

International Union of Operating Engineers, AFL–CIO, Hoisting and Portable Local No. 101 and Hunt Midwest Mining, Inc. Case 17–CB–3872

August 27, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
CRACRAFT AND OVIATT

On May 22, 1991, Administrative Law Judge William J. Pannier III issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

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

The Board has considered the decision in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions¹ 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, International Union of Operating Engineers, AFL–CIO, Hoisting and Portable Local No. 101, its officers, agents, and representatives, shall take the action set forth in the Order.

¹We affirm the judge's conclusion that the Respondent violated Sec. 8(b)(1)(B) of the Act as alleged by preferring and processing union charges against Production Superintendent Anthony McLaughlin, and by subsequently fining him, for working for the Employer behind the Respondent's picket line on April 30 and May 1 and 2, 1990.

In affirming the judge's conclusion, we find it unnecessary to pass on his discussion of whether the Respondent's discipline of McLaughlin might not have violated the Act if it had been motivated by McLaughlin's performance of supervisory activities other than 8(b)(1)(B) activities. The record does not establish, and the judge does not find, that McLaughlin was disciplined for anything other or more particular than his performance of his regular production superintendent duties (which were shown to normally and regularly involve grievance adjusting) behind the Respondent's picket line. In this regard, there is no showing in the record that McLaughlin performed even a minimal amount of bargaining unit work during the 3-day period for which he was disciplined. Indeed, McLaughlin's testimony that he performed no bargaining unit work at all during this time was uncontroverted. This case is therefore distinguishable from *Operating Engineers Local 501 (Golden Nugget)*, 287 NLRB 674 (1987), enf. granted in part and denied in part sub nom. *Rasmussen v. NLRB*, 875 F.2d 1390 (9th Cir. 1989), on which the Respondent relies. We also note that the Respondent failed to produce evidence that McLaughlin spent more than a de minimis amount of time—if any at all—in training the employee strike replacements, who were already working when the employer selected McLaughlin as its superintendent with responsibility for workplace grievance adjustment.

Member Cracraft notes that the finding of a violation in this case is consistent with the finding of a violation, in which she specifically concurred, as to the discipline of Project Manager Dennis Williamson in *Sheet Metal Workers Local 68 (DeMoss Co.)*, 298 NLRB 1000 (1990).

Richard C. Auslander, for the General Counsel.
James G. Walsh, Jr. (Jolley, Walsh & Hager), of Kansas City, Missouri, for the Respondent.
Earl J. Engle (Stinson, Mag & Fizzell), of Kansas City, Missouri, for the Charging Party.

DECISION

STATEMENT OF THE CASE

WILLIAM J. PANNIER III, Administrative Law Judge. I heard this case in Mission, Kansas, on December 11, 1990.¹ On June 20, the Regional Director for Region 17 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing, based on an unfair labor practice charge filed on May 15 and amended on November 30, alleging violations of Section 8(b)(1)(B) of the National Labor Relations Act. 29 U.S.C. § 151 et seq. (the Act). All parties have been afforded full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, and to file briefs.

Based on the entire record, on the briefs that were filed, and on my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all times material, Hunt Midwest Mining, Inc. (the Employer) has been a Delaware corporation engaged in the business of mining limestone for crushed aggregate at two mines in the Kansas City, Missouri area: one in Randolph, Missouri, and the other in Fairview, Missouri. During 1990, the year in which the alleged unfair labor practices occurred, the Employer sold and shipped such material valued in excess of \$67,000 directly to a project of Neosho Construction Co. located in the State of Kansas. Because the shipments of that value establish legal jurisdiction and, further, satisfy the Board's discretionary direct outflow standard for nonretail operations, I conclude that at all times material the Employer has been an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

At all times material, International Union of Operating Engineers, AFL–CIO, Hoisting and Portable Local No. 101 (Respondent) has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICE

A. *Findings of Fact*

This case presents issues of whether Respondent violated Section 8(b)(1)(B) of the Act by subjecting member Anthony McLaughlin to internal union discipline for working as production superintendent behind a picket line at the Employer's Randolph mine. Operations at the Employer's two Missouri mines are subject to the ultimate supervision of General Manager John Hayes. Below him in the table of organization is the general superintendent, who provides intermediate supervision for operation at both mines. A production superintendent, one for each of the two mines, supplies immediate supervision for employees working at each one. For example, prior to April 1, Mark Skuban had been production superintendent at the Randolph mine.

¹Unless stated otherwise, all dates occurred in 1990.

Historically, employees at, inter alia, the Randolph mine have been represented by 3 labor organizations: 13 or 14 truckdrivers by a Teamsters' local, 11 to 14 laborers by a Laborer local, and 5 or 6 operators by Respondent. Those labor organizations had been parties to separate collective-bargaining contracts with the Employer. Each of the most recent ones expired on April 1. When negotiations prior to that date failed to generate agreement on the terms for new contracts, the employees commenced a strike against the Employer on April 1.

At the time that the strike commenced, McLaughlin had been employed for almost 20 years by the Employer as a heavy equipment operator and equipment repairman. During that entire time he had been a member in good standing of Respondent, serving as its steward at the Randolph mine for approximately 4 years prior to commencement of the strike. He had favored commencement of that strike and had participated in the picketing that occurred on and after April 1.

Under article XII, section 1 of Respondent's contract that expired on April 1, if "any differences . . . between the employer and the labor organization . . . cannot be adjusted between the steward and the foreman, it shall be taken up between a representative of the Employer and the Union representative." It is undisputed that, during his term as steward, McLaughlin and Skuban discussed grievances of employees represented by Respondent—ones such as assignment of a laborer to work within Respondent's jurisdiction and, on another occasion, assigning Saturday work to less senior operators—and resolved every one between them without the need for resolution by a "representative of the Employer and [Respondent's] representative."

Following commencement of the strike, the Employer hired replacements and continued operations. However, on April 25 or 26, Skuban resigned as Randolph mine production superintendent for personal reasons, unrelated to the ongoing labor dispute. General Manager Hayes felt that, to replace Skuban, he needed someone who was familiar with operations at the Randolph mine so that the individual selected "could lead, guide and direct—instruct [the replacements]—to bring them up to speed with the [Employer's] former work force." Hayes decided that McLaughlin was such an individual. He offered the position to McLaughlin with the specific understanding that the latter would be performing the duties that Skuban had performed and would he fully in charge of the employees whom he supervised.

McLaughlin readily accepted that offer, but wanted to get a withdrawal from Respondent before crossing its picket line to work as the Employer's production superintendent. As a result, he did not actually commence performing the duties of that position until Monday, April 30. On April 27 McLaughlin sent a letter to Respondent "requesting a withdrawal card . . . as I am going into a management position." There is no dispute that Respondent received this letter.

After commencing work on April 30, McLaughlin continued working as Randolph mine production superintendent. In addition to performing the normal supervisory duties of hiring, firing, and directing the work of employees, he had occasion to resolve grievances brought to him by employees. For example, on May 1 an employee complained about being assigned to work underground, after having been hired to work a surface job. Inasmuch as he was one loader short, on

the following day McLaughlin worked out a rotation arrangement with the operators that would allow each one of them to work on the surface or in the stockpile area, as well as underground. For prescribed periods. Moreover, in mid-May, eight truckdrivers sought a wage increase, arguing that their training period should be viewed as completed. McLaughlin agreed and arranged with Hayes for each of the drivers to receive an hourly increase in pay.

During the evening of May 1, a friend told McLaughlin that during a meeting with the stickers earlier that same evening, then-treasurer Roger Kaminska had announced that the withdrawal card request would not be accepted and Respondent "was going to fine" McLaughlin and "harass [him] in any way they possibly could." As a result, McLaughlin prepared a letter resigning from membership in Respondent. That letter was express-delivered to Respondent during mid-afternoon on May 2.

Nonetheless, by letter dated May 8, Respondent notified McLaughlin that its then-president and business manager, Sam Long, had filed internal charges against the former for "work[ing] for [the Employer] behind a primary, lawful picket placed on said employer pursuant to an economic strike." At a general membership meeting on May 17, according to the minutes of that meeting, Kasminsha reported that McLaughlin had

crossed over the picket line and accepted a superintendent's job, resigned from the union and is now training non-union people to operate the plant. Charges have been filed on A.D. McLaughlin for breaking down 101's working conditions.

Furthermore, the minutes of the general membership meeting on June 21 recite that Long, "explained that Anthony McLaughlin was breaking down union conditions by teaching the strike breakers of [the Employer] to operate the equipment and machinery," with the result that the "strike may have been a success without his help to the [Employer]." Following these remarks, a substantial majority of those in attendance voted guilty and Long announced that a \$5000 fine would be imposed on McLaughlin.

B. Analysis

In *American Broadcasting Cos. v. Writers Guild*, 437 U.S. 411 (1978) (*ABC*), the Supreme Court confronted the issue of "whether a labor union commits an unfair labor practice when it disciplines a member who is a supervisory employee for crossing the union's picket line during a strike and performing his regular supervisory duties, which include the adjustment of grievances." (437 U.S. at 413.) A majority of the Court answered that question in the affirmative. They reached that conclusion despite the fact, pointed out by the four dissenting justices, "that the union had no interest in restraining or coercing the employers in the *selection* of their . . . grievance-adjustment representatives," and despite the further fact that the union's "sole purpose was to enforce the traditional kinds of rules that every union relies on to maintain its organization and solidarity in the face of the potential hardship of a strike." (437 U.S. at 440)

The majority's conclusion in *ABC* squarely governs disposition of this case. One of the regular duties of the Employer's production superintendents is grievance adjustment.

In fact, McLaughlin did adjust some grievances after becoming production superintendent. Moreover, so far as the evidence shows, once a contract is negotiated between Respondent and the Employer, McLaughlin will be the primary official of the latter charged with trying to resolve “differences” arising under it, *Sheet Metal Workers Local 68 (DeMoss Co.)*, 298 NLRB 1000 (1990), just as Skuban had done when he had served as the Employer’s Randolph mine production superintendent. Further, although Respondent’s officials expressed discontent at membership meetings over McLaughlin’s training of strike replacements, Long’s May 8 letter recites expressly that McLaughlin was being generally charged with “work[ing] . . . behind a primary, lawful picket [line],” without specification of particular authority that he was exercising, nor of activity in which he was engaging, while doing so. Consequently, so far as the record discloses, Respondent would have subjected McLaughlin to internal discipline for working behind its picket line—performing duties which included grievance adjusting—regardless of whether he did or did not train replacements.

Respondent argues, with support in the record, that its internal discipline did not affect McLaughlin’s willingness to continue serving as production superintendent. Yet, the reaction of the disciplined supervisor-member is not the significant fact under Section 8(b)(1)(B). “The statute itself reveals that it is the employer, not the supervisor-member who is protected from coercion by the statutory scheme.” *NLRB v. Electrical Workers IBEW Local 340 (Royal Electric)*, 481 U.S. 573, 594 (1978).

Although Hayes testified that, as general manager, the fact that McLaughlin had been charged by Respondent did not “influence . . . having him be superintendent of the Randolph operation,” McLaughlin had already been selected and was working as production superintendent by the time that he was charged by Respondent. There is no evidence that, at the time of selecting and offering that position to McLaughlin, Hayes has foreseen that it would lead Respondent to discipline McLaughlin. By contrast, at no point did Respondent develop any testimony or adduce other evidence that would support a conclusion that the Employer would remain unconcerned by the effect of union discipline on McLaughlin’s continued authority to adjust grievances on its behalf.

In *ABC* the Supreme Court pointed out the where a supervisor-member is disciplined for performing regular duties that include grievance adjusting, such discipline naturally tends to tempt that supervisor-member,

to give the union side of a grievance a more favorable slant while the threat of discipline remained, or while his own appeal of a union sanction was pending. At the very least, the employer could not be certain that a fined [supervisor-member] would willingly answer the employer’s call to duty during a subsequent work stoppage. . . . [437 U.S. at 435.]

There is no evidence in this record supporting a conclusion that, in the face of Respondent’s internal discipline, the Employer was so strong-willed that it would be unconcerned about McLaughlin’s handling of grievances on its behalf in the future.

Indeed, even were it to be shown that this particular employer would not have been concerned about a grievance adjustor’s attitude following internal discipline, that does not resolve the general issue of the natural effect of such discipline on future representation in collective bargaining and grievance adjusting. Just as with other actions prescribed by the Act, such as those encompassed by Section 8(a)(1), the subjective reaction of the employer under Section 8(b)(1)(B) should not determine whether a violation occurs. Otherwise a single prohibition would be applied differently to different people solely on the basis of their emotional strength in withstanding or succumbing to the proscribed action. In fact, the test of coercion under Section 8(b)(1)(B), as under other subsections of 8 of the Act, is “necessarily a matter of probabilities, and its resolution depends much on what experience would suggest are the justifiable inferences from the known facts.” *ABC*, supra at 432. Consequently, whether the Employer is an emotional rough old cob or, conversely, an emotional wilting violet, the adverse effect of intraunion discipline is evaluated by a single natural tendency: “[T]o insure having satisfactory collective-bargaining and grievance-adjustment services would require [the employer to make] a change in . . . representative.” *ABC*, supra at 435.

Respondent argues that there is no decided authority applying Section 8(b)(1)(B) to a situation where, as here, an employer promotes a striking employee during the course of a strike. That is, points out Respondent, all decided cases have involved fines imposed on individuals who occupied grievance adjustor positions prior to commencement of the strikes involved. Yet, Section 8(b)(1)(B) specified precisely that it protects “the selection of [the employer’s] representatives for the purposes of collective bargaining and grievance adjustment.” *Florida Power & Light Co. v. Electrical Workers*, 417 U.S. 790, 804 (1974). Nothing in the express words of that subsection, nor in the legislative history underlying its enactment, qualifies its application. There is no evidence that the Employer’s selection of McLaughlin as production superintendent had been motivated by an effort to undermine the strike against it. Accordingly, there is no basis for depriving an employer from protection under Section 8(b)(1)(B) for representative selections made during, as opposed to before a strike.

Finally, Respondent argues that, imposing discipline on McLaughlin, it had not been motivated specifically by any grievance adjustments that he made or was likely to have made on the Employer’s behalf. In the context of a different record this might have been a more persuasive argument. As pointed out above, the Supreme Court specifically held in *ABC* that union discipline violates the Act when imposed on a supervisor-member whose regular duties include adjustment of grievances. However, in footnote 8 of its later opinion in *Royal Electric* the Court modified the seeming breadth of that holding:

insofar as dictum in *ABC* suggests that a union may not discipline Supervisor members for acts or omissions that occur while the supervisor-member is engaged in supervisory activities other than Section 8(b)(1)(B) activities, the dictum is inconsistent with *Florida Power*, and we disavow it.

At first blush it might appear that by this disavowal, the Court imposed an affirmative burden of showing that internal union discipline was targeted at collective-bargaining or grievance adjustment activity before a violation of Section 8(b)(1)(B) could be established. That is, it does not suffice to establish a violation to show merely that supervisor with grievance adjustment responsibilities has been subjected to intraunion discipline. However, such a conclusion is not warranted.

By the very words used, the Court in *Royal Electric* disavowed the dictum—not the holding—of *ABC*. At no point in *Royal Electric* did the Court hold that Section 8(b)(1)(B) is not violated when discipline is imposed on a supervisor-member whose regular duties include adjustment of grievances. As a result it would appear that, because it did not reverse the *ABC* holding, footnote 8 of *Royal Electric* provides an affirmative defense to a prima facie showing that a violation of Section 8(b)(1)(B) has been made out under the holding enunciated in *ABC*. That is, once the General Counsel shows that a supervisor-member whose regular duties include collective bargaining or grievance adjustment has been disciplined for crossing a picket line and reporting for normally performed work, labor organizations can rebut the showing by going forward with evidence that that discipline had been motivated by “supervisory activities other than Section 8(b)(1)(B) activities.”

Such an interpretation gives continued meaning to both the holding in *ABC* and to the disavowal of *Royal Electric*. It also is consistent with the methodology utilized to determine whether other subsections of Section 8 of the Act have been violated. See, e.g., *Wright Line*, 252 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). In fact, it is consistent with the overall approach of imposing on a party whose motivation is at issue the burden of gaining forward with the evidence of lawful motivation, once a prima facie showing of unlawful motivation and conduct has been made out.

In this case, however, Respondent failed to avail itself of whatever avenue of escape was created by the disavowal language of *Royal Electric*. Most particularly, to the extent that its motivation is a pivotal factor, Respondent “alone is responsible for its conduct and it alone bears the burden of explaining the motivation for its actions.” *Inland Steel Co.*, 257 NLRB 65 (1981). Yet, Respondent produced no witnesses—such as Long or Kaminska—to testify specifically that it had charged, tried, and fined McLaughlin for engaging in “supervisory activities other than Section 8(b)(1)(B) activities.” Nor do the remarks reproduced in minutes of Respondent’s May 17 and June 21 membership meetings suffice to supply inferential evidence of such a lawful motive.

Of themselves, those remarks are no more than isolated expressions of a reason for discontent with the effects of McLaughlin’s return to work. On their face, those few scraps of remarks made during those meetings do not show that training of replacements had been the actual motive for charging, trying, and finding McLaughlin—as opposed to being a complaint regarding one consequence of McLaughlin’s offense of failing to observe Respondent’s picket line. Furthermore, any possible inference of motivation derived from remarks at membership meeting is obliterated completely the actual reason for having charged

McLaughlin set forth by Long in the May 8 charge: for having “worked for [the Employer] behind a primary, lawful picket placed on said employer pursuant to an economic strike.” Of course, as grievance adjustment is a regular component of the duties of the Employer’s production superintendents, that is the very motivation for internal union discipline adjudged unlawful by the Supreme Court’s holding in *ABC*.

It is well settled that, “mere existence of valid grounds for [an action] is no defense to a charge that the [action] was unlawful, unless [that action] is no defense to a charge that the [action] was unlawful, unless [that action] was predicated solely on those grounds.” *NLRB v. Symons Mfg. Co.*, 328 F.2d 835, 837 (7th Cir. 1964). Here, there may well have been a lawful basis for internal union discipline on supervisor-members, even ones possessing collective-bargaining and grievance-adjustment authority. However to do so, respondent unions must be prepared to show affirmatively that internal discipline had been motivated by “supervisory activities other than Section 8(b)(1)(B) activity,” in response to the General Counsel’s showing that discipline has been imposed on “a member who is a supervisory employee for crossing the union’s picket line during a strike and performing his regular supervisory duties, which include the adjustment of grievances.” *ABC*, supra. Respondent failed to satisfy that burden.

CONCLUSION OF LAW

International Union of Operating Engineers, AFL–CIO, Hoisting and Portable Local No. 101 is a labor organization which has committed unfair labor practices affecting commerce by preferring and processing a charge against Anthony McLaughlin, by trying and finding McLaughlin guilty of that charge, and by levying a fine against him on the basis of that finding of guilt, in violation of Section 8(b)(1)(B) of the Act.

REMEDY

Having found that International Union of Operating Engineers, AFL–CIO, Hoisting and Portable Local No. 101 engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and, further, that it be ordered to take certain affirmative action to effectuate the policies of the Act. With respect to the latter, it shall be ordered to rescind the fine levied against Anthony McLaughlin on June 21, 1990, and to expunge from its records all documents relating to the internal union charge, trial, and fine.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²

ORDER

The Respondent, International Union of Operating Engineers, AFL–CIO, Hoisting and Portable Local No. 101, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Restraining and coercing an employer, Hunt Midwest Mining, Inc., in the selection of its representatives for the

²If 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.

purposes of collective bargaining and the adjustment of grievances by preferring and processing charges against Anthony McLaughlin, by holding a trial and finding McLaughlin guilty of such charges, and by levying a fine against him.

(b) In any like or related manner restraining or coercing Hunt Midwest Mining, Inc. in the selection of representatives for the purpose of collective bargaining or the adjustment of grievances.

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

(a) Rescind the fine levied against Anthony McLaughlin on June 21, 1990, and expunge from its records all documents relating to the internal union charge, trial, and fine of McLaughlin.

(b) Notify in writing both Hunt Midwest Mining, Inc. and Anthony McLaughlin that the foregoing action of paragraph 2(a) has been taken.

(c) Post at its business offices, hiring hall, and meeting places in Kansas City, Missouri, copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by its authorized representative, shall be posted by International Union of Operating Engineers, AFL-CIO, Hoisting and Portable Local No. 101 immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members and employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that those notices are not altered, defaced, or covered by any other material.

(d) Additional copies of the attached notice marked "Appendix" shall be signed by an authorized representative of International Union of Operating Engineers, AFL-CIO, Hoisting and Portable Local No. 101, and forthwith returned to the Regional Director for Region 17 for posting by Hunt

Midwest Mining, Inc., it being willing, at its places of business, where notices to its employees are customarily posted.

(e) 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
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 and coerce an employer, Hunt Midwest Mining, Inc., in the selection of its representatives for the purposes of collective bargaining and the adjustment of grievances by performing and processing charges against Anthony McLaughlin, by holding a trial and finding McLaughlin guilty of such charges, and by levying a fine against him.

WE WILL NOT in any like or related manner restrain or coerce Hunt Midwest Mining, Inc. in the selection of representatives for the purpose of collective bargaining or the adjustment of grievances.

WE WILL rescind the fine levied against Anthony McLaughlin on June 21, 1990, and WE WILL expunge from our records all documents relating to the internal union charge, trial, and fine of McLaughlin.

WE WILL notify in writing both Hunt Midwest Mining, Inc. and Anthony McLaughlin that we have taken the foregoing action.

INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO, HOISTING AND PORTABLE LOCAL, NO. 101

³ 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."