

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

POWERLASERS CORPORATION

and

Case 8-CA-33278

INTERNATIONAL UNION, UNITED AUTOMOBILE,
AEROSPACE AND AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA, UAW

and

Case 8-CA-33476

MARK R. SCHMUCKER, An Individual

Gregory M. Gleine, Esq.,
for the General Counsel.
Paul H. Derrick, Esq., (Jackson & Lewis, LLP),
of Greenville, SC, for the Respondent.
Joan Torzewski, Esq., (Lackey, Nusbaum,
Harris, Renz & Torzewski), of Toledo, OH,
for the Charging Party Union.

DECISION

Statement of the Case

MARTIN J. LINSKY, Administrative Law Judge: The International Union, UAW, Union herein, filed a charge in Case 8-CA-33278 on April 10, 2002, against Powerlasers Corporation, Respondent herein.

On June 24, 2002 and September 25, 2002, Mark R. Schmucker, an individual, filed a charge and amended charge, respectively, against Respondent in Case 8-CA-33476.

On November 29, 2002, the National Labor Relations Board, by the Regional Director for Region 8, issued a complaint which alleges that Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act, herein the Act, when it posted, promulgated, and maintained a rule restricting the use of the Maintenance Shop area and when it issued employee counseling forms to Patrick McGilvery, Mark Schmucker, and Craig McKarns.

Respondent filed an answer in which it denied that it violated the Act in any way.

A hearing was held before me in Toledo, Ohio, on August 27, 2003.

Based upon the entire record in this case, to include post hearing briefs submitted by Counsel for the General Counsel, Counsel for Respondent, and Counsel for the Union and giving due regard to the testimony of the witnesses and their demeanor I make the following

I. Findings of Fact

Respondent is a Michigan corporation with a facility in Pioneer, Ohio, the sole facility involved herein, where it is engaged in the manufacture of welded blanks.

Respondent admits, and I find, that at all material times Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. The Labor Organization Involved

Respondent admits, and I find, that at all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. Overview

In late November 2001 employee Patrick McGilvery approached the Union seeking to get it to represent a unit of Respondent's employees.

Three of the principal advocates for the Union were three maintenance technicians on second shift, namely, Patrick McGilvery, Mark Schmucker, and Craig McKarns.

On January 23, 2002, the Board conducted an election among Respondent's employees. There were 15 votes for representation by the Union and 44 votes against representation. The Union lost the election.

The unfair labor practice allegations in this case are as follows:

1) That Respondent posted a notice in the Maintenance Area of its facility on December 13, 2001, which the General Counsel argues violates Section 8(a)(1) of the Act because it interferes with, restrains, and coerces employees in the exercise of the rights guaranteed them under the Act.

2) That Respondent violated Section 8(a)(1) and (3) of the Act when it issued an employee counseling form to union supporter Patrick McGilvery on January 15, 2002 just eight days before the election.

3) That Respondent violated Section 8(a)(1) and (3) of the Act when on March 1, 2002, it issued employee counseling forms to three union supporters, i.e., Patrick McGilvery, Mark Schmucker, and Craig McKarns.

Respondent maintains that the posting on December 13, 2001 was lawful and that the employee counseling forms are not discipline.

I will treat the unfair labor practice allegations separately.

B. The Posting

As noted above Patrick McGilvery approached the Union seeking to have it represent a unit of Respondent's employees. He was very active on behalf of the union, e.g., he circulated a petition to get a vote on the Union, wore union buttons, and distributed union literature.

On December 4, 2001 Respondent's President Walter Bilenki visited Respondent's facility in Pioneer, Ohio from his office in Canada.

5 Bilenki met with Patrick McGilvery, Mark Schmucker, and Craig McKarns around 8 p.m. on December 4, 2001. Bilenki wanted to know what the problems were that prompted the Union organizing effort. Bilenki told the three men that he wanted the organizing effort to stop and to give him (Bilenki) more time so he could get to the bottom of the problems that prompted the union organizing effort.

10 Two days later, on December 6, 2001, four employees Patrick McGilvery, Craig McKarns, Steven Atenoff and Mike Newell signed a letter addressed to Plant Manager Jim Hurley asking Respondent to voluntarily recognize the Union. The letter provided as follows:

15 "Dear Mr. Hurley:

20 We are employees committed to creating a better working environment thereby making a better product. This letter is to advise you that a majority of employees, in an appropriate bargaining unit, have designated the International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW) as our exclusive representative for the purpose of collective bargaining.

25 We are prepared to prove our majority status in an appropriate forum, including verification by a neutral party. It is the desire of the UAW to begin bargaining with you in respect to all of our terms and conditions of employment.

30 We have asked the union to file a petition for an election with the National Labor Relations Board (NLRB), but we would be pleased to work out an alternative method of establishing our majority status and proceeding quickly to discussions regarding a contract.

35 The UAW would like to advise you that the law provides that no unilateral changes can be made by an employer once a majority of its employees have designated a union as their exclusive bargaining representative.

40 A union will ensure that our voice is heard when decisions are made at Powerlasers and that all employees are treated with dignity and respect. We hope that you will honor our legal right to choose to unionize and will reply promptly to our request for voluntary recognition."

45 McGilvery, Schmucker, and McKarns went to Plant Manager Jim Hurley's office and personally presented the letter to him. All three were second shift maintenance technicians.

On week later, on December 13, 2001, the following notice was posted in the Maintenance Area:

Notice

Maintenance Area Employees

50 **The Maintenance shop is not a gathering place for conversation with other employees from different departments, so don't let them make it one!**

Especially between shifts

Ask them to leave, and you will follow up with as soon as you can, if it is a personal conversation tell (sic) you will see them at break or after work.

5

This gentleman is the only warning that will be given the rest will be written. Just use your common sense on this issue guys.

10

Brian Ramey”

Brian Ramey is the Maintenance Supervisor.

15

McGilvery testified for the General Counsel and I found him to be a very credible witness. He was no longer in Respondent’s employ when he testified before me. McGilvery testified that although he only worked for Respondent for 10 months he never saw a similar notice posted either in the maintenance area or anywhere else in the plant. There was no evidence that similar postings were put up in the facility at other times.

20

Brian Ramey, the maintenance supervisor, testified that as early as November 27, 2001 he sent an email to follow supervisors that read as follows:

25

“From: Brian Ramey
Sent: Tuesday, November 27, 2001 10:12 AM
To: Lee Steinke; Tina Michael; Greg Ryan
Cc: Bret Holzward; Dave Uphold; Jim Hurley; Jim Sloan; Kim Zeedyk; Doug Hogle

30

We need to address the issue of unauthorized people wondering in and out of the maintenance cage, the only people authorized to be in the maintenance cage are Dave Uphold and the maintenance people. Please if you see any of your people wondering in the cage tell them not to go in there without an authorized person. Starting 1/1/2002 I want people to start receiving warnings about being in the cage unauthorized. If anyone foresees a problem with this or has any comments please voice them now.

35

Thank You
Brian”

40

This email, which Ramey claim predates his knowledge of union activity, suggests, according to Respondent, that the posting had nothing to do with Union activity, but Ramey’s email had to do with unauthorized personnel in the maintenance cage and the notice posted on December 13, 2001 was addressed to people gathering and talking to one another in the maintenance area. The notice that was posted was posted on December 13, 2001 only after pro-union second shift maintenance employees met with Respondent’s President on December 4, 2001 and personally presented a written demand for union recognition on December 6, 2001 to Respondent’s Plant Manager. The timing is just too exquisite.

45

It seems obvious that Respondent’s motive in putting up the notice was to interfere, restrain, and coerce employees in the exercise of their Section 7 right to choose to be

50

represented by a union, more specifically, so that pro-union maintenance technicians McGilvery, Schmucker, and McKarns would have less opportunity to proselytize.¹

5 This is a violation of Section 8(a)(1) of the Act. Obviously the notice posted on December 13, 2001 is not per se a violation of the Act, but is a violation of the Act because of the motivation of Respondent in posting the notice.

C. Is Employee Counseling Discipline or Not

10 The Employee Counseling form is virtually identical with forms that Respondent concedes are disciplinary forms. See General Counsel Exhibits 3a, 3b, 3c and 3d and 4.

15 Three employee handbooks were introduced into evidence General Counsel Exhibits 2a, 2b, and 2c. General Counsel Exhibit 2a was in effect from May 1999 to May 1, 2001 and specifically includes employee counseling as part of Respondent's progressive disciplinary system as does General Counsel Exhibit 2C which was in effect from June 1, 2002 forward.

20 Employee counseling is not specifically listed as part of Respondent's progressive disciplinary system for the period May 1, 2001 to June 1, 2002. Employee counseling is not mentioned at all. In other words there is no written policy that specifically provides that between May 1, 2001 and June 1, 2002 employee counseling is not part of Respondent's progressive disciplinary system.

25 The employee counseling given in the instant occurred on January 15, 2002 and March 1, 2002 in the window between May 1, 2001 and June 1, 2002.

30 However, Maintenance Supervisor Brian Ramey thought employee counseling forms stayed in the personnel file for 1 year whereas Human Resources Administrator Dawn Christman thought employee counseling forms stayed in the personnel file forever but could only be considered for a 6-month period.

35 In any event employee counseling forms remain in the employees' personnel file indefinitely and Christman concedes is considered if someone is being considered for a promotion.

40 Considering all the evidence I conclude that employee counseling forms issued between May 1, 2001 and June 1, 2002 are clearly employee discipline and if given because of an employee's union activity would constitute a violation of Section 8(a)(1) and (3) of the Act.

¹ Section 7 of the Act provides as follows:

45 "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in
50 section 8(a)(3)."

D. Employee Counseling on January 15, 2002

Eight days before the election Patrick McGilvery left the plant during his shift to move his car closer to the plant and spoke with a fellow employee coming in for third shift.

5

Supervisor Tina Michael who was coming on duty for the third shift observed McGilvery that night. She made a written report to Brian Ramey, which provided as follows:

10

“On January 15, 2002 I was arriving at work somewhere in between the times of 10:25 pm and 10:30 pm. I noticed Patrick McGilvery during his vehicle around the side over by the lab parking. He got out of his vehicle and went over to Kevin Stilkes’ vehicle and stood outside their vehicle and talked for at least 15 minutes. He is being paid to work from 3:00 p.m. until 11:00 p.m., as a maintenance technician.”

15

Ramey gave an employee counseling form to McGilvery, which contained the following language in the discussion portion of the form:

20

“Patrick was caught moving his vehicle while he was on the clock and suppose to be working. Also during this time he was observed standing in the parking lot at Powerlasers talking with another employee instead of completing his assigned work.”

25

Evidence at the hearing before me reflected that other employees have been disciplined, some more severely, for the same infraction committed by McGilvery.

30

McGilvery testified that he moved his car in the past and nothing happened to him but there is no indication that anybody from management saw him do this. As McGilvery explained when he is coming to work the prior shift’s employees have taken the parking spaces closer to the facility and are still at work. Especially in winter he would sometimes move his car closer to the plant when parking spaces opened up. McGilvery conceded that he doesn’t know if management ever saw him do this in the past.

35

40

Applying the *Wrightline*² analysis I conclude that even though it was just 8 days before the election and in spite of the fact that McGilvery was very pro-union and management knew it, I find that management would have given McGilvery an employee counseling form even if he had not been active on behalf of the Union. I so find because in similar situations Respondent has given employee counseling or even a harsher penalty. See, for example, Respondent Exhibits 1, 3, and 6, which contain employee counseling of employees Gene Mathis and Jeff Woodby on March 21, 2001 and October 3, 2002 respectively and verbal warnings to employees Lindsey Carpenter, Joe Michael, Shane Barnhart, Mike O’Neal, and John Nagel on August 8, 2001.

45

Accordingly, I do not find a violation of the Act when McGilvery received employee counseling on January 15, 2002.

50

² *Wrightline*, 251 NLRB 1083 (1980), enf’d, 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 US 989 (1982).

E. Employee Counseling on March 1, 2002

Respondent maintains a suggestion box. Someone in Human Resources gave Maintenance Supervisor Brian Ramey an anonymous suggestion put into the suggestion box.
 5 The suggestion was as follows:

“Why is it that maint. gets 30-40 min lunches and 15-20 min breaks. Aren’t we all on the same clock. Tell me if Im wrong there is a lot of assc. that see this. They even receive more pay per hr. and do LESS per 8 hrs. and still have this luxury.
 10 And they was the ones that wanted a union so there was consistency & everyone treated equal (This is not equal) throughout the plant. It’s time someone does something about this dept.” (Emphasis in original).

The Human Resource person told Ramey that the “suggestion” was from a second shift employee. No further identification. The anonymous person was not interviewed. As a result of this so-called “suggestion” Ramey testified that he gave employee counseling forms to the three maintenance technicians who worked second shift, i.e., Patrick McGilvery, Mark Schmucker, and Craig McKarns.
 15

The employee counseling was identical for all three employees and read as follows:
 20

“It was brought to my attention on February 26th by some of the employees of second shift that my Maintenance technicians on second shift have been taking extended breaks and lunches, which I discussed with them at the beginning of their shift that evening. Today, March 1st, another issue of concern has been brought to my attention. The second shift employees are wondering why the Maintenance people can stand around in the cage until they decide to go to work, I explained that I meet with the guys everyday for a while. They responded that on some days it’s 4:30-5:00 o’clock before the (sic) even leave the cage. So I will discuss the problem with the second shift supervisor, so he can help monitor the situation. As maintenance people you should always be able to stay busy. There is always items to PM or clean even if no paper work is issued to do so.”
 25
 30

The three employees, McGilvery, Schmucker, and McKarns, who received employee counseling forms on March 1, 2001 were pro-union, spoke with Respondent’s President about why they wanted a union, two (McGilvery and McKarns) signed the letter to the plant manager demanding recognition of the Union, all three personally presented the letter demanding recognition to Plant Manager Hurley, and one of the three (Schmucker) was the union observer at the January 23, 2002 Board conducted election. Applying the *Wrightline* analysis I conclude that the counseling forms were given because of the pro-union activity of three men. I also note that there was no evidence that any other employee even received employee counseling based on an anonymous accusation.
 35
 40

Respondent violated Section 8(a)(1) and (3) of the Act when it gave employee counseling forms to McGilvery, Schmucker, and McKarns on March 1, 2001.
 45

Remedy

The remedy in this case should be a cease and desist order, the posting of an appropriate notice, and the removal of the March 1, 2002 employee counseling forms from the personnel files of McGilvery, Schmucker, and McKarns. The three employees should be
 50

notified that this has been done and that the employee counseling will not be considered against them in future personnel decisions.

Conclusions of Law

5

1. Respondent, Powerlasers Corporation, is an employer engaged in commerce within the meaning of Sections 2(2), (6) and (7) of the Act.

10

2. Respondent violated Section 8(a)(1) of the Act when it maintained, promulgated, and enforced a rule designed to interfere, restrain or coerce employees in the exercise of Section 7 rights.

15

3. Respondent violated Section 8(a)(1) and (3) of the Act when it gave employee counseling forms on March 1, 2001 to employees Patrick McGilvery, Mark Schmucker, and Craig McKarns.

4. The above violations of the Act are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

20

On these findings of fact and conclusions of law and on the entire record I issue the following recommended³

ORDER

25

Respondent, Powerlasers Corporation, its offices, agents, successors, and assigns, shall:

1. Cease and desist from

30

(a) Unlawfully promulgating, maintaining or enforcing a rule, which interferes with employees exercise of Section 7 rights.

(b) Unlawfully giving employee counseling forms to employees because they support a Union.

35

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in the National Labor Relations Act.

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

40

(a) Within 14 days from the date of this Order remove from its files any reference to the unlawful employee counseling forms given to Patrick McGilvery, Mark Schmucker, and Craig McKarns on March 1, 2002 and notify them in writing that this has been done and that the unlawful employee counseling will not be used against them in any way.

45

³ 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.

50

(b) Take down the notice posted in the Maintenance Area on or about December 13, 2001.

5 (c) Within 14 days after service by the Region, post at its facility in Pioneer, Ohio and all other places where notices customarily are posted, copies of the attached marked "Appendix A."⁴ Copies of the notice, on forms provided by the Regional Director for Region 8 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 customarily are posted. Reasonable steps 10 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 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 December 13, 2001.

15 (d) 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.

20 Dated, Washington, D.C., December 9, 2003.

25 Martin J. Linsky
Administrative Law Judge

30
35
40
45
50

⁴ 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 Judgment of the United States Court of Appeals Enforcing An Order of the National Labor Relations Board."

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 Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT give employee counseling forms to our employees because they support a Union.

WE WILL NOT post a notice announcing a rule that interferes with our employees exercise of Section 7 rights such as the notice we posted in the Maintenance Area on or about December 13, 2001.

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

WE WILL remove for our files the employee counseling forms given to Patrick McGilvery, Mark Schmucker, and Craig McKarns on or about March 1, 2002 and notify them in writing that this has been done and that the employee counseling will not be used against them in any way.

POWERLASERS CORPORATION

(Employer)

Dated _____ By _____
(Representative) (Title)

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

1240 East 9th Street, Federal Building, Room 1695, Cleveland, OH 44199-2086

(216) 522-3716, Hours: 8:15 a.m. to 4:45 p.m.

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

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

COMPLIANCE OFFICER, (216) 522-3723.