Greyhound Lines, Inc. *and* **Steve Thornell.** Case 19-CA-12242

July 31, 1981

DECISION AND ORDER

On February 4, 1981, Administrative Law Judge Earldean V. S. Robbins issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and counsel for the General Counsel filed a brief in support of the Administrative Law Judge's Decision.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt her recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Greyhound Lines, Inc., Seattle, Washington, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT do anything that interferes with, restrains, or coerces employees with respect to these rights. More specifically:

WE WILL NOT discharge employees because of their union or other protected concerted activities.

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 National Labor Relations Act.

WE WILL offer Sandra Burns immediate and full reinstatement to her former job or, if that job is no longer available, to a substantially equivalent job, without prejudice to any seniority or other rights and privileges previously enjoyed.

WE WILL make Sandra Burns whole for any loss of earnings she may have suffered by reason of our discrimination against her, with interest.

GREYHOUND LINES, INC.

DECISION

STATEMENT OF THE CASE

EARLDEAN V. S. ROBBINS, Administrative Law Judge: This case was heard before me in Seattle, Washington, on October 23, 1980. The charge was filed by Steve Thornell, an individual, herein called Thornell, and served on Greyhound Lines, Inc., herein called Respondent, on March 26, 1980. The complaint, which issued on May 1, 1980, alleges that Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, herein called the Act.

The principal issue herein is whether the alleged discriminatee, Sandra Burns, is a confidential employee and whether she is excluded from the protection of the Act.

Upon the entire record, from my observation of the demeanor of the witnesses, and after due consideration of the post-hearing briefs, I hereby make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent, a California corporation, with an office and place of business in Seattle, Washington, is engaged in the business of transportation. During the 12-month period prior to the issuance of the complaint herein, which period is representative of all times material herein, Respondent, in the course and conduct of said business operations, sold and shipped goods or provided services valued in excess of $500,000 from its facilities within the State of Washington directly to customers outside the said State, or sold and shipped goods or provided services valued in excess of $50,000 to customers within the State of Washington, which customers were themselves engaged in interstate commerce by other than indirect means.

The complaint alleges, Respondent admits, and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. LABOR ORGANIZATION

The complaint alleges, Respondent admits, and I find that the Evergreen States Division 1384, Amalgamated Transit Union, herein called the Union, is now, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

Respondent is a wholly owned subsidiary of the Greyhound Corporation, with corporate headquarters in Phoenix, Arizona. Respondent has a maintenance and service facility in Seattle, Washington, where it is engaged in the maintenance and servicing of its vehicles. There are approximately 78 employees employed at the Seattle maintenance and service center. All of these employees, except three—the manager, the assistant manager, and an office clerical—are in the unit represented by the Union. Donald Whitney is the manager; V. H. Roe is the assistant manager; and, prior to her discharge, Sandra Burns was the one office clerical. Whitney reports to A. C. Salinas, regional manager of Respondent's Western Maintenance Division, referred to as Maintenance West. Salinas, who is located in San Francisco, is responsible for several maintenance facilities in the western States. Salinas reports to J. C. Daffin, vice president of Respondent, who is also located in San Francisco.

The facts surrounding the discharge of Sandra Burns are undisputed. Burns was responsible for a myriad of clerical and recordkeeping functions typical of a one-clerical office, including functioning as Whitney's secretary. She was also the fiancee and housemate of Steve Thornell, a janitor and assistant union shop steward of the Seattle maintenance and service center. Following Whitney's assumption of the position of manager in about August 1979, there was a marked increase in the number of grievances filed. Thornell filed a grievance in December 1979 seeking 3 hours' holiday pay for Thanksgiving.[1] Whitney denied the grievance but was subsequently overruled at a higher grievance level.

In the early part of February 1980,[2] Thornell went into Whitney's office to discuss with him the lack of contractual guidelines for janitorial positions and the problems flowing therefrom. During the course of the conversation, they discussed generally grievances and some discharges that Whitney had made. On the morning of February 28, Thornell and Jess Iscar, the other janitor, filed a joint grievance regarding the janitorial problems that Thornell had discussed with Whitney in early February. That afternoon, Iscar told Thornell that he had been called into the office by Whitney and warned as to possible discharge.

Shortly thereafter, Thornell was called into the office. Whitney and the union steward were present. Whitney told Thornell that his attendance record required immediate improvement or he would be disciplined or possibly discharged. Whitney specifically mentioned three absences in January and one in February. Thornell said that was a definite improvement and that some of the absences had been caused by snow. Whitney said he realized that two of the absences had been caused by snow. Thornell said that was an improvement, and he believed the reason he was called in for a warning was that he had filed a grievance that morning. Whitney denied that.

On the evening of February 28, Thornell asked Burns to write a letter which he would dictate and take to the union meeting that evening. Burns did so. She did not participate in the formulation of the letter. She merely took the dictation in her handwriting. The letter was addressed to Whitney with copies to Salinas, Daffin, and Industrial Relations, and concerned the alleged harassment of employees.

Thornell gave the letter to the union president, who read it to the membership present at the union meeting that evening. The membership voted to send the letter, the body of which reads:

> Re: Continuing harrassment [sic] of Employees.
>
> It has been reported that many employees have been harrassed [sic] and threatened with their job. An example of this on 27/28/80, you brought several employees into your office, that in your opinion their absenteeism warranted discussion.
>
> With one employee who was absent 3 days in January, partly because of being snowed in, and being absent one day in February because of a twisted ankle to him you stated that his absenteeism had better improve, or he would be facing formal discipline, up to and including discharge. As the only reason to be absent is to be dead.
>
> These kind [sic] of tactics does nothing but add to the low moral [sic] problem that already exists at the Seattle Shop.
>
> We sincerely believe that more humane treatment and better judgement on your part, would better serve the Company and the people [sic] work for it.

The Union did send the letter, in Burns' handwriting, to the persons indicated thereon and named above. Whitney received the letter on February 29 or March 1; however, he did not mention it to Burns immediately. On March 19 following consultation with his superior, Whitney showed Burns the letter and told her that because it was in her handwriting she was terminated. Burns denied that it was her handwriting. Whitney said he and his superiors felt it was her handwriting and because of that she was terminated. He further said she could remain on the job for the remainder of the week. The next morning, Burns approached Whitney, told him she had lied about it not being her handwriting, and told him that it was her handwriting. Whitney said she was still terminated.

That day, Burns received a termination letter dated March 20 and signed by Whitney, the body of which reads:

> Concerning our conversation of 3/19/80 about the letter in your handwriting which came from Union Local 1384 charging me with harassment of employees at the Seattle Shop.

[1] At the time, Thornell was not assistant shop steward, a position he assumed in about May 1980.

[2] All dates hereafter will be in 1980 unless otherwise indicated.

> I cannot work in this type of arrangement where I do not have the full cooperation of the secretary. This position requires full cooperation and confidentiality.
>
> You are therefore being terminated effective 3/22/80 from Greyhound Lines.

Whitney admits that the fact that the letter from the Union was in Burns' handwriting was the sole reason for her discharge.

The General Counsel contends that, by physically writing the letter, Burns was engaged in the protected concerted activity on behalf of the Union of submitting a grievance on behalf of fellow employees. See *Mrs. Baird's Bakeries, Inc.*, 189 NLRB 606 (1971); *Farmers Union Cooperative Marketing Ass'n.*, 145 NLRB 1 (1963). Therefore, argues the General Counsel, her discharge was violative of Section 8(a)(3) of the Act. Respondent contends that Burns was not engaged in concerted activity since she did not have the "mental intent which is prerequisite to a finding of concerted activity." Thornell's drafting of the letter was not concerted activity and Burns' function in writing the letter was merely ministerial.

I find no merit in this contention by Respondent. The content of the letter is clearly related to terms and conditions of employment. Obviously, Burns has knowledge of such contents, including to whom it was addressed, and it is undisputed that she knew that Thornell sought her assistance because he was in a hurry to get the letter prepared so he could present it at the union meeting. He did cause it to be presented at the union meeting. By voting to send the letter, the membership adopted it and subsequently the letter was sent by the Union. Burns' termination letter makes it clear that Whitney knew this was a communication from the Union. This was clearly concerted protected activity—a union activity. Thus, however slight her participation may have been in the preparation of the letter, Burns did participate and was thus part and parcel of the concerted activity. Actually, it is apparent that Respondent thought her participation was significant since she was discharged therefor.

Respondent's other contention is that Burns was a confidential employee and, as such, outside the protection of the Act. The General Counsel contends that Burns was not a confidential employee and that, even if she were, she was entitled to the protection of the Act.

Although confidential employees are not specifically excluded from the definition of employee in Section 2(3) of the Act, the Board has consistently construed the Act as excluding from bargaining units "confidential employees." However, commencing with *Ford Motor Company*, 66 NLRB 1317 (1946), it has just as consistently narrowly defined "confidential employees" to embrace only those persons who assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations. *The B. F. Goodrich Company*, 115 NLRB 722 (1956); *Wheeling Electric Company*, 182 NLRB 218 (1970), enforcement denied 444 F.2d 781 (4th Cir. 1971); *American Beryllium Company, Inc.*, 142 NLRB 457, 459 at fn. 6 (1963). Thus, it is necessary to consider the functions and duties performed by both Whitney and Burns.

Whitney hires, dicharges, and disciplines employees. In so doing, he is required to conform to the quotas set by corporate or regional headquarters as to the number of employees at the Seattle maintenance and service center and to comply with the disciplinary and discharge policies and guidelines set forth in the discipline handbook and in the employee handbook which are formulated by personnel in Respondent's corporate headquarters in Phoenix, Arizona. Evaluations of employees are done after 30 and 90 days of employment and when employees are upgraded from one position to another. The timing of an upgrade is determined by the collective-bargaining agreement. However, Whitney makes all determinations as to upgrades to foreman positions. He also evaluates foremen. Foremen evaluate the employees they supervise.

Whitney is responsible for ensuring that the clerical employee prepares all reports required by EEOC and by the State Workers' Compensation Board. He is also the person designated by Respondent to handle employee grievances at the Seattle maintenance and service center at step 1 of the grievance procedure. If the grievance is not satisfactorily resolved at this level, it is presented at the second grievance level to the regional vice president and on through subsequent steps.

Whitney is involved with the Union in the day-to-day administration of the collective-bargaining agreement. However, he is not directly involved in contract negotiations. His only contribution to such negotiations is to make suggestions, when solicited by Daffin, as to changes he would recommend for the Seattle facility.

Burns functioned as receptionist, operated the teletype, processed the timecards, recorded information therefrom on timesheets, and prepared production records, fuel records, attendance records, etc., from information given her. She opened all mail except that marked "confidential" and then routed the mail to the proper person. She filed Whitney's incoming correspondence and typed any replies he might make to such correspondence, including that marked "confidential." She also typed and filed employee evaluations; letters or notices concerning employee personnel and disciplinary actions, letters from Whitney to the Union; replies to grievances; and Whitney's recommendations to Daffin as to Respondent's proposals for collective-bargaining agreements.

Files are kept in Whitney's office. Neither the office nor the files are kept locked during the day, even at times when both Whitney and Burns are absent from the office. Certain tools and supplies are kept in drawers of the file cabinets, and employees requiring these tools and supplies have access to the cabinets.[3] The drawers where personnel files are kept are locked at night but open during the day to permit employee access to such tools and supplies. Burns attended safety meetings where she took minutes which she later typed and distributed to all

[3] Apparently, files concerning grievances are kept in Whitney's desk or in a file cabinet located in a position in Whitney's office separate from the locations of the file cabinets where tools and supplies are kept. There is no reason for other employees to open these file drawers.

committee members, including the employee members. She never attended meetings between Whitney and union officials or between Whitney and unit employees. Whitney and Burns had keys to the files. Whitney, Roe, Burns, and the storekeeper[4] have keys to the office. Whitney sometimes discusses grievances with the storekeeper.

In applying its standards for determining whether a person is a confidential employee, the Board has always considered the three indicia of "formulate, determine and effectuate" in the conjunctive. *Holly Sugar Corporation*, 193 NLRB 1024 (1971). Using this criteria, I can only conclude that Whitney is not a person who formulates, determines, *and* effectuates management policies in the field of labor relations. Although it is clear that he effectuates such policies, it is equally clear that he does not formulate and determine them. Respondent appears to have a rather centralized approach to the formulation and determination of its labor relations policies, most of which is done at the corporate level with perhaps some significant participation at the regional level, but not at the local level.

In reaching this conclusion, I have carefully considered all the indicia asserted by Respondent as requiring a contrary conclusion. However, the Board has had previous occasion to consider almost all of these asserted indicia and has found that they are insufficient to confer confidential status. Thus, the Board has held that an employee who has access to files, including records of grievances, does not act in a confidential capacity. *California Inspection Rating Bureau*, 215 NLRB 780 (1974). Mere access to confidential material, albeit confidential labor relations material, is not sufficient to confer confidential status. *The Los Angeles New Hospital*, 244 NLRB 960 (1979); *Ernst & Ernst National Warehouse*, 228 NLRB 590, 591 (1977). Nor does the typing of disciplinary letters or other materials relating to personnel problems render an employee confidential. *ITT Grinnell Corporation*, 212 NLRB 734 (1974).

Similarly, the typing of confidential labor relations memoranda does not, without more, imply confidential status. Further, the Board has consistently held that a person will not be regarded as a confidential employee merely by virtue of being a secretary to a person involved in the handling of grievances. *Holly Sugar Corporation, supra*. Similarly, the fact that Whitney is consulted by Daffin prior to the commencment of bargaining negotiation is considered by the Board as limited advisory participation which does not warrant a determination that his secretary is a confidential employee. *Holly Sugar Corporation, supra; Weyerhaeuser Company*, 173 NLRB 1170, 1173 (1968).

Accordingly, I find that Sandra Burns is not a confidential employee.[5] I further find that she was discharged for engaging in protected concerted activities. I therefore find that she was discharged in violation of Section 8(a)(1) and (3) of the Act.

[4] The storekeeper is in the unit.

[5] It is therefore unnecessary to reach Respondent's argument based on *N.L.R.B. v. Bell Aerospace Company, Division of Textron, Inc.*, 416 U.S. 267 (1974), that confidential employees are excluded from the protection of the Act.

Upon the foregoing findings of fact and upon the entire record, I hereby make the following:

CONCLUSIONS OF LAW

1. Respondent Greyhound Lines, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Evergreen States Division 1384, Amalgamated Transit Union, is a labor organization within the meaning of Section 2(5) of the Act.

3. By discharging its employee, Sandra Burns, because she engaged in union or other protected concerted activities, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) 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.

THE REMEDY

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

As I have found Respondent unlawfully discharged Sandra Burns, I shall recommend that Respondent be ordered to offer her immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges. I shall further recommend that Respondent be ordered to make Sandra Burns whole for any loss of earnings she may have suffered as a result of the discrimination against her. Backpay shall be computed with interest as prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).[6]

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[7]

The Respondent, Greyhound Lines, Inc., Seattle, Washington, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging its employees because they engaged in union activities or other protected concerted activities.

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

2. Take the following affirmative action which is found necessary to effectuate the policies of the Act:

(a) Offer Sandra Burns full and immediate reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to

[6] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[7] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

her seniority or other rights and privileges. Make Sandra Burns whole for any loss of earnings suffered as a result of the discrimination against her in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Preserve and, upon 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 documents necessary and relevant to analyze and compute the amount of backpay due under this Order.

(c) Post at its Seattle, Washington, facility copies of the attached notice marked "Appendix."[8] Copies of said notice, on forms provided by the Regional Director for Region 19, after being duly signed by Respondent's authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 19, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

[8] In the event that 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."