Walle Corporation *and* International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL–CIO. Case 9–CA–30596

April 28, 1994

DECISION AND ORDER

BY MEMBERS STEPHENS, DEVANEY, AND BROWNING

On December 23, 1993, Administrative Law Judge James L. Rose 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 National Labor Relations 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,[1] and conclusions and to adopt the recommended Order as modified.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Walle Corporation, Winchester, Kentucky, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(b).

''(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. Insert the following as paragraph 2(b) and reletter the subsequent paragraphs.

''(b) Remove from its files any reference to the unlawful termination of Bryon Benham and notify him in writing that this has been done and that the termination will not be used against him in any way.''

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 lay off, or otherwise discriminate against, our employees because they engage in any activity on behalf of International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL–CIO or any other labor organization.

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 HAVE reinstated Bryon Benham to his former position of employment without prejudice to his seniority or other rights and privileges.

WE WILL make Bryon Benham whole for any loss of earnings and other benefits he may have suffered as a result of our discrimination against him, less any net interim earnings, plus interest.

WE WILL remove from our files any reference to the unlawful termination of Bryon Benham and notify him in writing that this has been done and that the termination will not be used against him in any way.

WALLE CORPORATION

Eric V. Oliver, Esq., for the General Counsel.
James K. L. Lawrence, Esq., of Cincinnati, Ohio, for the Respondent.

DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge. This matter was tried before me at Winchester, Kentucky, on November 3, 1993, on the General Counsel's complaint which alleged that on March 11, 1993, the Respondent ''permanently laid off'' employee Bryon Benham in violation of Section 8(a)(3) and (1) of the National Labor Relations Act. The Respondent admitted the layoff, but denied that it violated the Act.

Following the hearing both counsel submitted briefs. 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 corporation engaged in the manufacture and nonretail sale of labels at a facility in Winchester,

[1] The Respondent excepts to the judge's finding that there was no record evidence establishing that employee Bobby Manns was laid off on March 11, 1993, and cites discriminatee Bryon Benham's testimony that Manns was laid off at that time. We note, however, that the Respondent did not adduce any evidence regarding the circumstances surrounding the layoff of employee Manns.

[2] We shall modify the judge's recommended Order to provide that the Respondent remove from its files any reference to the unlawful termination of Bryon Benham and to notify him in writing that this has been done and that the termination will not be used against him in any way. The judge inadvertently failed to include such an expunction provision in his recommended Order.

In addition, the judge recommended that the Board issue a broad order requiring the Respondent to cease and desist from violating the Act ''in any other manner.'' We, however, do not find the Respondent's conduct in this case egregious enough to warrant the issuance of such an order. Accordingly, we are issuing a narrow cease-and-desist order requiring the Respondent to cease and desist from violating the Act ''in any like or related manner.'' See *Hickmott Foods*, 242 NLRB 1357 (1979).

Kentucky. During the course of this business, the Respondent annually sells and ships directly to points outside the State of Kentucky goods 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 ORGANIZATION INVOLVED

The Charging Party, International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL–CIO (the Union), is admitted to be, and I find, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICE

A. *The Facts in Brief*

When Bryon Benham was hired on March 11, 1991, the Respondent was not yet operational. Shortly after Benham and other new hires received their initial classroom training, and then moved into the plant, the Respondent began manufacturing labels for beverage containers. Benham was assigned as a training press operator, and he continued to work as a press operator until his layoff in March 1993.

During the course of his employment, Benham received periodic evaluations, all of which ranked him as a well above average employee. Thus a payroll change report of February 24, 1992, wherein Benham was given a merit increase, contained the comment, ''Our *most consistent* production producer on 2nd shift.'' (Emphasis in original.)

In December 1992 the Union began an organizational campaign. At a meeting of December 13, Benham signed an authorization card and became one of the inplant committee, although there is no evidence of what activity the committee was engaged in.

There were subsequent meetings of employees with the Union's organizer in January, February, and on March 10.

During late February or early March, Benham was approached by his supervisor, Steve Oaks, who asked if Benham was a member of the Union which was trying to get into the plant—that his name had come up in a meeting. Benham stated that the only union he had ever had anything to do with was the farmers' union.

On March 11, Vice President Dick Evans called Benham at his home to say that ''my number had come up and I was being laid off as of right then.'' Evans indicated there had been some changes in contracts which necessitated the layoff; and the status report of March 11 for Benham stated ''Down sizing workforce.'' However, the Respondent presented no evidence of reduced production requirements at the time.

To the contrary, at the unemployment compensation office on March 12, Benham observed signs stating that the Respondent was hiring. And when he returned to work in June, Benham observed 10 to 15 new employees, which is consistent with the testimony of Warren Dyke, the Respondent's new director of human resources, that employment increased during the period Benham was off work, and then lessened a bit after the summer of 1993.

Thus I find as an undisputed fact that when Benham was laid off on March 11, the Respondent was not downsizing its work force due to reduced contracts for its product.

As indicated Benham is again working for the Respondent at his former job, having been recalled pursuant to an unconditional offer of June 8, 1993.

B. *Analysis and Concluding Findings*

From these facts, none of which the Respondent contested, it is reasonable to conclude that the stated reason for laying off Benham (downsizing the work force) was a pretext to disguise its true motive, which can be inferred to have been his activity on behalf of the Union. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1966). Since I conclude that there was no business reason for a layoff of employees, I further conclude that Benham was terminated on March 11.

Although the organizational activity here was minimal, Benham did participate; and this participation was at least suspected by management. Benham's undisputed testimony is sufficient to establish company knowledge of the union activity and his participation.

His termination was the day following the last meeting of employees with the Union's organizer at a local motel, which further suggests an unlawful motive, since I find that the Respondent was aware of the organizational campaign.

Benham was, according to his supervisors' evaluations, an excellent employee. If in fact the Respondent needed to reduce the employee complement, reason suggests that someone of lesser skill would be selected.

Finally, the objective evidence, again uncontested, is that in fact there was no downsizing. The Respondent was hiring at the time of Benham's termination.

Counsel for the Respondent argues that Benham was a smoker and had been given warnings for violating the Company's no-smoking policy, distributing ''smokers' rights'' material, lack of respect for management, and poor relationship with other employees, suggesting he had received four separate warnings. In fact he was given a verbal warning in December 1992 alleging all these violations of company policy, which he disputed. In any event, there is absolutely no evidence connecting this event with his termination.

Accordingly, I reject the inference sought to be drawn by the Respondent that Benham was discharged for cause under conditions similar to the termination of two other employees on March 11.[1] Both these employees were terminated for excess absenteeism ''after verbal and written warnings.''

I conclude that the above facts establish prima facie that the Respondent terminated Benham because of his known interest in, or activity on behalf of, the Union. I further conclude that the Respondent did not rebut the General Counsel's prima facie case, which was its burden. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981). Indeed, the only witness called by the Respondent was Dyke, who was not employed at the time of the events in issue.

[1] Counsel for the Respondent argues that a fourth employee, Bobby Manns, was also laid off on March 11 because he violated the Company's smoking policy. In evidence is a warning Manns received on December 4, 1992. There is no evidence that he was laid off on March 11. Similarly, counsel contends that Mike McIntosh was laid off on March 16, but concedes that there is in evidence no record of this.

Therefore, I conclude that the termination of Bryon Benham on March 11, 1993, was violative of Section 8(a)(3) and (1) of the Act.

REMEDY

Having concluded that the Respondent committed an unfair labor practice, I shall recommend that it cease and desist therefrom and be ordered to take certain affirmative action designed to effectuate the policies of the Act. Since Benham has returned to work pursuant to the Respondent's unconditional offer to reinstate him, the Respondent will be ordered to make him whole for any loss of wages or other rights and benefits he may have suffered in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *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 recommended[2]

ORDER

The Respondent, Walle Corporation, Winchester, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Terminating, laying off, or otherwise discriminating against employees because of their activity on behalf of the Union or any other labor organization.

(b) In any other 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) Make whole Bryon Benham for any loss of wages or other benefits he may have suffered as a result of the discrimination against him with interest.

(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 this Order.

(c) Post at its facility, copies of the attached notice, which is marked ''Appendix.''[3] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt thereof and shall be maintained for 60 consecutive days in conspicuous places, including all places where notices to employees customarily are 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.

[2] 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.

[3] 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.''