

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS,
TALBOT LODGE NO. 61, AFL-CIO
(CUMMINS, INC.)

and

Case 13-CB-192662

RICHARD TALLEY, III,
An Individual

Jacqueline Rau, Esq., for the General Counsel.
William H. Haller, Esq. (IAM, Upper Marlboro, Maryland) for the Respondent Union.
Carita Austin, Esq., (Faegre Baker Daniels, LLP, Indianapolis, Indiana)
for the Employer.

DECISION

STATEMENT OF THE CASE

Arthur J. Amchan, Administrative Law Judge. This case was tried in Memphis, Tennessee on October 2, 2017. Richard Talley, III, filed the original charge on February 7, 2017. The General Counsel issued the complaint on June 23, 2017.

The General Counsel alleges and I find that Respondent, IAM, Lodge 61, violated Section 8(b)(1)(A) by refusing and failing to process to arbitration a grievance concerning the discharge of Richard Talley because he was not a union member. The General Counsel also alleges that Respondent violated Section 8(b)(1)(A) by telling Talley that it would not arbitrate his grievance because he was not a union member. On the entire record,¹ including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

¹ The exhibits initially filed by the reporting service do not include the correct G.C. Exhibit 2(b), which contains the text from Shop Steward Adkins to the Charging Party stating that the Union will not take his grievance to arbitration because he is not a union member. That exhibit was provided to me by the General Counsel with a “cc” to Respondent’s counsel.

Tr. 6, lines 18-19 should read “Bannon Mills” rather than “bound malice.”

Tr. 99, line 17 should read “evidence” rather than “repentance.”

FINDINGS OF FACT

I. JURISDICTION

5 Respondent, IAM Talbot Lodge 61, a statutory labor organization, represents all
production and maintenance employees at Cummins, Inc.'s Memphis, Tennessee plants.
Cummins manufactures and distributes diesel engines and related components. It purchases and
receives goods valued in excess of \$50,000 at its Memphis facility directly from points outside of
Tennessee. Cummins is an employer within the meaning of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

10 On September 6, 2016, 3 maintenance mechanics, Charging Party Richard Talley III,
Ronald Perry and Richard Howell, were summoned to fix a power press at the Cummins, Inc.
15 facility in Memphis. During this process, Howell was injured when part of the press moved and
broke his thumb. Cummins fired all 3 mechanics despite the fact that all had worked for the
company for a long time (Talley almost 18 years; Perry almost 38 years and Howell sufficient
service to retire), and had no active discipline on their records. Cummins fired the 3 for
allegedly violating its lock out/tag out policy.²

20 Talley immediately contacted Dameiko Adkins, the Union's shop chairman, and asked
him to file a grievance on his behalf. Adkins did so on September 7. The Union filed a
grievance on behalf of Ronald Perry as well. It is unclear whether it filed a grievance on behalf
of Howell or whether Howell asked that a grievance be filed on his behalf, Tr. 85-86.³

25 The Union and Cummins had a third step grievance meeting on October 13, 2016. Talley
and Perry attended this meeting; Howell did not. Present for the Union were Shop Chairman
Adkins and Kelvin Godwin, President and Business Representative of the IAM Woodworkers
District 2. Among those present for Cummins were the plant manager, Gary Johnson and Lacey
30 Ivy, a human relations manager.

35 During this meeting Talley contended, as he did at the instant hearing, that Cummins'
lock-out/tag out rules did not apply to the troubleshooting phase of the process before the
mechanics attempted to repair the press. He also stated that Howell was injured during the
troubleshooting process, i.e., when the 3 were trying to figure out what was preventing the
machine from working properly.

40 Godwin, on behalf of Talley and Perry, argued that Cummins had not followed its own
procedures in that a supervisor was not present. He also questioned whether the Cummins had
adequately trained the employees on lock-out, tag-out.

² Lock out/tag out is a safety precaution in which a machine is de-energized and steps are taken to prevent the machine from being energized inadvertently.

³ Perry was a union member. It is unclear whether or not Howell was a union member. The parties stipulated that Howell was a member of the Union, but Talley and Adkins testified that Howell was not a member.

On October 20, 2016, Cummins informed the Union that it was denying Talley's grievance. Shop Chairman Adkins so informed Talley immediately via a text message. Talley asked Adkins what was the next step in the process. In response, also on October 20, Adkins texted that since Talley was not a union member, the Union would not arbitrate his case, G.C. Exh. 2(b), Tr. 73. Talley heard nothing more from the Union about his case after October 20. He filed the unfair labor practice charge giving rise to this case on February 7, 2017.⁴

Respondent's defense, credibility resolutions and relevant case law

Existing Board law is that a union violates Section 8(b)(1)(A) in refusing and failing to arbitrate a bargaining unit member's grievance because the unit member is not a member of the Union, *Port Drum Company*, 170 NLRB 555 (1968). I am bound by Board law even, where as here the record establishes that the fees and expenses incurred by the arbitrator shall be borne equally by the parties and the Union must assume all expenses associated with preparation and presentation of its case, Jt. Exh. 1, p. 7 (Article 9, Section 4 of the collective bargaining agreement between the Union and Cummins). Thus the Union in this case is obligated to incur significant expenses on behalf of unit members who have not contributed a cent to the operation of the Union, *Machinists Local No. 693*, 223 NLRB 832 (1976).

The Union's defense is that Shop Steward Adkins played no role in declining to arbitrate Talley's grievance. The Union contends this decision was made by Business Representative Kelvin Godwin because the grievance was clearly non-meritorious and that the decision had nothing to do with the fact that Talley was not a union member.

The testimony of Talley and Godwin is not credible in this regard. The Union introduced an email purportedly sent by Adkins to the employer on November 1, 2016 stating that the Union will proceed to arbitration with Richard Talley's grievance. I find the Union has not established that this email was sent to the employer. There is no evidence that the employer received the email and Adkins never informed Talley that the Union had reconsidered its opinion that it would not arbitrate his grievance because he was a not a union member. Kelvin Godwin also did not communicate with Talley that it was considering going to arbitration. I conclude it never decided to arbitrate Talley's grievance.

Respondent contends that sometime in late November or early December 2016, Godwin withdrew Talley's grievance after asking the company to arbitrate. The Union claims this decision was made because it determined that Talley's grievance was clearly not meritorious. I decline to credit Godwin's testimony in this regard. First of all, there is no documentary evidence that supports it. Secondly, the record does not establish that Talley's grievance was clearly non-meritorious.⁵In this regard Ronald Perry's uncontradicted testimony established that

⁴ At some point Perry decided to retire instead of pursuing his discharge to arbitration. Howell apparently retired also, although it is not clear that a grievance was filed on his behalf.

⁵ Respondent Union objected to the General Counsel's eliciting any evidence touching upon the merits of the grievance, citing *Iron Workers Local 777 (Amamillo Steel Corp.)* 326 NLRB 375 (1998). However, I believe that case only prevents the award of backpay in a case such as this. It does not prohibit the introduction of evidence to contradict the testimony of a union official suggesting that the union had a non-discriminatory reason for failing to pursue the grievance to arbitration, i.e., that it was obviously not meritorious.

Adkins told Perry that his chances for prevailing in an arbitration were 50-50, Tr. 32. Godwin testified that there were potential problems for both the Union and Cummins if Talley's case went to arbitration. Although he testified that employers routinely terminate employees for violating lock-out/tag out rules, he also testified that a Cummins supervisor was not present at the time of Howell's accident and should have been. He also questioned whether Cummins adequately trained employees in lock-out/tag-out and testified that he understood that the controls on the press on which Howell was injured were mislabeled.

Conclusion of Law

In summary, I conclude that, as alleged, Respondent Union refused and failed to take Richard Talley's grievance to arbitration because he was not a member of the Union and by doing so violated Section 8(b)(1)(A) of the Act. It also violated Section 8(b)(1)(A) in telling Richard Talley that it would not arbitrate his grievance because he was not a union member.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. I order the Union to promptly request that Cummins, Inc. reinstate Richard Talley, III, to his former position, or if that position no longer exists to a substantially equivalent position and that Cummins make him whole for any loss of earnings and benefits. If Cummins refuses to reinstate Talley, the Union shall request that Cummins arbitrate Talley's discharge.

In the event that it is not possible for the Union to pursue Richard Talley's grievance to arbitration, and if the General Counsel shows in compliance that a timely pursued arbitration would have been successful, the Union shall make Richard Talley whole for any increase in the damages he suffered as a consequence of the Union's refusal to arbitrate his grievance, with interest.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁶

ORDER

The Respondent, International Association of Machinists, Talbot Lodge 61, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Refusing and/or failing to arbitrate a bargaining unit member's grievance because the employee is not a union member.

⁶ 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.

(b) Telling a unit member that it would not arbitrate the member’s grievance because the employee was not a union member.

5 (c) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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

10 (a) Request that Cummins, Inc. reinstate Richard Talley III and that Cummins make Talley whole for any loss of earnings and or other benefits suffered a result of his discharge. If Cummins refuses to reinstate Richard Talley, request that Cummins, Inc., arbitrate Talley’s discharge.

15 (b) In the event that it is not possible for the Union to pursue Richard Talley’s grievance to arbitration, and if the General Counsel shows in compliance that a timely pursued arbitration would have been successful, make Talley whole for any increase in damages he suffered as a consequence of the Union’s refusal to arbitrate his grievance, with interest.

20 (c) Within 14 days after service by the Region, post at its offices and at the Cummins, Inc. facility in Memphis, Tennessee, if allowed by Cummins to do so, copies of the attached notice marked “Appendix”.⁷ Copies of the notice, on forms provided by the Regional Director for Region 15, 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
 25 places where notices to unit members are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with unit members by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.
 30 In the event that, during the pendency of these proceedings, Cummins goes out of business or closes the facility involved in these proceedings, or if the Union ceases to be bargaining representative of unit employees, or if Cummins refuses to allow the posting of the notice, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current bargaining unit members and employees who were unit members at any time since October 20,
 35 2016.

Dated, Washington, D.C., November 8, 2017.



Arthur J. Amchan
 Administrative Law Judge

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⁷ 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.”

APPENDIX

NOTICE TO BARGAINING UNIT 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 Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain on your behalf with your employer
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT refuse or fail to request arbitration for your grievance if you are a bargaining unit member on the grounds that you are not a union member.

WE WILL NOT tell you that the reason we decline to arbitrate your grievance is that you are not a union member.

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

WE WILL ask Cummins, Inc. to reinstate Richard Talley, III, and to make him whole for any losses he sustained as the result of his discharge on September 6, 2016.

WE WILL ask Cummins, Inc. to arbitrate Richard Talley, III's discharge if Cummins refuses to voluntarily reinstate him and make him whole for his losses.

WE WILL in the event that it is not possible to pursue Richard Talley's grievance to arbitration, and if the General Counsel shows in compliance that a timely pursued arbitration would have been successful, make Richard Talley whole for any increase in the damages he suffered as a consequence of our refusal to arbitrate his grievance, with interest.

INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS, TALBOT LODGE NO.
61, AFL-CIO (CUMMINS, INC.
(Union)

Dated _____ By: _____
(Representative)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

The Brinkley Plaza Bldg., Suite 350, 80 Monroe Avenue, Memphis, TN 38103-2481
(901) 544-0018, Hours: 8 a.m. to 4:30 p.m

The Administrative Law Judge's decision can be found at www.nlr.gov/case/15-CB-192662 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (901) 544-0011.