

North American Refractories Co. and United Steelworkers of America, AFL-CIO Cases 7-CA-39958 and Case 7-CA-40626

August 31, 2000

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On December 23, 1998, Administrative Law Judge Irwin H. Socoloff issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed a cross-exception and supporting brief and a brief in opposition to the General Counsel'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 briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order as modified.²

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, North American Refractories Co., White Cloud, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(b).

"(b) Within 14 days after service by the Region, post at its facility in White Cloud, Michigan, copies of the attached notice marked "Appendix."⁵ Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees 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. In the event

¹ There are no exceptions to the judge's finding that the Respondent violated Sec. 8(a)(1) of the Act by maintaining an overly broad no-solicitation and no-distribution rule, or to the judge's recommended dismissal of an allegation that the Respondent violated Sec. 8(a)(3) of the Act by discharging Douglas Rand. There are also no exceptions to the judge's recommended dismissals of allegations of disparate enforcement of housekeeping and distributions rules and coercive interrogation of employees concerning their union activities and those of other employees. The General Counsel excepted to the judge's dismissal of an allegation that Rand's discharge independently violated Sec. 8(a)(1). For the reasons given by the judge, we adopt his recommended dismissal of the latter allegation.

² We have modified the judge's Order to conform with the requirements of *Excel Containers, Inc.*, 325 NLRB 17 (1997).

⁵ 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."

that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 23, 1997."

Dwight R. Kirksey, Esq., for the General Counsel.

David A. Kadela, Esq., of Columbus, Ohio, for the Respondent.

DECISION

STATEMENT OF THE CASE

IRWIN H. SOCOLOFF, Administrative Law Judge. Upon charges filed on June 23, 1997, and February 2, 1998, by, respectively, United Steelworkers of America, AFL-CIO, (the Union), and Douglas Rand against North American Refractories Co., (Respondent), the General Counsel of the National Labor Relations Board, by the Regional Director for Region 7, issued a complaint dated April 15, 1998, alleging violations by Respondent of Section 8(a)(3) and (1) and Section 2(6) and (7) of the National Labor Relations Act (the Act). Respondent, by its answer, denied the commission of any unfair labor practices.

Pursuant to notice, trial was held before me in Grand Rapids, Michigan, on July 27, 28 and 29, 1998, at which the General Counsel and the Respondent were represented by counsel and were afforded full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence. Thereafter, the parties filed briefs which have been duly considered.

Upon the entire record in these cases, and from my observations of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, North American Refractories Co., a corporation, operates a plant in White Cloud, Michigan, and is engaged in the manufacture and nonretail sale of refractory bricks and related products. During the year ending December 31, 1997, Respondent, in conducting its business operations at White Cloud, purchased and received at the facility goods valued in excess of \$50,000, sent directly from points located outside the State of Michigan. I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. Background

North American Refractories Co. (NARCO) is headquartered in Cleveland, Ohio, and operates some 10 facilities in the United States and Canada. At all of those locations, save the White Cloud, Michigan plant, involved in this proceeding, the production and maintenance employees are represented by the Steelworkers. At White Cloud, organizational activity on behalf of the Union occurred between May 14, 1997, and July 17, 1997, when the Union lost a Board-conducted election by a vote of 65 to 39. In the period preceding the election, the Company campaigned against unionization at White Cloud.

Some 6 months after the election, on January 15, 1998, NARCO discharged its press operator, Douglas Rand, who, earlier, had served as one of the 10 employees on the Union's in-plant organizing committee. In the instant case, the General Counsel contends that Rand was fired because he engaged in union activities, in violation of Section 8(a)(3) of the Act, and because, immediately preceding the discharge, on January 12, he and fellow employees concertedly complained to a management representative about working conditions, in violation of Section 8(a)(1). Respondent asserts that the discharge occurred as a result of Rand's misconduct on January 12. Also at issue is whether NARCO violated Section 8(a)(1) of the statute by maintaining, before and after the election, unlawfully broad no-solicitation and no-distribution rules; by disparately enforcing its distribution and housekeeping rules and by coercively interrogating employees concerning their union activities and those of other employees.

*B. Facts*¹

As contained in its handbook, distributed to every employee, Respondent, at all material times, maintained "Standards of Conduct" to which employees were expected to conform their behavior. Included were prohibitions against "soliciting, vending or collecting without permission" and "distributing communications without permission," rules enforceable by "discipline up to and including dismissal." These rules were in effect during the Union's organizational drive, but were not enforced. Indeed, the record contains no evidence of employer interference with protected solicitations on nonwork time, or protected distributions on nonwork time and in nonwork areas, at all. On April 22, 1998, a week after the consolidated amended complaint issued in these matters, the foregoing rules were effectively repealed.

Employee Lorry Austin testified that, in mid-May 1997, she and 3 fellow workers made initial contact with the Union and, shortly thereafter, the in-plant committee, including Rand, was formed. Committee members, generally, solicited other employees to sign union authorization cards, campaigned for the Union and distributed flyers and other information. Following the filing of an election petition with the Board, on June 6, 1997, some committee members, on a daily basis, distributed pronion literature, on each shift, in the lunchroom and the men's and ladies' locker rooms, for perusal by employees before and after work and during the designated breaks and the lunch period. While a few of the committee members passed out flyers person-to-person, others, like Austin, did so before work, and at the start of breaks, by leaving copies on the tables, microwaves, refrigerator, and counters in the lunchroom and in various places in the locker rooms. Multiple copies were left on each lunchroom table, and at the other locations. On June

23, Austin and employee Henry Rodriguez talked to Human Resources/Safety Coordinator Jim Casteel, and asked for permission to post pronion flyers on the plant bulletin board where the Company posted antiunion literature. On the next day, Casteel responded, denying the request, but assuring the employees that they were free to distribute flyers in the lunchroom and the locker rooms, during breaks.

Company policy concerning housekeeping is contained in the employee handbook and, Austin and others testified, is addressed frequently by management officials at employee meetings. Thus, the undisputed evidence shows that employees are often reminded of Respondent's emphasis on cleanliness, in work and nonwork areas, and of the Company's expectation that the workers and supervisors will pick up after themselves in the lunchroom and, if necessary, will pick up after others. In the June 23 to June 26 period, further uncontradicted evidence reveals, on several occasions following break periods, Casteel and the then plant engineer, Jim Maile, statutory supervisors, removed and discarded pronion flyers spread out on the lunchroom tables and, to some degree, on the floor. On other occasions, following management meetings employees concerning the subject of organization, company representatives similarly treated antiunion literature distributed at the meetings and left behind by the employees. In both cases, Casteel and Maile testified, their concern was obedience to the housekeeping policy and not the content of the flyers.

In support of the General Counsel's claim that the handbook rules were disparately enforced, evidence was proffered at trial showing instances in which lunch trash and nonorganizational reading materials were left in the lunchroom, and were not removed. Thus, Austin testified that, on a typical day, one or two magazines could be found in that room and, occasionally, one or two copies of a flyer left undisturbed on a table. Other witnesses testified that, despite the occasional appearance of lunch debris, and, or, magazines or a newspaper, the lunchroom and, particularly, the tabletops, were kept clean and uncluttered. The period of the union campaign apparently presented a different situation than theretofore encountered as, following breaks, as many as five leaflets were left, per table, as well as those that remained on the counters, microwaves, refrigerator and the floor. Casteel testified that the failure of employees to remove leaflets, following breaks, pursuant to the housekeeping policy, gave rise to complaints by other employees concerning the frequent disarray in the lunch and locker rooms, contrary to their normal appearance.

With regard to the complaint allegations of unlawful interrogation, employee Marshall Wilkinson testified that, in December 1997, he entered the lunchroom to buy a coke and encountered First Line Supervisors Roger Lowe and Mark McGowan. According to Wilkinson, Lowe told him that other supervisors "were talking and wondering" about what he, Wilkinson, thought of the Union. Wilkinson did not respond. Lowe, in his testimony, denied that he ever questioned Wilkinson about the Union, or about how the employee felt about the Union. For the reasons noted at footnote 1, I credit Lowe, rather than Wilkinson, and find that the alleged conversation did not, in fact, occur. The General Counsel also offered the testimony of employee Mark Hayes who, during the campaign, served on the in-plant committee, solicited employees, at work, to sign union authorization cards, distributed pronion literature and talked to employees in favor of the Union. Hayes testified that he made known to his immediate supervisor, Jim Jones, his union senti-

¹ The fact-findings contained herein are based upon a composite of the documentary and testimonial evidence introduced at trial. While, generally, the record is free of significant testimonial conflict, I have, infra, where necessary to do so in order to resolve material questions created by differences in the testimony, set forth credibility resolutions. In general, I found Respondent's supervisor, Roger Lowe, an honest and forthright witness and I have relied upon his testimony. On the other hand, I have viewed with some suspicion disputed portions of the testimony of Charging Party Rand, and that of fellow employee Marshall Wilkinson, in view of their initial claims, which they recanted when confronted with contrary documentary evidence, that they worked together as partners, on the same press, on January 12, 1998, immediately preceding the incident which led to Rand's discharge.

ments. According to Hayes, in January or February 1998, in the course of conversation, Jones asked Hayes if he had heard anything about another union drive starting up, and Hayes said, no. Jones, in his testimony, denied that he ever questioned Hayes about unionization. Jones credibly testified that it was Hayes who frequently attempted to engage him in discourse about the Union and who made clear to the supervisor that he, Hayes, was in favor of the Union.

Douglas Rand was hired by Respondent on May 17, 1993. In October 1994, he became a press operator, a position he occupied until his termination on January 15, 1998. During the organizing drive, Rand signed an authorization card and, as noted, was one of 10 members of the in-plant committee. For the duration of the campaign, he wore a "Vote Yes" button on his hat. In late June, his friend and coworker, Mark McGowan, then in training to be a supervisor and who was, later, to become Rand's immediate boss, looked at Rand's hat, chuckled, and referred to Rand as "one of the gullible ones." In November, employee Wilkinson testified, he, Wilkinson, was told by Supervisor Lowe that he "needed to try and stay away from Doug . . . eventually he's gonna go down and I'd hate for you to go down with him."

The press operators, running their machines, make refractory bricks from mixed material, referred to in the plant as "dirt." Operators are paid an hourly rate, plus a shift differential and, also, a bonus rate based on productively, that is, the number of bricks made per hour as calculated at the end of the month. If, in the course of their shifts, operators run out of dirt, creating downtime for their machines, this, through no fault of their own, will negatively impact on their bonus earnings. Rand, in the last 6 months of his employment, was one of 6 or 6 operators on the second of three shifts, working, variously, 1-person and 2-person machines. When he worked a 2-person job, he was generally paired with Wilkinson. Rand, consistently, was one of the top bonus rate earners. Indeed, his productivity often earned him a bonus rate almost equal to his hourly rate of pay. On September 8, 1997, 2 months after the election, he received his last employee evaluation, and was rated "exceeds requirements" in all areas evaluated.

In December 1997, while Rand temporarily was working on the third shift under Supervisor Marty Smith, his press ran out of material, or dirt, leaving him with nothing to produce. Rand testified that he "mouthed off" to Smith about it, in the presence of Wilkinson. Later in the day, Smith called Rand aside and told him that he, Smith, did not appreciate Rand's behavior. No discipline ensued. In early January 1998, during the course of the shift, Rand had a conversation with a second shift supervisor, Mark McGowan, and temporary employee Jimmy White. Rand called McGowan "a dumb asshole," and turned to White and told him that "after you get your 90 days in, you can call him whatever you want." When White left the area, McGowan expressed to Rand his displeasure at what Rand had said, "especially in front of a new employee." Again, no discipline ensued.

On January 12, 1998, Rand operated press number 3, under the supervision of McGowan. He ran out of dirt on several occasions and, as a result, he did not achieve his normal production for the day. For the last 30 to 45 minutes of his shift, he had no dirt to work with at all. At the end of the shift, he and other second-shift employees and supervisors went to the locker room, and many of them showered. At that time, employee Mark Hayes testified, he, Hayes, Rand, and other em-

ployees talked about the fact that Rand kept running out of dirt and that there was no reason for it, a matter of concern to all of them. As Rand got out of the shower, an announcement was made over the public address system that dirt was then available for press number 3. Then, in the presence of some 10 employees, as well as Supervisor Lowe, Rand angrily approached McGowan and said, "You stupid mother fucker . . . the third shift gets material from the control room, you stupid mother fucker." Hayes joined in, asking McGowan if it was not his responsibility as shift supervisor to see to it that the operators had enough dirt. McGowan told Hayes that the matter was none of his concern and then, visibly embarrassed, the supervisor walked out of the area.

McGowan reported the forgoing incident to Production Superintendent Troy Frisbie who, in turn, reported it to Assistant Plant Manager Al Hendricks and Human Resources/Safety Coordinator Casteel. On January 13, they met with McGowan and, later, Rand, to ascertain what had occurred. When Rand, who claimed the matter was a joke, admitted to the incident, as described by McGowan, Frisbie told him that he was suspended "with an eye toward termination," pending further investigation. Thereafter, upon such investigation, Casteel learned of the then recent prior incidents involving supervisors Smith and McGowan. On January 16, Casteel and Hendricks discharged Rand, after consultation with the corporate office, for violating company rules by use of "lewd or vulgar language" toward a supervisor and insubordination.

There is literally a ton of record evidence in support of the proposition that use of swear words, including the one used by Rand on January 12, is commonplace in the shop, by and between employees and supervisors, to "color conversation." However, the witnesses who so testified were able, when asked to do so, readily to distinguish such talk from angry use of those words, directed at someone in particular, muchless a supervisor, in attack fashion. The record contains evidence of only one prior comparable incident, in December 1996, when employee Fred Peabody, upset about his evaluation, told supervisors Jones and Lowe that "they were assholes and people basically had to kiss their asses to get a good evaluation there." Hendricks and Casteel, after learning of the verbal assault, gave Peabody a written warning and told him that they could have fired him for that conduct. At trial, Casteel distinguished the Rand and Peabody incidents, accounting for the lesser discipline meted out to Peabody, based on the first-time nature of the Peabody offense and the fact that it occurred outside the presence of other employees. Hendricks testified that, although Respondent maintains a progressive disciplinary system, it had previously discharged employees David Parker and John Fox for first offense serious safety violations.

C. Conclusions

As shown in the Statement of Facts, throughout the organizing campaign, and until April 22, 1998, the Company maintained rules, enforced or not, disseminated to all employees, prohibiting, without limitation, protected solicitations and distributions absent prior approval of management. Such overly broad rules are violative of Section 8(a)(1) of the Act. However, with regard to its confiscation and removal of union literature from the employee lunchroom, during working time, in the June 23, to June 26, 1997, period, the evidence shows that Respondent acted to enforce its housekeeping rules, and did so in a nondiscriminatory manner. Thus, Company officials had

expressly informed inquiring employees, orally, that they were free to distribute prounion flyers in the lunchroom during breaks, and the Company did not interfere when they did so. To the extent that Respondent, nonetheless, confiscated and removed flyers left behind following break periods, the evidence shows that it acted with equal zeal in so collecting anti-union literature. The record reveals a longtime and consistent emphasis by the Company on neatness and cleanliness, in work and nonwork areas, which, at least to some degree, came under assault during the campaign. That the evidence also shows that there were occasions when some lunch trash, a magazine or two, or even a newspaper were not immediately removed from the lunchroom, following a break, is not indicative of a discriminatory purpose by NARCO in picking up leaflets, after a break, which were scattered five to a table, and on the counters, microwaves, refrigerator, and floor, and which were the subject of employee complaints due to the disarray. In all the circumstances, I find the evidence insufficient to show that, in gathering up the literature, on a few occasions between June 23, and June 26, Respondent violated the Act.

As further shown in the Statement of Facts, in light of my credibility determinations, I have found that Supervisor Lowe did not question employee Wilkinson, late in 1997, concerning his feelings about the Union. Thus, this allegation of the Complainant must be dismissed. As to the General Counsel's contention that Respondent, early in 1998, engaged in an unlawful interrogation when Supervisor Jones allegedly questioned employee Hayes about whether or not another union drive might start up, I find no violation of the Act in that regard, even assuming that the matter occurred as described by Hayes. The undisputed record evidence reveals that Hayes was an unabashed union activist who, frequently, made known his union sentiments to Jones, his immediate supervisor in charge of production for the shift. Prior to the incident in question, Hayes, repeatedly, had attempted to engage Jones in talk about the union. The conversation at issue, if it occurred at all, was casual and offhand, and took place on the work floor between an employee and a low level supervisor, without threat or promises. Under *Rossmore House*² such questioning does not violate the Act as, in all the circumstances, it does not tend reasonably to restrain, coerce or interfere with statutory rights.

With regard to the Rand discharge, I conclude that when he, and Hayes, complained to Supervisor McGowan about the lack of "dirt" for Rand's press on the just concluded January 12, second shift (a matter discussed amongst the shift employees and of immediate concern to all of them), they were engaged in concerted activity, ordinarily protected under Section 7 of the Act. But, by the manner in which Rand proceeded, a profane, vulgar attack directed at his supervisor, his conduct lost the protection of the Act it otherwise would have enjoyed. Federal labor law simply does not provide a shield against the consequences of such insubordinate behavior.³

Some 6 months prior to his discharge, Rand had supported the Union's organizational drive, and Respondent knew it. During the course of the campaign, the Company made clear to the employees that it opposed unionization. Nonetheless, any number of factors present in this case convince me that Respondent would have suspended Rand on January 13, and discharged him on January 15, even absent his union activities.

Thus, the record contains no evidence that Respondent, long after the campaign had concluded, harbored resentment toward employees who had favored the Union. Nor is there evidence that Respondent, at any time, opposed organization by unlawful means. The Rand discharge occurred long after union activities at the plant had ceased and, in any event, Rand's actions in support of the Union, even during the campaign, did not distinguish him from other union supporters, at least some of whom were far more active. Few employers indeed would have tolerated Rand's outburst of January 12, 1998. Nor, in disciplining him, did Respondent act in a manner inconsistent with past practice.

In light of the above, I conclude that Rand's suspension and discharge were not violative of the statute. Accordingly, both the 8(a)(1) and 8(a)(3) allegations regarding same must be dismissed.

IV. THE EFFECTS OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section 1, above, have a close, intimate and substantial relation to trade, traffic and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in certain unfair labor practice conduct in violation of Section 8(a)(1) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

CONCLUSIONS OF LAW

1. North American Refractories Co. is an employer engaged in commerce, and in operations affecting commerce, within the meaning of Section 2(2), (6), and (7) of the Act.

2. United Steelworkers of America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By maintaining overly broad no-solicitation and no-distribution rules restricting employee conduct in these regards, Respondent has engaged in unfair labor practice conduct within the meaning of Section 8(a)(1) of the Act.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

5. Respondent has not otherwise violated the Act, as alleged in the Complaint.

Upon the foregoing findings of fact, and conclusions of law, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended⁴

ORDER

Respondent, North American Refractories Co., White Cloud, Michigan, its officers, agents, successors and assigns shall

1. Cease and desist from

(a) Maintaining overly broad rules restricting employee solicitations and distributions.

⁴ 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.

² 269 NLRB 1176 (1984), enfd. 760 F.2d 1006 (9th Cir. 1985).

³ *Foodtown Supermarkets, Inc.*, 268 NLRB 630 (1984).

(b) In any like or related manner, interfering with, restraining or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

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

(a) Rescind its overly broad no-solicitation and no-distribution rules.

(b) Within 14 days after service by the Region, post at its facility in White Cloud, Michigan, copies of the attached notice marked "Appendix."⁵ Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by Respondent's authorized representative, shall be posted by Respondent and maintained for 60 consecutive days, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced or covered by any other material. In the event that Respondent has gone out of business or closed the facility involved in this proceeding, it shall duplicate and mail, at its own expense, a copy

⁵ 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."

of the notice to all current and former employees employed by Respondent at any time since January 1, 1997.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official, on a form provided by the Region, attesting to the steps that Respondent has taken to comply herewith.

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 maintain overly broad rules restricting you solicitations and distributions.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce you in the exercise of the rights guaranteed you in Section 7 of the Act.

WE WILL rescind our overly broad no-solicitation and no-distribution rules.

NORTH AMERICAN REFRACTORIES CO.