Advance Cleaning Service *and* Dana Corn. Case 5-CA-16102

13 March 1985

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 29 May 1984 Administrative Law Judge Claude R. Wolfe issued the attached decision. The Respondent filed exceptions and a supporting brief.[1] The General Counsel filed an answering brief.

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,[2] and conclusions and to adopt the recommended Order as modified.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Advance Cleaning Service, Baltimore, Maryland, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

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

"(a) Interfering with, restraining, or coercing employees by discharging employees for striking or otherwise engaging in protected concerted activity."

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

[1] The Respondent has requested oral argument The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties

[2] Pursuant to a Notice To Show Cause, the parties stipulated that during the 12-month period prior to February 1984, a period which is representative of its business operations, the Respondent provided janitorial and maintenance services valued in excess of $50,000 for Carriage Hill Village Apartments, a residential apartment complex located in Randallstown, Baltimore County, Maryland, during the 4-month period prior to February 1984, the date of the complaint herein and a period representative of its business operations, Carriage Hill Village Apartments derived gross revenues in excess of $500,000 ($1-1/2 million on an annual basis) from the operation of its residential apartment complex and purchased and received at its Randallstown, Baltimore County, Maryland location natural gas valued in excess of $140,000 ($420,000 on an annual basis) from Baltimore Gas and Electric Company, which had received said natural gas directly from points located outside the State of Maryland Based on the above stipulation of facts, the parties agree and we find that, at all times material to the complaint issued in this case in February 1984, the Respondent was and had been an employer engaged in commerce within the meaning of Sec 2(2), (6), and (7) of the Act

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 Ntional Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT threaten employees with discharge for engaging in protected concerted activity.

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 make Linda Follmer, John Lawrence, and Mark Storie whole for any loss of earnings they have suffered, with interest thereon.

ADVANCE CLEANING SERVICE

DECISION

STATEMENT OF THE CASE

CLAUDE R. WOLFE, Administrative Law Judge. This case was tried at Baltimore, Maryland, on April 23, 1984, pursuant to charges timely filed and a complaint issued on February 27, 1984. It is alleged that Advance Cleaning Service (Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by threatening to discharge and discharging Linda Follmer, John Lawrence, and Mark Storie because they engaged in concerted activity protected by the Act. Respondent admits discharging the three, but denies the commission of unfair labor practices.

On the entire record and my observations of the demeanor of the witnesses testifying before me, and after consideration of the posttrial briefs filed by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

The pleadings establish that Respondent meets the Board monetary standards and statutory requirements for the assertion of jurisdiction, and is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II THE ALLEGED UNFAIR LABOR PRACTICES

A *Facts Found*[1]

Respondent has a contract to provide cleaning services for the Carriage Hill Village Apartments These services generally involve interior cleaning, but Respondent's employees are also required to shovel snow when necessary. I credit Edna Delong, Respondent's business manager, that she had informed the employees in 1983 of their snow shoveling obligations Employees obviously knew of their duty, even had Delong not so advised them, because they had shoveled snow in 1983 and started shoveling when directed to on January 18, 1984, without any protest or exclamations of surprise. It is not at all clear that overtime for shoveling snow, or for any other work, was mandatory, or, if it was, that employees had been so informed. The Carriage Hill Village Apartments' snow plan, promulgated by its manager, Edward Paylor, is the only documentary evidence relating to snow control, and that plan's mention of hours of work for snow removal, read in context with surrounding paragraphs, seems to apply to Carriage Hill employees, but not unambiguously to Respondent's employees. Respondent's employees are not represented by any labor organization

The essential facts are really quite simple [2] About 7.30 a.m. on January 18, 1984, Dana Corn, cleaning crew supervisor, and crew members Linda Follmer, Mark Storie, John Lawrence, and Melissa Burton rode to work together in a company car. It was not snowing at the time. When they arrived at the Carriage Hill Village Apartments at 8 a m. they began their usual routine of cleaning apartment interiors and hallways While they were so engaged, there began a heavy snowfall. About 9 a.m., Apartment Manager Paylor told Corn to put her crew to shoveling snow because it was getting deep. By 9:30 a.m all of Corn's crew was shoveling snow, as was Corn. Shortly thereafter, probably about 10 a.m. and no later than 11 a m., Corn called Delong and asked if the crew could leave early inasmuch as the company vehicle had no snow tires Delong referred her to Paylor who told Corn that Respondent's crew would have to work until 4, 7, or 9, possibly even midnight, if the snow continued Corn then called and so told Delong, who answered her by a later call that everybody would be off the job by 7 p.m In midmorning, some time prior to this latest talk with Delong, Corn had made telephone arrangements for her boyfriend to pick her, and others riding in the company car, up at 4 p.m. Accordingly, Corn told Delong that she would not work past 4 p m., nor would other employees. This last call seems to have been some time between 1 and 2 30 p.m After Corn reported the intentions of employees not to work after 4 p m , Delong directed her to find out which employees would stay and which would not Corn inquired and was told by Storie, Follmer, Lawrence, and Burton that they would not stay Corn then told this to Delong on the telephone Delong told her that anyone who did not work after 4 p.m would not be needed the next day. Corn reported Delong's ultimatum to the other employees who, all but Burton, stood fast in their intention to leave at 4 p m. Burton called Delong and expressed a willingness to stay, but explained that Corn had also called Burton's boyfriend to come at 4 p.m. and Burton would have no ride if she did not leave with the crew. Delong directed Burton to go with the others because Respondent could furnish her no transportation, and assured her she was not to be fired. Burton returned to work on January 19, 1984. Richard Russell, the only member of Corn's crew not yet named in this decision, elected to and did stay with the relief crew sent out by Delong about 4 p m. to finish the snow shoveling, which they did about 5:30 p m Corn, Follmer, Lawrence, Burton, and Storie left at 4 p.m in the vehicle of Corn's boyfriend I credit Delong that the only reason given her by Corn for employees not staying was the fact the boyfriends were coming to pick them up I do find, however, that the three did not want to work for various good reasons including illness and lack of suitable clothing for outside work in the snow.

In passing, I do not credit Burton's most improbable claim that she read the three-page snow plan aloud, word by word, to the assembled employees at Carriage Hill on January 18, 1984, in an effort to dissuade them from leaving early Moreover, Burton impressed me as a witness (now crew supervisor), anxiously and consciously coloring her testimony, including the attribution of considerable foul language to fellow employees and others, to make it more effective At no time during her testimony did she impress me as a witness of believable recollection to be relied on. Accordingly, Burton is not credited unless her testimony is corroborated by others

Respondent admits the discharge of Corn, Follmer, Lawrence, and Storie on January 18, 1984. The discharge of Corn is not alleged as unlawful because the General Counsel asserts she was a statutory supervisor at the time of her discharge There is no evidence Follmer, Lawrence, or Storie was replaced, and the parties stipulated, and I find, that Follmer, Lawrence, and Storie were offered unconditional reinstatement to commence February 27, 1984. Lawrence accepted Follmer and Storie declined.

Conclusions

Follmer, Storie, and Lawrence were engaged in a concerted refusal to work overtime on January 18, 1984, and Respondent knew it This had never happened before and there was no reason to believe on January 18 that the refusal would be repeated. These employees were not engaged in a partial or intermittent strike, but were engaged in a single concerted refusal to work overtime which is presumed to be a protected strike activity *Poly-*

[1] The facts set forth herein are derived from the credited aspects of the testimony of all witnesses, the exhibits, stipulations of the parties, and consideration of the logical consistency and inherent probability of the facts found Although I may not, in the course of this decision, advert to all the record testimony, it has been weighed and considered, and to the extent that testimony not mentioned herein might appear to contradict the findings of fact, that evidence has not been disregarded but has been rejected as incredible, lacking in probative worth, redundant, or irrelevant

[2] No witness seemed entirely reliable as to exact times events occurred Accordingly, I have assigned the times in accord with what seems to be the most probable sequence

tech Inc, 195 NLRB 695 (1972), *Embossing Printers*, 268 NLRB 710 at 724 (1984), *SME Cement*, 267 NLRB 763 fn. 1 (1983).[3] This presumption is deemed rebutted "when and only when the evidence demonstrates that the stoppage is part of a plan or pattern of intermittent action which is inconsistent with a genuine strike or genuine performance by employees of the work normally expected of them by the employer." *Polytech* at 696. The employees' individual reasons for stopping work at 4 p.m are irrelevant. See, e.g, *Smithfield Packing Co.*, 258 NLRB 261, 263 (1981), and Respondent has neither proffered nor adduced any evidence that the refusal to work after 4 p.m. on January 18, 1984, was part of any plan or pattern of intermittent action The presumption has not been rebutted, and I find the discharge of Follmer, Lawrence, and Storie for their refusal to work late violated Section 8(a)(1) of the Act. I further find that inasmuch as a threat to discharge for engaging in statutorily protected activity perforce requires a finding that it reasonably tends to interfere with, restrain, and coerce employees in the pursuit of that activity, and by so doing violates Section 8(a)(1) of the Act, Delong's threats of discharge for refusal to work overtime, relayed through Crew Supervisor Corn, violated the Act.

CONCLUSIONS OF LAW

1. Advance Cleaning Service is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By discharging Linda Follmer, John Lawrence, and Mark Storie because they had engaged in protected concerted activities, Respondent had interfered with, restrained, or coerced employees in the exercise of rights guaranteed in Section 7 of the Act, and is thereby engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

3. By threatening to discharge employees because they engage in protected concerted activities, Respondent has violated Section 8(a)(1) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

[3] To the extent that every individual's thoughts are private and probably never completely known to another each of his or her decisions is an individual decision, but when two or more employees, having each made an individual decision, join together in group action toward a commonly desired objective that action is concerted activity regardless of each individual's reasons for joining in it The Act is concerned with concerted activity, not concerted thought Any contention that a failure of all participants in a group activity to entertain identical reasons for engaging in that activity renders the activity individual rather than concerted is plainly without merit So too is Respondent's argument that here employees did not act concertedly because they decided individually not to work overtime. Whatever reasons they might have entertained for not wanting to work overtime the alleged discriminatees and Corn acted as a group in refusing to stay past 4 p m This action was concerted because it was a shared activity, *Meyers Industries*, 268 NLRB 493 (1984), and protected because it concerned hours of work Respondent knew the activity was concerted, knew it concerned a refusal to work overtime, and threatened to discharge and did discharge employees for engaging in this protected concerted activity

THE REMEDY

In addition to the usual notice posting and cease-and-desist requirements, my recommended Order will require Respondent to make Linda Follmer, John Lawrence, and Mark Storie whole for any loss of earnings they may have suffered as a result of their unlawful discharge during the period from January 18, 1984, to February 27, 1984, with interest thereon to be computed in the manner prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977).[4]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The Respondent, Advance Cleaning Service, Baltimore, Maryland, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interfering with, restraining, or coercing employees by discharging or in any other manner discriminating against employees for striking or engaging otherwise in protected concerted activity.

(b) Threatening employees with discharge for engaging in protected concerted activity.

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

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

(a) Make whole Linda Follmer, John Lawrence, and Mark Storie for any loss of earnings each of them may have suffered by reason of the unlawful action against him in the manner set forth in the section of this decision entitled "Remedy."

(b) 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.

(c) Post at its premises at Baltimore, Maryland, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 5, 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

[4] See generally *Isis Plumbing Co*, 138 NLRB 716 (1962)

[5] 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.

[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"

that the notices are not altered, defaced, or covered by any other material.

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