Bloomington-Normal Seating Co. *and* Local 362, Laborers' International Union of North America, AFL–CIO. Case 33–CA–13769

June 3, 2003

DECISION AND ORDER

BY MEMBERS LIEBMAN, SCHAUMBER, AND ACOSTA

On August 27, 2002, Administrative Law Judge David L. Evans issued the attached decision. The Respondent filed exceptions and a supporting brief.

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 brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Bloomington-Normal Seating Co., Normal, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the Order, as modified.

1. Substitute the following for paragraph 2(b).

"(b) Telling its employees to inform the Respondent if any employees were harassed about signing a union card."

2. Substitute the attached notice 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

The National Labor Relations Board has found that we violated the Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten you with discharge or other discrimination if you engage in activities on behalf of, or express sympathies with, a union.

WE WILL NOT request that you inform us if any employees are harassed about signing a union card.

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

BLOOMINGTON-NORMAL SEATING COMPANY

Ahavaha Pyrtel, Esq., for the General Counsel.
Gary A. Wincek, Esq., of Chicago, Illinois, for the Respondent.

DECISION

STATEMENT OF THE CASE

DAVID L. EVANS, Administrative Law Judge. This case under the National Labor Relations Act (the Act) was tried before me in Peoria, Illinois, on June 11, 2002. On October 9, 2001,[1] the charge was filed by Local 362, Laborers' International Union of North America, AFL–CIO (the Union), alleging that Bloomington-Normal Seating Company (the Respondent) has engaged in unfair labor practices as set forth in the Act. Upon an investigation of the charge, the General Counsel issued a complaint alleging that the Respondent had violated Section 8(a)(1) of the Act by threatening an employee with discharge because of his union activities and by telling employees to inform on the union activities of other employees. The Respondent filed an answer admitting that this matter is properly before the National

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] The Respondent excepts to the judge's "unsupported finding" that it violated Sec. 8(a)(1) "by requesting employees to report attempts by other employees to solicit union authorization cards on behalf of the Union." We agree that the evidence showed only that the Respondent's production manager, in the course of an antiunion speech to employees, asked the employees to "let [the Respondent] know about it" if they were "threatened or harassed about signing a union card." We also agree with the administrative law judge, however, that the Respondent thereby invited employees to inform it of protected, albeit unwanted, authorization card solicitations by other employees. Because of the potential for chilling legitimate union activity, the Board finds such conduct unlawful. See, e.g., *Greenfield Die & Mfg. Corp*., 327 NLRB 237, 238 (1988); *Eastern Main Medical Center*, 277 NLRB 1374, 1375 (1985), and cases cited. We have modified the language of the recommended Order and the notice to conform to the precise allegation of the complaint.

Member Schaumber would add that the request was unlawfully overbroad because it failed to distinguish between solicitation activity that is protected–even though persistent and subjectively disliked by a targeted employee–and solicitation activity that is unprotected because it interferes with work or contravenes a legitimate nondiscriminatory rule against workplace harassment.

[1] All dates mentioned are in 2001, unless otherwise indicated.

Labor Relations Board (the Board) but denying the commission of any unfair labor practices.

Upon the testimony and exhibits entered at trial,[2] and after consideration of the briefs that have been filed by the General Counsel and the Respondent, I make the following findings of fact and conclusions of law.

I. JURISDICTION

As it admits, the Respondent is, and has been at all material times, engaged at its office and place of business in Normal, Illinois, in the business of assembling automobile seats for Mitsubishi Motor Manufacturing of America, Inc., which entity is also located in Normal and which entity is directly engaged in interstate commerce. During the year immediately preceding the issuance of the complaint, the Respondent, in the course and conduct of its business operations, sold and shipped products and materials valued in excess of $50,000 directly to Mitsubishi Motor Manufacturing of America, Inc. Therefore, at all material times the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. As the Respondent further admits, the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

The Respondent employs about 110 production and maintenance employees at its facility. Production employee Russell Sears testified that during the last week in August 2001 he and other employees met with representatives of the Union to discuss the possibility of the Union's becoming their collective-bargaining representative. At that time, the representative gave Sears union authorization cards to distribute among other production and maintenance employees, which Sears did.

Sears testified that his usual start time during the first week in September was 6:30 a.m. One day during that week Sears appeared at work at 6:15. That day, Sears had brought with him a newspaper called *Union News*. (Sears testified that the *Union News* is distributed to members of various unions in the area; his wife had received the copy of the newspaper at home.) Sears went to his work station and, while waiting for the time to clock in, he took out the newspaper and began reading it. According to Sears:

> I was approached by my supervisor, Mark Overfelt. And I didn't see him coming because he come from around the cart and I was sitting there reading. And he came up with one hand and grabbed ahold of my newspaper and went [attempted] to pull it from me.
>
> And he asked me what I was reading; he said "Are you reading *Union News*?"
>
> And I said no. And I pulled it away from him, I rolled it up and I stood up and stuck it in my back pocket.
>
> And he asked me, "Are you trying to start a union?"
>
> And I said no.
>
> And then he said, "If you're trying to start a union, you're gonna be canned."[3]

Sears further testified that Overfelt then turned and walked directly to the Respondent's human resources department. On cross-examination, Sears agreed that other employees knew that he supported the Union, but he testified that he had tried to keep his prounion sympathies a secret from members of management.

Shirley Halsey, another production employee, is an aunt of Sears. Sears sometimes gives Halsey a ride to work. Halsey testified that during early September Sears gave her a ride to work and, at the time, she saw that he had a copy of the *Union News*. Halsey further testified that about 6:15 a.m. that day:

> Well, I was kind of keeping an eye on my nephew Russell Sears because I was afraid that he had that paper. And so I was kind of keeping an eye on him 'cause he was reading it up in his work station.
>
> And then our supervisor, Mark Overfelt, came like from behind a oven cart and tried to take the paper from Rusty, and he [Sears] got the paper back and put it in his back pocket.
>
> And so I started walking up towards the area to see what was going on, and by the time I got there he [Overfelt] had left and went to the human resource department.

On cross-examination, Halsey acknowledged that she could not hear the words of the exchange between Sears and Overfelt.

Based on the testimonies of Sears and Halsey, the complaint alleges that by Overfelt's conduct the Respondent, in violation of Section 8(a)(1), "threatened an employee that he would be fired if he were trying to start a union."[4]

For the Respondent, Overfelt testified that on the morning in question, as he walked about the plant performing his supervisory duties, he twice saw Sears reading a newspaper. On the first occasion, which was before the 6:30 a.m. start time, he could see by the form and layout of whatever Sears was reading that Sears was reading a newspaper, but he could not see what newspaper it was. Overfelt testified that he asked Sears what he was reading; Sears replied "nothing" and placed the newspaper on his work bench. Overfelt testified that he continued walking and said nothing more to Sears. Overfelt testified that later during that morning, as he was again walking near Sears' work station, he again saw Sears reading the newspaper. This time Overfelt could see that the newspaper was a copy of the *Union News*. Overfelt testified that, even during employees' paid time, when they are waiting for more production to come to their work stations, they are permitted to read newspapers, and he therefore said nothing to Sears at the time. Overfelt denied attempting to take the newspaper away from Sears on either occasion, and he denied threatening Sears in any manner. Over-

[2] Certain passages of the transcript have been electronically reproduced; some corrections to punctuation have been entered. Where I quote a witness who re-starts an answer, *and that re-starting is meaningless*, I sometimes eliminate words that have become extraneous; e.g., "Doe said, I mean, he asked " becomes "Doe asked . . . ."

[3] The Tr. p. 13, LL. 15–16, is corrected to add "If" to the quotation of this sentence. (See Tr. p. 17, LL. 9–11.)

[4] The complaint does not allege that Overfelt's questioning of Sears about whether he was trying to start a union was an interrogation in violation of the Act.

felt further denied that any other individuals were in the area on the first occasion that he saw Sears reading a newspaper.

As the parties stipulated, on September 5 Todd Bodine, the Respondent's production manager, read a speech to the production and maintenance employees. The parties further stipulated to the accuracy of a copy of Bodine's speech. The speech is about 500 words long; generally it argues the disadvantages of union organization and the signing of union authorization cards. The final paragraph of Bodine's speech was:

> Finally, if you are threatened or harassed about signing a union card, I hope you will let us know about it. We will not stand for anyone threatening or harassing our associates for any reason.

Based on this paragraph of Bodine's speech, the complaint alleges that the Respondent, in violation of Section 8(a)(1), "told employees to inform the Respondent if any employees were harassed about signing a union card."

III. CREDIBILITY RESOLUTIONS AND CONCLUSIONS

Sears testified that, during the first week of September, Overfelt attempted physically to take a copy of the *Union News* from him and threatened him with discharge (being "canned") if he was trying to start a union. Halsey corroborated Sears' testimony that Overfelt attempted to take the copy of the *Union News* from Sears. Overfelt denied any such conduct.

The Respondent has suggested no reason why Sears and Halsey would have lied during their testimonies. Moreover, as stated in *Federal Stainless Sink Division*, 197 NLRB 489, 491 (1972):

> "The average employee [who is providing information in a proceeding to which his employer is a party] is keenly aware of his dependence upon his employer's good will, not only to hold his job but also for the necessary job references essential to employment elsewhere."[12] Bearing this truism in mind, it is plain to see that the employee witnesses who testified against Respondent, especially Carol Maxwell and Winkler, did so knowing that they were in considerable peril of economic reprisal. Having thus much to lose, their testimony, adverse to Respondent, was in a sense contrary to their own interests and for this reason not likely to be false.[13]

[12] *Wirtz v. B.A.C. Steel Products, Inc., et al.*, 312 F.2d 14, 16 (C.A. 4).

[13] See, in this connection, *Georgia Rug Mill*, 131 NLRB 1304, 1305, modified on other grounds, 308 F.2d 89 (C.A. 5).

Also, in *Flexsteel Industries*, 316 NLRB 745 (1995), the Board stated that, although there is no presumption of credibly to be afforded to it, "the testimony of current employees which contradicts statements of their supervisors is likely to be particularly reliable because these witnesses are testifying adversely to their pecuniary interests."

The testimonies of Sears and Halsey afforded them no possible benefit and, being employed by the Respondent at the time that they gave their testimonies, they are "current employees" as described in the above-quoted Board decisions. That is, they were testifying against their employer's interest and therefore subjecting themselves to the possible perils of job-place recriminations (subtle as well as blatant) for that testimony. As the employees assuredly realized, the perils would be even greater if their testimonies were false. Moreover, Sears and Halsey had completely credible demeanors, and I do credit their testimonies over Overfelt's denials.[5] I therefore find that Overfelt, on or about September 5, 2001, threatened an employee with discharge if he attempted to assist any union in its efforts to become the collective-bargaining representative of the Respondent's employees. By such conduct, I conclude, the Respondent violated Section 8(a)(1).

I further find that the Respondent violated the Act when Bodine, in his speech of September 5, told the employees: "Finally, if you are threatened or harassed about signing a union card, I hope you will let us know about it." As the Respondent acknowledges on brief, the Board has repeatedly held that an employer's request that employees inform it of conduct by other employees that may include protected union activities such as soliciting union authorization cards violates Section 8(a)(1).[6] This is because what one employee may perceive as harassment (or a threat, explicit or implicit) may be no more than vigorous, or repeated, or vigorous and repeated, solicitations. Such solicitations are generally protected by the Act, but they would necessarily be discouraged by requests such as Bodine's.

On brief, the Respondent attempts to excuse Bodine's conduct by arguing that employers are sometimes held liable under Title VII for creating a hostile work environment when employees engage in sexual or racially based harassment of other employees. The Respondent argues that Bodine's request was consistent with such rulings and consistent with its employee handbook which encourages the reporting of such types of harassment. Bodine's speech, however, had nothing to do with employee conduct for which the Respondent may ultimately be held liable in a court of law. Bodine's entire delivery was an antiunion message, and the only type of "harassment" for which he solicited reports involved the protected activity of soliciting union authorization cards. Accordingly, I conclude that, by requesting employees to report attempts by other employees to solicit union authorization cards on behalf of the Union, the Respondent violated Section 8(a)(1).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[7]

[5] Overfelt also testified that he and Sears had been friends. Of course, that Sears and Overfelt may once have been friends is not a consideration. For example, in *Haines Hosiery*, 219 NLRB 338 (1975), the Board specifically rejected the administrative law judge's dismissal of an 8(a)(1) allegation on the basis of "the longstanding and friendly work relationship" between the threatening supervisor and the employee.

[6] See, for example, *Arcata Graphics*, 304 NLRB 541 (1991), and cases cited infra.

[7] 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.

ORDER

The Respondent, Bloomington-Normal Seating Co., Normal, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening its employees with discharge if they become or remain members of a labor organization or if they give any assistance or support to a labor organization.

(b) Requesting or instructing its employees to report attempts by other employees to solicit union authorization cards on behalf of Local 362, Laborers' International Union of North America, AFL–CIO.

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

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

(a) Within 14 days after service by the Region, post at its Normal, Illinois facility copies of the attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the director for Subregion 33, 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. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 5, 2001, the approximate date of the first unfair labor practice found herein.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[8] 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."