

**Great Lakes Warehouse Corporation and Teamsters
Union Local 142, an affiliate of International
Brotherhood of Teamsters, AFL-CIO. Case 13-
CA-36553**

March 9, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS HURTGEN
AND BRAME

On May 4, 1999, Administrative Law Judge Robert T. Wallace issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed exceptions and an answering brief to the Respondent's exceptions.

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

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

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Great Lakes Warehouse Corporation, Hammond, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in the Order, except that the attached notice is substituted for that of the administrative law judge.

¹ No exceptions were filed to the judge's findings of 8(a)(1) violations regarding the interrogation and a threat of unspecified retaliation for continuing to support the Union.

In adopting the judge's finding that the Respondent violated Sec. 8(a)(1) by offering a supervisory position to employee Gary Anderson, we particularly note that: Anderson had been and continued to be a key union proponent throughout a prolonged organizing campaign at the Great Lakes facility; the supervisory position that he was twice offered in October 1997 had been vacant since the previous June; and the Respondent provided no credible explanation as to why it had suddenly sought to fill the position shortly before the anticipated renewal of the union organizing campaign. In these circumstances, and in light of the Respondent's contemporaneous statements to Anderson when offering him the promotion, we agree with the judge that the Respondent violated the Act when offering him a supervisory position in order to induce him and other employees to abandon the Union.

In adopting the judge's finding that the Respondent violated Sec. 8(a)(1) by offering Anderson a supervisory position, Member Brame does not rely on the Respondent's comments to Anderson when offering him the position.

² In adopting the judge's finding that the Respondent violated Sec. 8(a)(3) by disciplining and discharging employee Oller, Member Hurtgen would not rely on the timing of the discipline or the relative paucity of warnings issued to Oller in the preceding 28-month period.

³ The judge inadvertently omitted part of the Board's standard make-whole relief from the "Notice to Employees." We correct this omission.

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.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives
of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected
concerted activities.

WE WILL NOT discharge, issue disciplinary warnings to, or otherwise discriminate against any employee for supporting Teamsters Union Local 142, an affiliate of International Brotherhood of Teamsters, AFL-CIO, or any other union.

WE WILL NOT offer promotions or other benefits to you to induce you to abandon Teamsters Union Local 142, an affiliate of International Brotherhood of Teamsters, AFL-CIO, or any other union.

WE WILL NOT threaten you with unspecified retaliation for continuing to support Teamsters Union Local 142, an affiliate of International Brotherhood of Teamsters, AFL-CIO, or any other union.

WE WILL NOT coercively interrogate you regarding your union sympathies.

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.

WE WILL, within 14 days from the date of the Board's Order, offer Victor Oller full and immediate reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Victor Oller whole for any loss of earnings and other benefits suffered as a result of his discharge, plus interest.

WE WILL, within 14 days, remove from Victor Oller's files any reference to the unlawful discharge and disciplinary warnings, and we will notify him in writing that they will not be used against him in any way.

GREAT LAKES WAREHOUSE CORPORATION

Valerie Ortique Barnett, Esq., for the General Counsel.
Walter J. Liszka, Esq. (Wessels & Pausch, P.C.), of Chicago,
Illinois, for the Respondent Company.

DECISION

STATEMENT OF THE CASE

ROBERT T. WALLACE, Administrative Law Judge. This case was tried in Chicago, Illinois, on July 7 and 8, 1998. The charge was filed November 7, 1997,¹ and the complaint issued March 24, 1998.

The complaint alleges that Respondent (Great Lakes) by means of threats, interrogation, and promises of benefits to employees violated Section 8(a)(1) of the National Labor Relations Act and that it discriminatorily disciplined and discharged employee Victor Oller in violation of Section 8(a)(3) of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, is a warehouse distributor with an office and facilities in Hammond, Indiana. It annually derives gross revenues in excess of \$500,000 from operations in Indiana. It admits and I find it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union (Local 142) is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Respondent is one of three warehousing companies in northern Indiana owned by the Fauré Brothers Corporation. Employee Oller worked as a lift truck operator at one of these (Illiana) for 31 years before being assigned to the same job at Respondent's Great Lakes warehouse on May 12, 1995. He is a longstanding member of the Local and he made that affiliation known by, among other things, regularly wearing union insignia (hats, buttons, etc.) on the job at Illiana as well as at Great Lakes.

On August 17, 1996, an "Open Letter" was sent to management wherein Oller and other employees at Great Lakes (including Gary Anderson) identified themselves as members of an organizing committee; and 2 days later Local 142 filed with the Board a formal petition for certification as collective-bargaining representative of a unit consisting of 11 Great Lakes' employees. However, the Local chose to withdraw the petition prior to a scheduled election.

The Local filed a second petition on April 14 seeking to represent a unit reduced to six employees. Again, Oller and Anderson were active in the ensuing campaign. But here too the Local, sensing it needed more time, sought to withdraw the petition. The request was granted by the Board on or about May 27, conditioned on the Local's willingness to forego a further filing for 6 months.

In mid-October in anticipation that the Local soon would begin a new organizing drive, a number of Respondent's office workers and supervisors, including its Warehouse Distribution Manager Lee Esterday, began wearing antiunion buttons.

Prior to October, Oller received only two written warnings over the 28-month period he had worked at Great Lakes, and both were for shipping errors. Of those, one issued on May 25, 1996, was for an incident occurring 2 days earlier and the other issued on July 22, 1996, for mistakes made on July 18.

In October, however, and 14 months after the last discipline, Oller was cited by Plant Manager Esterday for four instances of errors, and was given a written warning in each case² and, applying its progressive disciplinary rules, Respondent on issuing the fourth warning ended his 33 years of service by giving him an option to resign or be terminated.

The first dereliction occurred on October 1 when a truck loaded by Oller departed without one pallet of ordered product. Manager Esterday issued the warning on October 21.

The second happened on October 17 when he unloaded 38 cases of product more than he should have thereby necessitating a \$371.34 owner credit. This elicited a warning from Esterday coupled with a 1-day suspension without pay. The warning probably was issued on Tuesday, October 28,³ since Oller was absent on suspension the following day.

The third offense was on October 20 when Oller unloaded and stored 400 cases as "10101s" when 200 of them were actually "FB00101s." This error resulted in Esterday's giving him on October 30, the day he returned from his 1-day suspension, a warning and 3-day suspension. On the same day, Esterday alerted Jerry Helton, human relations manager of Fauré Brothers Corporation stationed at Illiana, that longtime employee Oller was vulnerable to discharge in the event of another warning. In turn, Helton contacted Owner Amy Fauré about what if anything the company could extend to Oller by way of a separation package.

The fourth written warning, presented to Oller on Friday, November 7 (2 days after he returned from his 3-day suspension), was for a mistake on October 27 when he received and designated 100 cases of cheese as having an expiration date of March 31, 1998, whereas 42 of them bore the date March 10, 1998. After observing that termination was mandatory under the disciplinary rules, Helton told Oller to take a scheduled 1-week paid vacation during which time Oller was to decide whether to accept a severance benefit package and voluntarily resign in return for signing a six-page typewritten "Settlement Agreement and General and Specific Release"⁴ previously prepared specifically to address Oller's situation.⁵

Oller returned on November 14, rejected the settlement offer, and was immediately discharged.

² At the time the warnings were issued, Oller did not dispute having made the indicated mistakes. However he refused to sign the last two. Esterday claims that he issued the warnings on being advised by inventory supervisor Kim Kazinsky that they had occurred. I find no basis for finding that Oller's leadperson Helen Farley was an agent for the purpose of attributing to Respondent any early knowledge she may have had of his mistakes, or for any other purpose. The General Counsel's motion in that regard is denied.

³ The warning was not dated and Esterday could not recall when he gave it to Oller.

⁴ Among other things, the document contains provisions waiving claims for wrongful discharge under numerous statutes including the National Labor Relations Act.

⁵ Anticipating that Oller would find the legal document confusing, Helton did not show it to him. Instead, he gave Oller a handwritten outline of benefits he would receive thereunder if he chose to resign.

¹ All dates are in 1997 unless otherwise indicated.

Two other warehouse employees were disciplined by Esterday for careless errors during the preceding 12-month period, as follows:

Barbara Pala received a warning with 1-day suspension on December 12, 1996, for errors made on November 27, December 5 and again on December 6.⁶ This was followed on January 17 by a warning and 3-day suspension for mistakes made on December 12, December 23 and January 15. Ten months later (on October 23) she was given a fourth and final written warning for an error made on the previous evening. The warning, however, also states that despite “. . . being given every opportunity to stop making mistakes . . . she is averaging at least two mispics per week.” Pala was allowed to resign in lieu of discharge.

Sharon Cole on June 24 was given two written warnings, one for mistakes made on May 12 and 14 and the other (accompanied by a 1-day suspension) for a mistake made on June 13.

Jim Campbell was given a written warning on December 17, 1996, for mistakes made that day “and prior.” Under “Remarks” Esterday wrote: “Employee has made numerous mistakes with the Coors account. Coors has complained of his poor performance. Employee has made errors that compromised our inventory. Also he has not watched out-of-date beer which resulted in another complaint.”

In October, while Oller was receiving warnings, another forklift driver (Gary Anderson) also had two meetings with management. Like Oller, Anderson was an overt union supporter and was known by management to be a member of the union organizing committee.

The first meeting occurred on October 16. During the course of giving Anderson his work assignments, Plant Manager Esterday reminded him that a foreman position was open and offered him the job⁷ with an attendant increase in hourly pay from \$11.50 to \$13. When Anderson declined, Esterday asked: “Because of the Union?” To which Anderson replied, “I can’t comment on that.” At that point Esterday told him, “Be prepared for changes,” and walked away.

The second occurred on October 20. Anderson had finished his shift and was passing through the main office area intending to leave the building. Three management officials were there: Amy Fauré Crohan, Billy Crohan (owner and safety director, respectively, of Fauré Brothers Corporation), and Esterday. Seeing Anderson, Amy asked him why he had turned down the foreman job. When Anderson again replied that he “couldn’t talk about it,” she inquired why he and other employees didn’t just come to her with their concerns rather than seek representation by a union, pointing out that, by dealing directly with her, employees would be better off and would avoid paying union dues. Anderson was unresponsive and the conversation ended shortly after turning to other matters including golf scores.⁸

⁶ Pala had received a verbal warning on October 10, 1996, for four separate “mispics” and a written warning 2 days later for another error made on October 11.

⁷ The opening occurred in June or July when a foreman was transferred to another warehouse. Esterday asked Anderson to think about taking the foreman job on October 14 but made no offer in that regard until the October 16 meeting.

⁸ Anderson’s testimony about both meeting is undisputed.

As of October, Anderson had worked for Respondent for approximately 11 years. He voluntarily resigned on March 5, 1998.

Discussion

On at least two occasions since 1996 Respondent had successfully avoided union organizing drives; and, anticipating a third campaign in November, office workers and supervisors, including Plant Manager Esterday began an opposition effort in mid-October by wearing antiunion buttons.

But Respondent did more than evince opposition. It acted to negate any hope of success by eliminating two known union activists from a potential bargaining unit of six dockworkers.

Two different approaches were taken.

In the case of employee Anderson, Respondent sought on October 16 and again on October 20 to remove him by inducing him to accept a supervisory (nonunit) position. Having in mind the timing of the offer in relation to the anticipated union drive, the fact that the position had been vacant since June or July, the clearly shown nexus between the offer and the concern voiced to Anderson by Plant Manager Esterday and Owner Amy Fauré about his pronoun stance and Esterday’s cryptic comment (i.e., “Be prepared for changes.”) when he declined the offer, I find Respondent’s conduct entails a hallmark violation of Section 8(a)(1): offering an employee a reward for abandoning a right to engage in union activity coupled with a threat of unspecified retaliation for not doing so.

The other employee (Oller) was discharged on November 14 for making four shipping errors between October 1 and 27. Each error elicited a separate disciplinary warning, these being issued to him on October 21, 28, and 30 and November 7 by Esterday. While Oller admittedly made the mistakes, I find his discharge to be unlawfully discriminatory in violation of Section 8(a)(3) for the following reasons:

(1) The warnings were issued on the eve of the anticipated union campaign and contemporaneously with the heretofore found unlawful importuning of Anderson.

(2) Oller had received only two similar warnings during the 28 months he worked at Respondent’s Great Lakes warehouse, and the last was issued more than 15 months prior to October.

(3) Although Human Relations manager Helton claims that termination of Oller—an employee with 33 years of service—was mandatory under Respondent’s rules, the pertinent rule is not that rigid. It provides that “Anyone involved in [an] error . . . *could* receive disciplinary action [emphasis added].”

(4) The discretion allowed under the rule was indeed exercised by Esterday. Thus, on October 23 he gave dockworker Pala a warning for an error made on the previous evening. However, he wrote on the warning: “She has been given every opportunity to stop making mistakes but has not improved . . . *she is averaging at least two mispics per week* [emphasis added].” Since Esterday’s next prior written warning to Pala was issued on January 17, it is apparent that he forbore issuing formal warnings to her on numerous occasions. Also, in a warning dated December 17 Esterday faults warehouseman Campbell for a mistake made that day as well as for “numerous” prior mistakes—none of which had elicited formal warnings under the progressive disciplinary program.

I conclude that Oller would not have received one or more of the warnings and would not have been discharged absent his prouction stance.

There remains for consideration whether, as alleged, Respondent's November 7 offer to give Oller certain benefits in return for his resignation and a release of all claims (including those arising from the Act) constitutes an inducement to resign, thereby to undermine support for the Union in violation of Section 8(a)(1). I find no violation. The offer amounts to nothing more than a garden-variety nonadmission settlement proposal designed to end litigation—one which Oller promptly chose to reject in favor of pursuing this case. A contrary result would tend to deter alternative resolution of litigable matters contrary to the purposes of the Act and public interest generally.

CONCLUSION OF LAW

Respondent Great Lakes is shown to have violated Section 8(a)(3) and (1) of the Act in the particulars and for the reasons stated above, and its violations have affected, and unless permanently enjoined, will continue to affect, commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having discriminatorily discharged an employee, Respondent must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁹

ORDER

The Respondent, Great Lakes Warehouse Corporation, a division of Fauré Brothers Corporation, of Hammond, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from
 - (a) Discharging, issuing disciplinary warnings to, or otherwise discriminating against any employee for supporting Teamsters Union Local 142, an affiliate of International Brotherhood of Teamsters, AFL–CIO, or any other union.
 - (b) Offering promotion or other benefits to employees to induce them to abandon Teamsters Union Local 142, an affiliate of International Brotherhood of Teamsters, AFL–CIO, or any other union.
 - (c) Threatening employees with unspecified retaliation for continuing to support Teamsters Union Local 142, an affiliate of International Brotherhood of Teamsters, AFL–CIO, or any other union.
 - (d) Coercively interrogating employees regarding their union sympathies.

⁹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

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

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

(a) Within 14 days from the date of this Order, offer Victor Oller full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Victor Oller whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge and disciplinary warnings issued to Victor Oller on October 21, 28, and 30, 1997, and on November 7, 1997, and within 3 days thereafter notify him, in writing, that this has been done and that the discharge and warnings will not be used against him in any way.

(d) 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, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Hammond, Indiana, copies of the attached notice marked "Appendix."¹⁰ 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. 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 16, 1997.

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

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

¹⁰ If this Order is enforced by a judgment of the 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 Judgement of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."