

**Agrigeneral Company, L.P. and Levetta Henson.**  
Case 9-CA-31678

March 15, 1996

**DECISION AND ORDER**

BY CHAIRMAN GOULD AND MEMBERS BROWNING  
AND COHEN

On November 9, 1995, Administrative Law Judge Robert T. Wallace 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,<sup>1</sup> 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, Agrigeneral Company, L.P., Kenova, West Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

<sup>1</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the judge's findings.

*Virone Alex Cravanas, Esq.*, for the General Counsel.  
*Fred B. Westfall Jr., Esq. (Huddleston, Bolen, Beatty, Porter & Cohen)*, of Huntington, West Virginia, for the Respondent.

**DECISION**

**STATEMENT OF THE CASE**

ROBERT T. WALLACE, Administrative Law Judge. This case was tried in Huntington, West Virginia, on October 25 and 26, 1994. The charge was filed on March 14, 1994,<sup>1</sup> the complaint issued on April 26, and briefs were submitted by the General Counsel and Respondent on December 5.

At issue is whether Respondent gave its employees a wage increase in violation of Section 8(a)(1) of the National Labor Relations Act and whether in discharging four employees it violated Section 8(a)(3).<sup>2</sup>

<sup>1</sup> All dates are in 1994 unless otherwise indicated.  
<sup>2</sup> The four employees were Levetta Henson, Ellen Thompson, Barbara Goodpaster, and Kenneth Holland. A fifth employee, Clyde Stiltner, was discharged at the same time and under the same circumstances. However, he opted not to be a party to this case and is not named in the complaint as an alleged discriminatee.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs, I make the following

**FINDINGS OF FACT**

**I. JURISDICTION**

Respondent, a corporation, operates a facility in Kenova, West Virginia, where it sorts and packages eggs. It annually ships eggs valued in excess of \$50,000 from there directly to points outside the State of West Virginia. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that Teamsters Local 505, affiliated with the International Brotherhood of Teamsters, AFL-CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

**II. BACKGROUND**

On November 4, 1992, a representation election was held among Respondent's production and maintenance employees following an organizing campaign by the Union. The vote count was 29 to 12 against the Union. During the campaign Henson and Thompson both wore union T-shirts as did a number of other employees including Wanda Gibson and maintenance man Stiltner. Goodpaster supported unionization and attended at least one union meeting.

In January 1994, Respondent eliminated its night shift. By February 21 it had 15 hourly employees engaged in processing eggs, including the 4 alleged discriminatees. Processors often worked 10 hours a day and sometimes on Saturdays sorting and packing at least 54,000 eggs an hour. The eggs moved in 18 lanes on conveyor belts through a series of sprayers, a "candling booth where 2 employees removed cracked or stained eggs, a weighing station where they were sorted by size and finally to a station where 3 employees packed the eggs in cases each holding 360 eggs. Packers were expected to weed out misgraded or defective eggs missed by candlers. An USDA inspector waited at the end of the line and typically inspected 1 out of 50 cases. They would "retain" for reprocessing cases containing misgraded, cracked, or stained eggs.

As of February 23, Henson had worked for Respondent for 3-1/2 years primarily as a packer; and Goodpaster and Thompson and had been employees for over 6 years as a candler and an all-purpose worker, respectively. Maintenance man Stiltner had more than 5 years and Holland, although employed by Respondent for less than 6 months, had been retained when all other night-shift employees were laid off. He was given various jobs on the day shift but worked primarily as a packer.

**III. ALLEGED UNFAIR LABOR PRACTICES**

While riding to the plant together on Monday, February 21, Holland and Henson discussed working conditions and agreed that union representation was needed. Later in the day Holland talked to another employee (Donna Yost) about organizing and, at her suggestion, he called a representative of the Union after work and arranged to get brochures and a supply of authorization cards on the following day.

Sometime during the workday on February 23, Henson asked employee Charlie Wallace to sign an authorization card and at the same time admonished him not to sign and then back out as he had done in the prior campaign; and after work she solicited Thompson and obtained her signature on a card. Holland told Yost he had obtained a supply of cards; and he tested the sentiments of another employee (Pete Rigsby) by getting him to talk about the prior unionization drive.

At noon nearly all processing room employees were present in the lunchroom. Continuing to test sentiments, Holland spoke to the group stating: "I can't believe the Union didn't get in 1992 . . . you should have been smarter." A discussion ensued (sometimes loud and accompanied by laughter) during the course of which Goodpaster spoke up saying, "I wish whoever voted the Union down had my [sore] feet"; and Stiltner volunteered that her union members were making more than she (\$8 an hour vs. \$5). Driver Philip "Tiger" White opined: "Keep talking and you'll find out who the rats ['snitchers'] were." The dialogue ended after Holland said: "Well I've got some union cards here in my lunchbox," laughed, and ostentatiously opened it producing a sandwich. Throughout the breaktime Plant Manager Norma Jean Bellomy was seated at a receptionist desk just around the corner from the open door of the lunchroom.

As Holland went out the door at the end of the workday, BELLOMY's son William, a dock employee who had not been present in the lunchroom, asked him if anyone was starting another union organizing drive. When Holland answered, "No," William rejoined: "They start that bullshit every time longer hours are required . . . you ain't going to tell be the truth either way."

That evening Holland left three authorization cards at the union office. One was signed by him and the others by Henson and Thompson.

At the end of the workday on Friday, February 25, Thompson, Henson, Holland, and Stiltner were told, successively by Foreman Osborne, to report to the office. When Henson asked, "Is this over that shit that was said in the breakroom the other day?" Osborne replied: "I don't know, but you're probably right."

General Manager Bruce Burrows and Bellomy were waiting in the office. Burrows told them to turn in their uniforms and access keys and, without giving any reason, stated: "Your services are no longer required." As they left, Bellomy handed them a slip stating they were discharged for "lack of work." As Osborne escorted them off the premises, Holland asked: "Why are they getting rid of us?" According to credited testimony of Holland, Osborne made no oral response, "[He] just hung his head and wouldn't give us no reason."

Goodpaster was out sick on February 25. When she reported to work at 6:30 a.m., on Monday, February 28, she was called to the office where Bellomy greeted her stating: "Give me your card, your services are no longer needed." She did not reply to either of Goodpaster's two questions: "Norma, what have I done? . . . is it about that union shit?" Instead she twice asked Goodpaster to leave. Osborne put his hands on her shoulders and showed her the way out. Like the others, Goodpaster received a slip stating she "is no longer working due to lack of work." On arriving at her home, she called Osborne and asked: "[W]as it over that

union shit?" Osborne told her he could not say why she was fired.

Later in the day President Marcus Pohlman arrived at the plant from company headquarters in Croton, Ohio, and announced that all hourly workers would get a 35-cent hourly wage increase effective immediately and at Christmastime would be paid for unused sick leave. Employees had been given no reason to expect upward wage adjustments.

Shortly after February 28, Bellomy, in the course of a conversation with USDA inspector Janet Hammond, told her "There are some people that are no longer working here, the least you know about it the better off you will be."<sup>3</sup> And in contesting the employees' claims for unemployment compensation, the Company told state authorities that they were discharged for performing poorly on the job.

#### Analysis

Respondent contends that the discharges and wage increases had nothing to do with any protected union activity and, indeed, that it had no knowledge of any such activity. I am persuaded otherwise.

I find that management officials were well aware of the "union talk" occurring in the lunchroom on February 23, and this wholly apart from a permissible inference under the "small plant doctrine" cited in *Health Care Logistics*, 273 NLRB 822 (1984). Here, more compelling indicia of knowledge are Plant Manager Bellomy's extended presence just outside the lunchroom door while the talk continued and her son's apparent awareness of a possible incipient union drive evinced in his questioning of Holland a few hours later.

Also, I find pretextual Respondent's claim that the employees were discharged for substandard work. That claim is at odds with the written reason ("lack of work") given them contemporaneously with their termination. It is further belied by the fact that the employees were not contemporaneously told why they were being terminated, were never given a written warning under Respondent's progressive discipline program,<sup>4</sup> and their immediate supervisor (Foreman Osborne) apparently did not tell them of any specific deficiencies.<sup>5</sup> Its attempt to bolster the poor performance claim by data showing a sharp decline in USDA required case reruns after February 28 is not persuasive. The reports relied on were highly selective and therefore do not adequately portray representative "before and after" periods and, in any event, the data fails to establish that the discharged employees were responsible.

In these circumstances, and in light of the close proximity of the discharges and surprise pay raise to the protected ac-

<sup>3</sup> All of the statements and actions thus far attributed to management officials are not disputed.

<sup>4</sup> I decline to credit Respondent's claim that the program and as well as all written rules of conduct for employees were inoperative after a corporate takeover in November 1993, particularly since no reason for revocation is given and employees admittedly were never informed.

<sup>5</sup> Plant Manager Bellomy, who spent most of her time in the office (80 percent), claims she had occasion (at unspecified times) to orally warn some of the discharges about derelictions. She did not give an example of any substantial failure. Indeed I find bizarre one cited deficiency. She claims she knew candler Goodpaster threw away good as well as bad eggs because Bellomy fished into the discard barrel and retrieved a good egg.

tivity, I conclude that the real reason for both actions was management's acute concern that Holland, a young, bright, relatively new employee who admittedly had performed well on the night shift and 1 month earlier had been the sole retainee from that shift, harbored prounion sentiments. Aware that with a substantially reduced work force it might well lose a new election, they decided to abort that possibility by firing Holland and four other employees (including Stiltner) who had openly supported the Union in 1992. Through the discharges other employees were made aware that union support entailed penalties ("sticks"), and the pay raises patently were intended to show them that benefits ("carrots") were forthcoming without union involvement.

CONCLUSION OF LAW

Respondent violated Section 8(a)(1) and (3) of the Act in the particulars and for the reasons stated above, and its violations have affected, and unless permanently enjoined will continue to affect, commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Among other things, it must offer the unlawfully discharged employees 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).

Disposition

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>6</sup>

ORDER

The Respondent, Agrigeneral Company, L.P., Kenova, West Virginia, its officers, agents, successors, and assigns, shall

I. Cease and desist from

(a) Discharging or otherwise discriminating against employees for supporting Chauffeurs, Teamsters, Warehousemen and Helpers, Local Union 505 or any other union.

(b) Granting wage increases or other benefits in order to undermine employee support for Chauffeurs, Teamsters, Warehousemen and Helpers, Local Union 505 or any other union.

(c) 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.

<sup>6</sup>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.

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

(a) Offer Levetta Henson, Ellen Thompson, Barbara Goodpaster, and Kenneth Holland 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.

(b) Remove from all files any reference to their unlawful discharges and notify them in writing that this has been done and that the discharges will not be used against them in any way.

(c) 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.

(d) Post at its Kenova, West Virginia facility, copies of the attached notice marked "Appendix."<sup>7</sup> 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 and maintained for 60 consecutive days in conspicuous places including all places where notices to employees 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.

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

<sup>7</sup>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 or otherwise discriminate against any of you for supporting Chauffeurs, Teamsters, Warehousemen and Helpers, Local Union 505 or any other union.

WE WILL NOT grant wage increases or other benefits in order to undermine your support for Chauffeurs, Teamsters, Warehousemen and Helpers, Local Union 505 or any other union.

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 WILL offer Levetta Henson, Ellen Thompson, Barbara Goodpaster, and Kenneth Holland 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 benefits resulting from their discharge, less any net interim earnings, plus interest.

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

AGRIGENERAL COMPANY, L.P.