

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

Wheeling Brake Block Manufacturing Company,

and

Cases 8-CA-34764
8-CA-35543

Retail, Wholesale, and Department Store Union,
Local No. 379, and the United Food and
Commercial Workers Union, AFL-CIO.

Thomas M. Randazzo, Esq.
for the General Counsel.

Henry A. Arnett, Esq.
for the Charging Party.

No Appearance
for the Respondent.

BENCH DECISION AND CERTIFICATION

Statement of the Case

David I. Goldman, Administrative Law Judge. This case was tried in St. Clairsville, Ohio, on November 16, 2005. The charge in Case No. 8-CA-34764 was filed on January 7, 2004, and amended on February 27 and May 24, 2004 by the Retail, Wholesale, and Department Store Union, Local 379, and the United Food and Commercial Workers, AFL-CIO (hereinafter "Union" or "Charging Party"). An additional charge was filed in case 8-CA-35543 on January 6, 2005 by the Union. The Consolidated Complaint issued March 31, 2005. The Respondent, Wheeling Brake Block Manufacturing, Co., filed a timely answer on April 8, 2005.

Respondent did not appear at the hearing despite having received repeated notification of the time and place of the hearing (GC Exh. 3).¹ After hearing the testimony of the General Counsel's witnesses and considering the documentary evidence and oral argument of Counsel for the General Counsel and Counsel for the Charging Party, I recessed the hearing until November 18, 2005, at which time I rendered a bench decision in accordance with Section 102.35(a)(10) of the Board's Rules and Regulations.

¹This includes notification I provided to Respondent's General Manager Robert Burgess. After Respondent failed to make a representative available for an October 28, 2005 pretrial telephone conference I had attempted to schedule, I faxed and mailed to Burgess the letter I have placed in the record as ALJ Exhibit 1 (along with the fax receipt confirmation notices). The letter reiterated that the hearing in this case was scheduled for November 16, 2005, informed Burgess that the conference call was rescheduled for November 4, and provided contact information for my office. Neither Burgess nor any representative of the Respondent contacted my office and when my assistant placed the conference call on November 4, Burgess' office informed her that Burgess was unavailable to take the call.

I hereby certify the accuracy of the November 18, 2005 transcript, pages 1 through 35, as corrected, containing my bench decision. A copy of that portion of the transcript is attached hereto as Appendix B. Corrections to the transcript are reflected in the attached Appendix C.

5 In supplement to the attached bench decision, I add the following. The General Counsel alleged, and I have found, that two conversations plant manager and owner Robert Burgess had with local union official Palmer, on July 15 and 18, 2003, were coercive and violative of Section 8(a)(1). As recited in the bench decision, on July 15, when Palmer came to the plant to get his layoff notice, Burgess initiated a conversation with Palmer in which he solicited Palmer “to get
10 rid of the Union,” emphasizing, as Palmer credibly testified, that if “I would get rid of the Union, the rest of the people would follow in my steps. They wouldn’t argue about it.” (Tr. 31, 32).² As demonstrated by Burgess’ remarks three days later, the July 15 comment was part of an effort to induce Palmer to assist Respondent’s plan to get rid of the Union. On July 18, Palmer returned to the plant to meet with Burgess regarding the failure of the Respondent to recall
15 employees back to work in order of seniority. Burgess again raised the subject of getting rid of the Union. Burgess said “that he was going to get rid of the Union in order to keep the ones he wanted” (Tr. 38-39), and added that “we could have a Union, but the Union there would be all answering to him, Rob Burgess. He would make final decisions and everything.” (Tr. 32-33). Given that both the July 15 and July 18 remarks were made to Palmer in the context of the
20 unprecedented layoff, I found in the bench decision that “[i]mplicit in these conversations [was] that by ingratiating himself with Burgess by helping to get rid of the union, Palmer’s recall prospects would be better” (Appendix B at 11). In fact, this link was also made explicit. Palmer testified that in the July 18 discussion Burgess “made the reference that he need a mixing man, and if I wanted to get rid of the Union that he would take me back as a mixing man.” (Tr. 38).
25 Thus, I find that Burgess explicitly promised to recall Palmer if he would oppose the Union, action that Burgess believed, and told Palmer, would encourage other employees to accept the Respondent’s effort to “get rid of the Union.” Palmer did not accept Burgess’ recall offer, and the next time they met Burgess was adamant that Palmer would not be recalled. (Tr. 42-43). As noted in the bench decision, Palmer and Brawdy, the only local union officials at the facility,
30 each of whom was solicited by Burgess to get rid of the Union and each of whom refused to comply, were the only employees never recalled. The explicit promise of recall to Palmer in exchange for acceding to Burgess’ demand that he assist in “get[ting] rid of the Union” further supports the findings in the bench decision that Burgess’ comments to Palmer violated Section 8(a)(1) and that the failure to recall Brawdy and Palmer violated Section 8(a)(3).

35 The General Counsel alleged, and I found that the July 14, 2003 layoff was unlawfully motivated and violated Section 8(a)(3) and (1). As noted in the bench decision, any employee suffering a loss of work as a result of this layoff is a discriminatee. However, as also discussed in the bench decision, the evidence does not show that all employees were laid off. Moreover,
40 the complaint identifies only six specific individuals alleged to be among those laid off. Two of them, Brawdy and Palmer, testified at the hearing. Based on their testimony, and the documentary evidence, there is no doubt that they were laid off and never recalled by the Employer. The other four--Robert Maxwell, Timothy Colley, Ronald McKenzie, and John Cumberlidge--did not testify. Significantly, the Respondent’s answer to the complaint admits
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² “[W]here an employer solicits employees to campaign against union representation . . . the Board has consistently held that such solicitation violates Section 8(a)(1) without reference to whether the solicited employee’s union sentiments are known to the employer.” *Allegheny Ludlum, Inc.*, 333 NLRB 734, 741 (2001) (and cases cited therein at n.55) enf’d, *Allegheny Ludlum Corp. v. NLRB*, 301 F.3rd 167 (2002). This is essentially what Burgess was asking of
50 Palmer on July 15.

that each of the four were laid off. Moreover, as detailed in the bench decision, records provided by the Respondent to the Region during the investigation of this case and introduced into evidence as General Counsel's Exhibit 30, provide further support for the complaint allegation that these four employees were laid off. In response to requests for records showing hours worked since June, 2003, the Respondent submitted responses evidencing a diminution of hours worked for Maxwell and Cumberlidge for the week of July 14, 2003. The response shows no hours worked for Colley the weeks of July 14, and July 21, 2003, and thereafter documents a return to full-time hours. The Respondent's submission does not show McKenzie working at all until January 19, 2004. In addition, in General Counsel's Exhibit 30, the Respondent admits that there were layoff slips similar to those provided to Brawdy and Palmer (GC Exhs. 9, 10) for employees Maxwell, Cumberlidge, and Colley, although the Respondent states that it is unable to locate the slips. Further, both Palmer and Brawdy testified—albeit without much specificity—that they thought that with one or two exceptions (the exceptions they identified were employees Mellinger and, perhaps, Dymidowski) all the Union member employees had been laid off for at least a short time. Although the evidence is not entirely clear as to the duration of their layoff, all the evidence supports the conclusion that Maxwell, Colley, McKenzie and Cumberlidge lost work as part of the July 14, 2003 layoff.³ If others were also laid off, the evidence is lacking, and, in any event, the complaint does not identify any other alleged discriminatees.

Conclusions of Law

1. The Respondent is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Union, at all material times has been the exclusive collective bargaining representative, based on Section 9(a) of the Act, of an appropriate unit for such purposes as defined by Section 9(b) of the Act of Respondent's employees at its Bridgeport, Ohio facility, composed of:

all production and maintenance employees employed by the Respondent at its Bridgeport, Ohio facility, excluding all office clerical employees and all professional employees, guards, and supervisors as defined by the Act.
4. The Union and the Respondent were parties to a collective bargaining agreement governing the unit employee's terms and conditions of employment that was effective by its terms from October 1, 2001 through September 30, 2004.
5. By informing an employee that the Respondent was going to get rid of the Union and replace it with a Union controlled by the Respondent, by soliciting an employee to assist Respondent in getting rid of the Union, so that others would more readily accept the loss of the Union, by implicitly and explicitly promising the employee that for opposing the Union the employee would be recalled from layoff, and by maintaining and enforcing an overly broad prohibition on union activity on its premises, the Respondent has been

³The extent of lost wages and benefits suffered by the discriminatees is a matter that can be determined in a compliance proceeding.

interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, in violation of Section 8(a)(1) of the Act.

- 5 6. By laying off of employees Robert Maxwell, Timothy Colley, Ronald McKenzie, John
Cumberlidge, Richard Palmer, and Greg Brawdy, on July 14, 2003, and by failing to
recall employees Greg Brawdy and Richard Palmer thereafter, Respondent has been
discriminating in regard to the hire or tenure or terms and conditions of employment of
employees, to discourage membership in a labor organization, in violation of Section
8(a)(1) and (3) of the Act.
- 10 7. By laying off and recalling employees without regard to the seniority provisions of the
parties' collective bargaining agreement as of July 14, 2003, by withdrawing from the
Union-Industry pension fund as of July 10, 2003 and thereafter failing and refusing to
make contractually-mandated pension contributions to the fund, by failing and refusing to
deduct and transmit dues deductions pursuant to the parties' collective bargaining
15 agreement from July 11, 2003 to September 30, 2004, by repudiating the parties'
collective bargaining agreement as of July 11, 2003, and by failing and refusing the
Union's request to recognize and bargain with the Union for the purpose of negotiating a
successor collective bargaining agreement, the Respondent has failed and refused to
bargain collectively with the representative of its employees and is in violation of Section
20 8(a)(1), (5), and (d) of the Act.
8. The unfair labor practices set out in paragraphs 5, 6, and 7, above, affect commerce
within the meaning of Section 2(6) and (7) of the Act.

25 Remedy

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

The Respondent, having unlawfully laid off employees Robert Maxwell, Timothy Colley,
Ronald McKenzie, and John Cumberlidge, on July 14, 2003, must make each employee laid off
whole for any loss of earnings and other benefits, computed on a quarterly basis from the date
35 of layoff to the date of a 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). In addition to making them whole in
accordance with the preceding, as to the two employees Respondent has, to date, failed to
reinstated, Greg Brawdy and Richard Palmer, it must immediately offer each of them
40 reinstatement to the position they occupied prior to the layoff, or to an equivalent position,
should their prior position not exist, without prejudice to their seniority or any other rights or
privileges previously enjoyed.

Respondent shall rescind the unlawful rule prohibiting union activity on its premises,
45 advise employees it has done so, and that they may engage in union activity on the premises of
Respondent during non-working time and in non-working areas, and in other areas and other
times on such terms as other non-work related activity is permitted, without retribution.

Having found that the Respondent violated Section 8(a)(1) and (5) by failing and refusing
50 to make contractually required payments into the Union-Industry pension plan, from July 11,
2003, the Respondent shall make the unit employees whole, with interest, for any loss of
benefits they may have suffered as a result, in the manner prescribed by *Ogle Protection*

Service, 183 NLRB 682 (1970), enforced 444 F.2d 502 (6th Cir. 1971). The Respondent shall be required to make all contractually required benefit payments or contributions that were not made from July 11, 2003, including any additional amounts applicable to such delinquent payments, in accordance with *Merryweather Optical Company*, 240 NLRB 1213, 1216 (1979).
 5 In addition, the Respondent shall reimburse unit employees, with interest, for any contributions they themselves may have made for the maintenance of the contractual pension funds after Respondent unlawfully discontinued contributions to those funds, as set forth in *Kraft Plumbing and Heating*, 252 NLRB 891, n. 2 (1980), enforced 661 F.2d 940 (9th Cir. 1981). Respondent shall reimburse the Union, with interest, for lost dues that should have been paid contractually
 10 but were not paid to the union because of the employer's repudiation of the labor agreement including the dues check off provision, for the term of the agreement, which ran until September 30, 2004, in the manner set forth in *Ogle Protection Service, supra*. All interest due and owing shall be computed as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

15 Respondent shall, upon demand of the union, meet and confer with the union for the purpose of bargaining a successor collective bargaining agreement .

20 Respondent shall post an appropriate informational notice, as described in Appendix A, attached. This notice shall be posted in the Employer's facility or wherever the notices to employees are regularly posted for 60 days without anything covering it up or defacing its contents. When the notice is issued to the Employer, it shall sign it or otherwise notify the Region what action it will take with respect to this decision.

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

ORDER

30 The Respondent, Wheeling Brake Block Manufacturing Company, Bridgeport, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

- 35 (a) Informing employees that the Respondent is going to get rid of the Union and replace it with a Union controlled by the Respondent, soliciting employees to assist Respondent in getting rid of the Union so that other employees would more readily accept the loss of the Union, implicitly and explicitly promising employees that by opposing the Union the employee would be recalled from layoff.
- 40 (b) Maintaining and enforcing an overly broad prohibition on union activity on its premises.
- 45 (c) Laying off and failing to recall employees to rid itself of the Union and union supporters.

50 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.

- 5 (d) Failing and refusing to abide by and repudiating the collective bargaining agreement, including the seniority, pension contribution, and dues check off provisions of the collective bargaining agreement.
 - (e) Upon request, failing and refusing to recognize and bargain a successor collective bargaining agreement with the union.
 - 10 (f) In like and 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 necessary to effectuate the policies of the Act:
- 15 (a) Offer immediate and full reinstatement to employees Greg Brawdy and Richard Palmer to their former jobs or, if those positions no longer exist, to substantially equivalent positions without prejudice to their seniority or any other rights or privileges previously enjoyed.
 - 20 (b) Make employees Robert Maxwell, Timothy Colley, Ronald McKenzie, John Cumberlidge, Greg Brawdy and Richard Palmer, whole with interest, in the manner set forth in the remedy section of this Decision and Order for any loss of earnings or other benefits resulting from the layoff described in this Decision and Order.
 - 25 (c) Make all affected employees whole, with interest, in the manner set forth in the remedy section of this Decision and Order, for any loss of earnings or benefits resulting from the repudiation of the collective bargaining agreement, including the repudiation of the seniority, pension, and dues check off provisions of the collective bargaining agreement.
 - 30 (d) Reimburse the Union, with interest, for dues it was required to withhold and transmit under the collective bargaining agreement, in a manner described in the remedy section of this Decision and Order, resulting from the Respondent's repudiation of the dues-checkoff provision of the collective bargaining agreement.
 - 35 (e) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the unit described in the Decision and Order concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in signed agreements.
 - 40 (f) Rescind the rule prohibiting union activity on the premises of the Employer and advise employees that it has done so, and that they are free to engage in union activity on the respondent's facility during non-working time and in non-working areas, and in any other areas and other times on such terms as other non-work related activity is permitted, without retribution.
 - 45 (g) Preserve and, within 14 days of a 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, including an electronic copy of the records if stored in electronic form, necessary
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to analyze the amount of backpay due under the terms of this Order. Bryant & Stratton Business Institute, 327 NLRB No. 174 (1999).

5 (h) Within 14 days after service by the Region, post at its facility in Bridgeport, Ohio, copies of the attached notice marked "Appendix A"⁵ Copies of the notice, on forms provided by the Regional Director for Region 8, 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 the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

10 (i) 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 that the Respondent has taken to comply.

15 Dated, Washington, D.C. December 9, 2005.

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David I. Goldman
Administrative Law Judge

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50 ⁵If 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 A

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 layoff, fail to recall, or otherwise discriminate against you for supporting the Retail, Wholesale and Department Store Union, Local 379 and the United Food and Commercial Workers Union, or any other union.

WE WILL NOT tell employees that we are going to get rid of the Union and replace it with a Union that we control.

WE WILL NOT solicit employees to assist us in getting rid of the Union so that other employees will more readily accept the loss of the Union.

WE WILL NOT implicitly or explicitly promise any employee that by opposing the Union the employee will be recalled from layoff.

WE WILL NOT repudiate the collective bargaining agreement, including the seniority, pension contribution, and dues check off provisions of the collective bargaining agreement.

WE WILL NOT refuse to recognize and bargain a successor collective bargaining agreement with the Union.

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.

WE WILL, within 14 days from the date of this Order, offer Greg Brawdy and Richard Palmer 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.

WE WILL make Robert Maxwell, Timothy Colley, Ronald McKenzie, John Cumberlidge, Greg Brawdy and Richard Palmer whole for any loss of earnings and other benefits resulting from their layoff, less any net interim earnings, plus interest.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

all production and maintenance employees employed by the Respondent at its Bridgeport, Ohio facility, excluding all office clerical employees and all professional employees, guards, and supervisors as defined by the Act.

WE WILL make all affected employees whole, with interest, for any loss of earnings or benefits resulting from the repudiation of the expired collective bargaining agreement, including the repudiation of the seniority, pension, and dues check off provisions of the collective bargaining agreement.

WE WILL reimburse the Union, with interest, for dues we were required to withhold and transmit under the collective bargaining agreement.

WE WILL rescind the rule in the expired collective bargaining agreement prohibiting union activity on our premises and WE WILL advise you that this has been done and that you are free to engage in union activity at our facility during non-working time and in non-working areas, and in any other areas and other times on such terms as other non-work related activity is permitted, without retribution.

WHEELING BRAKE MANUFACTURING
COMPANY

(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.nlr.gov.

1240 East 9th Street, Federal Building, Room 1695
Cleveland, Ohio 44199-2086
Hours: 8:15 a.m. to 4:45 p.m.
216-522-3716.

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, 216-522-3723.