

E. I. DuPont Newport Union, Local No. 9 and E. I. DuPont De Nemours and Company. Cases 4-CB-5912 and 4-CB-5969

December 31, 1990

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
CRACRAFT AND DEVANEY

On July 3, 1990, Administrative Law Judge Michael O. Miller issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel and the Charging Party filed briefs in opposition to the Respondent's exceptions.

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 brief and has decided to affirm the judge's rulings, findings,¹ and conclusions² and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, E. I. DuPont Newport Union, Local No. 9, Newport, Delaware, its officers, agents, and representatives, shall take the action set forth in the Order.

¹The Respondent 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), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

²The judge found, and we agree, that the Respondent violated Sec. 8(b)(1)(B) by fining employees Pierce and Burris for accepting temporary supervisor positions and by refusing to refund dues erroneously withheld from Pierce during July 1989. In adopting the judge's decision, we rely on his finding, amply supported by the record, that Pierce and Burris, as temporary supervisors, possessed authority to adjust grievances at the first step of the parties' negotiated grievance procedure. See *NLRB v. Electrical Workers IBEW Local 340*, 481 U.S. 573, 586 (1987); *Sheet Metal Workers Local 68 (DeMoss Co.)*, 298 NLRB 1000 (1990). Member Cracraft dissented in part in the latter case. In the present case, however, she joins her colleagues in finding that the Respondent violated Sec. 8(b)(1)(B) because the fines were not levied as a result of the supervisors performing rank-and-file work during an employer-union dispute.

Richard Heller, Esq., for the General Counsel.
Robert F. O'Brien, Esq. (Tomar, Simonoff, Adourian & O'Brien), of Haddonfield, New Jersey, for the Respondent.
Thomas L. Sager, Esq., of Wilmington, Delaware, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL O. MILLER, Administrative Law Judge. This case was heard in Philadelphia, Pennsylvania, on March 12 and 13, 1990, based on unfair labor practice charges filed on

September 11, 1989, as amended on September 21, 1989 (Case 4-CB-5912) and December 5, 1989 (Case 4-CB-5969) by E. I. DuPont De Nemours (the Employer or the Charging Party) and complaints issued by the Regional Director of Region 4 of the National Labor Relations Board (the Board) on December 1, 1989, and January 30, 1990. The complaints allege that E. I. DuPont Newport Union, Local No. 9 (Respondent) restrained and coerced the Employer in violation of Section 8(b)(1)(B) of the National Labor Relations Act (the Act) by fining member-supervisors and by refusing to return moneys improperly deducted from the pay of one of them. Respondent's timely filed answer denies the commission of any unfair labor practices.

On the entire record,¹ including my observation of the demeanor of the witnesses, and after considering the briefs filed by all parties, I make the following

FINDINGS OF FACT

I. THE EMPLOYER'S BUSINESS AND THE UNION'S LABOR ORGANIZATION STATUS PRELIMINARY CONCLUSIONS OF LAW

The Employer, a Delaware corporation, is engaged in the manufacture of chemicals and related products and maintains its principal office and place of business in Wilmington, Delaware. In the course and conduct of its business operations, it annually sells and ships products valued in excess of \$50,000 directly from its plants in Delaware to points located outside that State. The Respondent admits, and I find and conclude, that the Employer is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

The Employer's Holly Run plant, in Newport, Delaware, manufactures a single product, a pigment used in the production of data, video, and magnetic tape. It operates on a 7-day, around-the-clock basis, with four shifts of production employees rotating through the schedule. Its supervisory hierarchy includes a plant manager who is responsible for all aspects of the operation, an area supervisor responsible for day-to-day plant operations, and four group or shift supervisors. The Holly Run plant is the only plant involved in these proceedings.

The collective-bargaining unit at the Holly Run plant consists of about 90 employees, including approximately 35 production employees as well as others in maintenance, quality control/lab, shipping, and clerical positions. All of these employees, except for two secretaries, are represented by the Union. The collective-bargaining relationship goes back for many years. However, since 1974, there have been no new contracts. The terms of the 1974 agreement continue to apply except where specific changes have been negotiated. One

¹General Counsel's motion to correct transcript, except for the first proposed correction, is granted.

area which was modified, in 1981, is the grievance procedure.

B. *The Temporary Supervisor Program*

Since at least 1969, the Employer has had a practice of appointing unit employees to serve as temporary shift supervisors. The appointments are based on the recommendations of various supervisors and may be rejected by the employees to whom the upgrades are offered. While permanent supervisors are salaried, temporary supervisors remain hourly paid, at a rate which is 10 percent above the highest non-supervisory rate. Over the last decade, 10 or more employees have served in this capacity, including some who were union officers at the time of their upgrades. Those who are upgraded generally remain in the higher position for no more than 120 days, the period during which their unit seniority is protected by agreement of the parties.

The temporary supervisor program has not always functioned free of union opposition. In 1979 and 1980, the parties held a series of negotiations over union objections to it, finally reaching impasse. In the meeting of May 14, 1979, in response to a question from the Union, the Employer stated, "Temporary supervisors have full authority of a permanent supervisor during the period of their upgrade." In the third meeting, on December 17, 1980, the Employer agreed to a union proposal to cease dues deductions for any upgraded employee immediately upon the upgrade; the cessation was to be automatic.

Union objections to the temporary supervisor program resurfaced in May 1988. In response to a grievance protesting a warning issued by a temporary supervisor for absenteeism, Area Superintendent William McClellan wrote, "In the future, Temporary supervision will not be required to write or present a written progress report [warning]." Notwithstanding this, the Union continued to object to the program, asserting that it put upgraded unit employees in a difficult position with the bargaining unit members over whom they would have authority. The Union further objected to management's practice of not selecting permanent supervisors from among those who had served in temporary capacities. The objections came to a head in late May 1988 with a union resolution that its members would no longer participate in the program. At the Union's request, two employees then serving as temporary supervisors agreed to step down, returning to the unit. One of them was Steven Pierce, one of the temporary supervisors whose discipline by the Union is the subject of this proceeding.

C. *Appointments, Resignations, and Discipline of Pierce and Burris*

The Employer did not resume appointments of temporary supervisors until late June 1989.² At that time, McClellan offered, and Steven Pierce voluntarily accepted, an upgrade. Pierce was aware that the Union would take action against anyone doing so.

On July 12, Pierce asked David Detter, then the Union's treasurer, what he had to do to get out of the Union. Detter replied, "All you have to do is say you want out." Pierce said, "Well, I'm saying I want out" and Detter told him, "You're out." Pierce had a similar conversation with Alvin

Carey on the following day.³ On July 13, Pierce gave the payroll clerk a written order to stop his \$10-per-month dues deduction.

Noting the absence of any requirement in the Union's bylaws that a resignation take any particular form, and Pierce's clear expression of intent to resign, I find that Pierce had, in fact, effectively resigned on or about July 12. *Electrical Workers IBEW Local 340 (Hulse Electric)*, 273 NLRB 428 (1984); *Electrical Workers IBEW Local 66 (Houston Lighting)*, 262 NLRB 483 (1982).

About July 15, Pierce received a letter from the Union stating that internal union charges had been filed against him, alleging that his acceptance of the upgrade was detrimental to the interests of the Union and in violation of his membership obligations.⁴ On July 25, he was informed that a hearing on the charges would be held on August 1. He did not attend the hearing and, on August 21, received a notice that he had been suspended from the Union for a period of 12 months and fined \$109.20 per week for each week in which he served as a temporary supervisor. This was the amount by which his pay increased for such service. The letter included a warning that if he failed to comply with the order, legal action would be taken to collect the fine. Pierce appealed the Union's action; his appeal was denied.

Notwithstanding Pierce's notice to stop his dues, the Employer's agreement to stop dues deductions immediately on a unit employee's upgrade to temporary supervisor, and the completion of a form intended to instruct data processing to make the necessary change, the \$10 dues were erroneously deducted from Pierce's July wages and turned over to the Union. Pierce asked Detter to return them. Detter replied, according to Pierce, that he would return Pierce's \$10 when Pierce paid the Union what he owed, \$2000. Pierce never received his refund.⁵

Between April and July, Robert Burris told Roger Wolfe, union vice president, and others, that he was dissatisfied with the job the Union was doing in representing the employees. Finally, on July 18, he told Wolfe "that he might drop out." Wolfe replied, "Go ahead, we don't care." Burris directed the payroll office to stop his dues deductions, told Wolfe that he had done so and was again told, "I don't care." He believed that he also told Wolfe specifically that he had dropped out and was no longer going to be affiliated with the Union. Thereafter, he paid no dues and, while it was possible for a member to pay dues directly to the Union rather than by payroll deduction, he never received any notice from the Union asserting that he was delinquent in dues pay-

³ Detter recalled telling Pierce, when asked about the procedure for resigning, that the first step was to see the payroll clerk to cease dues deductions. He promised to get back to Pierce with information about what additional steps he would have to take. Detter admitted never responding further to Pierce's inquiry. He asserted that he received nothing in writing from Pierce regarding either the dues or Pierce's membership. However, he admitted that a supervisor had told him that Pierce had gone to the payroll clerk in order to stop his dues deductions. Noting that Pierce's recollection of what Detter told him about resignation is consistent with the Union's bylaws, which contain nothing restricting resignation, and their comparative demeanors, I credit Pierce. I similarly credit him over Carey, who claimed that he had no conversations with Pierce about resignation.

⁴ Pierce recalled receiving this notice before he took steps to resign.

⁵ Detter recalled Pierce angrily demanding the return of his \$10. He allegedly told Pierce that if the Union owed the money, Pierce would get it back. However, he told Pierce, he did not believe that the Union owed him anything. Noting that the money was never returned, resolution of this minor credibility conflict is not required.

² All dates hereinafter are 1989 unless otherwise stated.

ments.⁶ Based on the foregoing, I find that Burris, like Pierce, unequivocally expressed his intention to resign from the Union and that the Union understood what his intentions were. Burris effectively resigned from membership.

In late October, Burris accepted an upgrade to temporary supervisor. On November 1, he received a notice of charges against him, identical to those served on Pierce. On November 13, he was advised of a hearing, to take place on November 20. He did not attend the hearing and, on November 30, was informed of his 12-month suspension and fine of the difference between what he made as a rank-and-file employee and what he earned as a temporary supervisor, \$109.20 per week. Like Pierce, he was told that the Union would take legal action to enforce the fine if he failed to pay. He filed no appeal.

D. Authority of the Temporary Supervisors

In *NLRB v. Electrical Workers IBEW Local 340 (Royal Electric)*, 481 U.S. 573 (1987), the Supreme Court limited the application of Section 8(b)(1)(B) in cases involving union discipline of supervisor-members to situations meeting the precise language of the statute, where the supervisor was the employer's representative for the purposes of collective bargaining or the adjustment of grievances. It thus becomes necessary to determine whether the Employer's temporary supervisors were supervisors within the meaning of Section 2(11) and whether they served as management's representative for collective bargaining or grievance adjustment.

On the basis of the entire record, I must conclude that Respondent's temporary supervisors satisfy the requirements of Sections 8(b)(1)(B) and 2(11) during the periods of their upgrades.

Here, it is clear that the temporary supervisors exercise essentially the same authority as permanent shift supervisors. There is no dispute concerning the 2(11) authority of the permanent supervisors. The temporary supervisors are told that their authority equals that of permanent supervisors when upgraded; Pierce and Burris were told that they were "in charge."

Pursuant to the contractual grievance procedure, the practice of the parties and their discussions in 1979 and 1980, shift supervisors, whether permanent or temporary, handle first-step grievances. The Union has even sought to have them be present at the second-and third-step meetings on grievances arising during their upgrades. This is most significant because shift supervisors, whether permanent or temporary, are expressly designated as management's representatives at the first step of the contractual grievance procedure and are recognized as such by the Union. They are responsible for attempting to adjust any such grievance or for submitting a timely written response if no adjustment can be reached.⁷ This authority places them squarely within the ambit of Section 8(b)(1)(B).

⁶The foregoing is as described in Burris' testimony on cross-examination, testimony consistent with his pretrial affidavit. Wolfe did not testify.

⁷In 1986, James Smith, an electrician serving as a temporary supervisor (and a union member), received a grievance concerning the sizes of gloves stocked by the Company. He signed the grievance as the supervisor who received it and met with the employee and the union representative at the first step to gather information about the situation, which was beyond his ability to correct. He signed a written reply, which had been prepared from information he provided, and he attended the second-step meeting.

When the annual performance review period fell during Burris' tenure as a temporary supervisor, McClellan directed him to prepare the reviews.⁸ While Pierce had no occasion to do this, he did have an opportunity to direct the preparation of a review praising an employee who caught a mistake in production. He met with the employee and his review was placed in the employee's personnel file.

The issue of the temporary supervisors' disciplinary authority appears to be largely responsible for the Union's objections to temporary supervision. In May 1988, before the Union's resolution against cooperation in the temporary supervisor program, an employee objected to the Union over a written warning given him by a temporary supervisor. The Union protested, precisely because it had been issued by a temporary supervisor, and McClellan agreed that, "in the future, temporary supervision will not be required to write or present a written progress report [warning]." While it appears that this agreement was intended to preclude temporary supervisors from issuing written warnings, and not merely permit them to decline to do so, as the wording implies, Burris issued such a warning to an employee in January 1990; the Union objected to Connolly, asserting that it was contrary to their practice. On the other hand, temporary supervisors, including Pierce, have orally admonished employees they felt were out of line and have the authority to recommend discipline to McClellan when they feel it warranted. McClellan reviews the disciplinary recommendations of all shift supervisors to determine whether they are consistent with prior actions.

As previously noted, temporary supervisors are hourly paid, unlike permanent supervision, but receive 10 percent more than the highest paid nonsupervisory employees. In the cases of Pierce and Burris, the temporary supervisor's slot paid \$109 more per week than they had been making. They work out of an office, where they spend a substantial part of their time. They maintain time records, record overtime, assist and guide employees in their work, troubleshoot the operation, and, it appears, do not regularly perform production work. From about 5 p.m. until 7 a.m., they are the only supervisors, and the highest ranking persons, in the plant. At such times, they may call McClellan if extraordinary problems arise; they do not often do so.

Shift supervisors, whether permanent or temporary, assign job tasks at the start of each shift and may reassign employees during the shift. While much of this is routine, based on instructions left by McClellan concerning the work to be done and the workers' usual job assignments, some discretion is involved. Some assignments are based on the supervisor's observations of an employee's particular skills or physical limitations. Shift supervisors similarly assign some overtime, determining when it is necessary by the number of workers present during a given shift and calling in employees according to an established company procedure.

When an employee asks to be excused because of illness, it is the Employer's practice to allow that employee to leave.

⁸In 1988, a temporary supervisor in the maintenance department had similarly prepared such reviews. The Union objected and Mike Cullen, McClellan's counterpart in maintenance, and Ed Connolly, the Employer's production and employee relations superintendent, agreed that temporary supervisors would not perform this function. Those reviews were discarded and reissued by a permanent supervisor. McClellan was not part of, or aware of, that determination.

The request to leave is directed to, and granted by, the shift supervisor. The shift supervisor also schedules leave, essentially based on seniority and company policy.

As the Board has repeatedly stated, the statutory indicia set forth in Section 2(11) are listed in the disjunctive and only one of such indicia need be present to confer supervisory status on an individual. *Opelika Foundry*, 281 NLRB 897, 899 (1986), and cases cited therein. In this case, the temporary supervisors have the authority to adjust grievances at the first step, a function which brings them within both Sections 2(11) and 8(b)(1)(B). *Paperworkers Local 1575 (Scott Paper)*, 284 NLRB 1019 (1987). They also have authority to discipline employees or, at least, to effectively recommend discipline. *Cannon Industries*, 291 NLRB 632 (1989). This authority, as well as their authority to assign and direct employees, I find, is more than routine. The assignment of work is based, at least in part, on their knowledge of the employees' work skills and physical capabilities and thus requires the exercise of some discretion. *Rose Metal Products*, 289 NLRB 1153 (1988). Their discretion is best illustrated by the fact that, for many hours in the workday, they may be the only supervisors, and the highest rated persons, present in the plant. Whatever occurs during such periods, unless of an extraordinary nature, they resolve. *Iron Mountain Forge Corp.*, 278 NLRB 255 (1986). Moreover, they are considered to be supervisors by both management and the Union; it is precisely because they exercise supervisory authority during their upgrades that the Union objects to the program.

E. Conclusions

In this case, the Union fined, as its members, persons found to be supervisors within the ambit of Sections 2(11) and 8(b)(1)(B). The Union's resolution, and its discipline of Pierce and Burris, were expressly intended to directly discourage them and other employees from serving in such capacities.⁹

Moreover, the fines, and the threats to enforce them with legal action, occurred in the context of an existing collective-bargaining relationship, albeit one without a recently negotiated contract, and clearly constitutes an attempt to dictate the Employer's choice of representatives. See *Royal Electric*, supra; *Carpenters District Council of Dayton (Concourse Construction)*, 296 NLRB 492 (1989). Such conduct restrains or coerces an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances and violates Section 8(b)(1)(B) of the Act. The refusal to return Pierce's dues money, while de minimus in and of itself, is in the nature of additional discipline and a further violation of that section.

CONCLUSION OF LAW

By fining supervisor-members in order to discourage them from serving as supervisors, and by refusing to return dues money erroneously deducted from a supervisor-member, the Union has restrained and coerced the Employer in the selec-

⁹ Pierce and Burris had been members when, or shortly before, they were upgraded. I cannot find that their resignations, which the Union, by fining them, has refused to recognize, removes them from the category of supervisor-member considered in *Royal Electric* and its predecessors or bars a finding of violation herein.

tion of his representatives for the purposes of collective bargaining and the handling of grievances and has engaged in unfair labor practices affecting commerce within the meaning of Section 8(b)(1)(B) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist therefrom. Specifically, it must cease and desist from restraining or coercing the Employer by fining or otherwise disciplining members or former members who accept upgrades to supervisory positions, by refusing to return dues money deducted erroneously from the pay of such supervisor-members and by engaging in any like or related conduct. It must also be ordered to rescind the fines assessed against Steven Pierce and Robert Burris, notify them that that has been done, refund the July 1989 dues of Steven Pierce and post appropriate notices, the affirmative action which is necessary to effectuate the Act's policies.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁰

ORDER

The Respondent, E. I. DuPont Newport Union, Local 9, Newport, Delaware, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Restraining or coercing the Employer by fining or otherwise disciplining members or former members who accept upgrades to supervisory positions or by refusing to return dues money deducted erroneously from the pay of such supervisor-members.

(b) In any like or related manner restraining or coercing the Employer in the exercise of rights protected by the Act.

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

(a) Rescind the fines assessed against Steven Pierce and Robert Burris.

(b) Refund the July 1989 dues erroneously deducted from the pay of Steven Pierce.

(c) Remove from its files any reference to the unlawful fines of Steven Pierce and Robert Burris and notify them that this has been done.

(d) Post at its office in Newport, Delaware, copies of the attached notice marked "Appendix."¹¹ Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

¹⁰ 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.

¹¹ If 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."

(e) Sign and return to the Regional Director sufficient copies of the notice for posting by E. I. Dupont De Nemours and Co., if willing, at all places in the Holly Run plant where notices to employees are customarily posted.

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

APPENDIX

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

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT restrain or coerce E. I. Dupont De Nemours and Co. by fining or otherwise disciplining members or former members who accept upgrades to supervisory positions or by refusing to return dues money deducted erroneously from the pay of such supervisor-members.

WE WILL NOT in any like or related manner restrain or coerce the Employer in the exercise of rights protected by the Act.

WE WILL rescind the fines assessed against Steven Pierce and Robert Burris.

WE WILL refund the July 1989 dues of Steven Pierce.

WE WILL remove from our files any reference to the unlawful fines of Steven Pierce and Robert Burris and we will notify them that this has been done and that the charges and fines against them will not be used against them in any way.

E. I. DU PONT NEWPORT UNION LOCAL 9