Westinghouse Electric Corporation, Distribution Equipment Division *and* Local 2352, International Brotherhood of Electrical Workers, AFL–CIO. Case 14–CA–9392

September 16, 1977

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS PENELLO AND MURPHY

On May 11, 1977, Administrative Law Judge Jennie M. Sarrica issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

On May 26, 1976,[1] Respondent and the Union began negotiations for modifications in their collective-bargaining agreement which was to terminate on July 11. On June 1, the Union posted a notice to its members employed by Respondent that a confidence vote would be taken on June 9 for the purpose of authorizing the Union to call a strike. On June 4, Respondent sent a letter to each union member in its employ. In essence, the letter stated that it was premature for the Union to take a confidence vote since local negotiations had just begun. It asserted that such a vote could cause customers to take their business to a competitor who is not hampered by the threat of a strike. The letter further urged the employee-members to "request the type of ballot that will allow you to express your true feelings." Finally, it suggested that they should be given the opportunity to vote on the Company's proposal when it was presented.[2]

On June 7, the Union complained to Respondent's officials that the letter was an act of interference in its internal affairs. On the same date the charge in the instant case was filed. No other unlawful conduct is alleged.

The Administrative Law Judge found that Respondent's June 4 letter addresses the issues of when and how the Union should take a confidence vote and whether or not its members should vote on the Company's bargaining proposal. She concluded that all of these are purely internal union matters and that Respondent's remarks constitute an interference in the internal union affairs of its employees in violation of Section 8(a)(1) of the Act.[3] Respondent contends otherwise and argues that the remarks were protected speech within the meaning of Section 8(c) of the Act. We find merit in Respondent's position.

Respondent's June 4 letter did not address purely internal union matters. The letter expressed concern that the confidence vote would cause customers to take their business elsewhere to avoid the possibility of a strike. This clearly was a matter affecting Respondent as well as the Union. The remark regarding the premature timing of the vote was simply an argument to employees about the wisdom and necessity of taking a step that might do damage to the business. By the same token, the suggestions as to the type of ballot and the opportunity to vote on the Company's proposal were attempts to encourage employees to take an active interest in an issue of common concern.

In this connection, Respondent's action differed substantially from that at issue in the *Borg-Warner* and *General Electric* cases on which the Administrative Law Judge relies. In *Borg-Warner*, the employer insisted to impasse that its collective-bargaining agreement with the union include a clause calling for a prestrike secret vote by all employees regarding nonarbitrable issues.[4] The Supreme Court held that the employer could not lawfully insist on the clause because it was not a mandatory subject of bargaining relating to wages, hours, or terms and conditions of employment. Instead, the clause related "only to the procedure to be followed by the employees among themselves before their representative may call a strike or refuse a final offer."[5] The Court further noted that the effect of the clause was to allow the employer to deal directly with the employees rather than with their representative.

In contrast, Respondent here did not insist on a contract clause which would affect the method of bargaining during the life of an agreement. Nor did it suggest that all employees be required to vote on any disputed issue, in an attempt to deal directly with the employees rather than the Union. We, therefore, find that the *Borg-Warner* decision is not controlling in the instant case.

Nor do we find that the Board's decision in *General Electric* requires the finding that Respondent's June

[1] All dates are in 1976 unless otherwise indicated.

[2] The full text of the letter is set forth in the Administrative Law Judge's Decision.

[3] As authority for this finding, the Administrative Law Judge cites *N.L.R.B. v. Wooster Division of Borg-Warner Corp.*, 356 U.S. 342 (1958), and *General Electric Company, Battery Products, Capacitator Department*, 163 NLRB 198 (1967), enforcement denied in pertinent part 400 F.2d 713 (C.A. 5, 1968).

[4] Included among these issues were modification, amendment, or termination of the contract.

[5] *Borg-Warner, supra* at 350.

4 letter is unlawful. In *General Electric,* the employer made appeals to its employees and to the union to take a strike vote on company property on company time by secret ballot and under neutral supervision. It was also proposed that the voting be conducted in such a manner that all hourly employees would have the opportunity to vote. The employer simultaneously engaged in other unfair labor practices. The Board found the employer's conduct with regard to the strike vote constituted an intervention in the union's internal affairs and an attempt to undercut the union's status as bargaining representative in violation of Section 8(a)(1) of the Act.

Here, however, Respondent did not offer to set up an alternative strike vote procedure supervised by nonunion members. It did not suggest that the vote be so conducted as to allow all employees the opportunity to vote. Rather, Respondent's letter merely encouraged union members to take certain actions with regard to a vote already arranged by the Union. In these circumstances, and in the absence of other unlawful conduct, we find that Respondent's letter was not an attempt to dictate union matters or to deal directly with employees rather than with the Union. Instead, it constituted nothing more than an expression of opinion. Consequently, the *General Electric* decision is inapposite.

Moreover, we find that Respondent's letter of June 4 was an exercise of free speech protected by Section 8(c) of the Act. Section 8(c) provides, *inter alia,* that the expressing or disseminating of any views in written form shall not constitute or be evidence of an unfair labor practice if such expression contains no threat of reprisal or force or promise of benefit.[6] As the Senate report on the section states, its purpose is to insure full freedom of expression to employers and labor organizations in accordance with the Supreme Court's rulings that the first amendment guarantees freedom of speech to both sides in labor controversies.[7]

Here, Respondent's letter expressed views on matters germane to the interests of the employees and the parties and urged that certain actions be taken. The letter contained no threat of reprisal or force if employees failed to accept Respondent's views. It contained no promise of benefit if employees followed Respondent's suggestions, and it did not occur in conjunction with any unlawful conduct which might otherwise affect its impact on employees. Nor, as we have found, was it an attempt to interfere in internal union matters. In these circumstances, we find that Respondent's letter of June 4 falls within the scope of Section 8(c).[8]

Accordingly, we find that Respondent did not interfere with the Union's internal affairs in violation of Section 8(a)(1) of the Act and shall order that the complaint be dismissed in its entirety.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

[6] Sec. 8(c): "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."

[7] S. Rept. 105 on S.1126, I Leg. Hist. 429 (1947).

[8] Cf. *The Texas Company,* 93 NLRB 1358 (1951), and *Vogue Lingerie, Inc.,* 123 NLRB 1009 (1959), where the Board found it lawful for employers to urge employees by letter or in a speech to abandon a strike. See also *Mosher Steel Company,* 220 NLRB 336 (1975), where it was held lawful for an employer to make an individual appeal to an employee to cross a picket line.

DECISION

STATEMENT OF THE CASE

JENNIE M. SARRICA, Administrative Law Judge: Upon due notice, this proceeding under Section 10(b) of the National Labor Relations Act, as amended (29 U.S.C. §151, *et seq.*), hereinafter referred to as the Act, was heard before me at St. Louis, Missouri, on October 21, 1976,[1] pursuant to a complaint issued on September 7, based on charges filed on June 7 by Local 2352, International Brotherhood of Electrical Workers, AFL–CIO, hereinafter referred to as the Charging Party or the Union, presenting allegations that Westinghouse Electric Corporation, Distribution Equipment Division, hereinafter referred to as the Respondent, committed unfair labor practices within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act. In its answer dated September 9, Respondent denied that it committed the unfair labor practices alleged. Representatives of all parties were present and participated in the hearing herein.

Based on the entire record,[2] including my observation of witnesses and after due consideration of the arguments presented in briefs filed by the parties, I make the following:

FINDINGS AND CONCLUSIONS

I. JURISDICTION

It is alleged in the complaint and admitted by Respondent that Westinghouse Electric Corporation, Distribution Equipment Division, at all times material herein, maintained an office and plant at 1945 Craig Road, in the county of St. Louis, State of Missouri, the only facility involved herein, where it is engaged in the manufacture, sale, and distribution of electrical switch gear and the distribution of components and related products.

[1] All dates are in 1976 unless otherwise specified.

[2] Errors in the transcript have been noted and corrected.

During the year ending August 31, which period is representative of its operations during all times material herein, Respondent, in the course and conduct of its business operations, manufactured, sold, and distributed at its St. Louis plant products valued in excess of $50,000, of which products valued in excess of $50,000 were shipped from said plant directly to points located outside the State of Missouri.

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

II. THE UNION

Respondent admits, and I find, that Local 2352, International Brotherhood of Electrical Workers, AFL–CIO, is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Issue*

The issue is whether by communicating directly with employees concerning the taking of a confidence vote announced by the Union for consideration and balloting at a scheduled union meeting Respondent interfered with the internal affairs of the Union and thereby restrained and coerced its employees in violation of Section 8(a)(1).

B. *The Events Involved*

There is either no contradiction or substantial agreement with respect to the following statement of facts.[3] There is an established bargaining relationship between Respondent and the Union. On May 26, the parties held their first negotiating session for changes in their expiring 3-year collective-bargaining agreement which was to terminate on July 11. On June 1, the Union's chief steward, Kenneth Swyers, utilizing a bulletin board posting, notified its members employed by Respondent that a "confidence vote" would be taken at the union meeting on June 9.[4] After the posting on June 1, Swyers was called to the office of Edward H. Ruehl (also appearing in the record as Rule), where Fritz Wilson, operations manager, and Edward Bork, manufacturing manager, were also present. Swyers was asked to explain the purpose of the confidence vote and was told that management might issue a statement on the matter. Swyers told the management representatives that the members understood the procedures and that the Union could answer any question from its members. Wilson assured Swyers he would show the Union any statement prior to its issuance. However, without prior consultation with the Union, Wilson, on June 4, mailed to each individual union member the following letter:

> Your local union has scheduled a regular membership meeting for Wednesday, June 9th. The purpose of the meeting is to take a confidence vote.
>
> Such a vote can give your union leaders the right to call a strike in the St. Louis plant without giving you a chance to vote on our proposal after it is put on the table. That's why it's very premature to take such a vote at this time. Another thing, local negotiations have just begun and the issues have not yet been identified.
>
> A vote of this nature also can have serious effects upon our ability to obtain new business. Our customers want to be assured of uninterrupted deliveries and even the threat of a strike could very well cause our customers to take their business to a competitor who does not have a contract to negotiate.
>
> So be sure you attend the meeting and give careful thought and consideration to this serious question before you cast your ballot. You should request the type of ballot that will allow you to express your true feelings. Also you should be given the opportunity to vote on the company's proposal when it is presented.

Having become aware of the letter, on June 7 Swyers and Local Union Vice President Otto Salm contacted Respondent's officials and protested that by the distribution of the letter Respondent was meddling with the internal affairs of the Union and had failed to clear any statement with the Union, as previously promised. With respect to the latter accusation the union representatives were told that this was an oversight. The protest was reiterated at the bargaining session held on June 8 and, this being unproductive, Swyers distributed an explanatory letter to the membership.

Contentions of the Parties

Respondent contends that its letter was protected free speech within the meaning of Section 8(c) and that under Board law an employer has the right to communicate directly with its employees concerning their concerted activities so long as its communications do not contain threats of reprisal or force or promises of benefits and are not made in conjunction with any sufficiently proximate unfair labor practices which would evidence an opposition to the purposes of the Act. The General Counsel contends that Respondent's June 4 letter concerned itself with the mechanics of testing the statutory representative's power to call a strike, a purely internal union matter, and therefore was a communication by Respondent which constitutes

[3] I ruled at the hearing that the procedures the Union had established, with respect to confidence votes, strike votes, and votes to accept or reject the employer's last offer, as well as the procedures it in fact followed, and the accuracy or inaccuracy of Respondent's representation with respect thereto, were not in issue within the framework of the complaint. Accordingly, I excluded evidence and testimony directed thereto and rejected offers of proof.

[4] The notice read:

> ATTENTION UNION MEMBERS
>
> There will be a confidence vote taken at the next regular scheduled union meeting June 9. Everyone wishing to cast their vote meet at District 9 Michinist Hall located 12365 St. Charles Rock Rd. Third shift meets at 8:30 a.m. Second 1:30 p.m. and First 5:15. Anyone with questions feel free to come and ask.

All parties understood that the purpose of the "confidence vote" was to enable the Local to obtain from the International advance approval for any strike sanction.

interference in the internal union affairs, violative of Section 8(a)(1) of the Act.

Analysis and Conclusions

The General Counsel relies on the principle in *Borg-Warner*,[5] as applied by the Board in *General Electric Company*,[6] urging that this case is identical with the 8(a)(1) aspect of *Borg-Warner*, lacking only the refusal-to-bargain violation because, unlike the situation in that case, Respondent here did not make the fostered change in the Union's internal procedures a bargaining demand. Nevertheless, the General Counsel urges, the direct communication by Respondent to the individual union members, in advocacy of its position on internal union matters, alone, is an independent violation of Section 8(a)(1) of the Act.[7]

The General Counsel points out that here Respondent's letter identifies as the subject the "confidence vote" scheduled by the Union and then proceeds to argue that such vote is premature (a procedural question of timing rather than substance of whether or not to strike), and urges union members to attend and request a particular type of ballot and an opportunity to vote on the Company's proposal. (Again procedural rather than substantive.) Thus, it is urged that these are all matters concerning the procedure, the timing, and the "mechanics of testing the statutory representative's power to call a strike, a purely internal matter."[8]

Respondent would distinguish the *General Electric* decision on the ground that there the employer emmeshed itself in the determination of whom the union would allow to vote (all represented employees or union members only) whereas here Respondent merely urged employees how to vote, i.e., "to vote against the strike confidence vote," which was devoid of threats of reprisal or promises of benefit and comparable to urging employees to vote against representation; to refrain from striking; to abandon a strike; or to return to work, all protected by Section 8(c) of the Act.

In agreement with the General Counsel, I do not find Respondent's letter so limited. Indeed, I find the thrust of Respondent's message to be consistent with the analysis presented by the General Counsel, even with the accompanying references to the effect of a strike threat upon customers and the suggestion that employees should be given the opportunity to vote on the Company's proposal. Further, although the Fifth Circuit declined to enforce the *General Electric* holding, viewing the company's communication as attempted persuasion "to prevent one specific strike," I am governed by the Board's decision therein. Nor have I found any case indicating that the Board has departed from its *General Electric/Borg-Warner* holding.[9] Accordingly, I conclude and find, on the authority of the *Borg-Warner* and *General Electric* cases cited, *supra*, that by interfering in the internal union affairs of its employees Respondent engaged in activities violative of Section 8(a)(1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

Conclusions of Law

1. Westinghouse Electric Corporation, Distribution Equipment Division, is, and has been at all times material hereto, an employer within the meaning of Section 2(2) engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local 2352, International Brotherhood of Electrical Workers, AFL–CIO, is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

3. By interjecting itself into purely internal affairs of the Union, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

[5] *Wooster Division of Borg-Warner Corporation*, 113 NLRB 1288, 1294 (1955), enforcement denied 236 F.2d 898 (1956), reversed, upholding the Board 356 U.S. 342, 349–350 (1958). In its decision the Board held that "*the mechanics of testing the statutory representative's power* to call a strike . . . [is] a purely internal matter unrelated to any condition of employment," and the Supreme Court viewed the matter as one dealing "only with relations between the employees and their unions [which] substantially modifies the collective-bargaining system provided for in the statute by weakening the independence of the 'representative' chosen by the employees."

[6] *General Electric Company, Battery Products, Capacitator Department*, 163 NLRB 198, 211 212 (1967), enforcement denied in pertinent part 400 F.2d 713 (C.A. 5, 1968), where instead of stopping at presentation of the proposal limiting the representative's authority to the union, the respondent instead "carried the matter directly to the employees . . . and urgently sought their support on the issue, thereby intervening directly in the Union's internal affairs. . . ."

[7] Comparison is made to *Builders Supply Company of Houston*, 168 NLRB 163 (1967), enfd. 410 F.2d 506 (C.A. 5, 1969), wherein an employer's suggestion for a change in the union's election observer was found to be unlawful interference with the union's right to select its representative, and with *Diversified Industries, a Division of Independent Stove Company*, 208 NLRB 233, 252 (1974), wherein the plant manager suggested to a union member the ouster of certain union officials and supplied the services of a clerical employee who drafted critical letters advocating such ouster, which was found to be a deliberate injection into matters not his legitimate concern and interference with the union's internal affairs, a violation of Sec. 8(a)(1) of the Act.

[8] *Borg-Warner*, supra at 1295.

[9] Somewhat analogous findings, although without interference rationale or citation to the cases considered herein, and without identification as interference with internal affairs of the union, are findings of 8(a)(1) violations in *Dyna Corporation*, 223 NLRB 1200, 1206 (1976), wherein the employer offered incumbent officers of the independent union assistance to fight the independent's impending affiliation with an international union; *Warehouse Foods, a Division of M. E. Carter and Company, Inc.*, 223 NLRB 506 (1976), wherein a respondent official asked an employee not to attend the strike vote meeting stating, "If no one attended the strike vote, then there wouldn't be no strike"; and *Cathay (Wah Sang) d/b/a Daphne San Francisco Funeral Service*, 224 NLRB 461, 462–463 (1976), wherein the employer asked an employee whether he and other employees were keeping logs of their work from which the union billed the employer for his alleged violations of their contract, and suggested that employees would risk their continued employment by doing so.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I will recommend that Respondent be required to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

[Recommended Order omitted from publication.]