

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**DRESSER-RAND COMPANY**

**and**

**Cases 3-CA-27141  
3-CA-27260**

**LOCAL 313, IUE-CWA, AFL-CIO**

**ACTING GENERAL COUNSEL'S ANSWERING BRIEF  
TO RESPONDENT'S CROSS-EXCEPTIONS TO THE  
DECISION OF THE ADMINISTRATIVE LAW JUDGE**

**I**

**STATEMENT OF THE CASE**

Administrative Law Judge Paul Buxbaum issued his Decision and recommended Order in these matters on February 18, 2011. The Charging Party filed exceptions to the ALJ's finding and conclusion that the discharge of employee Glenn Painter did not violate the Act. The Respondent thereafter filed cross-exceptions to the ALJ's findings and conclusions that: Painter's activity, while not entirely protected by the Act, was concerted; certain of Painter's activities were both protected and concerted; and Respondent violated Section 8(a)(1) of the Act by coercively interrogating employees about internal Union matters.

Herein, the Acting General Counsel (AGC) answers Respondent's cross-exceptions to the ALJ's finding and conclusion that Respondent engaged in unlawful interrogation of employees. Although the AGC is not answering Respondent's remaining cross-exceptions, he respectfully requests that the Board affirm the ALJ's findings and

conclusions that Painter was engaged in concerted activity and that the majority of his statements to the market analysts were both concerted and protected.

## **II**

### **POSITION OF THE ACTING GENERAL COUNSEL**

The ALJ's finding and conclusion that Respondent interrogated employees in violation of Section 8(a)(1) of the Act is supported by the record evidence, and should be affirmed by the Board.

## **III**

### **STATEMENT OF FACTS**

The facts concerning the investigatory interviews of April 30, 2009, during which the violations found by the ALJ occurred, are adequately and accurately set forth in his Decision at page 14, lines 23-53; page 15, lines 2-4; page 36, lines 49-53 and page 37, lines 2-25.

## **IV**

### **ARGUMENT**

The ALJ correctly found that, to the extent Respondent sought to determine who made contact with the market analysts who follow the Company, Respondent did not violate the Act. However, the ALJ correctly perceived the difference between those questions that served Respondent's legitimate need to investigate and those that delved into purely internal Union matters, specifically the Union's internal practices, policies and procedures for appealing to third parties regarding labor disputes.

On the morning of April 29, 2009, Respondent believed that at least one of its employees had engaged in misconduct.<sup>1</sup> Later that day, Respondent learned the identity of one employee, Glenn Painter, who had left a voice mail message with at least one of the approximately 12 analysts the night before. In order to learn whether other employees were involved, Respondent decided to simultaneously interview each of the eight employees on the Union's bargaining committee on April 30. To that end, it prepared a printed list of questions for the investigatory interviews. (GC 32, 33, 35, 37 – 42) The ALJ correctly found that several of these questions violated the boundary between Respondent's legitimate need to investigate and the right of employees "to keep confidential their union activities." Citing Guess?, 339 NLRB 432, 434 (2003). (Decision at p. 38, lines 17-46; at p. 39, lines 2-17).<sup>2</sup>

Interrogation is not a *per se* violation of the Act, and the ALJ's Decision is consistent with this principle of Board law. Rossmore House, 269 NLRB 1176 (1984); Universal Laundries & Linen Supply, 355 NLRB No. 17, slip op. at p. 9 (March 2, 2010). In Rossmore House, the Board abandoned the *per se* approach to the interrogation of open and active union supporters in favor of a case-by-case analysis that takes into account all the surrounding circumstances. These include the backdrop against which the questioning occurs, the nature of the information sought, the identity of the questioner, and the place and method of the interrogation. Rossmore House, *supra* at 1277. The

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<sup>1</sup> Hereinafter, all dates are in 2009.

<sup>2</sup> Respondent's suggestion (Br. at 50) that it needed to inquire about internal Union matters in order to determine whether there was concerted activity afoot is absurd. Respondent regarded Painter's communication with the analysts as *unprotected* misconduct, even before its negotiating team heard Painter's voice on the recording. Dan Wallace's prepared statement to the Union's negotiating team on the morning of April 29 made that much crystal clear. (GC 31) If Respondent had a good faith belief that others may have been engaged in unprotected misconduct, Respondent could have disciplined them whether their activity was concerted or not, based on its position that the conduct was unprotected. Thus it was irrelevant, for the purposes of Respondent's investigation into the identity of any other individuals who may have been involved whether Painter's calls were part of a "concerted response."

ALJ applied these factors herein to find that certain questions plainly coerced employees in violation of Section 8(a)(1) of the Act. (Decision at p. 38, line 46 – p. 39, line 8).

In Frances House, Inc., 322 NLRB 516 (1996), the Board found coercive the interrogation of open union supporters where the questioning occurred in the context of “persistent individual grilling about their own or other employees’ protected and union activities and sympathies in a closed door office by a high ranking official.” Id. at 522.

In analogous circumstances, the Board affirmed an administrative law judge’s finding that the interrogation of stewards about such matters as whether the union paid them for being stewards, whether they knew anything about unfair labor practice charges the union had filed, whether one of the stewards had spoken with a union representative about the charges, and how a steward was selected for her position was coercive. Ellicott Development Square, 320 NLRB 762, 772 (1996).

## V

### CONCLUSION

Under the circumstances herein, the ALJ was clearly correct in finding that Respondent violated Section 8(a)(1) of the Act when it interrogated members of the Union’s negotiating committee about internal Union matters, and his Decision on this issue should be affirmed.

Dated at Buffalo, New York  
27<sup>th</sup> May, 2011

Respectfully submitted,

/s/ Ron Scott, Esq.  
Counsel for the Acting General Counsel  
National Labor Relations Board  
Niagara Center Building – Suite 630  
130 S. Elmwood Avenue  
Buffalo, New York 14202

Telephone (716) 551 - 4958