorized work stoppage and note that an employer may discipline any employee, including a steward, for causing a work stoppage in violation of a no-strike clause in the parties' applicable collective-bargaining agreement. See *Midwest Precision Castings Co.*, 244 NLRB 597 (1979); *Chrysler Corp.*, 232 NLRB 466, 474-476 (1977).

While in agreement with the Board's result in *Midwest Precision Casting Co.*, *supra*, Member Hunter does not endorse any of the particular opinions set forth therein.

**DECISION**

**STATEMENT OF THE CASE**

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was tried before me in Newark, New Jersey, on February 14 and March 15, 1983. The complaint herein issued on September 24, 1982, based on an unfair practice charge filed by Raymond Johnson on July 26, 1982.<sup>1</sup> The complaint alleges that Interstate Dress Carriers, Inc.<sup>2</sup> discharged Johnson on June 25 because he met

<sup>1</sup> Unless otherwise stated, all dates herein refer to the year 1982.

<sup>2</sup> At the commencement of the hearing the parties stipulated that subsequent to the events to be recited herein, the employer's name has been changed to International Distribution Centers, Inc. (the Respondent). The Respondent's name is therefore amended, *sua sponte*, to conform to this stipulation.

with other of its employees and discussed their wages, hours, and other terms and conditions of their employment in violation of Section 8(a)(1) and (3) of the Act. The General Counsel's case herein is that Johnson, a shop steward, was stopped by some fellow employees on the night of June 23; they asked Johnson some questions about their terms and conditions of employment and after about 15 minutes they returned to work. The Respondent alleges that on that evening Johnson initiated an unofficial union meeting with some fellow employees and that this meeting was contrary to its agreement with Local 20408, of the United Warehouse, Industrial and Affiliate Trades Employees Union, herein called the Union. Because Johnson purposely disrupted the work of these employees, for a period of approximately 20 to 30 minutes, he was discharged.

On the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs filed, I make the following

**FINDINGS OF FACT**

**I. JURISDICTION**

The Respondent, a New York corporation with an office and place of business in Secaucus, New Jersey, is engaged in the interstate and intrastate transportation of freight. During the 12-month period ending August 31, the Respondent derived gross revenue in excess of \$50,000 for transportation of freight and commodities from the State of New Jersey directly to points outside the State of New Jersey. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

**II. LABOR ORGANIZATION STATUS**

The Respondent admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

**III. FACTS AND ANALYSIS**

Johnson began his employment with the Respondent in September 1978; at the time of his discharge he performed a number of jobs for the Respondent, including "jockeying" its trucks between different locations in its yard and fueling the trucks with gas. About the summer of 1981, he became shop steward on the 4 p.m. to midnight shift. The critical events herein are the occurrences on the evening of June 23, of which there are credibility issues. Johnson testified that on that evening he punched out about 10 or 10:01 p.m. to take his meal break. He went into the cafeteria to use the rest room. When he came out of the rest room (still in the cafeteria) about six of the shuttle drivers<sup>3</sup> approached him and asked him questions—"Ray Sprattley was asking me about—he said, what is this about the job we have to do, and also

<sup>3</sup> The Respondent maintains a facility in Pennsylvania as well as the Secaucus facility involved herein and other facilities. Shuttle drivers leave from the Secaucus and Pennsylvania facilities at prearranged times, meet at a prearranged location with their trucks filled with wearing apparel, exchange vehicles, and return to the same facility from which they earlier had departed.

about our benefits. Rodriguez was asking me about that and Marty too." Johnson also testified that all the drivers were "asking me at one time about the union benefits and about the jobs they had to do, and I was trying to explain to them about what the union and management had agreed upon." Johnson told the shuttle drivers that there was to be a union meeting that Saturday night and they should come to the meeting because only then can the Union be strong. They asked about the union benefits and why they had to pay for doctor's bills; Johnson said that he was shop steward and he paid the same as they did. About 10:15, Supervisor Robert Miller came into the cafeteria and asked if they were conducting a union meeting and Johnson said that he was not: "I said, if I was holding a union meeting that I would . . . let you know way ahead of the schedule." Miller said, "I'm tired of your shit; you know better than . . . holding a union meeting back here." Johnson denied there was any union meeting and told the shuttle drivers to return to work (which they did) before somebody got into trouble.

Johnson testified further that Miller then went to the "tower," which is the locus of operations at the facility; Johnson followed him; when they entered the tower Miller said to James Cavera, the Respondent's assistant terminal manager (at the time), that Johnson had been in the cafeteria holding a union meeting with the shuttle drivers. Johnson said that there was no union meeting, he was just explaining to the shuttle drivers about their jobs and their benefits. Cavera told Johnson that he knew better than to hold a union meeting with the employees and Johnson said that he was not holding a union meeting; "If I was holding a union meeting back there, I would let you know way ahead of schedule." Cavera and Miller then asked Johnson if he was trying to close the doors of the facility and Johnson told them that he was simply explaining things to the drivers to prevent future difficulties.

Cavera said that he was tired of my shit and I was very smart. He asked me if I had a problem. I answered, no. I asked, "What do you want me to do? Apologize to you? I'll apologize to you." Miller asked, "Are you sure you don't want to close the doors?" I asked, "For what? There was no strike, no slowdown and no union meeting." I told Cavera that I was tired of their shit and that they were abusing the workers for a long time and it had to stop.

Cavera then said that he was going to dock the drivers for 20 minutes; Tony Ranaldi (a shuttle driver and the shop steward for the shuttle drivers) said that, if they were going to be docked 20 minutes, the Respondent owed them 5 minutes, and he and Johnson went to the dock and told the shuttle drivers to stop working for 5 minutes; at the end of the 5-minute period they told the shuttle drivers to return to work.

David Hill, who is employed by the Respondent and, at the time in question, was employed by the Respondent as a jockey moving trucks in the Respondent's yard, testified that he began work on June 23 at 4 p.m., and spent his break times in the cafeteria. He entered the cafeteria

between 10:05 and 10:10; at that time Johnson was already in the cafeteria speaking to the shuttle drivers; he overheard the shuttle drivers questioning Johnson about their benefits, Blue Cross and Blue Shield, the grievance system, and the upcoming union meeting; Johnson "suggested" to them what they should ask at this meeting. At approximately 10:10 Miller opened the door to the cafeteria and (from that location) said, "What is this, a meeting?" He said that he had been paging the shuttle drivers for several minutes<sup>4</sup> and asked Johnson why he was delaying the men from reporting for work; that he should inform management if he was going to conduct a meeting with the employees. Johnson answered that he was not holding a meeting, and apologized and said that he did not mean to cause any problem. Miller then walked out of the area and Johnson told the shuttle drivers that they better get to work before somebody got into trouble. Everybody, including Johnson and Hill, then left the cafeteria.

Hill testified further that, at that point, he left the cafeteria and went to the tower; when he arrived at the tower,<sup>5</sup> Miller and Cavera were present, Johnson had not yet arrived at the tower and did not arrive for "less than five, seven minutes, maybe." On direct examination, Hill testified that, when Johnson entered the tower Cavera told him, "What are you holding up the men for? These men should be docked for the time they been out." Johnson was "very calm" and simply shook his head and apologized. Miller then "jumped on his case" and said, "If you want to close these gates, we'll close these gates right now." Johnson remained calm and simply apologized. On cross-examination Hill was asked if he overheard any conversation between Cavera, Miller, and Johnson; he testified: "I can only recall Bob Miller, at that time, when he raised his voice up against Ray [Johnson]." He testified that, as Johnson was walking up toward the tower, Miller yelled at him, "If you want to close these gates, we'll close these gates right now. We'll get all the people off the dock and we'll close the gates." Johnson, in "a very calm voice," simply apologized and shook his head. Hill could not recollect the substance of the conversation between Cavera and Ranaldi.

Ranaldi (who was called as a witness by the Respondent) was employed by the Respondent as a shuttle driver on June 23, and had become shop steward for the Union

<sup>4</sup> Both Hill and Johnson testified that the Respondent maintains an intercom paging system, but that the speaker in the cafeteria does not work. Hill first testified that the page "wasn't heard at all." He then testified that he heard the page from another speaker while he was sitting in the cafeteria near the window, at a time when Johnson and the shuttle drivers were "a few feet" away from him. At one point in Hill's testimony he testified that he heard the page "a couple of minutes" before Miller appeared in the cafeteria doorway. Later in his testimony, he testified: "I was in the cafeteria for quite a while" before he heard the shuttle drivers being paged on the Respondent's intercom system.

<sup>5</sup> Hill's testimony regarding his reason for going to the tower is unclear. On the one hand he testified: "It's part of my function as a shuttle driver to see what trucks need to be hooked up, what trucks don't have to be hooked up, what trucks are going out" and "I was up in the tower to find out exactly what's going out, what might have to be hooked up." He also testified that while in the tower: "I can't recall asking for anything because—I'm very independent in the yard. I know exactly what has to be hooked up."

a month earlier. At the time of the hearing herein, he was employed as a regular driver. He testified that, by law, the drivers are required to complete a log showing the prior day's movements in the truck. By agreement with the Respondent, the shuttle drivers (who, generally, begin work at 10 p.m.) are given a few minutes to fill in or complete their log at 10 p.m. in the cafeteria;<sup>6</sup> this could take from 1 minute to 10 minutes. He testified that, on June 23, he arrived for work about 9:45 p.m., as he usually does, and was on the dock preparing to walk to the cafeteria to complete his log which he had begun preparing the previous evening. At that time Hill told him that Johnson wanted to talk to the shuttle drivers for a few minutes in the cafeteria. Randaldi entered the cafeteria about 9:50 and began completing his log. About 10 or 10:05 Johnson entered the cafeteria and began speaking to all the shuttle drivers (except one who was late). He told them that there was a union meeting the following month which he wanted them to attend because there were a lot of problems that needed discussion; he specifically mentioned that they should attempt to replace the head shop steward and they should convince the Union to attempt to negotiate with the Respondent to no longer require the shuttle drivers to load their own trucks. A number of employees then commented or asked questions; one commented that the Respondent's Blue-Cross, Blue-Shield coverage was worthless; another complained that they had to work on the docks loading their trucks. About 10:11 Ranaldi heard the shuttle drivers being paged over the Respondent's intercom system, but nobody responded. About 10:15 the page was repeated and a number of the shuttle drivers began to get up out of their seats and Hill said, "Wait a few minutes, Raymond is almost done." About 5 or 10 minutes later, Miller appeared and asked, "What's going on here?" Johnson said, "We're having a little meeting" and Miller answered, "It's too bad you're taking the guys money away from them" and walked away. About 3 or 4 minutes later the shuttle drivers left the cafeteria to go to the docks; Ranaldi heard Cavera ask Johnson what was going on; and Johnson said that they were having a little meeting. Cavera told Johnson that if he wanted respect he had to respect management, and that he was going to dock the shuttle drivers for 30 minutes' pay; Ranaldi saw that it was 10:27, so he told the shuttle drivers that they should not begin work for 3 minutes. Later that evening, Ranaldi discussed the situation with Cavera; he told Cavera that Johnson had called the meeting of employees; Cavera told him that he would not dock the employees for the 30 minutes and the employees received full pay for the day.

Cavera testified that the shuttle drivers begin working at 10 p.m. On June 23, about that time, while he was in the tower, he saw that they were not on the dock, although he had some trucks loaded, ready to leave. He had one of his supervisors page the shuttle drivers; when they did not respond to the first page, he had them paged again (this was about 10:10). About 5 minutes

<sup>6</sup> The Respondent's then terminal manager, Michael Metrick, testified that, by agreement with the Union, the Respondent gave its shuttle drivers up to 5 minutes at 10 p.m. to complete their logs.

later, when there was no response again he told Miller to locate the shuttle drivers. Cavera watched from the tower as Miller proceeded along the dock looking for the shuttle drivers, then went into the cafeteria; about 3 to 5 minutes later Miller returned to the tower and told Cavera that the shuttle drivers were having a union meeting in the cafeteria. About a minute later he observed the drivers going to their trucks, while Ranaldi came to the tower. Cavera told Ranaldi that he was going to dock the drivers for 30 minutes; Ranaldi said, "Don't blame me and the guys. Raymond called the meeting." Cavera told him "just get the guys back to work."

Cavera testified further that a few minutes later (some-time after 10:30) he saw Johnson and asked him what he was doing. Johnson said that he had called the meeting, and apologized and said that next time he called a union meeting he would first contact the Respondent and the Union. Cavera told Johnson that he was going to write him up for the incident and inform Mike Metrick, at the time the terminal manager and Cavera's superior, of the incident.

Cavera testified that this was a very busy period for the Respondent because 90 percent of the manufacturers close for 2 or 3 weeks in July and they want the goods out prior to closing. On that evening, at 10 p.m. some of their trucks were loaded and ready to go. At that time, as was their regular practice, they informed Pennsylvania facility of the number of trucks that were loaded and the dispatcher in Pennsylvania told him when to "cut it loose." They are usually instructed to dispatch the loaded trucks immediately. On this occasion they could not do so because they did not have drivers. As Cavera testified:

[T]hey're four hours away, you know, and if you don't coincide times, if you cut your truck loose at the same time or you spread it—in other words, you're meeting halfway, so you're coming up two hours or sometimes a little bit more or a little bit less, and he's coming down.

Now, if your terms [sic] aren't in conjunction, one guy is going to sit there waiting a half hour, an hour, an hour and a half, whatever, until the other truck meets, so it's important that you cut loose the trucks at that particular time, you know, certain times, when the calls come in.

Otherwise it goes all the way back that you tied everything up; you back up all your loads.

Metrick who was employed by the Respondent, at the time, as terminal manager of its Secaucus Terminal, testified that on June 23 he worked from about 9 a.m. to 8 p.m. When he arrived for work on June 24, he found a note from Cavera, addressed to him saying that Johnson had called a meeting of the shuttle drivers the previous night at 10 and a half hour of driving had been lost. Metrick telephoned Cavera a few hours later (to allow him to get some sleep) at his home. He asked Cavera what had occurred the previous evening and Cavera said that Johnson had called a union meeting that evening; Cavera

then told Metrick that he was still half asleep and he would speak to him of the incident when he arrived for work that evening. On that day, or the following day, Metrick spoke to Cavera, Ranaldi, and shuttle driver Canada about the incident of the evening of June 23 and all informed him that Johnson had called the employees to the meeting.<sup>7</sup> Metrick then looked at Johnson's file<sup>8</sup> and decided that considering his past work performance, and as Johnson had previously been warned by Cavera and Metrick not to interfere with the work of the shuttle drivers, he would be terminated. On that day he prepared the following letter which was dated June 25 and left in Johnson's timecard slot that day:

TO: Raymond Johnson  
FROM: Mike Metrick

On June 23, 1982, you stopped the shuttle drivers from working after their starting time of 10:00 p.m.

At approximately 10:10 p.m., Eric Lutchman paged twice over the loudspeaker for the shuttle drivers to report to the dock—Bobby Miller paged at 10:15 p.m.—no one responded.

One shuttle driver, who had started earlier, was not loading the trailer he was assigned to. The Jockey who started earlier was also stopped from performing his job.

At approximately 10:20 p.m., Bob Miller walked into the cafeteria looking for the *missing* personnel. It was at that point that IDC management learned that you had stopped the people from working, and you called a meeting involving union personnel (all of whom were on the clock and supposed to be

working). All of whom responded to you calling them off their jobs.

Approximately 5 minutes after Bob Miller left the cafeteria, after ordering everyone to get back to work, the personnel went to their respective jobs.

Article 24 in the Union Contract states "There shall be no strikes, sitdowns, walkouts, slowdowns, or any other cessation of work by the Union or by its individual members."

The company has no recourse but to terminate your employ with IDC effective immediately.

I found Cavera to be an extremely credible witness; he appeared to be testifying in a frank and honest manner and his testimony was very believable. On the other hand, I found Hill to be a witness generally lacking in credibility; it appeared that his testimony was tailored to benefit Johnson. He was clearly hostile in his answers to counsel for the Respondent, and when he was "cornered" with a question, he generally answered that he could not recall. In addition, at times, his testimony on its face seemed incredible. He testified that, after leaving the cafeteria, he arrived at the tower less than 5 or 7 minutes before Johnson. However, not only did Cavera testify that Hill was not present in the tower during this period, but Johnson testified also that he immediately followed Miller to the tower. It is difficult to imagine how Hill could arrive at the tower that much before Johnson in these circumstances. Although Johnson was not an obviously incredible witness, Ranaldi's testimony appears more credible and reasonable since it conforms with the testimony of Cavera, whom I have credited. In addition, Ranaldi, although clearly nervous and fidgety as a witness, appeared to be testifying in an honest and truthful manner.

On the basis of these credibility determinations, I find that Johnson took the initiative in stopping the employees from beginning work in order to inform them of the upcoming union meeting, and this discussion took place between about 10 and 10:20 p.m. On the basis of Cavera's testimony and Johnson's testimony that he told Cavera that if he were holding a union meeting he would have informed him of it in advance, I also find that Johnson was aware that any such meeting required prior approval by the Respondent.

In *Wright Line*, 251 NLRB 1083 (1980), the Board set forth the rule to be applied in determining whether certain actions will be found to be a violation under Section 8(a)(1) or (3) of the Act: "First we shall require that the General Counsel make a *prima facie* showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct."

The General Counsel has introduced no evidence establishing that the Respondent harbored any animus to the Union, or to Johnson, because of his position as shop steward for the Union. The only argument that could be made that protected conduct was a cause for his discharge is to say (as does the General Counsel in her brief) that since he was discussing the upcoming union

<sup>7</sup> Metrick testified that the procedure previously agreed to by the Respondent and the Union was that for any grievance other than one involving a driver in a hazardous or dangerous situation, the shop steward would leave his position and attempt to settle the matter with the supervisor in charge; if the employee was needed in these discussions, he would be called, but only when it would not inconvenience the Respondent's operation. He had informed Johnson of this procedure on three of four occasions.

<sup>8</sup> The file contained letters dated January 25 and February 26 and a memo from Miller regarding the June 23 incident referred to herein. The January 25 letter addressed to Johnson refers to a recent meeting with him (as well as others) where "the following was discussed and resolved"; the following subjects, *inter alia*, are mentioned; work rules and procedures, 15 minutes for union business, productivity, untimely lunch breaks, and notice to immediate supervisor when leaving work area. The letter concludes: "Upon closing of a very constructive meeting it was agreed by you to correct the mistakes and infractions and follow the proper procedures, work rules, etc." The February 26 letter to Johnson states:

Once again it was necessary to have a meeting with you, Fred Lawson, Dave Messinger, Jim Farrell and myself regarding infractions, mistakes, fuel shortages, work rules, procedures and abuse of overtime.

Your attitude and indifference leaves much to be desired, unless there is a Complete Turn-around, I will have no alternative except to suspend you from employment.

Let me remind you that we just had a recent meeting on January 25, 1982, regarding these very same infractions.

Hopefully, this time you will adhere to instructions, correct the infractions and assume the responsibilities for the job you are being compensated to perform.

This is a second warning regarding this matter, consequently this letter will serve as a reprimand in lieu of a suspension. However, any future infractions regarding this nature will serve as cause for immediate suspension.

meeting and working conditions with the drivers, Johnson was engaged in protected conduct. However, it was not this otherwise protected conduct that caused his discharge; rather he was discharged because he initiated these discussions with the shuttle drivers at a time when they were supposed to be working, in violation of agreement between the Respondent and the Union. The mere fact that Johnson was discussing the upcoming union meeting or working conditions with them does not necessarily immunize his actions, *Postal Service*, 252 NLRB 624 (1980), especially in the situation herein where his actions interrupted the Respondent's operation for approximately 30 minutes.<sup>9</sup> *Empire Steel Mfg. Co.*, 234 NLRB 530 (1978). I therefore find that the General

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<sup>9</sup> The General Counsel, in her brief, cites a case for the proposition that "otherwise protected activity does not lose its protection because it intrudes into production time for a short period particularly where, as here, there is no evidence of a disruption of production." Although otherwise agreeing with this position, I do not agree with the General Counsel that the Respondent suffered no significant interruption in production due to Johnson's actions; rather, because of the collaborative relationship between the Secaucus and the Pennsylvania shuttle drivers, the 30-minute delay of 6 drivers really represents a 30-minute delay to 12 drivers. As I credit Cavera's testimony that this was a busy period for the Respondent, I find that this represented a significant interruption of its operation.

Counsel has not made the required showing that protected conduct was a motivating factor in Johnson's termination, and the Respondent's discharge of Johnson did not violate Section 8(a)(1) or (3) of the Act.

#### CONCLUSIONS OF LAW

1. The Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent has not engaged in any conduct in violation of the Act as alleged herein.

Based on the entire record in this proceeding, I make the following recommended<sup>10</sup>

#### ORDER

It hereby is ordered that the complaint be, and it hereby is, dismissed in its entirety.

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<sup>10</sup> 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 and all objections to them shall be deemed waived for all purposes.