Wolfkill Feed & Fertilizer Corp. *and* **Jerry K. Williams.** Case 19–CA–16717

22 November 1985

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS DENNIS AND JOHANSEN

On 22 August 1985 Administrative Law Judge David G. Heilbrun issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed cross-exceptions, an answering brief, and a brief in support of the decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions, and to adopt the recommended Order.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Wolfkill Feed & Fertilizer Corp., Stanwood, Washington, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] No exceptions were filed with respect to the judge's discussion concerning deferral to arbitration.

[2] The Respondent argues, in effect, that legitimate business concerns will prevent the discriminatees from being reinstated The Respondent's argument is more appropriately left to the compliance stage of this proceeding.

Melvin R. Kang, Esq., for the General Counsel.
Bruce Michael Cross and *Michael T. Reynvaan, Esqs. (Perkins, Coie, Stone, Olsen & Williams)*, of Seattle, Washington, for the Respondent.

DECISION

STATEMENT OF THE CASE

DAVID G. HEILBRUN, Administrative Law Judge. This case was tried at Seattle, Washington, 30 May 1985.[1] The charge was filed by Jerry K. Williams 1 May and the complaint was issued 27 February 1985. The primary issues are whether Wolfkill Feed & Fertilizer Corp., the Respondent, (a) unlawfully laid off Williams, Donald Bowman, and Marvin Hansen because they concertedly complained to the Washington State Department of Labor and Industries, Division of Safety and Industrial Health (WISHA) regarding their wages, hours, and working conditions, in violation of Section 8(a)(1) of the National Labor Relations Act and (b) whether nevertheless the complaint should be dismissed because the Regional Director revoked a prior decision to defer processing of the case pursuant to the Board's policy in *Collyer Insulated Wire*, 192 NLRB 837 (1971), as modified by *United Technologies Corp.*, 268 NLRB 557 (1984).

On the entire record,[2] including my observation of the demeanor of witnesses, and after consideration of briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a Washington corporation, processes and sells feed and fertilizer at this facility in Stanwood, Washington. It annually sells and ships goods or services from all its facilities within the State of Washington valued in excess of $50,000 to customers outside the State, or to customers within the State which were themselves engaged in interstate commerce by other than indirect means. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Setting*

The establishment involved in this proceeding is part of a multifacility enterprise headquartered in Monroe, Washington, which engaged in feed mill and fertilizer production plus the operation of poultry farms. This Stanwood, Washington facility is managed by Jerry M. Wolfkill, a corporate vice president, and comprises at one integrated location a retail store, warehouse, and feed mill with appurtenant grinder, mixers, scales, silos, bins, and related apparatus for the movement of products.

A collective-bargaining relationship exists between Respondent and Teamsters Local 38, with contract representation at Stanwood applying only to drivers and feed mill workers of which there were three and four, respectively, during November. Other individuals of an administrative capacity, part-time warehouse employees, custodial, or in-store operations were not covered by the Teamsters agreement. A grievance and arbitration procedure was set forth in relevant contract language as article XIV, and keyed to "interpretation or application of any of the terms of this Agreement." Unsettled oral grievances were to be reduced to writing concerning their facts, remedy sought, and reference "to the article or articles of the Agreement alleged to have been violated." The arbitration clause contemplated arbitral selection from an FMCS list, and contained an express declaration that the agreement may not be altered in the process of an arbiter arriving at a decision.

[1] All dates are from November 1983 until October 1984 unless otherwise indicated.

[2] Errors in the transcript have been noted and corrected

B. *Basis of Analysis*

During late fall of 1983 feed mill operations were carried out by pairing the employees on shifts that rotated each week. One team was Bowman and Williams, the other was Hansen working with Mike Lynn. These pairs alternately covered a day shift of 9 hours on Monday through Thursday, and a swing shift of 7 hours from 4 to 11 p.m. on Monday through Thursday, plus a 9-hour workday on Friday.

Prior to November feed mill employees were allowed unrestricted access during all working hours to Respondent's store and office area in which a restroom was located. Wolfkill testified that this practice resulted in unwelcome disarray to the office from after-hours use, and that plans had been made to revamp basic lunchroom and restroom facilities for employees. In November the sequence of renovation work caused a locking of the door formerly used by feed mill employees for their after-hours access to a bathroom, first aid kit, and relief from particularly cold temperatures.

Bowman testified that this change dismayed him and the other mill employees, but from overheard remarks of Assistant Manager Rick Schmitt, it appeared the change was permanent. However, Wolfkill testified that he had invited Hansen to coordinate a direct cutting into the restroom area through its outer wall, but this expediency did not materialize because of distraction over the holiday season and unavailability of a needed independent contractor.

In early January the feed mill employees discussed their continuing annoyance with nonaccess to a bathroom and decided to call in WISHA on the matter. Contact was actually made by a neighbor of Bowman and on 12 January an inspector of that agency made an unannounced plant visit from which a written report issued to Respondent. Several minor violations were noted, one of which was "failure to have toilet facilities open for use during all working hours," for which the routine abatement date of 27 January was given. Wolfkill testified that bathroom access was soon completed, and that coincidentally the delayed independent contractor had appeared for this work about the same day as the WISHA inspection.

On 19 January Wolfkill conducted a meeting of union-represented employees along with his administrative staff. He had prepared a letter of that date to John Donovan, secretary-treasurer of Teamsters Local 38, and presented a copy to each of the assembled employees along with advice that Bowman, Hansen, and Williams were being laid off. At that point Bowman had been employed with Respondent for nearly 6 years, while Hansen and Williams each had worked there for approximately 13 years.

Wolfkill's letter to the Teamsters opened with a reference to Stanwood employees "appear[ing] unhappy," and that recent occurrences related to the lockout from formerly available areas and his ultimatum that cleaner surroundings be maintained had "stirred things up." In continuing these subjects the letter read, in part:

> In response to the lockup and the ultimatum to clean up, the employees filed a complaint with WISHA . . . I object to the way that the employees handled this complaint. A compromise could have been worked out between management and employees or through the union. It was not necessary to call in a third party . . . I am objecting to an official complaint to a third party without discussion.

Hansen testified that he worked the day following this meeting during which he oriented former truckdriver Paul Taylor on unfamiliar operations within the mill and on machinery maintenance. Bowman was recalled briefly for work as a truckdriver in February, while Williams was eventually recalled in September and worked from that point until another layoff in March 1985.

Wolfkill testified that the January layoffs were a combination of plans to improve productivity after installation of a large auger system to a 100-ton-capacity silo as would increase the amount of ground corn available for mixing into feed. He emphasized another factor as loss of a major customer which had increased Respondent's cost of production under previous staffing of the feed mill. The initial adjustments following the layoffs involved some overtime work, the transfer of Taylor into regular mill work, and use of part-time employee Roney. Wolfkill had also written again to Donavan on 1 February seeking consent to working union members less than the contractual 8-hour daily guarantee, but such authorization was never received.

C. *Collyer Issue*

On 14 June the Regional Director proposed deferring to arbitration under *Collyer*, subject to Respondent's willingness which was soon stated in a letter from its counsel dated 21 June. Following this, deferral was confirmed and the parties soon selected a Seattle arbitrator to hear what was termed "the layoff of Jerry K. Williams." At an arbitration hearing on 21 January 1985 the cases of Bowman and Hansen were included, with the Union's attorney asserting the issue under submission should be solely whether the employer violated article 11.02 of the agreement and, if so, what remedy was appropriate. This passage of the contract stated simply that "The Employer shall not discharge or suspend any employee without just cause." Respondent's attorney proposed that the issue be only, "Did the company lay off Jerry Williams because of his protected concerted activities [and] if so, what is the appropriate remedy?" The Union countered with an offer of permitting the arbitrator to frame the issue for decision, but Respondent was unwilling to accede in this and on that basis the hearing adjourned with both parties then informing the Regional Director of their respective positions. On 1 March 1985 the Regional Director revoked his earlier deferral and issued complaint, citing as a reason that Respondent "has refused to proceed to arbitration on the underlying contractual dispute herein."

Collyer, as modified by *Olin Corp.*, 268 NLRB 573 (1984), permits controlling arbitral resolution of an unfair labor practice issue in appropriate cases and where the contractual issue raised by the grievance is factually par-

allel to what the Board would analyze. Here the Teamsters contract is silent on nondiscrimination language as often found, except for its article 11.01 in which the upholding of "Union principles" is protected. Such phraseology is not equivalent to statutory rights in Section 7 of the Act, and Respondent's insistence on a statement of the arbitral issue, as stipulatedly described above, would deprive the Union of its entitlement to press for broader consideration under the "just cause" notion expressly contained in the contract.

It is axiomatic that arbitrators have extensive authority to apply various principles in assessing the "justness" of adverse actions, and to resolve the threshhold question of whether layoffs, as were here involved, constituted "discharge" or at least a "suspen[sion]" under contract language which the arbitrator was without authority to alter. Respondent's action is indefensible under *Collyer* for the essential reason that its narrower definition of the issue to be arbitrated could not lead to consideration of external matter that would be factually parallel to what is weighed in a classic "just cause" decision.

D. *Analysis of the Merits*

The question is whether or not these layoffs were motivated at least in part by a retaliatory intent with respect to the WISHA inspection. Clearly the employees harbored a "disgust" with abrupt closing off of their prior access to bathroom facilities during nonstore hours and to general comfort breaks as the winter season approached. This was actually voiced to admitted Supervisor Schmitt and, although the speaker during this November episode was Taylor, it occurred in the presence of Hansen whose attitude was unconcealed concerning the change.

Respondent has established elaborately, through its sales and production records, that customer cutbacks were part of the new year 1984 and, separately, that its newly installed plant equipment tended to permit fewer employees to achieve productivity levels of the past. These factors do not, however, offset timing of such unprecedented layoffs, their depth in terms of the full-time unionized work force nor, most importantly, the verbiage of Wolfkill's 19 January letter in which he plainly "object[s]" to employees having complained in distasteful manner to a "third party." This sentiment is directly at odds with the statutory entitlement to undertake just such concerted action as was here involved.[3] It is not incumbent on employees who perceive such a need to obtain advance permission "[from] management . . . or through the union," but is instead their right to so act and be secure from discriminatory consequences.

Besides such direct and compelling evidence of motivation, the same appearance of retaliatory action would be inferrable from the sudden transfer of Taylor into work with which he was unfamiliar and with the awkward utilization of youthful part-time employees to perform what these experienced individuals had done over many years without prior interruption to service. Overall there is ample, persuasive proof that, as alleged, management reacted to the WISHA inspection by punitive layoffs that would not otherwise have been determined.

[3] Respondent's extensive argument pertaining to application of the yet-unreconsidered rule from *Meyers Industries*, 268 NLRB 493 (1984), has been evaluated in reaching this rationale

Conclusions of Law

1. Wolfkill Feed & Fertilizer Corp. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. General Teamsters Union, Local #38, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America is a labor organization within the meaning of Section 2(5) of the Act.

3. By laying off employees Donald Bowmen, Marvin Hansen, and Jerry K. Williams, the Respondent has violated Section 8(a)(1) of the Act.

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.

The Respondent having discriminatorily laid off Bowman, Hansen, and Williams, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from dates of layoff to date of 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 *Florida Steel Corp.*, 231 NLRB 651 (1977).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

The Respondent, Wolfkill Feed & Fertilizer Corp., Stanwood, Washington, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Laying off any employee for engaging in protected concerted activities for the purpose of mutual aid or protection.

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

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

(a) Offer Donald Bowman, Marvin Hansen, and Jerry K. Williams immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

[4] 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.

(b) Remove from its files any reference to the unlawful discharges and notify the employees in writing that this has been done and that the discharges will not be used against them, in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at Stanwood, Washington, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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

[5] 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.

WE WILL NOT lay off any of you for acting together for the purpose of mutual aid or protection.

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

WE WILL offer Donald Bowman, Marvin Hansen, and Jerry K. Williams immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to thier seniority or any other rights of privileges previously enjoyed, and WE WILL make them whole for any loss of earnings and other benefits resulting from their layoff, less any net interim earnings, plus interest.

WE WILL notify them that we have removed from our files any reference to layoffs and that the layoffs will not be used against them in any way.

WOLFKILL FEED & FERTILIZER CORP.