Walter Pape, Inc. *and* Local 719, Production, Distribution and Maintenance Employees Union. Case 29-CA-1636

March 26, 1970

DECISION AND ORDER

BY CHAIRMAN MCCULLOCH AND MEMBERS FANNING AND BROWN

On December 2, 1969, Trial Examiner Owsley Vose issued his Decision in the above-entitled proceeding, finding that Respondent had engaged in and was engaging in certain unfair labor practices, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision Thereafter, Respondent filed exceptions to the Trial Examiner's Decision 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 powers in connection with this case to a three-member panel

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and brief,[1] and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner, and hereby orders that Respondent, Walter Pape, Inc., Brooklyn, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

[1] Respondent excepts to the Trial Examiner's credibility findings It is the Board's established policy, however, not to overrule a Trial Examiner's credibility findings unless, as is not the case here, a clear preponderance of all the relevant evidence convinces us that they are incorrect *Standard Dry Wall Products*, 91 NLRB 544, enfd 188 F 2d 362 (C A 3) We find no basis for disturbing the Trial Examiner's credibility findings in this case

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

OWSLEY VOSE, Trial Examiner This case, heard at Brooklyn, New York, on August 27, 1969, pursuant to a charge filed April 17, 1969, and a complaint issued on July 23, 1969, presents the question whether Respondent, in violation of Section 8(a)(1) of the Act, promised and granted wage increases and threatened the loss of benefits in order to induce employees to reject union representation.

Upon the entire record and my observation of the witnesses, I make the following

FINDINGS AND CONCLUSIONS

I THE NATURE OF THE RESPONDENT'S BUSINESS

The Respondent, a New York corporation, is engaged at its place of business in New York City in the sale and distribution of milk and dairy products. During the year preceding the issuance of the complaint the Respondent purchased and had delivered to its New York City facility from out-of-State sources over $50,000 worth of milk and dairy products. Upon these facts I find, as the Respondent admits, that it is engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein

II THE LABOR ORGANIZATIONS INVOLVED

Local 719, Production, Distribution and Maintenance Employees Union (herein called Local 719) and Local 338, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (herein called Local 338) are labor organizations within the meaning of Section 2(5) of the Act

III THE UNFAIR LABOR PRACTICES

The Respondent's acts of interference, restraint and coercion in violation of Section 8(a)(1) of the Act

A. *The Facts*

1. Background

In October 1968, Daniel Sullivan, Secretary-Treasurer of Local 719, presented Walter Pape, the President of the Respondent, with cards signed by a majority of the Respondent's employees, excluding supervisors and office clerical employees, authorizing Local 719 to act as their exclusive collective-bargaining representative, and requested that the Respondent recognize Local 719. After examining the cards, President Pape signed a recognition agreement with Local 719

Thereafter Local 438, without submitting any cards, sent the Respondent a telegram demanding that it recognize Local 438. On November 29, 1968, Local 438 filed with the Board's Regional Director a petition under Section 9 of the Act requesting that it be certified as the exclusive collective-bargaining representative of the Respondent's employees The hearing in the representation case was postponed several times and was not held until April 18, 1969

2 The Respondent's promise of a benefit to Francis McMullan

On April 10, 1969, about a week before the hearing was scheduled to be held in the representation case, President Pape approached Francis McMullan, one of the Respondent's route salesmen, in the garage, as he was returning with his truck and asked him, specifically referring to Local 719, "if [he] received a raise would [he] disassociate [himself] with the union " McMullan refused,

saying "that the raise would be fine for now, what about next year, or the year after "[1]

3 The Respondent's grant of a wage increase

When the route salesmen returned to the garage on Monday, April 14, 1969, after completing their day's work, Pape stopped the trucks on the way in and informed the drivers individually that he had given them a pay raise, that their guarantee was being raised from $120 to $140 a week. At the end of the week the men received their increased paychecks for the first time A few weeks later, the Respondent granted wage increases to its warehousemen and mechanics In the 9-year period, the Respondent had been in business it had granted at most three general wage increases. Pape testified that it was "probably" in 1966 that the route salesmen's wage guarantee was last increased.

4 The Respondent's letters of May 7 and 14, 1969

On May 7, 1969, after the hearing in the representation case and before the issuance of the Regional Director's decision, the Respondent sent a letter to all of its employees dealing with the subject of union representation. Quoted below is the letter sent to Francis McMullan.

Dear Frank,

During the past seven months all of us have been under considerable strain, resulting from the union activities which have been taking place These have been difficult times, and all of us have been adversely affected At this time I would like to bring you up to date on what is happening with your company's labor situation and my feelings regarding it

At the present time two unions are fighting over you. One union has indicated that it has a majority of the employees signed up claiming that it is the bargaining agent for you men. The other union claims you men want it to represent you and wants to have an election.

Why are two unions so interested in us — a small company with twenty-five potential members?

I would like to state that the company would prefer to continue non-union

For many years we have operated successfully without unions We have endeavored to keep pace with industry in wages, fringe benefits and working conditions, and we will continue to do so in the future. Through extended illness of a number of you men we have continued, uninterrupted, to pay sick benefits. Should either union win an election, I would definitely stop this benefit

We have substantially increased wages to provide you with additional income These increases were recently given to you by the company without your having to pay initiation fees or dues to any union.

We are investing in you and your ability and we now need your added cooperation and effort to provide additional sales which are vital to the company.

Our track record is good and I would prefer all of you to tell both of these unions that they are not wanted or needed and to go back where they came from and stop annoying us, but of course this I am not supposed to suggest We are dealing with a situation where the employer is not supposed to say anything

I wish to repeat, we will continue to give you increases in wages and benefits in the future We ask in return from each and every employee, cooperation, effort and loyalty. Sales are the backbone of this company. Increased sales mean increased income to you, and growth of the company I would like to put this company in a more profitable situation, and I need your cooperation. Cooperation is mutual, you cooperate with me and I will cooperate with you and continue to do so.

Very truly yours,
Walter F Pape

On May 14, 1969, the Respondent sent a second letter to the employees urging the rejection of the both unions. The text of this letter is as follows:

Dear Frank,

I would like to thank those of you who have responded to my last letter and let me know that you are supporting your Company 100% in its efforts to keep it non-union

My door is always open affording you the opportunity to make known your intent, progress is a must and it can best be attained by joining with me and moving forward together

This was a fine company to work for before the unions began upsetting you men and disrupting our business You and I are going to make it a fine company again by knocking these unions right out of here

This company has given to its employees a list of fringe benefits as long as your arm without a union and will continue to do so in the future providing we still have no union

Our sales and customer service has suffered greatly within the past seven months, and as you know, these are the most important elements of our business. Let us tend to our business and let the unions tend to theirs. How many sales have the unions contributed to our company? How much have they put in your pocket? The answer is nothing in each case, in fact they have done nothing but cause dissension.

Look around and see what they have done to business — to small companies as well as large ones. Read a newspaper and see how many companies have been put out of business by unions Read a newspaper? Not long ago there were a choice of at least seven newspapers, now your choice is down to a few; the others had to go out of business, why? One word, UNION!

They won't build our business only we can do that, but they can destroy it

You know my feelings, and I look to each of you to support me now as you have in the past

B. *The Illegality of the Respondent's Conduct*

1. The Respondent's implied promise of a benefit to McMullan

In my opinion, Pape's asking McMullan whether he would disassociate himself from Local 719 if he were

[1] This finding is based on the credited testimony of McMullan Pape denied having any conversation with McMullan or any other employees about granting pay raises if they would disassociate themselves from Local 719 The making of such an offer is consistent with Pape's other conduct discussed below, including the granting of wage increases and the sending of letters to the employees containing both promises of benefits and threats or reprisals depending on their decision with respect to union representation Under all the circumstances, I do not credit Pape's denial

given a raise constituted an implied promise of a benefit if he withdrew from the union. Such promises are well recognized forms of interference, restraint and coercion in violation of Section 8(a)(1) of the Act. *N.L.R.B.* v *Flomatic Corporation*, 347 F.2d 74, 76-77 (C.A. 2); *N.L.R.B.* v. *Pyne Molding Corp.*, 226 F.2d 818, 820 (C.A. 2).

2. The promise of benefits and threat of reprisals in the Respondent's letters of May 7 and 14

In his letter of May 7, to the employees, Pape suggested that the employees "tell both of these unions that they are not wanted or needed," reminded them of the past benefits accorded the employees without the intervention of any unions, and intimated that further increases in wages and benefits would be forthcoming if the employees renounced both unions. In addition, Pape bluntly threatened to stop paying sick benefits "should either union win an election." Pape's threat and thinly veiled promise of further benefits clearly constituted unlawful interference, restraint and coercion in violation of Section 8(a)(1) of the Act.

The Respondent exceeded permissible bounds in its letter of May 14 also. As found above, the Respondent included in this letter the following statement:

> This company has given to its employees a list of fringe benefits as long as your arm without a union and will continue to do in the future providing we still have no union

The tone of the Respondent's letter as a whole was strongly antiunion. Thus, the Respondent made a frank appeal to the employees to "knock . . these unions right out of here" It pointed out that the unions had contributed nothing to the employees' pocketbooks and implied that only the Respondent could do that. In the letter the Respondent also attributed the closing of many businesses, both large and small, to the activities of unions.

In my opinion, viewing the Respondent's statement above quoted in the context in which it appeared, it could reasonably be construed by the employees as a threat to discontinue fringe benefits if the employees chose union representation and therefore was violative of Section 8(a)(1) of the Act. Cf. *N.L.R.B* v *Exchange Parts Co.*, 375 U.S. 405, 407-410.

3. The Respondent's grant of a plant-wide wage increase

As found above, on April 14, 1969, just a few days before the hearing was scheduled to begin in the representation case, the Respondent announced to the route salesmen that it was granting what was in effect a substantial increase in their weekly guaranteed wage Thereafter, wage increases were granted to the remaining employees which the unions were seeking to represent. These increases were not granted as part of any regular program for raising the employees' compensation. As found above, the last general increase in compensation was given in about 1966.

The timing of the granting of the wage increases, a few days before the hearing in the representation proceeding, which Pape might reasonably anticipate would culminate in a direction of election, suggests that this action was taken by the Respondent with a view to influencing the employees' vote in the election. Further support for this conclusion is found in Pape's query of McMullan a few days earlier whether he would disassociate himself from Local 719 if he were granted a raise Further light on Pape's motives is cast by Pape's reminder in his letter to the employees dated May 7 that they had recently been given wage increases without their "having to pay initiation fees or dues to any union" By this statement, in my opinion, Pape made explicit what he had hoped would be implicit in granting the wage increases a month earlier. Pape's letters of May 7 and 14, containing as they do threats of reprisals and promises of benefits depending upon the employees' decision regarding union representation, reflect what in my opinion has been Pape's attitude since the outset of the organizing activities, namely, one of uncompromising opposition to having any union in the plant Under all the circumstances I conclude Pape granted the wage increases when he did for the purpose of inducing the employees to vote against any union in the election which he believed would be scheduled in the near future. By such conduct the Respondent interfered with, restrained and coerced its employees in violation of Section 8(a)(1) of the Act. See *N.L.R.B.* v. *Exchange Parts Co.*, 375 U.S. 405, 409-410; *N.L.R.B.* v. *Pyne Molding Corp.*, 226 F.2d 818, 820-821 (C.A. 2); *N.L.R.B* v *Flomatic Corporation*, 347 F.2d 74, 76-77 (C.A. 2).

CONCLUSIONS OF LAW

1. By making veiled promises of benefits and by granting wage increases to employees as an inducement to them to reject union representation, and by threatening employees that they would suffer the loss of benefits if they continued their union affiliation and activities, the Respondent has interfered with, restrained and coerced employees in the exercise of their rights under Section 7 of the Act, thereby engaging in unfair labor practices in violation of Section 8(a)(1) of the Act

2. The aforesaid 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 unfair labor practices in violation of Section 8(a)(1) of the Act, my recommended order will provide that the Respondent cease and desist from such conduct and that it take certain affirmative action found necessary to effectuate the policies of the Act

Upon the foregoing findings and conclusions and the entire record, and pursuant to Section 10(c) of the Act, there is hereby issued the following:

RECOMMENDED ORDER

The Respondent, Walter Pape, Inc., New York, New York, its officers, agents, successors, and assigns, shall

1 Cease and desist from:

(a) Making promises of benefits and threats of reprisals against employees to induce them to reject union representation.

(b) Granting wage increases to employees for the purpose of inducing them to reject union representation; provided however that the Respondent is not required to revoke any wage increase which it has granted.

(c) In any other manner interfering with, restraining or coercing its employees in the exercise of the rights

guaranteed in Section 7 of the Act.

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

(a) Post at its New York, New York, plant copies of the attached notice marked "Appendix."[2] Copies of said notice, on forms provided by the Regional Director for Region 29, after being duly signed by an authorized representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 29, in writing, within 20 days from the receipt of this Decision, what steps have been taken to comply herewith.[3]

[2]In the event no exceptions are filed as provided by Section 102 46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, recommendations, and Recommended Order herein shall, as provided in Section 102 48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and order, and all objections thereto shall be deemed waived for all purposes In the event that the Board's 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 be changed to read "Posted pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board "

[3]In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read "Notify said Regional Director, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith "

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board an agency of the United States Government

WE WILL NOT make promises of benefits or threaten our employees with loss of benefits or other harm in order to induce them to reject union representation.

WE WILL NOT grant wage increases or other benefits to employees in order to persuade them to reject union representation. However, we are not required to revoke any wage increases or benefits previously granted

WE WILL NOT in any manner interfere with, restrain or coerce our employees in the exercise of their rights to join or not to join any labor union, or to participate in union activities.

WALTER PAPE, INC.
(Employer)

Dated By
(Representative) (Title)

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 Board's Office, 16 Court Street, Fourth Floor, Brooklyn, New York 11201, Telephone 212-597-3535