Ball Plastics Division, Ball Corporation *and* Margaret Harper. Case 25-CA-11376

August 25, 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On July 21, 1980, Administrative Law Judge Thomas D. Johnston issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief,[1] and the General Counsel filed a brief in support of the Decision of the Administrative Law Judge.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rullings, findings,[2] and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.

We agree with the Administrative Law Judge's finding that Respondent violated Section 8(a)(1) of the Act by refusing employee Margaret Harper's request to have a union representative present during a series of investigatory interviews which Harper reasonably believed might result in her discipline.[3] *N.L.R.B.* v. *J. Weingarten, Inc.*, 420 U.S. 251 (1975).

With respect to the remedy for Respondent's violation of Section 8(a)(1), the Administrative Law Judge's recommended Order directs Respondent to reinstate Harper with backpay. We note that the Administrative Law Judge's Decision issued before *Kraft Foods, Inc.*, 251 NLRB 598 (1980), where the Board set forth the standards for determining the appropriate remedy for a violation of an employee's *Weingarten* rights. Applying the standards of *Kraft Foods* to the instant case, we find that reinstatement with backpay is not warranted.

In *Kraft Foods* the Board stated that the General Counsel can make a *prima facie* case for a make-whole remedy by proving that a respondent conducted an investigatory interview in violation of *Weingarten* and that the employee whose rights were violated was subsequently disciplined for the conduct which was the subject of the unlawful interview. Should the General Counsel make such a showing, the burden then shifts to the respondent to establish that its decision to discipline the employee in question was not based on information obtained at the unlawful interview. When the respondent meets this burden, a make-whole remedy will not be ordered and, instead, the traditional cease-and-desist order will be provided to remedy the 8(a)(1) violation.

In the case at bar, we find that the General Counsel established that Respondent conducted interviews with employee Harper in violation of *Weingarten* and that Harper was disciplined for the conduct which was the subject of the unlawful interviews. We therefore find that the General Counsel made the requisite *prima facie* showing of the appropriateness of a make-whole remedy. We further find, however, that Respondent has shown that its decision to discipline Harper was not based on information it obtained at the unlawful interviews. At the outset Harper told her foreman that she did not believe she should be required to do work in a certain classification to which she was assigned. In the ensuing interviews with Respondent's representatives Harper reiterated her reasons for refusing to do the assigned job while Respondent, in turn, set forth why she should carry out the assignment and, during the final interviews, explained to her the consequences of her refusal to do so. There is no indication that any information was gleaned from the interviews which Respondent did not already possess before the interviews. We therefore find that Respondednt has demonstrated that the decision to terminate Harper was not based on information obtained at the unlawful interviews and that Harper was discharged, as alleged by Respondent, for insubordination, i.e., for refusing to do her assigned job. Accordingly, our traditional cease-and-desist remedy for Respondent's 8(a)(1) violation is appropriate.

[1] Respondent has requested oral argument. This request is hereby denied as the record, the exceptions, and the briefs adequately present the issues and the positions of the parties.

[2] We note that at one point in his Decision the Administrative Law Judge identified Manufacturing Manager Skeath as Respondent's personnel director.

[3] In so doing we find no merit in Respondent's contention that *Weingarten* is inapplicable because the meetings it conducted with Harper were not investigatory interviews, but merely attempts to enforce an order to return to work and to make Harper understand the consequences of her actions. After Harper's initial complaint about her assignment to a different job classification, Respondent conducted four meetings involving different levels of management. At these meetings Respondent sought information as to the reasons for Harper's refusal to work in the assigned classification, and it set forth its view of the collective-bargaining agreement concerning job classifications. Further, Respondent conceded that its practice regarding terminations of employment required the involvement of both superintendent level management and personnel. Thus, the purpose of the meetings was not confined to attempting to get Harper to work in the assigned classification and to understand the consequences of her actions. Rather, the meetings also had the objectives of seeking information from Harper regarding the reasons for her refusal to do the assigned work, and of laying the procedural foundation for her termination. In these circumstances, we agree with the Administrative Law Judge's finding that the meetings were investigatory interviews where the *Weingarten* right to requested union representation applies.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Ball Plastics Division, Ball Corporation, Evansville, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Delete paragraphs 2(b) and (c) and reletter the subsequent paragraphs accordingly.

2. Substitute the attached notice for that of the Administrative Law Judge.

IT IS FURTHER ORDERED that the complaint in this case be, and it hereby is, dismissed insofar as it alleges violations of the Act not herein found.

MEMBER JENKINS, dissenting in part:

For the reasons fully explicated in my dissenting opinion in *Kraft Foods, Inc.*,[4] I would provide a "make whole" remedy for employees who are denied their *Weingarten* rights.

[4] 251 NLRB 598 (1980).

APPENDIX

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

WE WILL NOT maintain any rule or regulation prohibiting our employees from soliciting on behalf of any labor organization on our premises during nonworking time, or prohibiting the distribution of union literature in nonworking areas during employees' nonworking time.

WE WILL NOT require any employee to take part in an interview or meeting where the employee has reasonable grounds to believe that the matters to be discussed may result in his or her being the subject of disciplinary action and where we have refused to permit him or her to be represented at such interview or meeting by a labor organization.

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

WE WILL rescind our no-solicitation and no-distribution rule which was found to be unlawful.

BALL PLASTICS DIVISION, BALL CORPORATION

DECISION

STATEMENT OF THE CASE

THOMAS D. JOHNSTON, Administrative Law Judge: This case was heard in Evansville, Indiana, on March 25 and 26, 1980, pursuant to a charge filed on September 27, 1979,[1] by Margaret Harper, an individual, and a complaint issued on November 1.

The complaint, which was amended on January 7 and March 19, 1980, and again at the hearing, alleges that Ball Plastics Division, Ball Corporation (herein referred to as the Respondent), violated Section 8(a)(1) of the National Labor Relations Act, as amended (herein referred to as the Act), by maintaining and enforcing an unlawful no-solicitation and no-distribution rule, denying the request of Margaret Harper to be represented by the Union during an interview she had reasonable cause to believe would result in disciplinary action, conducting said interview, and discharging Harper as a result of that interview and because Harper sought to secure Respondent's compliance with the terms and conditions set forth in the collective-bargaining agreement between the Respondent and the Union.

The Respondent in its answers served on November 7, 1979, and January 10 and March 20, 1980, denies having violated the Act as alleged and asserts Harper was discharged for just cause and in response to her insubordination in violation of the Respondent's posted shop rules, particularly shop rule j. Further, the Respondent raises as an affirmative defense that the allegations relating to Harper have previously been processed through the grievance and arbitration procedure during which the case was dropped by the Union after the third step and further states as follows: "Respondent would submit that there are no allegations in the complaint that the Union has breached its duty of fair representation in handling the charging party's grievance over the same incident giving rise to the charge and the issuance of the complaint in this matter and that in the absence of such an allegation this complaint is meritless and should be dismissed as it is in direct contravention of the Act and particularly the Union's exclusivity as the section 9(a) bargaininq representative and will not effectuate the policies of the Act."[2]

The issues involved are whether the Respondent's affirmative defense has merit, whether the Respondent vio-

[1] All dates referred to are in 1979 unless otherwise stated.

[2] Prior to the hearing a motion filed by the Respondent to dismiss the complaint on the grounds quoted, *supra*, was dismissed by then Acting Chief Administrative Law Judge Arthur Leff on the basis the allegations of par. 5 of the complaint on their face pleaded conduct which if proved would constitute a violation of the Act and because from reading the complaint it could not be perceived how any question of whether the Union breached its duty of fair representation could possibly be involved.

lated Section 8(a)(1) of the Act by maintaining and enforcing an unlawful no-solicitation and no-distribution rule, and whether it discriminatorily denied Harper's request for union representation during an interview it conducted which she had reasonable cause to believe would result in disciplinary action and discharged her as a result of that interview or because she sought to secure the Respondent's compliance with the collective-bargaining agreement.

Upon the entire record[3] in this case and from my observations of the witnesses and after due consideration of their briefs filed by the General Counsel and the Respondent, I hereby make the following:[4]

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent, an Indiana corporation with an office and place of business located at Evansville, Indiana, is engaged in the business of the manufacture, sale, and distribution of various plastic and related products. During the 12 months preceding November 1, a representative period, the Respondent in the course of its operations manufactured, sold, and distributed products valued in excess of $50,000 which were shipped from its facility directly to States located outside the State of Indiana.

The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

District Union 99 of the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.[5]

III. THE UNFAIR LABOR PRACTICES

A. *Background*

The Respondent operates two plants located at Evansville, Indiana, where it is engaged in the manufacture, sale, and distribution of plastic and related products. Included among its official and supervisory personnel were former Personnel Director Bernard Wathen,[6] Personnel Director Carl Skeath,[7] General Foreman Robert Kelley, Finishing Superintendent Clyde Breeden, and Foreman William Arrick.[8]

It employs approximately 400 employees. They are represented by the Union which has a collective-bargaining agreement with the Respondent covering them. This agreement, which was their initial agreement, was effective from June 25 through July 30, 1982. It contains grievance and arbitration provisions.

Marqaret Harper, the discriminatee herein, was employed by the Respondent approximately 16-1/2 years until her discharge on July 5. She worked at the North Fulton Avenue plant and was classified as a finishing operator in labor grade 32. Although Harper stated that for about the last 8 years of her employment her job primarily had been operating a foiling machine, she acknowledged she had also performed all the jobs there, including some sonic welding.

Based on the undisputed testimony of Finishing Superintendent Breeden and Wayne Underhill, who is the Union's secretary-treasurer under the collective-bargaining agreement, although not specifically spelled out, the jobs of foiling machine operator and sonic welder are both included under the job classification of finishing operator in labor grade 32. Prior thereto the sonic welding job was a lower grade job classified as parts handler. During the union meeting held for the employees to ratify the collective-bargaining agreement, Underhill explained these new job classifications and gave out copies, to those persons present, of a document showing that the jobs of foiling machine operator and sonic welder were under the job classification of finishing operator in grade 32. Harper acknowledged attending this union meeting.

B. *The Denial of Harper's Request for Union Representation and Her Discharge*

Harper testified that on July 5 she was assigned by her supervisor, Arrick, to perform work as a sonic welder. After working on the sonic welding job a short period that morning she complained to Arrick she felt she was being treated unfairly because there were girls with less seniority than herself doing the foiling job whereas she was assigned to do sonic welding. Arrick instructed her to return to work; however, she refused. According to Harper when Arrick kept telling her to return to her job she told him she wanted to see JoAnn,[9] the union steward. Arrick denied her request and told her to go back on the job.

Foreman Arrick then got General Foreman Kelley, who also asked her to go back to work and when she again refused Kelley took her to the personnel office.

Under cross-examination Harper acknowledged she knew both jobs were under the same classification and that she could not pick her job by seniority.[10]

Both Arrick and Kelley confirmed Harper's testimony regarding the incident except that Arrick also stated that when Harper asked to see the union steward he told her there had not been union stewards designated[11] at that

[3] The unopposed motions filed by the General Counsel and the Respondent on April 30, 1980, to correct the transcript are hereby granted.

[4] Unless otherwise indicated the findings are based on the pleadings, admissions, stipulations, and undisputed evidence contained in the record which I credit.

[5] The record indicates that the name of the International Union has since been changed as a result of a merger to the United Food and Commercial Workers, AFL-CIO.

[6] Wathen last worked for the Respondent on October 4.

[7] On July 5 Skeath held the position of manufacturing manager.

[8] These five individuals were supervisors under the Act.

[9] The JoAnn who Harper referred to was Joan Powers. Although Powers had previously been appointed as a union steward, her position, according to Union Secretary-Treasurer Underhill, did not become official until the Respondent was notified in writing. Former Personnel Director Wathen denied such written notification dated July 3 was received until July 9 when the Respondent was informed for the first time of the identity of the Union's stewards. Under art. 7, sec. 6, of the collective-bargaining agreement the Union is responsible for notifying the Respondent in writing of their names.

[10] Former Personnel Director Wathen also denied employees had the right to select their own jobs.

[11] Arrick denied having any knowledge at the time about Joan Powers being a union steward.

time and said that if they had been designated she would have to contact them on her own time and not during working hours.[12]

Upon the arrival of General Foreman Kelley and Harper at former Personnel Director Wathen's office the undisputed evidence establishes Kelley explained to Wathen about Harper's refusal to do the sonic welding job. Pursuant to Wathen's inquiry, Harper explained that she felt she should be doing the foiling job because girls with less seniority than herself were doing it and she felt her job classification should be doing it. Wathen informed her sonic welding was part of her job classification.

According to both Kelley's and Harper's undenied testimony, Harper refused Wathen's instructions to return to her job.

Harper further testified during the conversation that she also asked to see JoAnn whereupon Wathen told her she would have to get her on her own time.

Both Wathen and Kelley denied Harper requested a union steward on that occasion.[13]

Kelley further stated Harper also mentioned that she did not have to do the job and that is why they had a union.

The conversation ended with Wathen directing Kelley to take Harper to the superintendent.[14]

To the extent that the testimony of Harper conflicts with that of Wathen and Kelley, I credit Wathen and Kelley, whom I find to be more credible witnesses than Harper. Apart from my observations of the witnesses in discrediting Harper, her testimony was contradictory.

General Foreman Kelley accompanied by Harper then went to Finishing Superintendent Breeden's office. Carl Skeath, who was then manufacturing manager and Breeden's boss, was also present during part of the conversation at Breeden's request.

Harper testified Skeath asked her what the trouble was whereupon she replied she felt she should be on a foiling job which she felt was her classification and on which she had all those years of experience while the sonic welding job was a big job. When Skeath said she had to do the job, she refused and said people out there were very unhappy and that is why they needed a union.

Breeden's version was that after Kelley informed him Harper refused to do the sonic welding job he explained to her that job was upgraded into a foiler operator's classification, it was an equal job, and she was required to do that type work. When Harper refused he informed her the job refusal could lead to termination.

While Breeden denied Harper asked for a union representative[15] or that he knew she wanted one he stated she did say she wanted to see JoAnn Brown[16] at which time he told her to go back to work and contact the Union on her own time.

Breeden stated that when Skeath came over he informed him what had happened whereupon Skeath also explained the job classification to Harper and told her she must go back to her job, which Harper refused to do.

Both Kelley and Skeath corroborated Breeden's testimony. Further, Skeath, consistent with Harper's own testimony, also stated he informed her she had to go back to the job assigned or she would in effect be terminating herself. When Harper replied she would not terminate herself and he would have to do it, he informed her he stood corrected and said he would have to terminate her. Skeath further acknowledged Harper mentioned something about their having a union there to protect them.

While Skeath denied that Harper requested a union representative he said Breeden had mentioned to him about Harper asking for JoAnn Brown and his telling her to see the Union on her own time. Under cross-examination upon being asked whether he personally made any connection back then between JoAnn Brown and union representation, Skeath's response was, "Probably so, but there was nothing I could do about it. There were no stewards."

The conversation ended with Skeath directing Harper to go to former Personnel Director Wathen's office.

I credit the testimony of Breeden, Skeath, and Kelley rather than Harper for reasons previously given.

Upon her arrival at Wathen's office Skeath instructed her to wait outside while Skeath went inside, explained to Wathen what had happened, and had the following termination notice, dated July 5, typed up:

> Margaret Harper, Department 40, was assigned a sonic weld job as Finishing Operator on July 5, 1979. Margaret questioned her foreman as to why she was assigned to this job. Her classification calls for this job and was assigned accordingly. She refused to continue work after being on the job for approximately thirty (30) minutes.
>
> She was informed that she either do the job or she would be terminated.

Harper was then called into Wathen's office where Wathen, Skeath, and Kelley were present. Harper was then told to do the job assigned or she would be terminated. Harper testified she said she wanted to see JoAnn Powers, who was a union steward and could help her out, because she needed help and realized it. However, Wathen said she would have to have a union steward on her own time. Harper was then asked to read and sign the termination notice which she refused to sign.

Harper was told to turn in her belongings and informed she was terminated.

[12] Art. 7 of the collective-bargaining agreement, which deals with the industrial relations committee and union stewards, provides in sec. 4, in pertinent part, as follows: "Whenever possible, meetings for any purpose shall be scheduled outside the employees' workinq hours."

[13] At the hearing Wathen stated it was his understanding on July 5 that employees were not permitted to consult with union representatives on company time and it was the practice for employees to contact union stewards on their own time.

[14] Wathen explained at the hearing that he sent Harper to see the superintendent and production manager so they could find out why Harper thought she had a right to do one job as opposed to another job.

[15] Harper admitted that she did not ask for a union steward on this occasion.

[16] Harper explained at the hearing that on July 5 she had mistakenly mentioned the name of another employee, JoAnn Brown, who was not a union steward, rather than JoAnn Powers, but had immediately corrected her error.

While Skeath testified Harper appeared to read the termination notice and informed them pursuant to his inquiry she agreed with what it stated Harper denied either reading or agreeing with it although she acknowledged looking at it.

Wathen, Skeath, and Kelley all credibly denied Harper requested a union steward on that occasion or that she was told to get a union steward on her own time.

According to Wathen and Skeath, they along with Kelley made the decision to discharge Harper and the reason she was discharged of which she was informed was for her insubordination in refusing to go back to her job. This violated the Respondent's shop rule j.[17]

Personnel Director Skeath explained at the hearing there were several reasons why the Respondent utilized so many management personnel on July 5 to explain to Harper about her doing the job or being terminated. These reasons were that the Respondent's practice of terminating an employee requires both superintendent level management and personnel, the newness of working under the collective-bargaining agreement, and because of past problems they had discussed with Harper whereupon they wanted to make sure she understand what was happening and why.

The latter reason involved an incident which occurred in 1976[18] when Harper admittedly walked off the job. According to former Personnel Director Wathen the reason given by Harper on that occasion was because she felt younger employees were getting jobs she should have had. Harper at that time was returned to work on the condition she receive medical help, which she did. Former Personnel Director Wathen's undisputed testimony also establishes he also informed Harper upon her return to work in 1976 that if it happened again she would be terminated.

Harper filed a grievance following her discharge. Initially the alleged basis for the grievance was a violation of her seniority rights. However, the Union subsequently asserted as the basis of the discharge the fact that the Respondent had denied Harper the right to have union consultation prior to her discharge. The grievance, which was denied by the Respondent, was processed through the third step of the grievance procedure at which time, the Union's Secretary-Treasurer Underhill testified, the Union's executive board decided not to take it to arbitration which was the next step.

C. *The Unlawful No-Solicitation and No-Distribution Rule*

The Respondent maintains a list of shop rules which are posted and copies given to its employees. Included among the rules, which were in effect on July 5, is the following rule: "E. Unauthorized solicitation and unauthorized distribution of written materials."

Although former Personnel Director Wathen explained what the rule meant and it had always been the Respondent's policy that employees could not solicit on company time but could do so on their lunchtime and breaks, it was not established the employees were ever so advised.

D. *Analysis and Conclusions*

The General Counsel contends that the Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing an unlawful no-solicitation and no-distribution rule, denying Harper's request for union representation during an interview it conducted which she had reasonable cause to believe would result in disciplinary action, and discharging Harper as a result of said interview and also because Harper sought to secure the Respondent's compliance with the collective-bargaining agreement.

The Respondent denies having violated the Act, asserts Harper was discharged for cause, and raises an affirmative defense in its answer.

Section 8(a)(1) of the Act prohihits an employer from interfering with, restraining, and coercing its employees in the exercise of the rights guraranteed them in Section 7 of the Act.

The initial issue to be resolved is whether the affirmative defense has merit.

The Respondent argues as its affirmative defense that, since the Union is the exclusive representative of Harper and decided, without any showing it violated its duty to fairly represent Harper, not to take Harper's grievance to arbitration or file an unfair labor practice charge over the incident, the "consideration of the merits of this case would be in direct contravention of and would not effectuate Section 9(a) and the policies underlying the NLRA."

A pretrial motion filed by the Respondent to dismiss the cmmplaint on this same grounds was denied prior to the hearing. Further, under the Act an employee has the statutory right to file an unfair labor practice charge on his own behalf and to have union representation at a *Weingarten* type interview, discussed *infra*. The fact that a union represents the employee and elects for reasons of its own not to so act for the employee does not, as here, deprive the employee and in this case, Harper, of such statutory rights under the Act. Therefore, the affirmative defense has no merit and is hereby denied.

Insofar as the no-solicitation and no-distribution rule is concerned, rules which prohibit employees from soliciting for a union on nonworking time and from distributing union literature when they are on their nonworking time and also in nonworking areas of the employer's premises are presumptively invalid and violate Section 8(a)(1) of the Act. Such presumption can be rebutted by evidence, absent here, of special circumstances necessary to maintain production or discipline. *The Times Publishing Company*, 240 NLRB 1158 (1979); *Minneapolis-Honeywell Regulator Company*, 139 NLRB 849 (1962); *Stoddard-Quirk Manufacturing Co.*, 138 NLRB 615 (1962); and *Walton Manufacturing Company*, 126 NLRB 697 (1960), enfd. 289 F.2d 177 (5th Cir. 1961).

Here the rule in issue, which was admittedly maintained in effect as part of the Respondent's shop rules, prohibited the unauthorized solicitation and distribution of written materials. Not only was authorization required which infringed upon the lawful rights of employees to

[17] This rule, in pertinent part, prohibits disobedience to proper authority.

[18] Personnel Director Skeath denied that this incident was a reason for her termination.

solicit for the Union and to distribute union literature but the rule itself did not distinguish between working and nonworking time or working and nonworking areas of the Respondent's premises and is therefore overly broad.

Under the applicable principles of law expressed I find the Respondent by maintaining the no-solicitation and no-distribution rule violated Section 8(a)(1) of the Act.[19]

The remaining issues to be resolved are whether the Respondent unlawfully discriminated against Harper as alleged.

Under Section 7 of the Act[20] an employee has the right to have union representation at an investigatory interview which the employee reasonably believes might result in disciplinary action. *N.L.R.B.* v. *J. Weingarten, Inc.*, 420 U.S. 251 (1975). The protection accorded employees covers both "investigatory" and "disciplinary" interviews except for these interviews, not applicable here, conducted for the exclusive purpose of notifying an employee of previously determined disciplinary action. *Baton Rouge Water Works Company*, 246 NLRB 995 (1979). The test for determining whether an employee reasonably believes the interview might result in disciplinary action is measured by objective standards under all the circumstances of the case rather than by an employee's subjective motivations. *Weingarten, supra* at 257, fn. 5. Further, to invoke this protection the employee must request union representation.

The findings, *supra*, establish that on July 5 Harper refused to do her assigned job of sonic welding and complained to her foreman, Arrick, the reason was because she felt she was being treated unfairly because girls with less seniority than herself were doing the foiling job she normally did. Notwithstanding, Arrick repeatedly instructed her to return to her assigned job and she refused. Foreman Arrick admitted on that occasion that Harper requested to see the union steward which request he denied informing her that union stewards had not been designated and even if they had she would have to contact them on her own time and not during working hours.

Neither reason given by Foreman Arrick for refusing Harper's request was legally valid. Under *Weingarten, supra*, employees are entitled to union representation at the interview itself rather than afterwards and on their own time. Although the Respondent had not yet received the Union's letter designating its selection of union stewards at the time Harper made her request, the Union itself, which had only recently been selected as the bargaining representative, was Harper's recognized representative and could have acted on her behalf.

Following this incident, the evidence, *supra*, establishes a succession of meetings were held with various management personnel that same day, including General Foreman Kelley, former Personnel Director Wathen, Finishing Superintendent Breeden, and Manufacturing Manager Skeath, during which Harper's reason for her refusal to do the job was discussed and she was given the choice of returning to her assigned job or being discharged. Upon her continued refusal to return to her job she was then discharged. While the credited evidence establishes, contrary to Harper's testimony, that during these subsequent meetings she did not specifically repeat her request for union representation, the testimony of Skeath, who participated in the decision to discharge Harper, indicates that he was aware she had requested union representation and Finishing Superintendent Breeden himself acknowledged he told her to return to work and contact the union on her own time when she asked to see a JoAnn Brown.

Not only does such evidence show the Respondent, particularly Skeath, was aware Harper wanted union representation at these subsequent meetings, but by her having requested and being denied union representation at the initial meeting with Foreman Arrick it was not necessary that she renew her request in order to avail herself of her legal right to union representation. See *Roadway Express, Inc.*, 246 NLRB 1127 (1979); and *Chrysler Corporation, Hamtrack Assembly Plant*, 241 NLRB 1050 (1979).

Having previously walked off of her job in 1976 and being warned that if it happened again she would be terminated and by refusing Foreman Arrick's repeated instructions on July 5 to return to her assigned job which she refused to do, Harper had grounds for reasonably believing at the time she requested union representation that such interview with Arrick might result in disciplinary action being taken against her. Not only did these meetings in which she continued her refusal to perform her job lead to her discharge but Personnel Director Skeath also acknowledged one of the reasons the various management personnel talked to Harper that day was because of its practice in terminating an employee which required both superintendent level management and personnel.

For those reasons discussed I am persuaded and find that the Respondent violated Section 8(a)(1) of the Act by denying Harper's request for union representation at interviews she reasonably believed might result in disciplinary action against her and by requiring her to appear unassisted during such interviews. Further, I find that since Harper's discharge on July 5 resulted from such unlawful interviews by the Respondent her discharge was also unlawful even though it might otherwise have been for cause. See *Anchortank, Inc.*, 239 NLRB 430 (1978), enfd. in part 615 F.2d 1153 (5th Cir. 1980).

To the extent the General Counsel further asserts Harper was also discharged because she sought to secure the Respondent's compliance with the collective-bargaining agreement, I find there was no evidence to support such position. Not only were the jobs of sonic welding and foiling machine operator both included under the same job classification of finishing operator, but Harper attended a prior union meeting at which employees were informed of this and she also acknowledged she knew both jobs were so classified and that she could not pick her job by seniority. Thus, there was no contractual claim arising under the collective-bargaining agreement

[19] There was no evidence that this rule was also enforced and that portion of the amended complaint insofar as it alleges the unlawful enforcement of the rule only is dismissed.

[20] Sec. 7 of the Act guarantees to employees the right to "engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection."

involved here which would give rise to a protected concerted activity and no evidence otherwise to indicate that Harper in refusing to do her job had acted in concert with any other employees. Rather, the evidence reveals she acted solely on her own behalf and for her own sake.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent set forth in section III, above, found to constitute unfair labor practices, occurring in connection with the operations of the Respondent described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

CONCLUSIONS OF LAW

1. Ball Plastics Division, Ball Corporation, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. District Union 99 of the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By maintaining an unlawful no-solicitation and no-distribution rule, the Respondent has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed them in Section 7 of the Act and has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act.

4. By requiring that Margaret Harper participate in employer interviews or meetings without union representation, which had been requested by Harper and had been refused by the Respondent, when Harper had reasonable grounds to believe that the matters to be discussed might result in her being the subject of disciplinary action, and actually imposing such disciplinary action on Harper by discharging her on July 5, 1979, the Respondent has violated Section 8(a)(1) of the Act.

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

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices within the meaning of Section 8(a)(1) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action to effectuate the policies of the Act.

Accordingly, the Respondent shall be ordered to rescind its no-solicitation and no-distribution rule herein found to be unlawful and to offer immediate and full reinstatement to Margaret Harper to her former job or, if that job no longer exists, to a substantially equivalent job, without prejudice to her seniority and other rights and privileges, and to make her whole for any loss of earnings and compensation she may have suffered as a result of the discrimination against her by discharging her on July 5, 1979, until the date of such full and proper reinstatement. Backpay and interest as herein provided for shall be computed in the manner prescribed by *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).[21]

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

ORDER[22]

The Respondent, Ball Plastics Division, Ball Corporation, Evansville, Indiana, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Maintaining any rule or regulation prohibiting its employees from soliciting on behalf of any labor organization on the Respondent's premises during nonworking time, or prohibiting the distribution of union literature in nonworking areas during employees' nonworking time.

(b) Requiring that employees participate in employee interviews or meetings without union representation, when such representation has been refused by the Respondent, when the employees have reasonable grounds to believe that the matters to be discussed may result in their being the subject of disciplinary action, and actually imposing such disciplinary action on employees.

(c) 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 no-solicitation and no-distribution rule herein found to be unlawful.

(b) Offer immediate and full reinstatement to Margaret Harper to her former job or, if that job no longer exists, to a substantially equivalent job, without prejudice to her seniority and other rights and privileges, and make her whole for any loss of earnings or other compensation she may have suffered as a result of the discrimination practiced against her herein found in the manner set forth in that section of this Decision entitled "The Remedy."

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze and determine the amount of backpay due under the terms of this Order.

(d) Post at its Evansville, Indiana, facilities copies of the attached notice marked "Appendix."[23] Copies of said notice, on forms furnished by the Regional Director for Region 25, after being duly signed by the Respondent's authorized representative, shall be posted by the Re-

[21] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[22] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order and all objections thereto shall be deemed waived for all purposes.

[23] In the event that 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."

spondent immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 25, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the amended complaint be, and it hereby is, dismissed insofar as it alleges unfair labor practices not specifically found herein.