JD(SF)–27–03
Las Cruces, NM

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

UNITED RENTALS, INC.

and

Cases 28-CA-17881-1
28-CA-17881-2
28-CA-18245

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 953, AFL-CIO

Richard A. Smith, Esq.,
of Phoenix, Arizona, for the General Counsel.

Daniel F. Murphy, Jr., Esq., of New York,
New York, for the Respondent.

DECISION

Statement of the Case

JAMES L. ROSE, Administrative Law Judge: This matter was tried before me at Las Cruces, New Mexico, on February 4, 2003, upon the General Counsel's consolidated complaint which alleged that the Respondent committed certain violations of Section 8(a)(1) of the National Labor Relations Act, as amended, 29 U.S.C. §151, *et seq.*, and suspended Joseph Kowalski for three days in violation of Sections 8(a)(3) and (4).

The Respondent generally denied that it committed any violations of the Act, and contends that the suspension was for cause.

Upon the record as a whole, including my observation of the witnesses, briefs and arguments of counsel, I hereby make the following findings of fact, conclusions of law and recommended order:

I. JURISDICTION

The Respondent is a Delaware corporation with an office and place of business at Las Cruces, New Mexico, as well as other branches in various cities throughout several states of the United States, where it is engaged in the business of renting heavy machinery, tools and related equipment. In the course and conduct of its business, the Respondent annually purchases and receives at its Las Cruces facility goods, products and materials directly from

points outside the State of New Mexico, valued in excess of $50,000 and annually derives gross revenues in excess of $500,000. The Respondent admits, and I conclude, that it is an employer engaged in interstate commerce within the meaning of Sections 2(2), 2(6) and 2(7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

International Union of Operating Engineers, Local 953, AFL-CIO (herein the Union) is admitted to be, and I find is, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts.

In late March 2002,[1] representatives of the Union met with certain of the Respondent's employees in an effort to organize them. Apparently a significant number, if not a majority, signed authorization cards and a petition for representation was filed in mid April. However, according to Edward Trejo, the Union's representative in charge of this organizational campaign, because he was transferred and two employees asked that their authorization cards be returned his superiors in the Union determined to withdraw the petition. The petition was withdrawn sometime in June.

Most of the activity alleged violative of Section 8(a)(1) occurred in April and was principally engaged in by Jack Sturtz, whom the Respondent contends is not, and was not, a supervisor or agent within the meaning of Section 2(11) or 2(13).

On October 14, the Respondent suspended Joseph Kowalski for three days for failure to attend a mandatory inventory. The General Counsel alleges the suspension was violative of Section 8(a)(3), since Kowalski was a known union supporter, and Section 8(a)(4) because it can be inferred that the Respondent must have known he gave an affidavit in support of the initial charge in this matter.

B. Analysis and Concluding Findings.

1. The Section 8(a)(1) Allegations.

a. By Jack Sturtz.

The General Counsel alleges, and the Respondent denies, that Sturtz was a supervisor within the meaning of Section 2(11). Although the issue is close, since Sturtz's primary duties involve rank and file work, I conclude that he had been given the authority to responsibly direct other employees and that during the material time he was a supervisor.

Just prior to the advent of the union activity here, Steven Berkley, the service manager, took a leave of absence for personal reasons. He was, according to his testimony, off from late March until April 21. Branch Manager Randy Sewell testified that due to Berkley's absence, "I basically gave him (Sturtz) the an honorary title of shop foreman." And Sturtz testified "I was given the honorary title of shop foreman when Steve was leaving, to help facilitate questions

[1] All dates are in 2002, unless otherwise indicated.

being asked and people coming to me. . . ." The Respondent argues that this "honorary title" was not meant to convey supervisory authority to Sturtz – that he helped other employees because of his superior knowledge and ability.

I do not credit Sewell or Sturtz and conclude that they testified to the "honorary title" in an attempt to mislead me on a material issue.[2] The Respondent's Performance Appraisal of Sturtz dated March 7, 2001, designates him as a Mechanic I. The appraisal for Sturtz dated February 18, 2002, well before any of the events here including Berkley's leave of absence, gives his job title as "Shop Foreman."

A summary of the shop foreman job description attached to the appraisal for Sturtz states, in relevant part: "The shop foreman's primary task is that of a mechanic. However, in addition to the mechanic's job, the shop foreman should ensure that workers, equipment, and materials, are used properly to maximize productivity. Their daily activity includes coordinating the activities of mechanics, and overseeing the repair of rental equipment, to ensure that work is performed satisfactorily." "Key Duties, Skills, and Activities:" include, "monitor employees, and ensure that work is done correctly" and "train and supervise mechanical personnel." Clearly the duties of a shop foreman include responsibly directing shop personnel.

Further, Sturtz's appraisal states, "Just promoted to shop foreman. Very interested in doing well. Assigns task enforces safety needs to improve on service department paperwork." "Trains subordinates and ensures work is completed in a safe timely manner." The promotion to shop foreman was clearly not honorary nor was he designated shop foreman just as Berkley was about to leave, as both testified.

Although Sturtz does not possess all the indicia of supervisory status listed in Section 2(11), I conclude that he does responsibly direct other shop employees and that the Respondent held him out to have such authority. The fact that the Union's organizer may have felt Sturtz would in the bargaining unit is irrelevant. Either he meets the test under Section 2(11) or he does not. I conclude that he does and that at material times he was a supervisor whose statements to employees bound the Respondent.

Further, from Sewell's e-mail memos to Cindy Mann, the Respondent's Southwest Regional Human Resources Manager, it is clear that Sturtz acted on behalf of the Respondent in gathering information on the organizational activity and reporting back to Sewell.

Nathaniel Griggs does detail, that is, he washes and cleans the returned equipment. In April he met with a union representative and signed an authorization card. At about this time, he had a conversation with Sturtz wherein Sturtz "told me I might as well start looking for another job because they going to close this store down . . . Because we all joined the Union."

[2] In addition to Sewell's misleading testimony concerning Sturtz, he also attempted to mislead me on the question of whether he knew that Kowalski was involved with the union campaign. He wrote several e-mail memos to Cindy Mann concerning the organizational effort and in one stated: "OUR FRIEND JOE IS SNEAKING AROUND TALKING IT UP. . . ." He testified that he had no idea what he meant by "it," suggesting that he was not referring to the Union. Such testimony to totally unworthy of belief. On all material issues, where there is a factual dispute, I discredit Sewell.

Then a few days later, Griggs had another conversation with Sturtz. Griggs testified that Sturtz "asked me did I have a Union card. I told him, Yes, I have – I have a card that Mr. Blackwell gave me. And I told him it was out there in my truck. He asked me to go get it. Then he came to me again and have us sign a piece of paper saying we no – don't want no part of the Union, because they're going to close the store down. So he had us to sign a paper." Griggs testified that he gave his card back to Sturtz that day.

Sturtz denied threatening or interrogating Griggs, a denial which I discredit. I not only found Griggs to be credible, but, as noted above, I found Strutz to be incredible, having testified in an attempt to mislead me on a material issue. I therefore conclude that Strutz in fact threatened closure of the facility. I also conclude that Strutz's interrogation of Griggs about having signed an authorization card was accompanied by a threat and therefore was unlawful. See, *Rossmore House,* 269 NLRB 1176 (1984). And I find that Strutz solicited Griggs to give him the authorization card and sign a petition against the Union. The Respondent thereby violated Section 8(a)(1) as alleged in paragraphs 5(a)(2), 5(c)(1) and 5(c)(2).

Joseph Kowalski testified that on or about April 12, Strutz approached him and said "that they had a conference call the following (sic) night with Steve Middleman, the regional – regional vice president, and Randy (Sewell), and that he wanted to talk to me and said if we had gone to Union that he would close down the operations here, close down the building, move the operations to El Paso, and we'd be out of jobs." This statement was undenied by Strutz. Thus I conclude that as alleged in paragraph 5(b)(3), the Respondent threatened employees with branch closure if the selected the Union.

There is no testimony or argument that the Strutz engaged in the activity alleged in paragraphs 5(a)(1), 5(b)(1) or 5(b)(2). Accordingly, I shall recommend these paragraphs be dismissed.

b. By Cindy Mann.

Having received several e-mail messages from Sewell in early April reporting on the employees' union activity, Mann was well aware of the ongoing organizational campaign.

On April 15, she came to the Las Cruces branch and met with employees for 15 to 20 minutes. According to Kowalski's unrefuted testimony, during the course of this meeting, she said she was there "because she saw that we had some problems. But she says, I'm not talking about what – what is going on now, but I want to come over and talk to you about a lot of overtime; we've got some new benefits coming out, we've got profit sharing. We think that you people need to have profit sharing twice a year instead of once a year, and that we also have an incentive program where they give you point for being – going above and beyond youe duty, and they had like a – we come out with a magazine with different things. You could buy TVs, microwaves and all that. And then she kept on introducing things like that." One of the drivers complained about having to get up early to make runs across the State and Mann said "I'm going to check into this and we're going to stop this because you people are putting in too much overtime."

Sewell did not deny the essence of Kowalski's testimony nor did Mann testify. Therefore, I conclude that she generally made the statements attributed to her. Sewell did testify that early in the year 2002, he learned that the profit sharing system was going to change; but even if true, Mann clearly made the announcement during an ongoing organizational campaign, along with the announcement of other benefits including more

employees in order to lighten overtime. The Respondent came forth with no showing of a legitimate business reason for Mann's timing of the announcement of benefits with the organizational campaign. By timing these announcements with the organizational campaign, I conclude that the Respondent promised benefits in order to discourage union activity, as alleged in paragraphs 5(d)(1), (2) and (3). See *Holly Farms Corp.,* 311 NLRB 273 (1993).

c. By Steven Berkley.

It is alleged that in October, Berkley violated Section 8(a)(1) by warning employees that the Respondent would take adverse action against its employees engaged in union activity. This is based on the testimony of Kowalski. He testified that around the time of the first inventory in September, he observed Berkley and Sewell talking, after which Berkley told Kowalski that Sewell had said "that we're on the list of stores to be closed, then he questioned my wife's income, how could she make so much money. And then he did say, You better watch out for Randy; he's coming – he's coming with you with both barrels loaded, and he's going to get you for anything he can." Berkley denied making a statement to this effect.

On this I credit Berkley over Kowalski. I found Berkley to be a generally credible witness, whereas I feel that Kowalski's is questionable. Further, it makes little sense that Sewell would be "gunning" for Kowalski in September or October because of Kowalski's union activity where the union activity ended in April and the petition for an election had been withdrawn in June. Accordingly, I conclude that paragraph 5(e) should be dismissed.

d. By Randy Sewell.

It is alleged that on October 14, Sewell "disparaged its employees by accusing them of creating a hostile work environment because they had engaged in activities in support of the Union; and invited its employees to resign their employment because they had engaged in activities in support of the Union." The testimony in support of these allegations is from Kowalski and occurred when Sewell suspended Kowalski. Since they are integral to the allegation that Kowalski was suspended in violation of the Act, they will be treated with that allegation.

2. The Section 8(a)(3) and 8(a)(4) Allegation.

The facts leading to Kowalski's suspension are not really in dispute. Each year the Respondent conducts a parts and merchandise inventory and subsequently a serialized and bulk asset inventory. The parts and merchandise inventory was scheduled for a Saturday in late September. Since Kowalski has some kind of an e-Bay business he operates on week-ends (though he does work one week-end in four) he asked Sewell if he could do this inventory on a weekday. Sewell responded that if this was approved by the home office, it would be all right with him. Permission to perform the inventory on a week day was approved and Kowalski did do the inventory over a two day period.

Concerning the serialized inventory, Kowalski testified: "I – I approached Randy. I said, Because I know the serialized is coming up in two or three more weeks, that since I had done the parts and merchandise and no one else helped me, that I – I can't see no reason why that I should be able to have to come in for that, that he had enough employees to do the serialized – and have the serialized, because it was an easy – it was an easy thing to do." He further testified that Sewell made no response. Sewell denied that Kowalski spoke to him before the inventory although he learned from Berkley that Kowalski intended not to show up.

Berkley testified that in the week prior to the second inventory (or perhaps the day before as he put in a statement), Kowalski "told me that he didn't think it was fair that he come in on Saturday, he had already participated or took part in the inventory, which he had done was the parts inventory." Kowalski told Berkley he was not coming in for the inventory on October 12 and he did not.

Kowalski testified that he did not participate in the inventory: "(b)ecause I had previously told Mr. Sewell that I would not be there because I had done the other inventory and that he had enough people to do the serialized inventory." He did not deny that presence at the inventory was mandatory. Nor did he say that he had been given actual permission to be absent. He contends only that he assumed Sewell gave permission since he told Sewell he would not come in and Sewell remained silent. Finally, Kowalski testified that the reason he did not participate in the inventory is because "I have a business (on e-Bay) to run (on weekends)."

On October 14, Sewell had Berkley call Kowalski into his office at which time Sewell gave Kowalski a three-day suspension. According to Kowalski, during this interview they accused each other of creating a hostile work environment. Kowalski admitted that he "might have raised his voice" and "my blood pressure might have gone up a little bit." He said that he did not lose his temper, "I just pointed my finger at him and told him that I didn't appreciate him talking about my wife. . . ." And according to Kowalski, when Sewell said he was being suspended for three days, "I said, Great, I can make more money on eBay than I can make here all week." Finally, according to Kowalski, Sewell said: "Why don't you just quit and get out of here." Kowalski said he had no intention of quitting. Kowalski further testified that at no time was the Union mentioned by Sewell. Sewell testified that the suggestion for Kowalski to quit was in response to Kowalski saying that he could make more money on eBay. Kowalski's testimony was somewhat evasive on this point, nor did he really deny the sequence of statements. Further, Sewell's version seems to make sense. Thus, notwithstanding Sewell's general lack of credibility, on this if find Sewell's version credible.

I also conclude that the suspension of Kowalski was not motivated by Kowalski's union activity or the fact that Sewell might have assumed Kowalski gave an affidavit to the Board (an inferential leap that would be difficult to make in any event). It is unlikely that in mid-October Sewell would have been motivated to make an example of a known union activist in order to thwart the organizational campaign. The petition had been withdrawn some four months previously and there is no evidence of any inclination on the part of anyone to revive it. Second, if Sewell actually had animus toward Kowalski because of Kowalski's union activity it is doubtful that Sewell would have agreed to allow Kowalski to perform the first inventory on a weekday. Finally, Kowalski's blatant refusal to participate in a mandatory inventory could reasonably have been a dischargeable offense.

Kowalski, for some reason, determined that he was going to make his own rules concerning whether he would work or not. He knew the inventory was scheduled and he knew it was mandatory. Nevertheless, he decided, in fairness to himself, that he would not participate so that he could "run" his eBay business on the Saturday in question. He did not ask Sewell (or Berkley) to be off. He told them he was not coming in. That he was given just a three-day suspension for such overt insubordination is not outside the area of reasonable punishment. The fact of Kowalski's previous union activity does not immunize him from obeying directions from his employer, including participating in mandatory overtime, even though such might interfere with his personal plans.

The General Counsel argues that Sturtz also missed the inventory but was only given a written discipline, therefore the disparate treatment proves that Sewell's discipline of Kowalski was unlawful. I disagree. Strurtz's situation was sufficiently different from Kowalski's that the General Counsel's argument is not persuasive. Strutz had been granted time off to attend the funeral of a friend in St. Louis. When he found that he could not make it back to Las Cruces in time for the inventory, he called Sewell. This, I conclude, is different from telling Sewell that he was not going to come in for the inventory. That Strutz missed the inventory was not an overt refusal to do assigned work.

The General Counsel also argues that the Respondent has a progressive discipline system, demonstrated by the fact that other employees who have been absent were given written warnings prior to being suspended. There is, however, no evidence of an employee intentionally missing a mandatory inventory and then receiving a mere warning. I conclude that going directly to a suspension in this situation does not prove disparate treatment.

Finally, while there were probably references to a hostile work environment, and Sewell may have suggested Kowalski quit when said he could make more money with his eBay business, I conclude these comments had nothing to do with the previous union activity. Accordingly, I conclude that the allegations in paragraph 5(f) and 6 be dismissed.

IV. REMEDY

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

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended [3]

[3]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, United Rentals, Inc., its officers, agents, successors and assigns shall:

1. Cease and desist from:

    a. Threatening employees with store closure should they select the Union as their bargaining representative.

    b. Interrogating employees about their union membership, sympathies and activities.

    c. Soliciting employees to engage in anti-union activity.

    d. Timing the announcement of benefits in order to discourage employees' union activity.

    e. 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

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

    a. Within 14 days after service by the Region, post at its facility copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 28, 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. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed any facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all former employees employed by the Respondent at any closed facility since the date of this Order.

[4] If this Order is enforced by a Judgment of the 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."

b. Within 21 days after service of this Order, inform the Region, in writing, what steps the Respondent has taken to comply therewith.

c. The allegations of unfair labor practices not found above are dismissed.

Dated, April 24, 2003, San Francisco, California.

_____
James L. Rose
Administrative Law Judge

JD(SF)–27-03
Las Cruces, NM

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 Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT threaten employees with store closure should they select the Union as their bargaining representative.

WE WILL NOT interrogate employees about their union membership, sympathies and activities.

WE WILL NOT solicit employees to engage in anti-union activity.

WE WILL NOT time the announcement of benefits in order to discourage employees' union activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

UNITED RENTALS, INC.

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

2600 North Central Avenue, Suite 1800, Phoenix, AZ 85004-3099

(602) 640-2160, Hours: 8:15 a.m. to 4:45 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (602) 640-2146.