UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
THIRD REGION

DRESSER-RAND COMPANY

and

LOCAL 313, IUE-CWA, AFL-CIO

Cases 3-CA-27141
3-CA-27260

RESPONDENT'S CROSS EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Respondent Requests Oral Argument

Respectfully submitted,

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PRELIMINARY STATEMENT

Respondent Dresser-Rand Company ("Respondent," "Employer," "Company" or "D-R") hereby respectfully cross-excepts to certain rulings set forth in the decision of Administrative Law Judge Paul Buxbaum (the "ALJ") in the above-referenced matter in accordance with Section 102.46(e) of the Rules and Regulations of the National Labor Relations Board ("NLRB"). The hearing in this case was held in Elmira, New York on August 2, 3, 4, 5 and Corning, New York on October 20, 21 and 22, 2010. All parties participated in the proceeding, including the Company, the IUE-CWA, Local 313, ALF-CIO ("Charging Party" or "Union" or "Local 313") and Counsel for the acting General Counsel of the National Labor Relations Board, Region 3 ("General Counsel"). Thereafter the parties submitted post-hearing briefs. The ALJ rendered his Decision on February 18, 2011 ("ALJ Decision"). The Charging Party filed exceptions dated April 1, 2011. The General Counsel filed no exceptions. On April 8, 2011, the Associate Executive Secretary extended Respondent's time to file an answering brief and cross-exceptions through and including April 29, 2011.

Respondent hereby requests oral argument.

EXCEPTIONS

A. Exceptions Regarding ALJ's Finding That Painter's Activity Was "Concerted"[1]

1. The ALJ erred when he found that "a realistic appraisal of Painter's thought process reveals mixed motivations." (ALJ p. 22, l. 7-8).[2]

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[1] Ultimately, the ALJ found in favor of the Respondent regarding the charges alleging Mr. Painter was improperly terminated for engaging in protected speech. The termination and the protected / unprotected nature of Mr. Painter's speech is currently the subject of the Charging Party's exceptions. Since portions of Mr. Painter's speech will be the subject of review, the Company excepts in order to place the entire contents of his speech on the record for review as Respondent continues to contend that nearly all of Mr. Painter's statement was unprotected by the Act. Respondent has no objection, however, to the ALJ's ultimate finding that Mr. Painter's speech was unprotected and his termination justified.

The Respondent proved that Painter's only true motive was retaliation. (ALJ p. 31, l. 10-20, ALJ p. 32 l. 29-32; Tr. 444, 482).

2. The ALJ erred when he concluded that "In my view, however, this analysis of Painter's intentions does not go far enough. There was more to it than that… it is entirely logical to infer that the loss of paid time on the part of its officers while they conducted union business posed a detriment to the functioning of the Union as a whole. I readily conclude that these factors also played a part in Painter's thinking. Indeed, such considerations go to the heart of concerted activity. For example, when workers go out on an economic strike, it is natural to believe that each striker is primarily focused on the effort to improve his or her own economic situation while, at the same time, recognizing that the outcome of the strike will powerfully affect the economic situations of his or her coworkers as well." (ALJ 22, l. 19-29).

   The Respondent proved that Painter's only true motive was retaliation. (ALJ p. 31, l. 10-20, ALJ p. 32 l. 29-32; Tr. 444, 482).

3. The ALJ erred when he found that Painter had a secondary motivation when he stated "he also acted out of similar concerns regarding the proposed elimination of this practice for his two colleagues and the effect of this change on the Union's overall ability to function." (ALJ 22, l. 38-41).

   Painter never testified that he was concerned about the effect of the Company's proposal on his co-workers Scouten and McNally. (ALJ p. 22, l. 21, 39-44).

4. The ALJ erred when he credited Painter's "contention that he was motivated, in part, by a general desire to pressure the Company into reaching an agreement with the Union." (ALJ 22: 43-44).

   The Respondent proved that Painter's only true motive was retaliation. (ALJ p. 31, l. 10-20, ALJ p. 32 l. 29-32; Tr. 444, 482).

5. The ALJ erred when he found that "Painter's motivations were a mixture of highly individual grievances and general and collective concerns about the terms and conditions of employment for his fellow union officers and the entire bargaining unit. Because Painter's telephone calls to the investment analysts were designed to apply pressure to the Employer in order to ameliorate his own terms and conditions of employment and the terms and conditions of employment of his coworkers, they contained sufficient lineage to group action in order to have constituted concerted activity within the *Meyers II* framework." (ALJ p. 23, l. 7-15).

   The ALJ further erred when he continued to refer to Painter's activity as "concerted" throughout the opinion, (ALJ p. 23, l. 15, 17; p. 45 l. 38-40), and

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[2] Citations to the ALJ Decision are in the form "ALJ p. ____, l. ____" indicating the page and relevant lines, if applicable. Citations to the hearing transcript are "Tr. ____," indicating the page.

when he later stated "without doubt, some of Painter's statements directly or at least tangentially, concerned the labor dispute. By this, I am referring to Painter's comments regarding the negotiations at Painted Post and Wellsville and the Company's proposal of a reduced workweek at Painted Post. Informing the analysts of these matters may well have served the Union's interests by placing pressure on the Company to reach a contract with the Union." (ALJ p. 34, l.7-11).

The ALJ further erred when he stated "There can be no doubt that the Employer was aware of the concerted activity." (ALJ p. 45, l. 39-40).

Painter never testified that he was concerned about the effect of the Company's proposal on his co-workers Scouten and McNally. (ALJ p. 22, l. 21; 40-45). The ALJ's finding is inconsistent with Board law expressed in *Meyers II* because Painter's statements (1) failed to call anyone to action, group or otherwise, (2) brought no complaint to the attention of management, (3) were made without the authority of any other employee, (4) failed to request help, (5) were made out of a concern for himself only or in the alternative, out of a concern for investors. The Employer was also unaware that Painter's actions were concerted.

B. Exceptions Regarding ALJ's Findings That Certain of Painter's Statements Were "Protected"

6. The ALJ erred when he found that Painter's statement that "negotiations between the Company and Local 313 took a turn for the worse on April 28" was "completely free of problems. The sentence contains a statement of fact and an opinion." The ALJ further erred when he stated "Painter's opinion that the session had gone poorly in terms of the hope of reaching any agreement was well supported by the events on that day. Even more importantly, his choice of language made it clear that he was expressing an opinion about the course of the negotiations, not making a statement of objective fact. Standing alone, this statement would certainly constitute protected activity within the meaning of the Act." (ALJ p. 25, l. 35-42).

   This statement is unprotected by the Act because it is unrelated to any labor dispute, disloyal and/or maliciously false.

7. The ALJ erred when he found that Painter's statement regarding Painted Post's workload -- "[t]he workload and backlog at Painted Post had fallen off dramatically" -- "informs the listener that he is giving a subjective opinion or assessment." (ALJ p.25 l. 45-47).

   Painter's statement is unprotected by the Act because it is unrelated to any labor dispute, disloyal and/or maliciously false.

8. The ALJ erred when, in finding that Painter's statement that "[t]he workload and backlog at Painted Post had fallen off dramatically" was protected, he reasoned that: "Nevertheless, as the Board explained in *Valley Hospital Medical Center*,

supra, merely biased or hyperbolic statements do not forfeit the speaker's protection under the Act. Here, Painter testified that his union duties caused him to travel around the plant. During the course of these travels, he observed, 'a number of departments where people had nothing to do.' (Tr. 326) In addition, it is undisputed that the Employer had just warned the Union that there was some possibility of layoffs in the next few months. If Painter's claim that there had been a dramatic loss of work was an exaggeration it was not so extreme as to justify a finding of malice or recklessness. Once again, standing alone, Painter's claim about the volume of work at Painted Post would constitute protected activity." (ALJ p. 25, l. 45 – p. 26, l. 5).

Painter's statement is unprotected by the Act because it is unrelated to any labor dispute, disloyal and/or maliciously false.

9. The ALJ erred when he found that Painter's statement "[t]he company has proposed a possible 32-hour work week" was protected.

   Painter's statement is unprotected by the Act because it is unrelated to any labor dispute, disloyal and/or maliciously false.

10. The ALJ erred when, in finding that Painter's statement that "[t]he company has proposed a possible 32-hour work week" was protected, he reasoned that: "On balance, coming immediately after his two prior statements about Painted Post, I do not find it particularly troubling that he failed to state that the management proposal for a reduced workweek did not involve any other plants. It is clear that Painter was referring to the topic raised by management at the April 28 session. Once again, Painter engaged in a certain degree of exaggeration. … I am not concerned about the exaggeration or puffery designed to make the employment situation at Painted Post look as bad as possible. The fact remains that Painter's statement was at least grounded in some objective reality. Furthermore, Painter took the trouble to inform the analysts that the Company's proposal was for a 'possible' reduction in the work week. (GC Exh. 8(a).) I do not conclude that this statement or the combination of statements about conditions at Painted Post were of a type that would forfeit protection." (ALJ p. 26, l. 6-25).

    Painter's statement is unprotected by the Act because it is unrelated to any labor dispute, disloyal and/or maliciously false.

11. The ALJ erred when he found that Painter made "lawful statements about the subject that he knew the most about." (ALJ p. 26, l. 25-6).

    Painter's statements are unprotected by the Act because they are unrelated to any labor dispute, disloyal and/or maliciously false.

12. The ALJ erred when he stated "one of these statements was phrased in a manner that retains its protected character, referring to Painter's statements about facilities other than Painted Post." (ALJ p. 26, l. 27-8).

Painter's statements are unprotected by the Act because they are unrelated to any labor dispute, disloyal and/or maliciously false.

13. The ALJ erred when he found that Painter's statement regarding Wellsville labor negotiations - that "it's not looking good at this time that an agreement will be reached by August 15, 2009" - was "an opinion rather than a statement of fact." (ALJ p. 27, l. 28).

    Painter's statements are unprotected by the Act because they are unrelated to any labor dispute, disloyal and/or maliciously false.

14. The ALJ erred when, in finding that Painter's statement regarding Wellsville labor negotiations - that "it's not looking good at this time that an agreement will be reached by August 15, 2009" - was "an opinion rather than a statement of fact", he reasoned that: "Despite these concerns on my part, I must conclude that Painter's choice of wording was sufficiently vague to preserve his protection under the Act. By telling the analysts that the labor situation at Wellsville was 'not looking good at this time,' he was implicitly informing the analysts that this was simply a forecast of future events. By its nature, such a prediction represents an opinion rather than a statement of fact. While I conclude that Painter's basis for his opinion was recklessly weak, I also find that Section 7 permits him to offer such an opinion so long as it is clearly couched in language that conveys to the listener that it is a mere forecast of future events. Because Painter's remarks about Wellsville referred to the Employer's labor relations and were couched as predictions of the future course of such relations, I conclude that they were protected within the Board standards as summarized in *Valley Hospital Medical Center*, *supra*, 351 NLRB at 1252-1253. (ALJ p. 26, l. 30 – p. 27, l. 35)."

    Painter's statements are unprotected by the Act because they are unrelated to any labor dispute, disloyal and/or maliciously false.

15. The ALJ further erred later in his opinion when he stated "[n]ot all of Painter's assertions were false" (ALJ p. 34 fn. 38) and that "many of Painter's comments could have retained their protected character." (ALJ p. 46, l. 4).

    As set forth in the previous exceptions, Painter's statements are unprotected by the Act because they are unrelated to any labor dispute, disloyal and/or maliciously false.

C. Exceptions Regarding ALJ's Finding of Unlawful Interrogation

16. The ALJ erred when he stated "I find that the Employer did violate the Act by interrogating its employees about their protected activities." (ALJ p. 2, l. 2-3). The ALJ erred when he concluded that: "in its zeal to learn as much as possible about the events at issue, the Employer went beyond the permissible bounds by widening the scope of its inquiry to include prohibited topics." (ALJ p. 38, l. 17-20). Equally in error was the ALJ's reasoning supporting this conclusion: "In

particular, it posed a series of detailed questions regarding internal union procedures and policies. … [E]mployees were asked about the procedures 'employed by IUE Local 313 prior to permitting a communication to go out to the press, public or a [s]ecurities analyst.' (GC Exh. 32, p. 4.) ... [T]he Employer sought to learn whether the local union contacted the international union prior to communicating with outside entities." (ALJ p. 38, l. 20-24).

These questions were necessary and proper under the law, based on all the facts and circumstances, and in order to make a determination whether the activity in question was protected and concerted, and to determine the extent of unprotected and unlawful activities.

17. The ALJ erred when he concluded that: "Even more intrusively, the script of questions demanded to learn about the Union's internal deliberations regarding the events at the negotiating session on April 28. (ALJ p. 38, l. 25-26). Equally in error was the ALJ's reasoning supporting this conclusion: "[E]mployees were asked whether there was 'a discussion of the public reaction the Union should have in response to the Company's changes [in negotiating position on April 28].' (GC Exh. 32, p. 6.) ... [A]nother question was asked that honed in on the topic as follows: '[D]id the union bargaining committee make plans to provide information to the press, public and/or securities analysts relating to the Company's changes? What was that plan?' (GC Exh. 32, p. 6.)" (ALJ p. 38, l. 27-33). "This series of questions went to the heart of the protections afforded by Section 7. They sought to uncover detailed information regarding internal union methods. Even more troubling, they sought to learn the contents of internal union discussions directly related to the ongoing collective-bargaining talks. To underscore the impermissible scope of these questions, I note that they also went far beyond an effort to learn about the contacts with financial analysts. They also addressed contacts with the press and with the general public. None of this bore any appropriate relationship to the matter under investigation. ... Interrogation about such activity is unlawful." (ALJ p. 38, l. 34-45).

These questions were necessary and proper under the law, based on all the facts and circumstances, and in order to make a determination whether the activity in question was protected and concerted, and to determine the extent of unprotected and unlawful activities.

18. The ALJ further erred when he concluded that "[t]he Company's conduct in seeking to invade the confidentiality of employees' participation in lawful union activities violated Section 8(a)(1) of the Act" and when he stated in a footnote that "[i]t is the over breadth of the interview script that runs afoul of the statute. (ALJ p. 39, l. 16-17, fn. 42).

The Company's questions with which the ALJ found fault were necessary and proper under the law, based on all the facts and circumstances, and in order to make a determination whether the activity in question was protected and concerted, and to determine the extent of unprotected and unlawful activities.

19. The ALJ erred when he concluded that "other evaluative criteria" -- referring to the use of certain "methods in conjunction with the highly intrusive questioning regarding internal union deliberations and procedures constituted unlawful interference, restraint, and coercion of the interview subjects." (ALJ p. 38, l. 46 and p. 39 l. 1) -- supported a finding that certain of the Company's investigatory questions were coercive (ALJ p. 38-9).

    The ALJ conceded that he was "not suggesting that the manner of the interrogation would have been unlawful" standing alone (ALJ p. 39, l. 10-11). The evidence shows that the Employer undertook special measures and safeguards to conduct the investigation with unusual care; the manner of the interrogation and the inquiries posed were lawful.

20. In finding that certain of the Company's investigatory questions were coercive, the ALJ erred in supporting that conclusion with the reasoning that: "[t]he background included Wallace's sharp warnings read to the interviewees on the preceding day indicating that the Employer clearly contemplated adverse action against individuals deemed to have violated the Company's policies regarding outside contacts. The questioning was conducted by high company officials rather than the immediate supervisors of the interview subjects. The place and method of questioning were such as to heighten the coercive atmosphere. The location was away from the shop floor and the use of a written script was a dramatic illustration of the seriousness of the situation." (ALJ p. 39, l. 1-8).

    The ALJ conceded that he was "not suggesting that the manner of the interrogation would have been unlawful" standing alone (ALJ p. 39, l. 10-11). The evidence shows that the Employer undertook special measures and safeguards to conduct the investigation with unusual care; the manner of the interrogation and the inquiries posed were lawful.

21. The ALJ further erred in concluding that "the use of these methods in conjunction with the highly intrusive questioning regarding internal union deliberations and procedures constituted unlawful interference, restraint and coercion of the interview subjects." (ALJ p. 39, l. 11-13).

    The ALJ also conceded that he was "not suggesting that the manner of the interrogation would have been unlawful" standing alone (ALJ p. 39, l. 10-11). The evidence shows that the Employer undertook special measures and safeguards to conduct the investigation with unusual care; the manner of the interrogation and the inquiries posed were lawful.

22. The ALJ erred in his conclusions of law that "By interrogating its employees about the internal practices and procedures of their union and by interrogating them about the internal deliberations of their union officials regarding collective-bargaining negotiations, the Employer unlawfully interfered with, restrained, and coerced those employees in violation of Section 8(a)(1) of the Act" (ALJ p. 57, l. 6-10) and by ordering the remedy specified as "I find that [the Employer] must be

ordered to cease and desist and to take the affirmative action by posting an appropriate notice" specified by the ALJ (ALJ p. 57, l. p. 16-20) and shown in the Appendix (ALJ Appendix).

Based on all the facts and circumstances, and in order to make a determination whether the activity in question was protected and concerted, and to determine the extent of unprotected and unlawful activities, the interrogation and the manner in which it was carried out was necessary and proper under the law.

23. The ALJ erred when he Ordered Respondent to "Cease and desist from: (a) coercively interrogating its bargaining unit employees regarding internal policies and procedures of their union, the internal deliberations of their union officials regarding collective bargaining negotiations, or their protected union activities, [and] (b) by any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed then by Section 7 of the Act" (ALJ p. 58, l. 27-37) and to take the "affirmative action" set forth in the Order (ALJ p. 58, l. 40-45 and p. 59, l. 1-17).

    Based on all the facts and circumstances, in order to make a determination whether the activity in question was protected and concerted, and to determine the extent of unprotected and unlawful activities, the interrogation and the manner in which it was carried out was necessary and proper under the law, and its manner was lawful.

CONCLUSION

Respondent is filing herewith a brief in support of the exceptions which contains the argument and citation to authority in support of the foregoing exceptions.

Dated: April 29, 2011

Respectfully submitted,

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