Wexler Meat Company *and* Francisco A. Jimenez.
Case 13–CA–37659

May 24, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS HURTGEN AND BRAME

On February 14, 2000, Administrative Law Judge Richard H. Beddow Jr., issued the attached decision in this proceeding. The General Counsel filed exceptions and a supporting brief. The Respondent filed an answering 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 record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified.[1]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge, as modified below, and orders that the Respondent, Wexler Meat Company, Chicago, Illinois, its officers, agents, successors, and assigns shall take the action set forth in the recommended Order as so modified.

Substitute the following for paragraph 2(a).

"(a) Within 14 days after service by the Region, post at its facilities in Chicago, Illinois, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent 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 Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to the named discriminatees, and all current employees and former employees employed by the Respondent at any time since November 1, 1998."

Helen I. Gutierrez and *Denise Jackson Riley, Esqs.,* for the General Counsel.

Joseph A. Macatuso, Esq., of Chicago, Illinois, for the Respondent.

DECISION

RICHARD H. BEDDOW Jr., Administrative Law Judge. This matter was heard in Chicago, Illinois, on December 6 and 7, 1999. Subsequently, briefs were filed by the General Counsel and the Respondent. The proceeding is based on an original charge filed March 18, 1999,[1] by Francisco A. Jimenez, an individual. The Regional Director's complaint dated October 13, alleges that Respondent Wexler Meat Company, of Chicago, Illinois, violated Section 8(a)(1)(3) and (4) of the National Labor Relations Act by promulgating and maintaining an overly broad rule prohibiting employees from engaging in union or protected concerted solicitations and distribution of literature; by threatening to discharge employees for distributing protected literature in violation of its rules; and by giving an employee a written disciplinary warning because he had engaged in union and/or concerted protected activity and because he filed a petition with the Board and gave testimony before the Board.

Upon a review of the entire record in this case and from my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent is engaged in the processing and sale of meat. It annually derives gross revenues in excess of $1 million and it annually purchases and receives goods and materials valued in excess of $50,000 directly from points outside Illinois. It admits that at all times material is and has been an employer engaged in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act. It also admits that United Food and Commercial Workers Union, Local 546, has been a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The Respondent's business involves boning beef and it has approximately 220 employees of which approximately 35 are classified as butchers (sometimes called boners).

The United Food and Commercial Workers, Local 546, has represented the employees at the Respondent's facility for over 13 years and the current contract between Respondent and Local 546 runs from July 7, 1997, through July 28, 2000. Although the contract was negotiated by the Union and ratified by the employees, it was unpopular with the butchers inasmuch as the terms of the contract effectively gave the butchers' a reduction in pay and benefits. The butchers are paid at a combination hourly and piece rate. The piece rate can vary depending on which cut of beef they are processing. Under the new contract, the hourly rate was lowered and the piece rate was increased. This restructuring meant that in order to make up for the loss in the hourly rate, the butchers would have to work at increased speed. In addition to the wage loss, the way vacation pay is calculated also was changed (prior to the new contract, vacation pay was calculated by averaging the wages of the previous 6 months, however, under the new contract, vacation pay was calculated by averaging the wages of the previous year). In addition, under previous contracts, employees were paid a weekly bonus while under the current contract this bonus was no longer paid. Butchers also lost the 1-½ times the piece rate they were paid when they processed "quality cut" meat. Quality cut meat is classified as choice meat, is more valuable and, therefore, requires extra care in its processing. Quality cut meat requires more effort and time to cut but while under the new contract the butchers still work on quality cut meat, they

[1] We have modified the judge's recommended Order to conform to *Indian Hills Care Center*, 321 NLRB 144 (1996), as revised in *Excel Container, Inc.*, 325 NLRB 17 (1997).

[1] All following dates will be in 1999 unless otherwise indicated.

are no longer paid at 1-½ times the piece rate. While all other of Respondent's employees received increases, the butchers were unhappy with the contract and in protest, they walked off the job on December 23, 1997. The Company offered to take back all employees who returned to work the following day and the following day all the butchers returned to work without receiving any discipline.

In the fall of 1998, Ricardo Castaneda an organizer for another union (Production Workers, Local 101), began talking to employees at lunchtime in front of Respondent's facility. Castaneda asked the employees if their union was working well for them and some employees said how unhappy they were with the representation they were receiving from Local 546. Castaneda invited the employees to meet at Local 101's union hall and about 2 weeks later, a meeting was held with between 80 and 90 employees in attendance. They discussed what alternatives they had, including the steps needed to stop paying dues to Local 546. As a result, in late October and throughout mid-November 1998, butcher Francisco Jimenez, who also was the union steward for Local 546, began to spearhead a UD petition drive (withdrawal of union shop authority and the obligation to pay dues), and along with a few other employees, he began to collect the signatures needed to file a UD petition with the Board.

In early November 1998, while on his lunchbreak in the steamroom talking to other employees about having a UD election, Jimenez was approached by Plant Superintendent Dan Frankowski who asked to see him in his office later that day. After his shift ended, Jimenez went to Frankowski who told him "not to talk to people regarding changing unions" and that if he "wanted to do it, to do it on his own time" and "not to do it during (his) break or lunch time" and that if he wanted to gather signatures "to do it in my own time in the street."

While the effort to collect signatures for the UD was underway, Castaneda, the organizer for Local 101, continued to drop by periodically to visit with employees outside the Company as they were leaving work or during their lunch hour. During one such visit on November 11, 1998, Castaneda met with the employees in Respondent's trailer parking lot as the employees were leaving work. Frankowski came out and said they couldn't be there. Shortly thereafter, on November 19, 1998, Jimenez came to the Board's office and filed the UD petition. Jimenez and David Perez (who had accompanied him), picked up several NLRB brochures titled "Your Government Conducts an Election For you—on the Job." Upon returning to work, Jimenez and Perez passed out copies of the brochure to employees so that they would know their rights (set forth in the leaflet) and not be afraid to stop paying dues.

Jimenez testified that after the UD petition was filed, superintendent Frankowski started to watch his work more closely. Perez testified that Frankowski would observe Jimenez work for 10 to 15 minutes at a time, and would sometimes move from one place to another to observe him and that he would do this often, sometimes daily. Ramon Zuno testified that after the filing of the petition the atmosphere became more tense at work and that the supervisors appeared to be checking Jimenez' work more often than the work of other employees.

On December 28, 1998, Jimenez asked Frankowski if he could speak with the second-shift workers. Frankowski responded that he could not and if he wanted to speak with employees to do it on his own time and outside the company. Also in December, Jimenez approached Frankowski, assertedly in his capacity as union steward, to speak about a problem an employee was having. Frankowski responded that Jimenez was no longer the union steward, and therefore, could no longer represent the employees. Subsequently, sometime in January, Jimenez received notice from Local 546 that his position had ended. The Employer, however, previously had been officially notified of this by letter dated December 15, 1998, from Local 546.

The UD election was held on January 6 and the proposition passed by a vote of 126 to 23, Jimenez was one of the observers and after the election he passed out brochures and literature and spoke to employees about discontinuing payment of union dues. He thereafter drafted an authorization form that instructed the company to stop the payment of union dues and he, along with a few other employees, distributed the forms to employees. Jimenez received about 110 signed authorization forms from the employees and turned them in to Frankowski, however, a few days later the forms were returned to Jimenez with instructions that each authorization form was to be handed in personally by each employee and that each employee needed to include their social security number on the form.

On January 22nd, Frankowski approached Jimenez during his lunch hour and told him he wanted to see him in his office. Frankowski told Jimenez that he could not continue passing out flyers and that if he continued to do so he would be dismissed. Jimenez told Frankowski he knew his rights, showed him the brochure he had received from the Board and told Frankowski that he had 3 days to give him something in writing that said he could not pass out the flyers during breaktime or lunchtime.

About 5 days later, Frankowski approached Jimenez as he was returning from the bathroom and told him to be careful with other unions because they could trick him regarding the cost of the pension as well as insurance. Later that day, Jimenez went to Frankowski's office to finish his earlier conversation and Frankowski again told Jimenez to stop talking to the workers and to stop distributing forms (or flyers). Jimenez replied that he had given him 3 days to give him something to prove that he could not and that he had not received a response, he would continue to distribute flyers. Frankowski then told him to do it on the street on his own time and that if he continued to hand out flyers he would be dismissed or laid off.

On February 16, 1999, Frankowski came up to Jimenez' workstation and instructed him to clean the bones better. Jimenez said he would. But he also told Frankowski to tell the guys that cut the meat to do a better job because he had to do twice the work and was wasting time. Frankowski told Jimenez that he was nobody to tell him that and that if he didn't like it, the door was open. A short while later Frankowski returned with Supervisor Antonio Cabezas and allegedly told Cabezas to look over Jimenez' work and if he was not cleaning the bones well to give him a warning and then if he didn't comply, to dismiss him. Later that same day, Frankowski gave Jimenez a written warning for failing to clean the bones properly. Jimenez refused to sign the warning.

On March 26, Jimenez filed a grievance with Local 546 over receiving more meat requiring quality cutting (which takes more time to cut), and not being paid premium pay to do quality cut work. He thereafter filed the charges involved in this proceeding.

III. DISCUSSION

The issues in this case arose after the employer and the incumbent union negotiated on a 3-year contract (ratified by the membership), which resulted in less favorable terms for the 35

employees classified as butchers. Francisco Jimenez, who then was the union steward, initiated a two-prong protest against this result. First there was a 1-day walkout, followed by a display of reluctance to do "quality work" and an apparent lack of effort to do the more time consuming thorough cleaning of the maximum amount of meat off of bones (which affected their ability to get more piecework pay. Secondly, Jimenez acted against the incumbent union by leading a petition drive to withdraw union-shop authority. He then was removed by the union from his position as steward, however, he was successful in obtaining a vote in favor of withdrawal of union-shop authorization and he thereafter facilitated the employees opportunity to request that union dues not be withheld from their pay.

A. Employer Restrictions on Solicitation and Distribution

Although the employees involved (especially those who testified with the aid of an interpreter), are predominantly Hispanic and Superintendent Frankowski speaks only English, it appears that the Spanish speaking employees understand English and apparently exchanged all verbal communications with Frankowski in English. Accordingly, the exact nature of statements allegedly made by Frankowski may have been somewhat inexact as recalled by the Hispanic employee witnesses, however, their testimony essentially conveys what they understood Frankowski to have said and, for the most part, I credit their recall and understanding as demonstrating what effect his words had in regards to their rights to be free of conduct by an employer that interferes with, restrains, or coerces them in their Section 7 rights.

It appears that Frankowski has enjoyed a good working relationship with the Respondent's employees but that he lacks any sophisticated background in labor relations. It is equally clear that the employer had no written rules concerning its solicitation and distribution policies and that Frankowski's spontaneous reaction to the several incidents in which he challenged Jimenez's activities were not limited or phased in a manner that would prohibit distribution of union-related information only during working time in working areas.

In the instant case, Frankowski promulgated and threatened to enforce an oral no-solicitation/no-distribution rule that clearly was too broad and which interfered with employees' rights to engage in protected concerted activity. Prior to the events, there was no "no-solicitation/no-distribution" rule in existence at Wexler, nor does one currently exist. Moreover, an employer violates a valid solicitation rule by disparate enforcement and here, it otherwise is shown that the Respondent allows employees to regularly sell candy and raffle tickets for different fund drives.

An employer also violates Section 8(a)(1) of the Act by implementing a new policy in response to union activity or by enforcing previously unenforced policies, where the employer's action restricts opportunities for employees to engage in lawful union activities, see, for example *Tualatin Electric,* 319 NLRB 1237 (1995), *Wellstream Corp*., 313 NLRB 698, (1994), *Ideal Macaroni Co*., 301 NLRB 507 (1991), *Horton Automatics*, 289 NLRB 405 (1988), and *Mitler Group*, 310 NLRB 1235 (1993).

Here, the promulgated rule is overly broad and it has the effect of precluding employees from lawful solicitation and distribution within the company's property without regard to where it occurred or to the time of distribution. Also, the no-solicitation rule was not applied uniformly against all solicitation and under these circumstances Respondent's rules in this respect are invalid and unlawful and the plant superintendents' actions in restricting the employees' activities are shown to be in violation of Section 8(a)(1) of the Act, as alleged.

The superintendent also threaten to discipline Jimenez for breaking the unlawful rule. In addition to being invalid, the rule was not shown to have been widely disseminated or disclosed to employees prior to Frankowski's threat to discipline for any future violation of the rule. Frankowski would not listen to the employee's attempts to explain his rights, and I therefore, find that a threat by a plant superintendent in this regard clearly is coercive in nature. Accordingly, I also find that the threat constitutes a separate interference with employee rights, and I find, that the General Counsel also has shown that the Respondent's action was unlawful and in violation of Section 8(a)(1) of the Act, as alleged.

The facts relating to the incident at the plant parking lot after work on November 11 require a different conclusion. As referred to above, Jimenez sometimes misunderstood English but other Hispanic employees agreed with Superintendent Frankowski's testimony that he asked them to go to the park across the street. The group did so and there was no discussion or communication with management that would had disclosed the nature of the gathering to management. The Respondent also demonstrated that it had no trespassing signs in the lot and that it had increased security there 2 months previous in response to ongoing problems and complaints to the Company and to public officials from residential neighbors. Moreover, employees previously have been notified of a rule against loitering in the parking lot in memos (in Spanish and English) distributed with their paycheck. The memos described the neighbors' concerns and were distributed in 1996, 1997, and again in July 1998.

Under these circumstances, I find that the Respondent had a legitimate business reason for making a request that the group leave the parking lot, that the request was not related to perceived union or concerted activity, and that it was not done in a coercive manner. Accordingly, I find that no violation of the Act is shown to have occurred in relation to this incident and I conclude that this allegation of the complaint should be dismissed.

B. Threat to Discipline and Issuance of a Warning

It is alleged that on February 16 the Respondent threatened to issue Jimenez a warning if he did not clean the bones properly and that it thereafter followed through by giving him a written warning.

The General Counsel alleges that this was in retaliation for Jimenez' roll in the UD petition and resulting election, and his solicitation of employees, and distribution of union materials and brochures. Here, the General Counsel has shown that Jimenez did have a strong roll in the preparation, filing, and execution of a successful petition and election which allowed the employees to elect to stop paying dues to the incumbent union. It also shows that the Respondent did engage in some unlawful activity specifically related to protected activity that was carried on by Jimenez. It also made an attendant unlawful threat to discipline him for such activity. This showing related to motivation certainly outweighs the Respondent's argument that the Company and its superintendent had a benign attitude towards the ongoing activities.

The accepted standard for review of a case of this nature is *Wright Line,* 251 NLRB 1083 (1980), see *NLRB v. Transporta-*

tion Management Corp., 462 U.S. 393 (1983), which requires that the General Counsel must make a showing sufficient to support an inference that the employees' union or protected concerted activities were a motivating factor in Respondent's subsequent decision to take disciplinary action. Here, the General Counsel has shown that employee Jimenez engaged in union protected activity, that the Respondent knew of this activity and that it illegally restricted his protected solicitation and distributions. It also threated discipline in this regard and, accordingly, it properly may be inferred that his activities were a motivating factor in its subsequent decision to give him a disciplinary warning.

Under these circumstances I find that the General Counsel has met its *Wright Line* burden and that the record should be evaluated to consider Respondent's defense and whether the General Counsel has met his overall burden.

The Respondent's defense is based on the testimony of Superintendent Frankowski (as well as the testimony of several butchers), and the showing that it had a controlling legitimate reason for its action. Here, I conclude that Frankowski's demeanor and testimony is straightforward and believable and I find that his description of the surrounding events and his actual motivation is highly credible. Although he made mistakes in his 8(a)(1) dealings with Jimenez, I otherwise credit Frankowski's testimony that the Respondent had had a "hands off" policy regarding the UD petition.

First, it is shown that the butchers in general, including Jimenez, adopted a bad attitude toward their work, especially in relation to more time consuming (and less remunerative), quality work, after the new, less favorable labor agreement was ratified and, in fact, they staged a 1-day protest in December 1997. Jimenez testified: "Regular is that I can cut the meat without being very careful and quality is that I cut the meat being very careful—and that's where I waste time." After the December walkout, Frankowski noticed the butchers were leaving more meat on the bones to try to get more production (and more money), and he described two pictures (received into evidence), showing one view of a bone with most of the meat removed (the way it is supposed to be), and another with some quantity of meat still on the bone. Frankowski described the meat seen on bones processed by Jimenez on February 16, which resulted in his admonition to him to clean the bones better. Jimenez testified that he said he would and Frankowski said he verbally warned him that if he didn't, Frankowski would have to give him time off. Jimenez then challenged Frankowski either by saying (as he testified), that Frankowski should "tell the guys who cut the meat to do a better job because he had to do twice the work and was wasting time" or (as Frankowski testified), saying "you can't give me time off because you never warned me before." Frankowski credibly testified that he said "I gave you a verbal warning before," "Fine, so now I'll put it in writing" and he thereafter went to the office to place the warning in written form which also states that the next warning would result in a 1-day suspension. I also credit Frankowski's testimony that he rarely puts verbal warnings in written form but did so because Jimenez said he had not been warned before and he wanted a record that he had.

The Respondent presented documentation showing 16 examples of written warnings to employees for substandard cleaning of bones dating between 1981 and 1998, including 1 in 1995, 3 in 1996, 3 in 1997, and 2 in 1998, each of which is substantially similar to the written warning given to Jimenez.

Here, the record shows that when Jimenez was given a verbal warning to do a better job cleaning the meat off his bones, he did not deny leaving excess meat on the bones, but, in effect, reopened the subject of his dissatisfaction with pay under the new contract and then challenged his plant superintendent to formalize the warning. The Respondent has shown by persuasive evidence, that it had a legitimate reason for issuing a warning at the time it did and that although this type of warning is infrequently imposed, it is consisted with nine similar warnings given between 1995 and 1998.

Under these circumstances, I conclude the Respondent has demonstration by a preponderance of the evidence that it had legitimate and nondisparate reasons for its warning and threat to impose progressive discipline and that the written disciplinary warning would have been given even in the absence of Jimenez' prior union and protected activities. Accordingly, I find that the General Counsel has failed to prove that the Respondent violated Section 8(a)(1) and (3) of the Act in this respect, and that this allegation of the complaint should be dismissed.

As noted above, part of the union activity engaged in by Jimenz included the filing of a UD petition with the Board and acting as an election observer. Although discrimination by an employer against an employee for participation in a Board proceeding or for filing labor practice charge is a violation of Section 8(a)(4) and (1) of the Act, see *General Electric Co*., 321 NLRB 662, 676 (1996), I find that for the same reasons discussed immediately above, that the disciplinary warning given to Jimenez was justified and was not illegal and, accordingly, I find that no violation of Section 8(a)(4) of the Act is proven and that this allegation of the complaint also should be dismissed.

CONCLUSIONS OF LAW

1. Respondent is an Employer engaged in commerce within the meaning of Section 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. By promulgating, maintaining, and threatening to enforce an overbroad solicitation and distribution rule, Respondent has interfered with, restrained, and coerced employees in the exercise of their rights guaranteed them by Section 7 of the Act, and thereby has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act.
4. The Respondent otherwise is not shown to have engaged in conduct violative of the Act as alleged in the complaint.

REMEDY

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

Otherwise, it is not considered necessary that a broad order be issued.

On these findings of fact and conclusions of law and on the entire record, I hereby issue the following recommended[2]

[2] 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.

ORDER

The Respondent, Wexler Meat Company, Chicago, Illinois, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act by promulgating, maintaining, and threatening to enforce an overbroad solicitation and distribution rule.

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

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

(a) Within 14 days after service by the Region, post at its facilities in Chicago, Illinois, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent 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 Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps Respondent has taken to comply.

[3] 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 interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act by promulgating, maintaining, and threatening to enforce an overbroad solicitation and distribution rule.

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.

WEXLER MEAT COMPANY