

General Dynamics Corporation, Quincy Shipbuilding Division and Jonathan D. Brandow. Case 1-CA-19734

13 July 1984

DECISION AND ORDER

BY MEMBERS ZIMMERMAN, HUNTER, AND DENNIS

Upon a charge filed 2 April 1982 by Jonathan D. Brandow and duly served on General Dynamics Corporation, Quincy Shipbuilding Division, the Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 1, issued a complaint 6 April 1983, an amended complaint 19 August 1983, and a correction of the amended complaint 2 September 1983 alleging that the Respondent had engaged in and was engaging in a number of unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the National Labor Relations Act. Copies of the charge and complaints were duly served on the parties to this proceeding.

With respect to the unfair labor practices presently in question, the amended complaint, as corrected, alleges that on two occasions, the first of which occurred about 16 March 1982 and the second of which occurred about April 1982, the Respondent suspended Brandow from his employment with the Respondent because he joined, supported, or assisted Local No. 5, International Union of Marine and Shipbuilding Workers of America, AFL-CIO, the Union, and engaged in concerted activities for the purpose of collective bargaining or other mutual aid or protection. The amended complaint alleges that by engaging in these acts the Respondent discriminated in regard to Brandow's hire or tenure or terms or conditions of employment, and thereby discouraged membership in the Union and engaged in unfair labor practices within the meaning of Section 8(a)(3) of the Act, and interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act. On 1 September 1983 the Respondent filed an answer admitting in part and denying in part the allegations in the amended complaint.

On 7 October 1983 the Respondent filed directly with the Board a Motion for Partial Summary Judgment, a supporting memorandum, and supporting attachments requesting the Board to order that the unfair labor practice allegations presently in question be deferred to the parties' grievance-arbi-

tration procedure and that the portions of the amended complaint setting forth those allegations be dismissed. On 20 October 1983 the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the Respondent's Motion for Partial Summary Judgment should not be granted. On 24 October 1983 counsel for the General Counsel sent the Board a letter stating, *inter alia*, that the General Counsel opposed the Respondent's Motion for Partial Summary Judgment, and on 1 November 1983 counsel for the General Counsel filed with the Board a memorandum in opposition to the Respondent's Motion for Partial Summary Judgment.

Also on 7 October 1983 the Respondent filed with the Board a Motion to Stay Hearing requesting the Board to order that the hearing on the amended complaint scheduled to be held before an administrative law judge be stayed pending the Board's ruling on the Respondent's Motion for Partial Summary Judgment. On 24 October 1983 counsel for the General Counsel sent the Board a letter stating, *inter alia*, that the Regional Director had postponed the hearing on the amended complaint pending the Board's ruling on the Respondent's Motion for Partial Summary Judgment.

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

On the entire record, the Board makes the following

Ruling on the Motion for Partial Summary Judgment

In its Motion for Partial Summary Judgment, supporting memorandum, and supporting attachments, the Respondent contends, *inter alia*, that the unfair labor practice allegations presently in question should be deferred to the parties' grievance-arbitration procedure because Brandow filed grievances over his suspensions and pursued those grievances through four of the five steps of the grievance-arbitration procedure, and he should not be allowed, as he attempted to do, to then withdraw those grievances from the grievance-arbitration procedure and instead pursue an unfair labor practice charge before the Board.¹ In his memorandum in opposition to the Respondent's Motion for Partial Summary Judgment, counsel for the General Counsel contends, *inter alia*, that the unfair labor practice allegations presently in question should not

¹ Inasmuch as we find the Respondent's above-described contention sufficient to warrant granting the Motion for Partial Summary Judgment, we deem it unnecessary to pass on the other contentions and issues raised in the Respondent's Motion for Partial Summary Judgment and counsel for the General Counsel's memorandum in opposition to that motion.

be deferred to the parties' grievance-arbitration procedure because Brandow's attempt to withdraw his grievances indicates that Brandow would not voluntarily participate in the grievance-arbitration procedure and that the grievance-arbitration procedure would not be likely to produce a resolution of the dispute over Brandow's suspensions. The relevant facts alleged by the Respondent and not disputed by counsel for the General Counsel are as follows.

The Respondent suspended Brandow for the first time about 16 March 1982 and for the second time about April 1982. Among the reasons offered by the Respondent for Brandow's first suspension were alleged violations by Brandow of the provision in the collective-bargaining contract between the Respondent and the Union concerning off-the-job passes for union stewards,² of the Respondent's guidelines implementing the off-the-job pass system for union stewards, and of an arbitrator's award interpreting that provision and those guidelines. Among the reasons offered by the Respondent for Brandow's second suspension were alleged acts of insubordination by Brandow.

At the time of his suspensions, Brandow was a union steward. In May 1982 he was elected the union president.

Pursuant to the provisions in the parties' collective-bargaining contract creating a grievance-arbitration procedure, Brandow filed grievances over his first and second suspensions 26 March and 14 April 1982, respectively. The collective-bargaining contract's grievance-arbitration provisions create a five-step grievance-arbitration procedure culminating in arbitration which is "final and binding upon the parties,"³ and the contract defines a grievance in pertinent part as "dissatisfaction and complaint with classification, wages, hours or other conditions of employment by any individual employee or group of employees . . ."⁴ Both of Brandow's grievances alleged that his suspensions constituted violations of the provision in the collective-bargaining contract prohibiting the Respondent from discriminating against any employee because of his union membership or activity⁵ and of the provision in the contract prohibiting the Respondent from disciplining any employee except for just cause.⁶

On 2 April 1982 Brandow also filed with the Board's Regional Office an unfair labor practice charge alleging, inter alia, that his suspensions constituted violations of Section 8(a)(3) and (1) of the

Act. On 19 May 1982 the Acting Regional Director sent Brandow a letter stating, inter alia, that he had decided that the unfair labor practice allegations concerning Brandow's suspensions should be deferred to the parties' grievance-arbitration procedure because the grievance-arbitration procedure was available for resolution of the dispute and was in fact being utilized by the parties. Accordingly, the unfair labor practice complaint issued by the Regional Director 6 April 1983 did not include any allegations concerning Brandow's suspensions.

Between April 1982 and June 1983 Brandow pursued his grievances through the first four steps of the parties' grievance-arbitration procedure. At some point after the fourth step of the grievance-arbitration procedure had been completed, the parties agreed to take Brandow's grievances to the fifth step and submit the grievances to arbitration. The parties agreed to select Professor Archibald Cox as arbitrator, and Professor Cox scheduled an arbitration hearing for December 1983.

On 20 June 1983 Brandow sent the Respondent and counsel for the General Counsel identical letters stating that he intended to withdraw his grievances from the parties' grievance-arbitration procedure "without prejudice or precedent." In his letters, Brandow offered three reasons for his decision to withdraw his grievances: (1) that his suspensions had been expunged from his disciplinary record; (2) that the amount of backpay which might be awarded to him in arbitration "would undoubtedly be outweighed by the cost of arbitration itself"; and (3) that "NLRB procedures at th[at] time constitute[d] the most appropriate avenue for relief"

On 27 June 1983 the Respondent sent Brandow a letter stating that it believed Brandow could not unilaterally withdraw his grievances from the parties' grievance-arbitration procedure and that it intended to proceed with the arbitration hearing scheduled by Professor Cox. On 29 June 1983 the Respondent sent counsel for the General Counsel a letter explaining in greater detail the reasons for the position expressed in the letter it sent Brandow.

On 11 July 1983 the Acting Regional Director sent the Respondent and Brandow identical letters stating that, because Brandow had withdrawn his grievances, he was revoking the decision expressed in the letter sent by the Acting Regional Director 19 May 1982 that the unfair labor practice allegations concerning Brandow's suspensions should be deferred to the parties' grievance-arbitration procedure. On 14 July 1983 the Respondent sent the Assistant to the Regional Director a letter requesting him to reconsider the revocation of the decision to defer. On 21 July 1983 the Assistant to the Region-

² Art. IV, sec. 10(a), of the contract.

³ Art. IV of the contract.

⁴ Art. I, sec. 5, of the contract.

⁵ Art. III, sec. 3, of the contract.

⁶ Art. IV, sec. 8, of the contract.

al Director sent the Respondent a letter stating that he had reconsidered the revocation of the decision to defer and had again decided that, because Brandow had withdrawn his grievances, "the essential condition of voluntarism . . . [was] no longer present" and "deferral [was] no longer appropriate" Although the Respondent sent the Assistant to the Regional Director a letter 27 July 1983 again requesting him to reconsider the revocation of the decision to defer, the decision to defer remained revoked. Accordingly, the amended unfair labor practice complaint issued by the Regional Director 19 August 1983 and corrected by the Regional Director 2 September 1983 included allegations concerning Brandow's suspensions.

On the basis of all of the foregoing facts, we conclude in agreement with the Respondent that in the circumstances of this case the unfair labor practice allegations concerning Brandow's suspensions should be deferred to the parties' grievance-arbitration procedure. In our recent decision in *United Technologies Corp.*, 268 NLRB 557 (1984), we held that the policy expressed in the majority opinion in *National Radio Co.*, 198 NLRB 527 (1972), of deferring allegations of violations of Section 8(a)(1) and (3) and Section 8(b)(1)(A) and (2) of the Act to establish grievance-arbitration procedures in appropriate circumstances "deserve[d] to be resurrected and infused with renewed life" (268 NLRB at 559). In doing so, we stated (*ibid.*):

It is fundamental to the concept of collective bargaining that the parties to a collective-bargaining agreement are bound by the terms of their contract. Where an employer and a union have voluntarily elected to create dispute resolution machinery culminating in final and binding arbitration, it is contrary to the basic principles of the Act for the Board to jump into the fray prior to an honest attempt by the parties to resolve their disputes through that machinery. For dispute resolution under the grievance-arbitration process is as much a part of collective bargaining as the act of negotiating the contract. In our view, the statutory purpose of encouraging the practice and procedure of collective bargaining is ill-served by permitting the parties to ignore their agreement and to petition this Board in the first instance for remedial relief.

Applying the policy announced in *United Technologies* to the facts of that case, we concluded that an allegation of a violation of Section 8(a)(1) of the Act should be deferred in circumstances which established that the parties' collective-bargaining contract contained a broad grievance-arbitration provi-

sion clearly encompassing the unfair labor practice allegation.

Applying the policy announced in *United Technologies* to the facts of this case, we conclude that deferral is all the more appropriate in circumstances which indicate not only that the parties' collective-bargaining contract contains a grievance-arbitration provision clearly encompassing the allegation that Brandow's suspensions constituted unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act, but also that Brandow voluntarily filed grievances over his suspensions pursuant to that provision and willingly pursued those grievances through four of the five steps of the parties' grievance-arbitration procedure. As already spelled out, the record indicates that Brandow filed grievances over his suspensions in March and April 1982. Between April 1982 and June 1983 Brandow pursued his grievances through the first four steps of the grievance-arbitration procedure; indeed, at some point after the fourth step of the procedure had been completed, the parties agreed to submit the grievances to the fifth and final step and to select Professor Cox as arbitrator, and Professor Cox proceeded to schedule an arbitration hearing. It was only after he had pursued his grievances through almost all of the grievance-arbitration procedure that Brandow announced his intention to withdraw his grievances from that procedure and instead pursue the unfair labor practice charge concerning his suspensions which he had filed before the Board. There is no indication that the grievance-arbitration procedure had been or was likely to be unfair or irregular or that the procedure had produced or was likely to produce a result repugnant to the Act; on the contrary, Brandow's own announcement of his decision to withdraw his grievances indicated that his decision was based in essence simply on his conclusion that it would be less expensive and more convenient to pursue his unfair labor practice charge before the Board than to pursue his grievances through arbitration. In the circumstances of this case, to conclude that the unfair labor practice allegations concerning Brandow's suspensions should not be deferred to the parties' grievance-arbitration procedure would be in effect to hold that a party may withdraw a grievance without prejudice after he has voluntarily and willingly pursued the grievance through almost all of the steps of a fair and regular grievance-arbitration procedure established by the parties' collective-bargaining contract—and that he may do so on the basis essentially of nothing more than a conclusion that it would more effectively serve his own interests to pursue an unfair labor practice charge before the Board than to pursue

the grievance through all of the steps of the grievance-arbitration procedure. To so hold would be in effect to render meaningless both the contractual agreement of the parties to establish a grievance-arbitration procedure and the statutory policy of the Board, as expressed in *United Technologies*, to encourage the use of grievance-arbitration procedures.

For the foregoing reasons, we shall, in accordance with the policy expressed in *United Technologies*, order that the Respondent's Motion for Partial Summary Judgment be granted, that the unfair labor practice allegations concerning Brandow's suspensions be deferred to the parties' grievance-arbitration procedure, and that the allegations in the amended unfair labor practice complaint concerning Brandow's suspensions be dismissed. As in *United Technologies*, however, we shall retain jurisdiction over the unfair labor practice allegations concerning Brandow's suspensions for the purpose of entertaining a motion for further consideration on a showing that either (a) the dispute has not been resolved through the grievance-arbitration procedure or (b) the grievance-arbitration procedure has not been fair and regular or has produced a result repugnant to the Act. At the same time, we shall order that the Regional Director's postponement of the hearing to be held before an administrative law judge be revoked insofar as it concerns the allegations in the amended unfair labor practice complaint other than the allegations concerning Brandow's suspensions and that the hearing be rescheduled on those other allegations.

On the basis of the entire record, the Board makes the following

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

General Dynamics Corporation, Quincy Shipbuilding Division, a Massachusetts corporation, maintains an office and place of business in Quincy, Massachusetts, where it is engaged in the construction and repair of ships. During the calendar year ending 31 December 1982, a period representative of all times material herein, the Respondent, in the

course and conduct of its business operations, purchased and received products, goods, and materials valued in excess of \$50,000 directly from points located outside the Commonwealth of Massachusetts.

We find, on the basis of the foregoing, that the Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

Local No. 5, International Union of Marine and Shipbuilding Workers of America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

CONCLUSIONS OF LAW

The unfair labor practice allegations concerning Jonathan Brandow's suspensions should be deferred to the grievance-arbitration procedure established by the parties' collective-bargaining contract.

ORDER

The Motion for Partial Summary Judgment is granted, and the allegations in the amended complaint concerning Jonathan Brandow's suspensions are dismissed; provided that jurisdiction over the allegations concerning Brandow's suspensions is retained for the limited purpose of entertaining an appropriate and timely motion for further consideration on a proper showing that either (a) the dispute has not, with reasonable promptness after the issuance of this Decision and Order, been resolved through the parties' grievance-arbitration procedure or (b) the grievance-arbitration procedure has not been fair and regular or has reached a result which is repugnant to the Act.

IT IS FURTHER ORDERED that the postponement of the scheduled hearing before an administrative law judge is revoked insofar as it concerns the allegations in the amended complaint other than the allegations concerning Jonathan Brandow's suspensions, and the Regional Director is directed to reschedule the hearing on those other allegations.