Westinghouse Electric Corporation, Small Motors Plant *and* International Union of Electrical Radio and Machine Workers, AFL–CIO–CLC. Case 10–CA–9689

June 12, 1973

DECISION AND ORDER

BY CHAIRMAN MILLER AND MEMBERS KENNEDY AND PENELLO

On January 23, 1973, Administrative Law Judge George L. Powell issued the attached Decision in this proceeding. Thereafter, the General Counsel and the Charging Party filed exceptions with supporting briefs and the Respondent filed an answering 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 briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge solely to the extent consistent with this Decision.

As more fully set forth in the Administrative Law Judge's Decision, the facts of this case are relatively simple. The Respondent is alleged to have violated Section 8(a)(3) and (1) by enforcing an announced policy prohibiting employees from reporting more than 30 minutes before, or staying more than 30 minutes after, working time. The General Counsel stated on the record that it was not attacking this rule, but rather its application to employees distributing union literature. The Respondent, in reliance on that statement, rested its case and refrained from calling additional witnesses.

No independent unfair labor practices have been alleged and there is nothing in the record which would support a finding that union adherents were not treated in the same manner as other employees. The most that can be said is that the rule was enforced for the first time against employees distributing union literature. Patently, that is not enough.

That other employees occasionally sought and obtained permission to be on the premises outside their working hours is also unpersuasive. No such permission was requested here. Further, the assertion that employees do not require their employer's permission to exercise their rights under Section 7 demonstrates a misconception of the right involved. The legality of the rule was not litigated; therefore, the right at issue is not employee access to an employer's premises for organizational purposes, but rather the right of an employee to nondiscriminatory treatment.

The argument that the Respondent's justification for the rule was insufficient is burdened by a similar defect. Since the rule was not under attack, it required no justification.

The nondiscriminatory enforcement of an unambiguous rule against union adherents is not an unfair labor practice unless the rule itself is unlawful. As the legality of the rule was not litigated, we shall dismiss the complaint in its entirety.

ORDER

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

DECISION

I STATEMENT OF THE CASE

GEORGE L. POWELL, Administrative Law Judge: The issue in this case is whether an employer violates Section 8(a)(1) and (3) of the National Labor Relations Act,[1] herein called the Act, by discriminately or nondiscriminately enforcing plant rules and regulations dealing with the presence of off-duty shift employees at an employee entrance of the building where they are employed. Specifically, employees, in a three-shift operation, were asked not to violate the plant policy or rule which stated that employees were not to report to the plant earlier than 30 minutes before their scheduled starting time to work and not to remain on the plant property more than 30 minutes after their scheduled stopping time, unless authorized. Disregarding these specific instructions, five off-duty employees from the third shift, whose work period ran from midnight to 8 a.m., joined two off-duty employees of the second shift at approximately 3:35 p.m. at the employee entrance to the plant building for the purpose of distributing union literature to second-shift employees as they entered the plant for work beginning at 4 p.m. The employer disciplined these five employees (gave each a 3-day layoff) for "Willful failure to carry out definite instructions or assignments," a category set out in the employees' handbook.

The Union[2] charged[3] the Respondent Employer with a violation of the Act, and the General Counsel of the National Labor Relations Board, herein called the Board, issued a complaint[4] alleging a violation of Section 8(a)(1) and (3) of the Act by the 3-day disciplinary suspensions of the five third-shift employees on the theory that an employer cannot lawfully discipline its off-duty employees when all they were doing was engaging in the distribution of union literature on

[1] 29 U.S.C. Sec. 151, *et seq.*

[2] International Union of Electrical, Radio and Machine Workers, AFL–CIO–CLC.

[3] Charge was filed July 20, 1972.

[4] Complaint issued by Walter C. Phillips, Regional Director for Region 10 on August 29, 1972.

their own time on company property at the employee entrance to the plant building. The Respondent's plant rules are not in issue nor is it alleged that the promulgation of the 30-minute rule violates the Act. Applying the rule to prohibit union activity is the gravamen of the complaint.

I find, for the reasons hereinafter set forth, that the Act has not been violated and I will order the complaint dismissed in its entirety.

The trial of the case, under Section 10(b) of the Act, took place in the McMinn County Courthouse, Athens, Tennessee, on October 17, 1972. Briefs were filed by the parties, after a 10-day extention of time was granted to November 20, 1972, pursuant to request of the Union. The Respondent's brief was timely filed on November 20, 1972, whereas the briefs of the General Counsel and the Union were untimely filed on November 21, 1972.

Upon the entire record including my observation of the demeanor of the witnesses, and after due consideration of the brief of Respondent,[5] I make the following:

Findings and Conclusions

II JURISDICTION

Respondent, Westinghouse Electric Corporation, Small Motors Plant, is a Pennsylvania corporation engaged in the manufacture of electric motors and electric motor parts at its plant and place of business at Athens, Tennessee. During calendar year 1971, a representative period, Respondent made, sold, and shipped its products, valued in excess of $50,000, directly to customers located outside the State of Tennessee. I find Respondent has been and is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

I find that the Union, International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC, has been and is a labor organization within the meaning of Section 2(5) of the Act.

III THE ALLEGED UNFAIR LABOR PRACTICES

The facts are undisputed and those facts which directly involve the incident giving rise to this case are stipulated to as follows:

> At approximately 3:35 p.m. on July 17, 1972, seven hourly employees came to the employee entrance of the Athens Motor Plant for the purpose of the distribution of union literature to oncoming second shift employees who begin their shift at 4:00 p.m. and to first shift employees who leave at 4:00 p.m.
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> Included in the employees who showed up for the purpose of distributing union literature were two second shift employees, Barbara Faye Williams and Glen Ray Johnson, and five third shift employees, Kathleen Holder, Nettie E. Hyde, Margie Ann Watson, Reba Shelton and Kenneth Torbett.
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> At approximately 3:45 Messrs. Jack Springer, Bob Rich [manager of operations] and Jerry Crabtree approached the seven employees distributing the literature at the employee entrance. Mr. Crabtree asked them if they understood Mr. Rich when he explained the 30-minute plant rule and told them that he did not want any employees to report to the plant prior to 30 minutes before the start of their shift and did not want employees to remain on the property more than 30 minutes after the conclusion of the shift. Mr. Crabtree went around to each of the seven employees and specifically asked them if they understood what Mr. Rich had told them relative to this rule and the possibility of disciplinary action for infractions. They each, in turn, indicated that they understood. Mr. Crabtree then told the five third shift employees they were being given a three-day disciplinary furlough effective immediately and that this disciplinary furlough would cover their Tuesday, Wednesday and Thursday shifts and they would be expected to return to work on their regular Friday, which would be Thursday night at midnight, July 21, 1972. He further told the group that he wanted the five third shift employees to leave the plant property immediately . . . . Mr. Springer told the five third shift employees that the three-day disciplinary furlough would become a permanent part of their record and Kathleen Holder indicated she understood this.
>
> Kathleen Holder then spoke up and asked if it was all right to distribute literature at the beginning of the driveway which they in fact did. Both Mr. Springer and Mr. Crabtree said that Barbara Faye Williams and Ray Johnson, since they were second shift employees, could distribute literature at the employee entrance, and in fact, they did so.
>
> The five third shift employees then left the plant property and three of them were subsequently seen distributing literature on Tellico Avenue at the plant road entrance.

Events Leading up to July 17, 1972

1. Prounion activity

The Union commenced its organizing activities on February 16, 1972, some 5 months before the events in question, and such efforts had not ceased at the time of the trial. Nonemployee Ted Nolan, international representative of the Union, and non-Athens employee Maxwell[6] began the organizing. They distributed some 14 separate distributions of union literature at either one or both of the entrances to the plant's parking lot. The pieces of literature were in excess of 50. They were not interfered with in any way.

Additionally, Nolan established headquarters at a local motel where employees went to discuss union benefits. It was "common knowledge" he was there. He also held general meetings with the employees at public meeting places

[5] Reasons for not considering the briefs of the other parties are set out in the conclusion of this Decision.

[6] "Jim Maxwell is the President of IUE Local 724, representing the employees of the Westinghouse Electric Corporations plant in Lima, Ohio," according to Nolan.

including the courthouse, the library, and Gilbert's Hall. He contacted employees at their homes to discuss union benefits and visited them there "extensively." He used the mails to contact the employees.

He created a plant union committee, which on July 17, 1972, was composed of five employees on the third shift, two on the second shift, and two on the first shift. The composition of this committee had changed from time to time, but at no time were there less than two members from each of the three shifts, and the identity of the committee was made known by listing them on distributed leaflets. Respondent's counsel admitted that it was common knowledge as to who was on the committee, and that Respondent knew the five disciplined employees were members of the committee.

Through October 10, 1972, a week before the trial, 52 separate distributions of union literature had been made at the plant. They were made: 1) by Nolan and Maxwell off company property at the two entrances to the plant's parking lot; 2) by on-duty employees in the nonproduction areas on plant property such as the cafeteria, restrooms, and the employee entrance to the plant; 3) by off-duty employees at the employee entrance to the plant building but within the 30-minute policy, and 4) by off-duty employees off plant property at the entrances to the parking lot at times when the off-duty employees were outside the 30-minute policy.

2. Antiunion activity

During this same period of time, an antiunion campaign among the employees began, and some 10 separate distributions of antiunion literature were made. They were made: 1) by on-duty employees on plant property in the same nonproduction areas mentioned above; 2) by off-duty employees on plant property in the nonproduction areas but always within the 30-minute period; and 3) by off-duty employees outside of the 30-minute period off plant property.

3. June 14, 1972, incident

On June 14, 1972, employees Holder (one of the named alleged discriminatees in the instant case) and Williams came to the employee entrance to the plant shortly after 3:30 p.m. to distribute literature. This time was within the 30 minutes allowed for second-shift employee Williams, but outside the 30 minutes for Holder who was on the third shift which would not begin until midnight, over 8 hours away. Nothing was said to Williams who continued to distribute the literature, but Holder was warned that she was in violation of the 30-minute policy and was told she could distribute off plant property which she did. Based on the evidence adduced at the trial, this violation of the 30-minute policy was the first that had ever occurred in the plant's history.

4. Plant history

The plant commenced operations in 1970,[7] but before that a start-up team began as early as August 1968 to prepare for operations. A member of this team was J. V. Springer, the present manager of employee relations, who, among his other duties, prepared the looseleaf employee handbook entitled, "You and Your Job at Westinghouse," which is in evidence as General Counsel's Exhibit 2. The purpose of this book was to make newly hired employees aware of the "regulations and procedures which must be followed in our Plant. All of these are designed to help make our plant a safe, pleasant and desirable place to work." The book was drafted in 1968 and printed in 1969, over 1 year before the plant became operational. Each new employee was given a copy of the book and each provision was reviewed with him before he was placed on his job.

5. 30-minute policy

Among other rules and policies contained in the handbook is the 30-minute policy involved herein. It provides:

> We want our operations to run smoothly, without confusion that could result from people arriving too early or staying too late. That is why you are asked not to report to the Plant earlier than 30 minutes before your scheduled starting time, and not to remain on the Plant property more than 30 minutes after your scheduled stopping time, unless you have been scheduled to work.

Springer testified without challenge that his primary concerns in developing this policy were: the control of people entering; potential exposure to wage and hour law liability; potential exposure to workmen's compensation liability; general third-party liability exposure; safeguarding of employee's property; and the obvious prevention of interference with production. As noted above, the General Counsel does not contest the promulgation of the rule. The General Counsel also specifically did not and does not attack Respondent's "no-solicitation" rule in the handbook at page F–9, Rules 1–12 and B–6.

The undisputed evidence of Respondent's sole witness, Springer,[8] is that the 30-minute policy was adhered to by every employee in the plant since Respondent began operations in 1970, except for the Holder incident on June 14, 1972, and the July 17, 1972, incident involved herein. The occasions when off-duty employees came on the property outside the 30-minute period for work-related purposes were specifically permitted by Respondent. The employees knew they could apply for permission. The parties admit that the first time the policy was invoked was at the time of the Holder incident and the second time it was invoked was at the July 17, 1972, incident, but there is no evidence that at some earlier time the policy could have been invoked and was not invoked.

6. The warning of the employees, June 20, 1972

At meetings of each of the three shifts of employees on June 20, 1972, the attention of all the employees was drawn

[7] At the time of the charge, there were approximately 425 hourly employees on three shifts. Fifty to 60 percent of them live in Athens, a town of about 12,000, and the remainder reside within a radius of 20 miles.

[8] The General Counsel called no witness of his own but rested his case on the stipulation of the parties, noted above, the employee handbook, above, the individual disciplinary reports given the five third-shift employees, the alleged discriminatees, and the formal papers. The Union called one witness, Nolan, its international representative.

to the plant policy that employees were not to enter plant property more than one-half hour before the start of their shifts and should be off plant property within one-half hour after their shifts end. Failure to observe this policy, they were told, could result in disciplinary action. Other matters were taken up at these shift meetings as set out in a memorandum admitted into evidence as Respondent's Exhibit 2.[9]

7. Torbett's statement and Respondent's response

According to the stipulation of the parties, after Crabtree told the five third shift employees to leave the plant property immediately, because of their violation of the 30-minute rule, employee "Kenneth Torbett then spoke up and said, 'do you know what the law says,' and Mr. Springer responded that he knew what the law said and we were administering the 3-day disciplinary furlough and they should leave the property immediately."

The stipulation of the parties also noted that:

> At 6 p.m. on July 17, 1972, Mr. Rich met with the second shift employees in the plant cafeteria and explained to them the disciplinary action that had been taken in view of the plant rules and regulations that had been explained to all employees the preceding month. Mr. Rich further explained that courts have ruled both ways in this particular subject and we believe our rule to be proper and administered it as we did because we believed it to be proper. Mr. Rich met with the third shift employees and the first shift employees on July 18, 1972, to explain to them what had happened.

[9] The below items were discussed at plantwide meetings on each shift

1. April and May factory performance including the fact that we billed in excess of $1 million in May and made $2400 profit

2 Everyone helping to maintain clean restrooms and cafeteria with each person accepting the responsibility of cleaning the mess he or she makes.

3. The loss of $10 and $20 in the plant by two employees through thievery It was explained we thought we had screened out dishonest employees, but we had evidently missed, and it would be prudent for everyone to watch his personal valuables a little more closely

4 The loss of the fourth automobile off our parking lot indicates that each employee should be sure to lock his car before coming in to work In addition, we are planning to have a Burns Agency man as quickly as possible to watch the parking lot around the clock for some indeterminable period of time. [The guard was hired on June 20, 1972 Four cars had been stolen from the company parking lot, on four different days, April 25, June 14, June 19, and June 20, 1972.]

5 Plant policy is for employees not to enter the plant more than one-half hour before the start of their shift and [they] should be off the plant property within one-half hour after the shift ends This is a plant policy and procedure that is outlined in the employee handbook and has been with us since the very beginning. Failure to observe this plant policy could result in disciplinary action [One of the considerations for placing this item on the agenda was the Holder incident on June 14, 1972]

6 Employee picnic is set for July 15 Supervisors will be canvassing each employee to determine the number of people expected to be in attendance and whether they would prefer Knox Park or Meigs County, where we had it last year. This year, we plan to have Burkett Witt prepare the meat

7 Because of customer commitment, it has been necessary to work overtime in an attempt to get the required number of motors since we have not been able to get people into the plant as fast as we would like Customer commitments always bring pressure and we certainly hope that this pressure does not interfere with our ability to communicate with each other and certainly does not affect the fine efforts and accomplishments that we have achieved to date.

Analysis and Conclusions

The theory of the General Counsel is either: (1) a pure theory that off-duty employees cannot be disciplined for engaging in union activity (distributing prounion literature) on their employer's property at the employee entrance to the plant; or (2) the policy that the 30-minute policy or rule is not under attack as a rule, but only its application is under attack. With that understanding, it must be concluded that the General Counsel's theory is (2), above, rather than (1), because under the latter the mere promulgation of the rule would have to be alleged as an unlawful interference with Section 7 rights of employees.

The General Counsel has failed to establish by a preponderance of the evidence that the 30-minute rule or policy was discriminatorily applied. It is a fact that the first time any disciplinary action was taken was on July 17, 1972, but this is the first time any employees had failed to heed the warning not to violate the rule, which warning was given on June 20, 1972, to all employees. It is also clear that the warning was given because of Holder's violation of the 30-minute policy on June 14, 1972, when she was particularly warned. It is also clear from this record that the General Counsel did not establish by a preponderance of evidence that Respondent permitted the 30-minute policy to be violated without warning or discipline until union activities were involved. Just because union activities bring on the first warning or discipline does not in itself establish a discrimination in the application of the 30-minute policy.

The 3-day disciplinary layoff was made in accordance with plant rule B–9, that all employees knew. I find it is reasonable to believe the warnings given each of the three shifts of employees on June 20, 1972, qualifies as "definite instructions" within the meaning of the rule and each employee was put on notice to adhere to the rule. All employees obeyed but the disciplined five. Their disobedience must be classified as "willful failure to carry out definite instructions" within the meaning of the rule.

The interesting question is why did these five employees risk the possible 3 days off without pay, as called for by plant rule B, on page F–9 of the employees' handbook. They were definitely challenging the rule, and they did this deliberately. It is obvious that there was no need for the third-shift employees to be distributing union literature in order to get it in the hands of employees. The second-shift employees could and were distributing the literature. Apparently prounion and antiunion literature was being made available to all employees even inside the plant at the cafeteria, restrooms, and other nonworking areas by on-shift employees.

Counsel for the Union, in cross-examining witness Springer, attempted without success to get Springer to admit either that the 30-minute rule was not written for the distribution of union literature or, in the alternative, was written primarily with the distribution of union literature in mind or was being applied only to the distribution of union literature. Springer's testimony, in effect, was that the rule had a universal application.

Having in mind the facts that the Union's organizing efforts had been going on for some 5 months with no success in persuading a majority of employees to join up, that an-

tiunion efforts were also going on, that Holder had unsuccessfully attempted to distribute union literature on June 14, 1972, and that all employees had been warned thereafter on June 20, 1972, not to violate the 30-minute policy, I find the Union changed its organizing strategy from one of reasoning to a strategy of action to directly attack the Employer. If it could violate the Respondent's 30-minute rule that had been recently brought to the attention of all employees in a warning, without incurring disciplinary action therefor, it could establish itself in power equal to the Respondent and thereby prove to the employees that it could successfully represent them in collective bargaining. This would give a tremendous boost to the organizing campaign.

In order to win this action, the Union would have to: 1) deliberately violate the rule and 2) persuade the Respondent not to discipline the employees therefor. If this did not work, the Union could file a charge with the Board and attempt to eliminate the rule insofar as distributing union literature was concerned.

Therefore, when the five third-shift employees attempted to distribute union literature on July 17, 1972, outside of the 30-minute rule, the main consideration in doing this was *not* to solicit employees or get the literature in the hands of the employees it was wooing (this was being done in other ways) but rather it was to directly ignore and thereby challenge the company policy and warning.

When the employees were being disciplined, employee Torbett attempted to persuade Respondent not to discipline them by asking the company officials if they knew what the law was—implying that the law was on the side of the five third-shift employees. Unsuccessful in this effort, the Union filed the charge resulting in this case. Therefore, just as many employers use the fact that employees are dischargeable for cause as a pretext for discharging them for their protected concerted activities, the Union here used the distribution of union literature as a pretext for attacking the authority of the employer to establish uniform nondiscriminatory rules for the orderly operation of its business. The rule in issue, it must be remembered, is not a "no-solicitation rule," although admittedly when it was invoked it stopped some solicitation but only that engaged in by unauthorized employees. Solicitation by unauthorized employees continued and there is no evidence of real or meaningful interference with the Section 7 rights of the employees.

The law of this case, on its own peculiar facts, is governed by the discussion of the Supreme Court in *N.L.R.B.* v. *Babcock & Wilcox Co.,* 351 U.S. 105, 112 (1956). The Supreme Court said:

> Organization rights are granted to workers by the same authority, the National Government, that preserves property rights. Accommodation between the two must be obtained with as little distruction of one as is consistent with the maintenance of the other. The employer may not affirmatively interfere with organization; the union may not always insist that the employer aid organization.

Finally, I find that Respondent's 30-minute policy was a rule which regulated its property in clear and unmistakable terms with respect to the rights of employees and it does not infringe on those rights to a greater extent than necessitated by legitimate employer interests in such matters as security, traffic, and littering. (See *Westinghouse Electric Corporation, Tampa Division,* 199 NLRB No. 101.)

Failure to Timely File Briefs

As noted earlier, the General Counsel and the Charging Party failed to comply with the Board's Rules and Regulations requiring briefs to be received at times specified. Accordingly, they are not made part of the record in this case. Like the Company's rule in the instant case, the Board's rules are issued to aid the orderly course of business and compliance therewith is required. (See *Colyer* v. *Skiffington,* 265 F. 13, 48.) It has been said that had God wished a permissive society he would have issued "10 Suggestions."

Conclusions of Law

1. Respondent is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The alleged violations of the Act were not established by a preponderance of the evidence.

The Remedy

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following:

ORDER [10]

The complaint is dismissed in its entirety.

[10] In the event no exceptions are filed as provided by Sec. 102 46 of the Rules and Regulations of the Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec 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.