

**United Enviro Systems, Inc. and Bradley Garie,
William Rathgeb, and Gregory Von Ohlen.**
Case 22-CA-16290

February 27, 1991

DECISION AND ORDER

BY MEMBERS CRACRAFT, DEVANEY, AND OVIATT

On October 18, 1990, Administrative Law Judge Howard Edelman issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an exception and a brief in reply to the Respondent's exceptions.

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 briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order as modified.²

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, United Enviro Systems, Inc., Flanders, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

“(a) Offer Bradley Garie, William Rathgeb, and Gregory Von Ohlen 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 Respondent's unlawful conduct as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).”

2. Substitute the attached notice for that of the administrative law judge.

¹The 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 findings.

²The General Counsel has excepted to par. 2(a) of the judge's recommended Order which, in requiring that the Respondent reinstate the three discharged sales representatives, inadvertently refers to their former positions as “truckdrivers.” We shall modify par. 2(a) accordingly. We shall further modify that paragraph by providing for the computation of interest on backpay under *New Horizons for the Retarded*, 283 NLRB 1173 (1987), rather than *Florida Steel Corp.*, 231 NLRB 651 (1977).

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT terminate you because you have engaged in activities protected in Section 7 of the National Labor Relations Act, or in order to discourage you from engaging in such activities.

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 employees Bradley Garie, William Rathgeb, and Gregory Von Ohlen 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.

UNITED ENVIRO SYSTEMS, INC.

Marta Figueroa, Esq., for the General Counsel.
Richard A. Herman, Esq. (Herman & Weiner), for the Respondent.

DECISION

STATEMENT OF THE CASE

HOWARD EDELMAN, Administrative Law Judge. This trial was heard before me on November 29 and December 1, 1989, in Newark, New Jersey.

On April 26, 1989, a charge was filed by the above-named individuals against United Enviro Systems, Inc. (Respondent). On August 29, 1989, Region 22 of the National Labor Relations Board issued a complaint against Respondent, alleging that Respondent had discharged the above-named individuals for engaging in protected concerted activities in violation of Section 8(a)(1) of the Act.

Briefs were filed by counsel for the General Counsel and counsel for Respondent. On a consideration of the briefs, the entire record, and based on my observation of the demeanor of the witnesses, I make the following findings of fact and conclusions of law.

Respondent is a New Jersey corporation with an office and place of business in Flanders, New Jersey, where it is engaged in the operation of environmental hazardous waste disposal. In the course of such operations, Respondent annually

performs services valued in excess of \$50,000 directly for customers located outside the State of New Jersey.

I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Garie, Rathgeb, and Von Ohlen were employed by Respondent as technical sales representatives. It was their job to solicit new customers and to maintain their established accounts. They were paid on a base salary and commission basis. An additional sales employee, Frank Occhiuzzo, was also employed. These sales employees were directly supervised by Nikki Janosch. Michael Rotella was also a supervisor. It is admitted by Respondent that both Janosch and Rotella are supervisors within the meaning of Section 2(11) of the Act. Dean and Phyllis Leuzarder are the president and vice president of Respondent respectively, and in overall charge of the entire operation.

The sales representatives were required to keep rather detailed records concerning the maintenance of old customers and new accounts as well as calls made to potential new customers. These records required considerable paperwork. For a period of some months the sales representatives, particularly Garie, had been complaining about the extensive paperwork required by Respondent. Such complaints were usually made during Respondent's weekly meetings. Respondent conceded there was considerable paperwork involved and to an extent made some effort to reduce it. However, such reductions did not satisfy the employees, particularly Garie, who was the unofficial leader of Respondent's sales force.

Sometime in early February 1989, Respondent instituted a new incentive sales program, which would involve additional sales efforts to effect new accounts to be rewarded by a modest incentive bonus. According to Occhiuzzo, one of the four sales representatives, Garie stated during a lunch in a local restaurant that the sales representatives should not comply with this incentive sales program because it would cut into the time required to maintain their regular sales accounts.¹ Respondent was unaware of Garie's alleged statement until sometime after the March 22 sales meeting discussed immediately below.

On March 22, a weekly sales meeting was held. The four sales representatives were present. The meeting was conducted by Supervisor Janosch. Present also were Supervisor Rotella, Lori Fredricks, a secretary, and another employee. The meeting was conducted by Janosch. About a half-hour into the meeting, the subject of sales calls under the new incentive program came up. At this time the sales employees, particularly Garie, began to complain about the excessive paperwork they felt they were being subjected to which occupied their time so that they could not make sales calls. The essence of their complaints was that the paperwork interfered with their earnings. Their complaints became rather loud and at times contained obscenities. For example, at one point Garie shouted, "The god-dam paperwork is a pain in the ass. I don't have the fucking time for it." It is clear that no obscenities were directed at Respondent's supervisors personally. Moreover, such language was used by the sales representatives at prior sales meetings from time to time. Even-

¹ Garie denied that he was encouraging noncompliance with the sales incentive program. I do not find it necessary to determine credibility on this issue in view of my findings and conclusions set forth below.

tually the discussion concerning paperwork ended and the sales meeting continued with other matters being discussed.²

Following the meeting, Rotella and Occhiuzzo, who were friendly, went to lunch. At this time Occhiuzzo told Rotella about Garie's alleged statement to hold back on his sales calls in connection with the sales incentive program and that the other sales representatives, excluding himself, intended to go along with Garie's suggestion.

Following this conversation, Rotella called Phyllis Leuzarder, who was on vacation with her husband in Florida, and related to her what had taken place at the sales meeting concerning the discussion about paperwork and his conversation with Occhiuzzo concerning the alleged Garie statement and the intentions of the three sales representatives concerning the sales incentive program.

Leuzarder then telephoned Occhiuzzo who confirmed Rotella's version as to what had taken place at the sales meeting and his assertion that the other sales representatives were planning a slowdown on the sales incentive program. Leuzarder then conferred with her husband and, according to the testimony of Phyllis Leuzarder, it was decided that the three sales representatives should be terminated for their insubordination at the sales meeting and their alleged intention to cause a slowdown on the sales incentive program. Pursuant to this decision, letters were immediately sent to each employee which stated: "As of March 23, 1989, you are hereby terminated by United Enviro Systems, Inc. You are being terminated for insubordination."

Leuzarder then telephoned each employee and notified them that they were being discharged for insubordination.³

Phyllis Leuzarder testified at the trial of this case that she discharged the three employees because of their insubordination during the March 22 sales meeting and because of their threatened slowdown concerning the sales incentive program. When questioned as to why she set forth "insubordination" as the only reason for the discharge in her letter to the employees, she stated "It was a mistake on my judgment not to have expanded further on this letter." When questioned further as to whether one reason dominated her decision to discharge the three employees, she testified: "The actual incident in the sales meeting, the belligerence that went on in that meeting would not be tolerated anymore in that office, because there are other employees that I have to contend with."

Analysis and Conclusion

By Leuzarder's own admission, at least one, if not the only reason for the discharge of the three sales representatives was their alleged insubordination during the March 22 sales meeting concerning a discussion of what the sales representatives contended was excessive and unnecessary paperwork. Such activity is clearly related to terms and conditions of employment. It obviously relates to the employees' wages, as excessive paperwork expends time which might otherwise be spent servicing customers and thus earning more in commissions.

² The facts concerning the March 22 meeting are based on the combined credible testimony of Janosch, Rotella, and the four sales representatives.

³ Employee Von Ohlen testified that Leuzarder told him he was being discharged because of collusion. Leuzarder denied such statement. In view of the language of the discharge letter, I do not credit Von Ohlen's testimony on this issue.

The Board held in *Meyers Industries*, 268 NLRB 493, 497 (1984):

In general to find an employees activity to be "concerted," we shall require that it be engaged with or on the authority of other employees, and not solely by and on behalf of the employee himself. Once such activity is found to be concerted, an 8(a)(1) violation will be found if, in addition the employer knew of the concerted nature of the employee's activity, the concerted activity was protected by the Act, and the adverse employment action at issue [e.g.] was motivated by the employees protected concerted activity.

The facts in the instant case establish without doubt that the March 22 meeting was a concerted activity. The three sales representatives were collectively protesting what they considered to be excessive paperwork required by Respondent. Respondent was aware of the concerted nature of such activity, since the meeting was conducted by Respondent's supervisors. Clearly such activity related to terms and conditions of employment; thus it was protected. The Board has found similar activity to be protected concerted activity, *Pacific Mutual Insurance Co.*, 284 NLRB 163, 167 (1987); *Hancor, Inc.*, 278 NLRB 208, 216 (1986); *Herrick & Smith*, 275 NLRB 398, 422 (1985).

Thus, under *Meyers*, the facts of this case establish that the sales representatives' activity was protected concerted activity, and Respondent was aware of such activity. It is now necessary to assess Respondent's motivation under the principles set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Under *Wright Line*, the Board requires that the General Counsel make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor in the employer's discharge decision." On establishing such inference, the burden shifts to the Respondent to demonstrate that the same action would have taken place even in the absence of such protected concerted activity. In rebutting the General Counsel's case, Respondent cannot simply present a legitimate reason for its action, but must persuade by a preponderance of evidence that the same action would have taken place even in the absence of the protected conduct. *Roure Bertrand Dupont, Inc.*, 271 NLRB 443 (1984). Applying these principles to the facts of the instant case, it is clear that the General Counsel has established a strong case that the sales representatives' activity during the March 22 meeting was the motivating factor in Respondent's decision to discharge these employees. Such case is established by Respondent's letters to the employees setting forth that their discharge was because of their conduct during the March 22 meeting wherein they protested the excessive paperwork required as part of their job. Although Leuzarder contended that the alleged threat of a work slowdown was also a motivating factor in the decision to discharge the employees, when questioned as to why such reason was not set forth in the discharge letter, she lamely claimed it was a "mistake." The General Counsel's case is virtually conclusively established by Leuzarder's admission that of the two alleged reasons for the discharge the primary reason was the employees' conduct at the March 22 meeting

because she could not tolerate such belligerence, especially in the presence of other employees.

Respondent contends that if the employees' activity during the March 22 meeting was concerted, it was not protected because of the profane language used by the sales representatives at this meeting. I find no merit to such contention. The Board has permitted employees engaged in such concerted activity a wide latitude in how they are required to conduct themselves. The Board has permitted employees to express themselves in a loud and angry manner and use profanity, provided they do not engage in flagrant misconduct so violent or of such character as to render the employee unfit for further service, *Postal Service*, 250 NLRB 4 (1980). The facts of this case establish that the employees' conduct did not come close to exceeding such standard of misconduct defined above. Although the employees were angry and spoke in an angry manner, the profanity used was in describing paperwork. There was no profanity directed at any Respondent official or any employee. Supervisor Janosch described the meeting in her testimony as "a lively discussion." Moreover, such profanity was at other times used at other sales meetings by employees and routinely tolerated by Respondent.

Respondent contends the discharge was motivated by the employees' alleged threat of a slowdown. However, Respondent merely makes such contention without any evidence of support. This is understandable in view of Respondent's discharge letter and Leuzarder's admission as to the real reason for the discharge. Accordingly, I conclude Respondent has failed to meet its *Wright Line* burden and further conclude that by discharging the three sales representatives, Respondent has violated Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. Respondent United Enviro Systems, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By terminating Bradley Garie, William Rathgeb, and Gregory Von Ohlen because they had engaged in concerted activity protected by the Act and because it wished to discourage other employees from engaging in such activities, Respondent violated Section 8(a)(1) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴

ORDER

The Respondent, United Enviro Systems, Inc., Flanders, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Terminating the employment of employees because they have engaged in concerted activities protected under Section 7 of the National Labor Relations Act, or in order to discourage other employees from engaging in such activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

⁴If 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 Bradley Garie, William Rathgeb, and Gregory Von Ohlen immediate and full reinstatement to the positions as truckdrivers or, if those jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole for any loss of earnings sustained as a result of Respondent's unlawful conduct, the backpay and interest thereon to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977).⁵

(b) Remove from its files any reference to the terminations of Bradley Garie, William Rathgeb, and Gregory Von Ohlen and notify them in writing that this has been done and that evidence of their unlawful terminations will not be used as a basis for future personnel actions against them.

(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 New Jersey office and facility copies of the attached notice marked "Appendix."⁶ Copies of the notice, on forms provided by the Regional Director for Region 22 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.

⁵ See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

⁶ 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."