

United States Postal Service and Claudette Anderson. Case 13-CA-31343-P

June 30, 1994

DECISION AND ORDER

BY MEMBERS STEPHENS, DEVANEY, AND COHEN

On December 10, 1993, Administrative Law Judge Walter H. Maloney issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed cross-exceptions and a brief responding to the Respondent's exceptions.

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

The National Labor Relations 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 and set forth in full below.

We agree with the judge's finding that the Respondent violated Section 8(a)(1) by denying Charging Party Claudette Anderson's requests for union representation during a November 3, 1992 investigatory interview which led to disciplinary action. We find merit, however, in the General Counsel's limited cross-exception to the judge's use of "disciplinary interview" language instead of "investigatory interview" language in the recommended Order and notice. See *NLRB v. J. Weingarten*, 420 U.S. 251 (1975).

We also find merit in the Respondent's exception to the judge's recommended remedy expunging Anderson's disciplinary warning and to his recommended broad cease-and-desist order. The General Counsel agrees with the Respondent in this respect. The judge found the broad order appropriate because the Respondent, United States Postal Service, had been found guilty of similar violations at other postal facilities in 1982 and 1988. See *Hickmott Foods*, 242 NLRB 1357 (1979). He also ordered the Respondent to expunge references to the discipline imposed here from Anderson's personnel records.

We conclude that this remedial relief is improper. There is no contention or finding that Anderson's discipline was itself an unfair labor practice or that the discipline was not for "cause." The violations consisted only of the denial of representation during the preceding interviews. Anderson is not entitled to an

¹The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

expunction remedy with respect to the discipline imposed because there was no demonstrated nexus between the wrongful denial of representation and the subsequent discipline. *Taracorp Inc.*, 273 NLRB 221, 223 (1984).

In addition, a broad cease-and-desist order is inappropriate under the *Hickmott Foods* standard because the Respondent has not shown a proclivity to violate *Weingarten* rights, or a general disregard for employees' fundamental rights. There is no evidence of a prior *Weingarten* violation at this facility. The previous violations that the judge referred to in his decision were committed by other individuals in "Postal Service facilities elsewhere." Further, they occurred 4 and 10 years ago and are too remote to justify a broad cease-and-desist order. *Overnite Transportation Co.*, 306 NLRB 237 fn. 4 (1992).²

We will modify the judge's recommended Order and notice accordingly.

ORDER

The National Labor Relations Board orders that the Respondent, United States Postal Service, Lake Zurich, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Depriving any employee of his right to union representation at an investigatory interview which the employee reasonably believes may result in disciplinary action.

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

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

(a) Post at its Lake Zurich, Illinois office copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees 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.

²Although he concurs with the narrow order, Member Cohen does not rely on the fact that the other violations were at other locations. All of them occurred in the same bargaining unit. Rather, he relies on the fact that all violations are of the same character and thus the broad language "in any other manner" is not warranted. In addition, he notes that the General Counsel does not seek a broad order.

³If 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."

(b) 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 deprive any employee of his or her right to union representation at an investigatory interview which the employee reasonably believes may result in disciplinary action.

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

UNITED STATES POSTAL SERVICE

Denise R. Jackson, Esq., for the General Counsel.
Andrew C. Friedman, Esq., of Chicago, Illinois, for the Respondent.
Claudette Anderson, of Wooddale, Illinois, pro se.

DECISION

STATEMENT OF THE CASE

I. FINDINGS OF FACT

WALTER H. MALONEY, Administrative Law Judge. This case came on for hearing before me at Chicago, Illinois, on an unfair labor practice complaint, issued by the Regional Director for Region 13,¹ which alleges that the Respondent, United States Postal Service,² violated Section 8(a)(1) of the Act. More particularly, the complaint alleges that the Respondent denied to the Charging Party her rights under Section 8(a)(1) of the Act, as set forth in *NLRB v. J. Weingarten*, 420 U.S. 251 (1975), in that she was denied union representation during an investigatory interview which led to disciplinary action. While admitting that the interview was investigatory in nature and that the Charging Party did not have union representation at the interview, the Respondent

¹The principal docket entries in this case are as follows:

Charge filed by Claudette Anderson, an individual, against the United States Postal Service on November 19, 1992, and amended on February 16, 1993; complaint issued against the Respondent by the Regional Director, Region 13, on February 26, 1993; hearing held in Chicago, Illinois, on November 3, 1993; briefs filed with me by the General Counsel and the Respondent on or before November 29, 1993.

²The Respondent admits, and I find, that it is subject to the jurisdiction of the Board by virtue of the provisions of the Postal Reorganization Act, 39 U.S.C. § 101. The American Postal Workers Union, AFL-CIO is a labor organization within the meaning of Sec. (5) of the Act.

ent denies the commission of any violation of the Act, contending that she failed to request union representation on that occasion in a timely manner. Upon that contention the issue herein was joined.³

II. THE UNFAIR LABOR PRACTICES ALLEGED

The events in question in this case took place at the postal facility in Lake Zurich, Illinois, a suburb of Chicago. At this facility approximately 80 persons are employed who are covered by a national agreement concluded by the United States Postal Service with the American Postal Workers Union, AFL-CIO. Three classifications of employees covered by this agreement are employed at the Lake Zurich post office. Anderson, the Charging Party, is now and has been for 3 or 4 years the shop steward for the postal clerks at this facility.

Anderson has been a mail sorter for about 20 years. For the past 5 years, her supervisor has been Keith Bockelmann, whose title is supervisor of mails and delivery. She testified without contradiction that, during the past 5 years, she had processed about 30 grievances on behalf of postal clerks with Bockelmann.

About 10:30 a.m. on Monday, November 2, Postmaster Nancy Moore approached Anderson while the latter was working in the bulk mailroom and told her that she had a phone call. She gave Anderson a slip of paper with a telephone number on it. Moore did not know the identity of the caller but told Anderson to return the call on her break because she thought it was a personal call. The call turned out to originate from Don Wisniewski, a recently retired mail carrier, who was phoning Anderson to inquire about his eligibility for retirement benefits. Anderson had worked at one time in the section of the post office dealing with pay and retirement questions and was conversant about such matters.

Anderson used the phone in the mailroom to return the call. The line was busy so she hung up. Apparently Moore saw Anderson use the mailroom phone and instructed her to return the call on the pay phone in the lobby during her break. Anderson did so and was able to contact Wisniewski on her second call.

On the following day, Bockelmann approached Anderson in the work area and asked her to come to see him in his office. She asked Bockelmann if she needed to fill out a form to leave the area on union business.⁴ Bockelmann said that she would not need to do so because he wanted to talk to her about "other things." His reply made her feel apprehensive so she asked for union representation, stating that she "could not represent herself." She also told Bockelmann that she first had to contact the union vice president.⁵ Bockelmann told her that she did not need union representation. When they arrived in his office she again asked to have a union representative present but to no avail.

³Certain errors in the transcript have been noted and corrected.

The General Counsel's motion to correct the transcript is granted.

⁴As union steward, Anderson may leave her work area, with supervisory permission, to attend to union business but she is required to fill out a Form 7-E-20 on each occasion to record her absence.

⁵Bockelmann testified that Anderson did not ask for union representation in his office. He was never specifically asked about the request for representation which was made in the bulk mailroom before they reached his office. I credit Anderson's version of this incident.

Bockelmann proceeded to inform her that he was going to issue a warning letter concerning an incident that had happened the day before when Anderson used the bulk mailroom telephone to return a call from Wisniewski.⁶ In the next few minutes the two of them engaged in an acrimonious discussion. Anderson argued to Bockelmann that she should not receive a warning letter for using the mailroom phone. First, she noted that she did not complete the phone call in question because no one on the other end responded to it. The line was busy so she hung up. Bockelmann then asked her what had happened and she responded giving him much of the information set forth above. Nancy Moore, the postmaster, had approached her with the information that she had received a phone call, told Anderson to return it on her lunch hour, and gave her a slip of paper containing the phone number. Later, Moore asked Anderson if she had used the mailroom phone and she admitted that she had done so. She went on to argue that she did nothing wrong, that she may have made a mistake, but had only used the mailroom phone for union business. She informed Bockelmann that she had eventually reached Wisniewski on the pay phone in the lobby and that Wisniewski had asked her some questions pertaining to retirement benefits. She then asked Bockelmann to just let the matter pass. Bockelmann replied by asking her if she had committed murder and had admitted it, would he be expected to let her go? Her retort was that she did not commit murder, that she had only made a phone call and had not completed the call at that.

Bockelmann was not persuaded. He proceeded to prepare a rough draft of a disciplinary warning and forwarded it to a supervising postal authority at Carol Stream, Illinois, for approval. With minor revision, the draft was approved.⁷ On Friday, November 6, he summoned Anderson into his office and handed her the disciplinary letter. She again requested union representation but Bockelmann had been advised that

⁶On October 16, 1991, the postmaster posted a notice, entitled "Telephone Policy for Lake Zurich Post Office" on the employee bulletin board. It read:

Post Office telephones are for official USPS business.
Phone calls received for employees will be screened.
Employees will be paged immediately for an emergency phone call.

Every attempt will be made to locate and inform any employee who may not be present at the time of the phone call.

The name and number of the caller on non-emergency calls will be given to the employee. The employee may return the call during break or lunch periods.

Employees are not authorized use of the postal phones for personal calls. All calls of personal nature must be made from the pay phone located in the lobby.

Designated union representatives may request and shall be granted postal phone use for legitimate business related to the administration of the National Agreement.

⁷Either on November 4 or 5, Bockelmann again asked Anderson to come to this office. On this occasion his purpose was to hand her a disciplinary warning. She demanded union representation and refused to go without it. Bockelmann did not press the point and sought legal counsel instead. He was advised that, under such circumstances, she was not entitled to representation. By the time he was prepared to review his request that she come to the office, Anderson had left for the day. He completed the disciplinary action the following day, as noted in the text. It is not necessary to resolve any legal or factual questions arising out of his confrontation and I do not.

Anderson was not entitled to union representation at such a meeting since it was called solely for the purpose of serving her with a warning letter and she had none. Anderson came to the office, but refused to sign the letter to acknowledge receipt so Moore was called into the office to witness the service of the letter on the employee. The letter read:

This official disciplinary letter of warning is being issued to you for the following reason:
"Failure to Follow instructions."

On Monday November 2, 1992 you were given a message by Postmaster Nancy Moore. Postmaster Moore informed you that the call was personal in nature and specifically instructed you to return the telephone call in the box lobby, while on your break—if you chose to return the call. At approximately 10:27 am Postmaster Moore observed you using the bulk mail telephone.⁸

On Tuesday, November 3, 1992 during my investigation you did in fact admit to using the bulk mail telephone to return the telephone call you specifically were instructed to use in the lobby on break. Therefore, you are charged with "Failure to Follow Instructions."

A review of your record indicates:

Letter of Warning 12-18-91

"Failure to Follow Instructions"

It is hoped that this official letter of warning will serve to impress upon you the seriousness of your actions and that future discipline will not be necessary. If you are having difficulties I am not being aware of or if you need additional assistance or instructions for improving your performance, please call on me, or you may consult with your supervisors, and we will assist you where possible. However, I must warn you that future deficiencies will result in more severe disciplinary action being taken against you. Such action may include suspension, deduction in grade or pay, or removal from the Postal Service.

You have the right to file a grievance under the Grievance/Arbitration procedures set forth in Article 15 of the National Agreement within 14 days of your receipt of this letter.

Anderson did file a grievance under the Postal Service contractual grievance procedure but it was resolved adversely to her contentions.⁹

⁸Anderson testified without contradiction that Moore did not instruct her to use the pay phone until after she had placed a call on the bulk mailroom phone, reserving her initial instruction simply to the matter of returning the call during Anderson's break time. Moore was present for the hearing in this case but was not summoned to testify. I credit Anderson's version of this event although a contrary finding on this peripheral factual question would not affect my conclusion in this case.

⁹While certain information concerning the arbitration is in evidence, the arbitration proceeding and whether or not Anderson was justified in making the phone call at issue are not before me and I intimate no opinion as to the merits of that case. An employee's *Weingarten* rights are the same whether the discipline at issue is justified or wholly unwarranted.

C. Analysis and Conclusions

Nearly 20 years ago the Supreme Court held that “the action of an employee in seeking to have the assistance of his union representative at a confrontation with his employer clearly falls within the literal wording of Section 7 that ‘employees shall have the right . . . to engage in . . . concerted activities for the purpose of . . . mutual aid or protection.’” *NLRB v. J. Weingarten*, 420 U.S. 251 at 260. This application of Section 8(a)(1) of the Act has been made by the Board and courts many times since the announcement of the *Weingarten* decision. See, for example, *NLRB v. Bell Telephone Co.*, 674 F.2d 618 (7th Cir. 1982); *Postal Service*, 260 NLRB 221 (1982); *Postal Service*, 288 NLRB 864 (1988). In this case, the Respondent levels no challenge to the basic legal principle at stake nor does it contend that it is inapplicable to the interview which Bockelmann conducted with Anderson on November 2. While conceding that the interview was investigatory in nature, Respondent contends that Anderson was not denied any of her Section 7 rights when a union representative was not present because she never requested the presence of such an individual, thereby presenting a purely factual issue upon which the outcome of this case depends. I have discredited the Respondent’s testimony on this point and have credited Anderson’s testimony to the effect that she asked for union representation at least twice before the November 2 interview began; once in the bulk mailroom when she was summoned to Bockelmann’s office and again inside the office. Accordingly, the Respondent herein denied Anderson a legal right to representation at a disciplinary interview when such right was invoked in a timely manner and, in so doing, violated Section 8(a)(1) of the Act.

On the foregoing findings of fact and conclusions of law and on the entire record here considered as a whole, I make the following

CONCLUSIONS OF LAW

1. The United States Postal Service is now and at all times herein has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The American Postal Workers Union, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. By denying to an employee the right to be represented at a disciplinary interview after receiving a timely request for such representation, the Respondent violated Section 8(a)(1) of the Act. The aforesaid unfair labor practices have a close, intimate, and substantial effect on the free flow of commerce within the meaning of Section 2(2), (6), and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I will recommend that it be required to cease and desist therefrom and to take certain affirmative actions designed to effectuate the purposes and policies of the Act. Since the Respondent has been found guilty of *Weingarten* violations before, as noted above, and continues to violate the Act in this regard, I will recommend to the Board a so-called broad 8(a)(1) remedy designed to suppress any and all violations of that section of the Act. *Hickmott Foods*, 242 NLRB 1357 (1979). I will also recommend that the Respondent be required to remove from the personnel records of Anderson any and all references to this discipline and to notify her in writing that it will not be used in the future as the basis for further disciplinary action. I will also recommend that the Respondent be required to post the usual notice, informing employees of their rights and of the results in this case.

[Recommended Order omitted from publication.]