Transpac Fiber Optics & Telecommunications, Inc. *and* Communications Workers of America Local 9503, AFL–CIO. Case 31–CA–17739

December 30, 1991

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

On September 25, 1991, Administrative Law Judge Gordon J. Myatt issued the attached decision. The Respondent filed exceptions and a supporting 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 brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Transpac Fiber Optics & Telecommunications, Inc., Sherman Oaks, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Marjorie Fireman, Esq. and *Arthur Yuter, Esq.*, for the General Counsel.

Mark C. Madden, Esq., of Pasadena, California, for the Respondent.

DECISION

STATEMENT OF THE CASE

GORDON J. MYATT, Administrative Law Judge. On charges filed by Communications Workers of America Local 9503, AFL–CIO (the Union), against Transpac Fiber Optics & Telecommunications, Inc. (the Respondent), the Regional Director for Region 31 issued an amended complaint and notice of hearing on April 10, 1990. The complaint alleges the Respondent engaged in conduct which violated Section 8(a)(3) and (1) of the National Labor Relations Act (the Act), 29 U.S.C. § 151 et seq. Specifically, the complaint alleges the Respondent discharged employees Adolpho Colon, Jose Corral, David Menzies, Andreas Moran, and Jose Santiago on March 1, 1989,[1] because they assisted the Union or engaged in other protected concerted activities. Respondent filed an answer in which it admitted certain allegations of the complaint, denied others, and denied committing any unfair labor practices.

A hearing was held in this matter on June 28, 1990, in Los Angeles, California. All parties were represented by counsel and afforded full opportunity to examine and cross-examine witnesses and to present material and relevant on the issues. Briefs have been submitted and duly considered.[2]

On the entire record in this matter, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a California corporation with an office and principal place of business located in Sherman Oaks, California, where it is engaged in cable and telecommunications installation. In the course of its business operations, Respondent annually purchases and receives goods and/or services valued in excess of $50,000 directly from suppliers located outside the State of California. Accordingly, I find the Respondent is, and has been at all times material, an employer within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Communications Workers of America Local 9503, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

There is no dispute here concerning the facts surrounding the discharge of the five alleged discriminatees. Adolpho Colon, Jose Corral, David Menzies, and Jose Santiago were journeymen electricians and Andreas Moran was an apprentice. All were employed by the Respondent and working as probationary employees.[3] Respondent followed a practice of providing three options by which employees could receive their paychecks. One was by direct deposit to their bank accounts, another was by first-class mail to their homes, and the last was by picking up the paycheck at Respondent's Sherman Oaks office on Fridays between the hours of 3 p.m. and 5 p.m. At the time of the events here, Colon, Menzies, and Moran were having their paychecks mailed to their home addresses, and Corral and Santiago were picking up their paychecks at Respondent's office.

The unrefuted testimony indicates that while Respondent normally remitted employee-members' union dues (withheld pursuant to valid checkoff authorizations) to the Union in a timely fashion each month, it was delinquent in its payment of deducted dues during the month of February. On February 24 (a payday) at approximately 3 p.m., Mike Newlon, Respondent's operations coordinator, was passing out paychecks to employees in a conference room at the Sherman Oaks facility. Newlon was seated at a table and approximately 15 employees were informally gathered around in the area. The five alleged discriminatees had prearranged to meet there, although Corral and Santiago were the only ones scheduled to pick up their paychecks at the office.

The five employees went up to Newlon and Corral acted as their spokesperson. He informed Newlon that he had learned from someone connected with the Union that Respondent had not made a payment of the union dues withheld from the employees. Corral then asked Newlon, ''We are

[1] All dates herein refer to the year 1989 unless otherwise indicated.

[2] The General Counsel's unopposed motion to correct the transcript on p. 10, LL. 11–13 is granted.

[3] Under the terms of the collective-bargaining agreement the probationary period for new employees was 90 days from the date of hire. (R. Exh. 1, art. 9.)

paying union dues and since the union isn't getting the money, what are you doing with it?'' Corral also asked, ''Who is our union steward and why are you keeping it a secret?'' The other four employees in the group repeated Corral's questions and voiced similar comments of their own. In questioning Newlon, the employees did not raise their voices or act in a threatening manner. Newlon asked the employees to go to another nearby conference room and wait until he finished giving out the paychecks. The five employees complied with his request. After Newlon distributed the paychecks, he went to the second conference room to talk to the five employees. They repeated their previous questions and Newlon was not able to provide them with answers. Newlon testified he did not have the information available to enable him to do so. After Newlon failed to answer the employees' questions, they left Respondent's premises.

Newlon reported the conversations he had with the five employees to Don Westerfeld and Ed Newhouse; Respondent's president and vice president of operations, respectively. After a series of discussions covering several days, a decision was made on February 28 to terminate the five employees. Newlon stated the decision was based on the fact that the five had ''confronted'' him while he was in the process of handing out paychecks and, as probationary employees, the five had engaged in conduct which warranted termination for cause under the terms of the collective-bargaining agreement. Specifically, Respondent asserts that the five probationary employees engaged in conduct set forth in article 9 of the bargaining agreement which defines cause as being, among other things, an ''[a]ttitude detrimental to harmonious working with fellow employees and managers.''

Concluding Findings

The General Counsel argues that the facts demonstrate the five employees were acting in concert and engaging in activity protected by the Act when they inquired about the Respondent's failure to remit their withheld dues to the Union and the identity of their union steward. Further, that the manner in which the employees sought this information from Respondent's representative was neither boisterous nor threatening; hence, they were not removed from the Act's protection even though they were probationary employees.

Respondent, on the other hand, contends that while the conduct of the employees may be construed ''technically'' as being concerted, it was not protected by the Act because their inquiries did not relate to matters pertaining to wages, hours, and working conditions. Rather, according to the Respondent, the employees were engaged in personal conduct for which they, as probationary employees, could be terminated under the terms of the collective-bargaining agreement. Respondent also seems to be asserting that the employees' recourse lies not with the Act but under the grievance procedures of the collective-bargaining agreement.

The threshold question to be determined here is whether the five employees were engaged in protected concerted activity when they confronted Newlon about the Respondent's failure to remit their dues deductions to the Union and the identity of the union steward. Based on the undisputed record here, it is fully apparent that the employees were acting in concert and were of one accord in expressing their complaints about Respondent's delinquency in this regard. Indeed, Respondent's concession that the conduct was ''technically'' concerted is a half-hearted recognition of this fact. Unlike Respondent's pale characterization of the obvious, I find that the record clearly demonstrates the employees were engaged in concerted activity. Contrary to the claim of the Respondent, I also find that the conduct of the employees was completely within the umbrella of employee rights protected by Section 7 of the Act. Under the terms of the collective-bargaining agreement the Respondent was required to remit to the Union at the end of each month dues deducted from the wages of employees who had executed checkoff authorizations. (See art. 5, R. Exh. 1.) Thus, the questions posed by the five employees were directly related to the Respondent's compliance with the provisions of the contract as it pertained to the union dues deducted from their wages. Additionally, the employees' questions were not based on unfounded speculation since they had received their information from someone connected with the Union. Further, it is admitted that the Respondent was delinquent in its payment of the deducted dues to the Union at the time the employees spoke to Newlon. Therefore, in the absence of engaging in egregious conduct which would remove them from the protection of the Act, the employees were engaged in protected activity when they were asserting and protecting rights arising under the contract. *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984); *Ecker Mfg. Corp.*, 286 NLRB 470 (1987). Cf. *Emarco, Inc.*, 284 NLRB 832 (1987).

Further, there is not a scintilla of evidence in the record which demonstrates the five employees engaged in any conduct so egregious that they forfeited the protection provided by the Act. They were not loud or boisterous, nor did they address their questions to Newlon in threatening or violent manner. When Newlon instructed them to go to another room and wait to allow him to complete the distribution of the paychecks, they complied with his request. When Newlon subsequently met with the employees and was unable to provide answers to their questions, they left Respondent's premises without any disturbance and of their own accord. While the questioning of Newlon as what Respondent was doing with their deducted dues may have offended Respondent's officials, such questioning certainly fails to constitute a basis for removing the employees from the Act's protection. See *Ecker Mfg. Corp.*, supra (employee accused employer of stealing his deducted dues).

Accordingly, I find the five employees here were engaged in protected concerted activity when they confronted Respondent's official about the failure to remit their dues deductions to the Union as required by the collective-bargaining agreement and sought the name of their union steward.

Turning to the issue of whether Respondent could nevertheless discharge the five employees for engaging in activity protected by the Act because they were on probationary status, I find the Respondent could not. The Board has consistently held that probationary status of employees does not remove them from the Act's protection when they are discharged for reasons that are unlawful under the Act. *Korea News*, 297 NLRB 537 (1990); *Gupta Permold Corp.*, 289 NLRB 1234 (1988); *North Vernon Forge*, 278 NLRB 708 (1986); *Curtis Mfg. Co.*, 189 NLRB 192 (1971). Cf. *Appalachian Power Co.*, 204 NLRB 184 (1973). Since it is evident that the very conduct for which the employees were discharged here is conduct which is protected by the Act and they did nothing to remove themselves from that protection,

it follows that the Respondent violated Section 8(a)(1) by discharging the five employees on March 1, 1989.[4]

CONCLUSIONS OF LAW

1. Respondent Transpac Fiber Optics & Telecommunications, Inc. is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. Communications Workers of America Local 9503, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. By discharging probationary employees Adolpho Colon, Jose Corral, David Menzies, Andreas Moran, and Jose Santiago on March 1, 1989, because they engaged in protected concerted activity by asserting and protecting their rights arising under the collective-bargaining agreement, the Respondent has violated Section 8(a)(1) of the Act.

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

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices within the meaning of Section 8(a)(1) of the Act, it shall be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. The Respondent having discriminatorily discharged employees Adolpho Colon, Jose Corral, David Menzies, Andreas Moran, and Jose Santiago, it must offer them reinstatement and make them 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). In addition, the Respondent shall be required to remove from its files any reference to the unlawful discharges and notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

On these findings of fact and conclusions of law and the entire record in this case, I issue the following recommended[5]

ORDER

The Respondent, Transpac Fiber Optics & Telecommunications, Inc., Sherman Oaks, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging probationary employees, or any other employees, because they engage in protected concerted activity by asseting and protecting their rights arising under the collective-bargaining agreement between the Respondent and the Union.

(b) 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) Offer Adolpho Colon, Jose Corral, David Menzies, Andreas Moran, and Jose Santiago immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this decision. In addition, remove from its files any reference to the unlawful discharges and notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

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

(c) Post at its facility in Sherman Oaks, California copies of the attached notice marked ''Appendix.''[6] Copies of the notice, on forms provided by the Regional Director for Region 31, 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 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.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[4] Having found that the discharges violated Sec. 8(a)(1) of the Act, I do not find it necessary to determine whether Respondent's conduct also violated Sec. 8(a)(3) as alleged by the General Counsel. See *Burnup & Sims*, 379 U.S. 21 (1964); *Emarco, Inc.*, supra, at 835, fn. 18.

[5] 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.

[6] If 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.''

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 employees, probationary or otherwise, because they attempt to assert and protect the rights provided in the collective-bargaining agreement between the Union and us.

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 National Labor Relations Act.

WE WILL offer Adolpho Colon, Jose Corral, David Menzies, Andreas Moran, and Jose Santiago immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them whole for any loss of earnings and other beneflts resulting from their discharge, less any net interim earnings, plus interest.

WE WILL notify the above employees, in writing, that we have removed from our files any reference to their discharges and that the discharges will not be used against them in any way.

TRANSPAC FIBER OPTICS & TELECOMMUNICATIONS, INC.