

**Shamrock Coal Company, Inc. and International  
Union of Operating Engineers, Local 627, AFL-  
CIO. Case 16-CA-10363**

31 July 1984

**DECISION AND ORDER**

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

On 30 December 1982 Administrative Law Judge Stephen J. Gross issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed limited cross-exceptions and a supporting 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, and conclusions only to the extent consistent with this Decision and Order.

The judge found that the Respondent violated Section 8(a)(1) of the Act by discharging Clarence Barry Jr. because of his statements relating to wage increases or the unionization of the Respondent's work force. We find merit in the Respondent's exception to this finding.<sup>1</sup>

The Respondent operates coal strip mines at a number of locations in the State of Oklahoma. The location involved in this proceeding is the Respondent's "North" mine. The method of mining employed at that location involves the use of four major pieces of equipment in a load cycle. The "D-10" bulldozer loosens the cover of earth and rock so that the two scrapers can load it. The "D-9" bulldozer is used to push one scraper while the other is unloading.

This load cycle allows the operation to be run on virtually a constant basis. Barry was the D-9 operator.

James T. McGuire, Shamrock's owner, had known Barry for 25 years. Over the years, McGuire had gone out of his way to assist Barry, including creating Barry's present job position. McGuire had knowledge of Barry's membership in a labor organization when he hired Barry.

Barry was under the false impression that 2 months earlier McGuire had promised him a wage increase as soon as the Respondent obtained higher coal prices; that the Respondent had gotten higher prices; and that McGuire had reneged on his prom-

ise because he had not given Barry a raise. This lack of a wage increase was one of the circumstances which led Barry to discuss organizing with the Union at the union hall in February 1982, and on 4 March 1982,<sup>2</sup> and to solicit cards for the Union.

On the early afternoon of that day, Foreman Garry Wilson informed McGuire that "there was trouble" at the mine. When asked, Wilson said that Barry had been "stopping the machines." This statement was troubling and surprising to McGuire. Wilson went on to say that Barry was handing out authorization cards. McGuire and Wilson then proceeded by pickup truck to the nearby mine. On their arrival, McGuire observed that the scrapers and the D-9 were stopped, and the D-10 was starting to move away.

Alone, McGuire approached Barry motioning for him to get down from the machine. The judge found that there were three versions of the ensuing conversation: McGuire's testimony, Barry's testimony, and McGuire's affidavit given to a Board agent in April 1982. Each was different, with the differences stemming from honest differences in recollection. The judge found that the following occurred based on composite credited testimony:

McGuire began by heatedly demanding to know "what's going on here"—referring (in his own mind) to the stopped machines. Barry, assuming that the comment had to do with his organizing efforts, responded by mentioning the coal price increase that he thought that Shamrock had gotten and the promise of a wage increase that he thought McGuire had made back in January. Barry then went on to say that he was going to organize Shamrock's employees and was going to force Shamrock to grant a wage increase. McGuire thereupon told Barry to get his lunchbox, which both men knew meant that Barry was fired.

The pertinent facts of McGuire's affidavit dated 6 April 1982, taken without counsel during the investigative stages of the instant charge, are as follows:

On March 5 after lunch Wilson came to me and said he had been having trouble with Barry that morning. He said that other employees had told him that every time he left the pit Barry would stop employees and talk to him about getting a union. Wilson said Barry also was handing out union cards.

Wilson and I got in his pickup and went to the pit where Barry was assigned. I could see

<sup>1</sup> The General Counsel excepts to the judge's failure to resolve the 8(a)(3) allegation, as well as the 8(a)(1) allegation, relating to the same conduct. Inasmuch as our reversal of the judge's 8(a)(1) finding removes any basis for finding an 8(a)(3) violation, this exception is denied.

<sup>2</sup> All dates are in 1982 unless stated otherwise.

that a dozer (Barry's) and 2 scrapers were stopped. I could see Barry and one of the scraper operators on Barry's machine, apparently talking. By the time we drove up, stopped and got out of the truck Barry had started his machine again. I waved to him to stop and walked down to him; he stopped. I asked what was going on. Barry said that I had refused to give him a raise, that he was going to get me organized and that I was going to pay him more because I had received an increase in what I had paid for coal. I said that he was wrong, that he was not going to organize me in that manner and that he was going to the pickup, meaning he was fired. We went to the mine office and got a final check for Barry.

The testimony of McGuire at the hearing when called as an adverse witness by the General Counsel reveals a version of the conversation consistent with his affidavit except for the chronological placement of the comment by Barry concerning "organizing." When asked, both on direct examination and cross-examination, McGuire acknowledged that his affidavit placed the reference by Barry to organizing before he had fired Barry as they were walking to the truck. McGuire explained that the substance of his affidavit was correct, but that when the affidavit was taken he was not terribly concerned with the chronology of statements. Barry flatly denied mentioning "unionization" or organizing during the conversation.<sup>3</sup>

The judge found that McGuire testified honestly. Accordingly, we are of the opinion that the consistent testimony of McGuire on the stand, both on direct and cross-examination, should be credited. We find that the conversation was as testified to by McGuire at the hearing. The conversation started with McGuire motioning for Barry to get off his D-9. McGuire asked, "What's going on here?" Barry replied, "I asked you for a raise awhile back and you told me when you got an increase in your coal price you were going to give me, and you didn't do it. And you got an increase in your coal price and you are going to pay me more money." McGuire answered, "I'm not going to pay you any more money in this way. You are not going to get any more money out of me doing this. Just get your lunch bucket, I'm taking you to your truck."

<sup>3</sup> Barry did testify on initial direct examination that McGuire stated, "I don't need in [sic] goddamned union trouble out here, get your lunch box, let's go." The next version of this conversation by Barry made no reference to this alleged comment. The judge did not credit Barry's first version of the termination conversation of 5 March 1982, and neither do we.

Under this version of the conversation, the only possible activity protected under the Act occurring prior to Barry's termination relates to his complaint about wages. It is clear, however, that his endeavors to obtain a wage increase were purely personal in nature, and, hence, not concerted or related to group concerns. Therefore, because his complaint was an individual one, the discharge of Barry was lawful. *National Wax Co.*, 251 NLRB 1064 (1980); *Mills Patrol Service*, 264 NLRB 323 (1982).

Contrary to Member Zimmerman, *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964), is inapplicable to this case because Barry, in his encounter with McGuire, did not engage in any protected concerted activity before his termination. *Meyers Industries*, 268 NLRB 493 (1984).

Accordingly, we shall dismiss the complaint in its entirety.

#### ORDER

The complaint is dismissed.

MEMBER ZIMMERMAN, dissenting.

I cannot join in my colleagues' determination to reverse the decision of the administrative law judge, and dismiss the complaint. For the reasons stated by the judge, I would find that the Respondent violated Section 8(a)(1) of the Act by discharging Clarence Barry.

The majority proceeds as though the judge based his decision on a determination to discredit the testimony of the Respondent's Owner James McGuire. That is not the case. The judge credited McGuire's testimony, but found that McGuire and Barry had a misunderstanding concerning each other's comments. He went on to find that Barry's comments to McGuire were protected by Section 7 of the Act. McGuire, however, interpreted those comments as threats of work disruption, a statement which would, as the judge notes, justify discharge.

But the judge found that Barry did not say what McGuire testified to having heard or thought he heard. The judge therefore analyzed the issue as falling within the Supreme Court's decision in *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964). My colleagues in the majority find that case inapplicable because they conclude that Barry was not engaged in any protected activity before his termination. But, as noted above, their conclusion is premised on a mistaken reading of the judge's findings, including those pertaining to credibility. They have therefore failed to provide a valid basis for finding that the judge's analysis of this case under *Burnup & Sims* is faulty. In the absence of such justifica-

tion, and I can find none, I would adopt the decision of the judge for the reasons set forth by him.

Accordingly, I dissent.

### DECISION

STEPHEN J. GROSS, Administrative Law Judge. Respondent Shamrock Coal Company mines coal at a number of strip mines in Oklahoma. On March 5, 1982, Shamrock fired one of its employees, Clarence Barry Jr. Barry is a member of the International Union of Operating Engineers, Local 627, AFL-CIO (Local 627 or the Union), and on March 30, 1982, the Union filed a charge with the Board claiming that Shamrock's discharge of Barry violated the National Labor Relations Act (the Act). By complaint dated April 23, 1982, the Regional Director for the Board's Region 16 alleged that Shamrock fired Barry because of Barry's union activities. Shamrock's answer admitted the jurisdictional allegations of the complaint but denied any wrongdoing.

#### The Events Leading to Barry's Discharge

During the period in question Barry worked in the southwestern part of Shamrock's "North" mine. Shamrock operated four major pieces of equipment in that area: two "scrapers" that loaded "cover" (earth and rock covering a vein of coal) by scraping it up, a "D-10" bulldozer that loosened the cover so that the scrapers could load it; and a D-9 bulldozer. Due to the circumstances prevailing at that part of the North mine at the time, the scrapers could not efficiently scrape up cover relying solely on their own power. Accordingly, the D-9 bulldozer was used to push each of the two scrapers during its "load cycle." The D-9 would push one scraper while it loaded; then, while that scraper moved away to unload, the D-9 would push the other scraper. Accordingly inactivity on the part of the D-9 operator could shut down three pieces of equipment: the D-9 and the two scrapers. Barry was the D-9 operator.

James T. McGuire is a Shamrock's owner. Garry Wilson is the foreman at Shamrock's North mine. Early in the afternoon of March 5, Wilson told McGuire that "there was trouble" at the mine. When McGuire asked what that trouble was, Wilson said that Barry had been "stopping the machines." Each of the machines used at Shamrock's mines is expensive to own and operate, and Shamrock's equipment operators were expected to keep the machines in virtually constant motion. Thus Wilson's statement was surprising and troubling to McGuire. Wilson went on to say that Barry was handing out union authorization cards. (Shamrock's employees are not unionized.)

McGuire said that he wanted to go down to where the trouble was, and Wilson and McGuire immediately drove to the southwest area of the mine. Arriving there McGuire saw that the D-10 was stopped but was getting underway, that the two scrapers were stopped and empty, and that the D-9 (Barry's machine) was stopped within a few feet of one of the scrapers and that Barry and the driver of the scraper were talking. Based on his foreman's comments, McGuire jumped to the conclusion

that the scrapers were stopped and empty because Barry, in the D-9, was refusing to do his job.

That was not the case. Barry had been handing out union authorization cards that day, but had not been interfering with the mine's activities in doing so. The reason the D-9 and the scrapers were stopped when McGuire arrived in the area was that one of the scraper operators had asked Barry to stop. (As it turned out the scraper operator had made that request so that he could make an unpleasant comment to Barry about Barry's organizing efforts.) And the work cessation was only momentary.

McGuire would have been angered by a work slowdown by any of his employees. But the fact that Barry was causing the problem—so McGuire thought—was particularly upsetting. McGuire had known Barry for 25 years—since Barry was a teenager. And during those years McGuire had gone out of his way to do important favors for Barry (including, most recently, creating a job for him in one of McGuire's mines). Thus Barry's behavior, as misperceived by McGuire, seemed to McGuire to represent massive ingratitude.

As for Barry, he was under the impression that 2 months earlier McGuire had promised a wage increase as soon as Shamrock obtained higher prices for its coal; that Shamrock had gotten those higher prices; and that since there had been no pay raise, McGuire had reneged on his promise. (Barry was wrong about that. McGuire had made no such promise. And there had been no coal price increase.) The lack of a wage increase was one of the circumstances that led Barry to try to organize the mine.

#### Barry's Discharge

McGuire reacted to the sight of the stopped equipment by motioning to Barry to get down from the D-9 so that the two could talk.

There are three descriptions of the conversation—or rather, exchange of words—that followed: in McGuire's testimony; in Barry's testimony; and in an affidavit that McGuire gave to a Board agent in early April.<sup>1</sup> Each is different. And those differences seem to me to stem from honest differences in recollecting what happened. Thus the fact is that no one will ever know with any certainty what Barry and McGuire actually said to each other during those moments before Barry was fired. But based on the totality of the record before me plus what I saw of the two men, I find that the conversation went as follows.

McGuire began by heatedly demanding to know "what's going on here"—referring (in his mind) to the stopped machines. Barry, assuming that the comment had to do with his organizing efforts, responded by mentioning the coal price increase that he thought that Shamrock had gotten and the promise of a wage increase that he thought McGuire had made back in January. Barry then went on to say that he was going to organize Shamrock's employees and was going to force Shamrock to grant a wage increase. McGuire thereupon told Barry

<sup>1</sup> G.C. Exh. 2

to get his lunchbox, which both men knew meant that Barry was fired.

#### Conclusion

The most obvious conclusion to draw from the sequence of events described above is that McGuire fired Barry because Barry said that he was going to organize Shamrock's employees and because he threatened to use the thereby increased bargaining power of the employees to insist on a pay increase. The Act protects employee statements of that nature. Accordingly if that was the reason that McGuire fired Barry, Shamrock violated the Act.

But apart from the incident in question, there is no evidence that McGuire is antiunion. And on the witness stand McGuire insisted that he fired Barry solely because Barry had been keeping Shamrock's machines from operating and because Barry was threatening to continue that course of action.

I am convinced that McGuire testified honestly. I accordingly find that the reason McGuire fired Barry is this: By the time McGuire asked Barry "what's happening?" McGuire was altogether infuriated by what he (mistakenly) thought were Barry's work disruptions. That state of emotions led McGuire to badly misunderstand Barry's answer, taking that answer to be a threat of further work disruptions even though Barry's words could not reasonably be construed to mean that.

Had Barry actually been interrupting mine operations and actually threatened to continue that behavior Shamrock would have been free to fire him.<sup>2</sup> And ordinarily an employer does not violate the Act merely for firing an employee for an offense the employee did not in fact commit.

But here Barry was fired as a result of making a remark of the kind the Act protects. In *Burnup & Sims*<sup>3</sup> an employer was told that an employee, while engaged in union organizing efforts, had threatened "to use dynamite if the union did not acquire the authorizations."<sup>4</sup> While the report turned out to be untrue, the employer's management believed the report and, acting in good faith, fired the employee. The Court concluded that the employer had violated the Act:

Section 8(a)(1) is violated if it is shown that the discharged employee was at the time engaged in a protected activity, that the employer knew it was such, that the basis of the discharge was an alleged act of misconduct in the course of that activity, and that

<sup>2</sup> E.g., *Pacific Telephone & Telegraph Co.*, 107 NLRB 1547 (1954) (employee action creating a condition that is "neither strike nor work" is unprotected); see also *Clarklift of St. Louis*, 259 NLRB 12 (1981); *Classic Products Corp.*, 226 NLRB 170 (1976); *Honolulu Rapid Transit Co.*, 110 NLRB 1806 (1954). Cf. *Auto Workers v. Wisconsin Employment Relations Board*, 336 U.S. 245 (1949).

<sup>3</sup> *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964).

<sup>4</sup> *Id.* at 21.

the employee was not, in fact, guilty of that misconduct.

That rule seems to us to be in conformity with the policy behind § 8(a)(1). Otherwise the protected activity would lose some of its immunity, since the example of employees who are discharged on false charges would or might have a deterrent effect on other employees. Union activity often engenders strong emotions and gives rise to active rumors. A protected activity acquires a precarious status if innocent employees can be discharged while engaging in it, even though the employer acts in good faith. . . .<sup>5</sup>

The difference between the case at hand and *Burnup & Sims* is that in *Burnup & Sims* the employee was fired for misconduct allegedly occurring in the course of what the employer knew was protected activity. Here McGuire misheard what Barry said, or badly misinterpreted Barry's words, so that McGuire did not know the actual import of Barry's words and thus could not know (given that misperception) that they were the kind the Act protects.

My conclusion is that Shamrock nonetheless violated the Act. Barry uttered remarks protected by Section 7, and those remarks were the cause of his discharge. As in *Burnup & Sims*, if an employee was not protected against discharge in that setting simply because the employer's "strong emotions"<sup>6</sup> caused the employer to misperceive what the employee said, the protected activity would indeed "lose some of its immunity."<sup>7</sup> I accordingly conclude that Shamrock's discharge of Barry violated Section 8(a)(1) of the Act notwithstanding the fact that his discharge stemmed solely from McGuire's honest belief that Barry had engaged in unprotected activity and was threatening to continue that activity.

#### THE REMEDY

The recommended Order will require Shamrock to reinstate Barry and to make him whole for any loss of earnings which he may have suffered by virtue of the discrimination against him by paying an amount equal to what he would have earned from the date of discharge to the date when he is offered reinstatement. Backpay shall be calculated in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *Florida Steel Corp.*, 231 NLRB 651 (1977). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

In addition Shamrock will be required to cease and desist from its unlawful acts, to notify its employees of the Board's Order, and take various other actions relating to the above requirements.

[Recommended Order omitted from publication.]

<sup>5</sup> *Id.* at 23.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*