

Caterpillar, Inc. and International Union, United Automobile, Aerospace & Agricultural Implementation Workers of America. Cases 33-CA-10414 and 33-CA-10415

December 10, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING
AND FOX

On June 24, 1996, Administrative Law Judge James L. Rose issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and the Charging Party filed briefs in support of the judge's decision, and the General Counsel filed an answering brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions² and to adopt the recommended Order as modified.³

The Respondent has excepted, inter alia, to the breadth of the judge's recommended Order requiring that it cease and desist from "[i]n any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act." For the reasons set forth below, we find no merit in this exception.

¹ We find it unnecessary to rely on the judge's analysis in sec. III,B,3, pars. 4 and 5 of his decision to the extent that it suggests that an employer may place restrictions on the reinstatement of unfair labor practice strikers if it can show a legitimate and substantial business justification for the restrictions. *Bali Blinds Midwest*, 292 NLRB 243 (1988), and *General Portland Inc.*, 283 NLRB 826 (1987), discussed by the judge, are clearly distinguishable from the instant case because they involved economic strikes rather than an unfair labor practice strike. An employer cannot lawfully restrict the reinstatement of employees engaged in a lawful unfair labor practice strike who have unconditionally offered to return. *Brooks, Inc.*, 228 NLRB 1365 (1977), enfd. in relevant part 593 F.2d 936 (10th Cir. 1979). Because we agree with the judge that this was a lawful unfair labor practice strike, we find that the Respondent was not permitted to condition the return of the strikers on assurances that there would be no "recurrence of unannounced and sporadic interruptions in [the Respondent's] operations by these strikers as a result of this issue." Accordingly, we agree with the judge that the Respondent violated Sec. 8(a)(3) and (1) by refusing to accept the employees' unconditional offer to return to work.

² In sec. III,B,1, par. 4 of his decision, the judge referred to Case 33-CA-10158, et al. in which he found that the Respondent's ban of T-shirts bearing the slogan "Permanently Replace Fites" was unlawful. We note that we affirmed that finding subsequent to the issuance of the judge's decision in the instant case. See *Caterpillar, Inc.*, 321 NLRB 1178 (1996).

³ We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996). We shall also substitute a new notice that conforms with the recommended Order.

This is the fourth case in which we have addressed the Respondent's unlawful response to protected activity among its employees. As the judge noted, he previously found, and we agreed,⁴ that in 1992 the Respondent violated Section 8(a)(1) of the Act by prohibiting employees at its York, Pennsylvania facility from displaying various union slogans, including T-shirts containing the slogan "Permanently Replace Fites"; and violated Section 8(a)(3) and (1) by discharging, suspending, and disciplining employees in enforcing this rule, and by discriminatorily enforcing rules concerning solicitation. We also adopted the judge's findings that at York the Respondent violated Section 8(a)(1) by suggesting that an employee seek other employment because of his protected concerted activity and by requiring prior management approval of union insignia employees might display. In addition, we found that the Respondent violated Section 8(a)(1) by threatening employees with plant closure and discharge, discouraging employees from filing grievances, and coercively interrogating an employee about his union activity. We further found that the Respondent violated Section 8(a)(5) and (1) by unilaterally announcing stricter enforcement of work rules. *Caterpillar, Inc.*, 321 NLRB 1178 (1996).

We have also affirmed the judge's finding in *Caterpillar, Inc.*, 321 NLRB 1130 (1996), that in 1992, at its East Peoria, Illinois facility, the Respondent violated Section 8(a)(3) by discriminating against full-term strikers by denying them the right to bid on jobs posted after their unconditional offer to return to work and by giving preferential treatment in job assignments to employees who quit a strike in progress and returned to work. The Respondent also violated Section 8(a)(1) by announcing to employees who remained on strike during its entire duration that those who quit the strike and returned to work had been given preferential treatment in job assignments and tenure.

In *Caterpillar, Inc.*, 322 NLRB No. 115 (Dec. 10, 1996) (Case 33-CA-10453), we adopted the judge's finding that in 1993, at its Mossville, Illinois facility, the Respondent violated Section 8(a)(1) by restricting an employee's display of union materials on his toolbox, by interfering with an employee's right to talk to a union officer on nonworktime, and by threatening an employee with discharge for engaging in protected activity. In addition, we found that the Respondent violated Section 8(a)(1) by threatening reprisals against an employee who was wearing a union insignia and by imposing a "gag order" on Union Representative George Boze. We further found that the Respondent violated Section 8(a)(3), (4), and (1) by suspending and later discharging Boze.

In the instant case, we have affirmed the judge's finding that once again, in 1993, at its Denver, Colo-

⁴ *Caterpillar, Inc.*, supra, 321 NLRB 1178.

rado facility, the Respondent violated Section 8(a)(1) by prohibiting display of union insignia. We have also affirmed the judge's finding that the Respondent violated Section 8(a)(1) by threatening employees with indefinite suspension for exercising their lawful right to strike, and violated Section 8(a)(3) by unlawfully suspending an employee for engaging in protected activity and by refusing to accept the unconditional offer of unfair labor practice strikers to return to work.

Based on the violations in the three earlier cases, as well as the violations in the instant case, we find that during a 2-year period the Respondent has repeatedly engaged in numerous serious unfair labor practices and that a narrow cease-and-desist order would not sufficiently deter future misconduct. The Respondent's pattern of unlawful conduct convinces us that, without proper restraint, the Respondent is likely to persist in its attempts to interfere with employees' statutory rights. Accordingly, we agree with the judge that the Respondent's proclivity to violate the Act warrants the issuance of a broad remedial order under the criteria set forth in *Hickmott Foods*, 242 NLRB 1357 (1979).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Caterpillar, Inc., Denver, Colorado, 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 from the date of this Order, remove from its files any reference to the unlawful suspension of Joe Vasquez, and within 3 days thereafter notify him in writing that this has been done and that the suspension will not be used against him in any way.”

2. Add the following at the end of paragraph 2(d).

“In the event 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 October 27, 1993.”

3. Substitute the attached notice for that of the administrative law judge.

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 prohibit our employees from wearing or displaying buttons or other insignia with the message, “Happiness is waking up in the morning and finding Donald Fites’ picture on a milk carton.”

WE WILL NOT suspend or otherwise discipline our employees because they wear or display such a button.

WE WILL NOT threaten to indefinitely suspend employees for engaging in protected concerted strikes.

WE WILL NOT refuse to accept our employees’ unconditional offer to return to work from an unfair labor practice strike.

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

WE WILL make whole Joe Vasquez and each employee who engaged in the strike of October 20, 1993, for any losses they may have suffered as a result of our discrimination against them, with interest.

WE WILL, within 14 days from the date of the Board’s Order, remove from our files any reference to the unlawful suspension of Joe Vasquez, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the suspension will not be used against him in any way.

CATERPILLAR, INC.

Deborah A. Fisher, Esq., for the General Counsel.

Sandra R. Goldman, Esq., of Denver, Colorado, and *Joseph J. Torres, Esq.*, of Chicago, Illinois, for the Respondent.

Richard Rosenblatt, Esq., of Englewood, Colorado, and *Stanley Eisenstein, Esq.*, of Chicago, Illinois, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge. This matter was tried before me at Denver, Colorado, on May 22 and 23, 1995, on the General Counsel’s complaint which alleged that on October 20, 1993,¹ the Respondent suspended employee Joe Vasquez in violation of Section 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. § 151, et seq., because he refused to take off a button with the caption, “Happiness is waking up in the morning a finding Don Fites’ picture on a milk carton” and a caricature of Fites.² It is further alleged that on October 20 and 21 the Respondent refused to accept the employees’ unconditional offer to end their strike protesting the discharge of Vasquez, and thereby violated Section 8(a)(1) and (3) of the Act.

The Respondent admitted that Vasquez was told not the wear the button, and when he failed to take it off, he was suspended; however, the Respondent argues that wearing this particular button was not protected by Section 7 of the Act. Similarly, the Respondent admitted that the striking employ-

¹ All dates are in 1993, unless otherwise indicated.

² The General Counsel refers to this as the “happiness is” button, the Charging Party as the “happiness” button and the Respondent as the “milk carton” button. I shall call it the “Fites” button.

ees were not immediately reinstated, but contends that it legitimately demanded that employees give assurances they would not strike again over the issue of the Vasquez suspension.

On the record as a whole, including my observation of the witnesses, briefs, and arguments of counsel, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a Delaware corporation with its principal office at Peoria, Illinois, and facilities throughout the United States and overseas. The Respondent is engaged in the manufacture and sale of heavy construction machinery and related products. In the course and conduct of this business, the Respondent annually sells and ships directly to points outside the State of Illinois goods, products, and materials valued in excess of \$50,000. The Respondent admits, and I find, that it is an employer engaged in interstate commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATIONS INVOLVED

The Charging Party, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

This another of many cases arising out of the labor dispute which began in late 1991 when the Respondent and the Union were unable to reach agreement on a contract to replace the one expiring on October 30, 1991.

The Denver parts facility was covered under the expired contract; however, the Denver employees were not involved in the strike or lockout of 1991/1992. They did strike on June 20, 1994, along with the other unionized employees. During the course of this dispute, as with employees at the larger manufacturing facilities, Denver employees expressed their thoughts about the dispute through various insignia, particularly including buttons.

Joe Vasquez is the president and chairman of Local 1415. On the morning of October 20 he wore to work the "Fites" button described above. Kristen Nimm, the Denver facility human resources manager, saw Vasquez wearing the button and, she testified, she "told him I didn't think I was going to be able to allow him to wear it but I would have to check with corporate labor relations." She did check and told Vasquez that the button was not allowed.

Vasquez took the button off, but later decided that he had a right to wear it, and put it back on and so informed his foreman, David Borger. As a result, Borger suspended him for insubordination.

Shortly after Vasquez left the plant, 30 fellow employees left in protest of his suspension. Borger testified that he told employees who were walking out that they would be suspended indefinitely and would not be allowed to return to work until notified by the Respondent.

Vasquez was notified of the strike and returned to the plant and along with the Local's vice president, Lew Garner,

met with Nimm and other management personnel. According to Vasquez, Nimm asked the reason for the strike and he said it was because of his suspension for wearing the button and harassment of union officials. Vasquez told her they were making an unconditional offer to return to work and she stated the Respondent needed assurances that "they would not have the same problems, meaning the strike, I guess." Nothing was resolved at this meeting and Vasquez left to type a formal, unconditional offer to return to work, which he read in a telephone call to General Foreman Dick Goff, and later delivered to the plant.

About 7 a.m. the next morning Vasquez and the other employees reported to the front gate of the plant. They were met by Nimm, who presented Vasquez with a letter answering his, which stated, in material part:

[W]e do not consider your offer to return to work as unconditional since you have not suggested or accepted a resolution of the underlying dispute nor have you provided any assurance that Caterpillar will not be subjected to a recurrence of this action in connection with this matter. This was the position I explained to you in our meeting yesterday.

Therefore, unfortunately, strikers will not be reinstated until the underlying dispute is resolved or the company is otherwise satisfied that there will be not further recurrence of the unannounced and sporadic interruptions in our operations by these strikers as a result of this issue.

She also offered to submit the suspension of Vasquez to arbitration. There followed a couple of telephone discussions between Vasquez and Nimm, the upshot of which was that on October 22 the employees, including Vasquez, were allowed to return to work. He agreed not to wear the button, but would grieve his suspension, which he did. The grievance was denied and the matter is pending arbitration.

Nimm testified that in her meeting with Vasquez on October 20 "I again told them that we needed to either resolve the dispute or receive assurance that they would not go out over the same—very same issue again. And they were unwilling to give that, and I told them they would not be allowed to return."

Nimm testified that the matter was resolved with Vasquez: "That he would return from his two-day suspension on Friday, the next day; that he would have the right to grieve the suspension and arbitrate, if he wished; all the employees would return to work on the next day, Friday; that there—he gave an assurance that they would not go out on strike again over this same issue, meaning his suspension for the button, and that he would not wear the button again."

B. *Analysis and Concluding Findings*

The General Counsel alleges that wearing the "Fites" button was activity protected by Section 7 and that suspending Vasquez, because he refused to take it off was violative of the Act. The General Counsel also alleges that the strike resulting from the suspension of Vasquez was to protest these unfair labor practices and that the Respondent acted unlawfully when it refused the employees' unconditional offer to return to work on October 20. I agree.

1. The "Fites" button

One of the persistent issues in this massive litigation concerns the Respondent's attempts to restrict the wearing buttons, hats, T-shirts, and the like. Although the principal insignia case, as well as others dealing with this issue in some form, has not yet been submitted for decision, in other cases whether and to what extent the Respondent may forbid the wearing of particular insignia has been considered. Consistent with what I consider to be established precedent, I have concluded that as a general principle Section 7 protects the right of employees to advertise their position on matters relating to the labor dispute. *Mead Corp.*, 314 NLRB 732 (1994). However, where the Respondent is able to establish "unusual conditions" or "special circumstances" then such insignia can lawfully be banned. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).

The Respondent here contends that the "Fites" button is not protected by Section 7, because it had nothing to do with the labor dispute, and even if did, the message was "a vicious, personal attack" on Fites and suggested violence against him. I disagree.

First, the message is generally in keeping with the employees' often stated position that Fites was felt to be an impediment to the successful resolution of contract negotiations. I conclude that the message directly related to this labor dispute.

The message of this button is similar to that on T-shirts stating, "Permanently Replace Fites." In Case 33-CA-10158, et al., I found the Respondent's ban of such T-shirts to be unlawful. As in that case, I conclude here that the message could not reasonably be construed as a personal attack on Fites. Further, as the chief executive officer, he was not unreasonably the focus of the employees' frustration in failing to arrive at a contract. By virtue of his position Fites is central to the labor dispute, in a way other management personnel are not.

The Respondent's argument of "special circumstances" is a conclusion that somehow the message of the button was a personal attack and sought to promote violence. These conclusions are neither inherent in the message nor supported by any objective facts. In order to limit employees' Section 7 rights something more than opinion is necessary. There must be some actual showing of special circumstances or unusual conditions. The message of the "Fites" button does not contain fighting words, nor appear to be inherently disruptive to good order and discipline. It is well known, and I take notice of the fact, that milk cartons are a means by which the pictures of missing children are circulated to the public. Thus the presumed message conveyed by this button is that employees would be delighted if Fites would disappear. Not only is such a message devoid of personal attack, it does not suggest violence. There is no evidence that violence is the only cause for children to be missing, or even a significant cause. Finally, there is no showing that potential customers would be offended, or even that customers tour this facility, as is sometimes the case in the manufacturing plants.

In short, I conclude that the message on the button was fair comment of the employees' position in the labor dispute, and that the Respondent did not establish "special circumstances" to justify ordering Vasquez not to wear it. The Respondent thus violated Section 8(a)(1) by prohibiting

Vasquez from wearing the "Fites" button, and violated Section 8(a)(1) and (3) of the Act in suspending him.

I therefore do not consider the General Counsel's alternate argument that the ban here was disparate since other buttons relating to Files at this and other facilities were allowed.

Finally, I reject the Respondent's de minimis argument by which it contends that Vasquez could have worn other buttons, or worn the "Fites" button away from the company premises, making the prohibition of one button worn by one person insignificant. The Respondent has cited no authority in support of this proposition. While the Board will sometimes find a single instance of interrogation de minimis where there are no other unfair labor practices, such is clearly not applicable here. The prohibition here is just one of many companywide instances of prohibiting the display of union messages by employees. It is part of a larger context and can scarcely be considered de minimis.

2. The strike

Shortly after Vasquez was suspended, 30 fellow employees walked off the job in protest. Though unclear, it appears the strikers represented only a portion of the first shift.³ The afternoon of the strike Vasquez made an unconditional offer to return on behalf of the strikers and this was denied by Nimm on grounds they would not eschew such strikes in the future. Nimm testified that she meant future strikes over the issue of suspending Vasquez for wearing the button. Vasquez testified that he understood Nimm to say "she needed assurances that these kinds of things would not happen in the future. . . . meaning the strike, I guess."

Nimm's letter of October 21 in response to the letter Vasquez delivered on October 20 tends to support her version of their discussion on October 20—that she need assurances that "there will be no further recurrence of unannounced and sporadic interruptions in our operations by these strikers as a result of this issue." Nevertheless, I conclude that the Respondent violated the Act in refusing, on October 20, the employees' unconditional offer to return to work.

The Respondent contends, and I agree, that the walkout was solely to protest the suspension of Vasquez, notwithstanding the statement of Vasquez that it also had something to do with the general harassment of union officials. There is no evidence of such "harassment" nor evidence that such, if it occurred, played any part in the walkout; nevertheless, I conclude it was an unfair labor practice strike, because it occurred to protest the Respondent's unlawful conduct in suspending Vasquez for wearing a button he had the protected right to wear.

Citing *Bali Blinds Midwest*, 292 NLRB 243 (1988), and *General Portland Inc.*, 283 NLRB 826 (1987), the Respondent argues that it had a right to partially lock out employees by placing reasonable conditions on their reinstatement. These cases hold that where employees engage in an economic strike, an employer can engage in a partial lockout by placing restrictions in their reinstatement if a legitimate and substantial business justification can be shown. And here the Respondent argues that as a parts distribution facility, unannounced, sporadic strikes, have an impact on its business.

However, the mere fact that a strike may harm an employer is not dispositive. Strikes almost always cause some

³ There are 150 to 160 bargaining unit employees on 3 shifts.

economic damage to the employer, and in fact are meant to do so; nevertheless, the right to strike is specifically protected by Sections 7 and 13 of the Act. The extent to which an employer can limit its employees' right to strike is a matter of balance, with the employer needing to prove some significant economic impact in the event of a strike. Since the order-fillings could be diverted to other facilities, the potential impact of strikes at this facility does not appear significant. Therefore the assurances sought by the Respondent were not lawful. E.g., *Lindy's Food Center*, 232 NLRB 1001 (1977); *Roadhome Construction Corp.*, 170 NLRB 668 (1968).

Beyond that, where, as here, the strike is a spontaneous protest of an unfair labor practice, then restrictions on reinstatement are not lawful. *Child Development Council of Northeastern Pennsylvania*, 316 NLRB 1145 (1995); *Brooks, Inc.*, 228 NLRB 1365 (1977), *enfd.* in relevant part 593 F.2d 936 (10th Cir. 1979) ("a no-strike guarantee attached to an offer of reinstatement is an unlawful condition").

Finally, the Respondent could assure the employees would not strike again over this issue by reinstating Vasquez with backpay and not further prohibiting his wearing the "Fites" button.

3. The threat

It is alleged that Borger threatened employees in violation of Section 8(a)(1) when he told them they would be indefinitely suspended if they walked out on October 20. The facts of this allegation are undisputed, and I find Borger told employees in substance that if they struck they would be suspended. Since employees have a right to strike, such a threat is violative of the Act.

REMEDY

Having concluded that the Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom. I shall further recommend that Joe Vasquez be given backpay for the time he was off work, with interest, as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987); and that each of the strikers be given backpay, with interest, for the time they were off work after having offered unconditionally to return on October 20, 1993.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴

ORDER

The Respondent, Caterpillar, Inc., Peoria, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

⁴If 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.

(a) Prohibiting our employees from wearing or otherwise displaying buttons or other insignia with the message, "Happiness is waking up in the morning and finding Donald Fites' picture on a milk carton."

(b) Suspending, or otherwise disciplining, employees because they wear or display a button such as that described in (a), above.

(c) Threatening to indefinitely suspend employees for engaging in protected, concerted strikes.

(d) Refusing to accept employees unconditional offer to return to work from an unfair labor practice strike.

(e) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.⁵

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

(a) Make whole Joe Vasquez and each employee who engaged in the strike of October 20, 1993, for any loss of wages and other benefits with interest as provided in the remedy section above.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful suspension of Joe Vasquez and notify him in writing that this has been done and that the suspension will not be used against him in any way.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, time-cards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by Region 33, post at its facility in Denver, Colorado, copies of the attached notice marked "Appendix."⁶ Copies of the notice, on forms provided by the Regional Director for Region 33, 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.

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

⁵I conclude that the unfair labor practices found here, along with those found in earlier cases, justify a broad remedial order. *Hickmott Foods*, 242 NLRB 1357 (1979).

⁶If 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."