Sprint/United Management Company *and* Communications Workers of America, Local No. 7019, AFL–CIO. Case 28–CA–13599

August 27, 1998

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND LIEBMAN

Upon a charge filed March 13, 1996,[1] the Regional Director for Region 28 issued a complaint April 29, 1996, against the Respondent, alleging that the Respondent engaged in certain unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the National Labor Relations Act. Copies of the complaint and notice of hearing were served on the Respondent and Charging Party.

On October 15, the General Counsel, the Respondent, and the Charging Party filed a stipulation of facts and a joint motion to transfer proceedings directly to the Board. The parties waived a hearing and issuance of a decision by an administrative law judge and indicated their desire to submit this case directly to the Board for findings of fact, conclusions of law, and a decision. The parties also agreed that the stipulation of facts and exhibits would constitute the entire record before the Board.

On November 14, the Board issued an order granting the motion, approving the stipulation, and transferring the proceeding to the Board. Thereafter, the General Counsel and Respondent filed briefs.

On the entire record and the briefs, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a Kansas corporation, provides long-distance telephone services to the public from its facility in Phoenix, Arizona. During the 12-month period preceding the execution of the stipulated record, the Respondent purchased and received at its Phoenix, Arizona facility goods and materials valued in excess of $50,000 directly from points located outside the State of Arizona and has derived gross revenues in excess of $100,000 from its operations in Phoenix, Arizona. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Stipulated Facts

The Respondent is engaged in an operation providing long-distance telephone services to the public. At its Phoenix, Arizona facility, the Respondent employs approximately 424 long-distance agents. These employees work at their respective computer terminals in the Respondent's designated work area. The Respondent provides each of these employees with an individual locker for storing their personal materials. These lockers are located in a nonworking area of the Respondent's facility.

Each locker is numbered, and has a mail slot located on its door. Each employee has a key to his or her respective locker. Employees visit the locker area before and after their shifts, during lunch, and during other breaks.

A statement about the use of the employee lockers is included in a script developed by the Respondent for use in conducting orientation programs for new employees. The pertinent portion of the script states:

> Your locker is for your use only, and is Company property. You cannot solicit employees by using their lockers for this purpose.

This statement has never been published or distributed to the Respondent's employees. At least two of the Respondent's employees were not informed of this locker policy during their orientation.

The Respondent's employee information book contains the following rule concerning employee solicitation:

> To avoid disruption of business activity, Sprint prohibits solicitation of an employee by another employee during the working time of either person. Working time does not include authorized rest breaks or lunch periods.
>
> Employees are prohibited from distributing literature in working areas at any time. Persons not employed by Sprint shall not distribute literature or solicit employees on company premises at any time for any purpose. Solicitation or distribution of materials is permitted for company-sponsored United Way programs.

The Respondent maintains one or more "blind" or unassigned lockers, and periodically inspects these lockers to check for unauthorized distribution of literature. Since at least January 1994, only material distributed by the Respondent has been found in these unassigned lockers. Since prior to January 1994, employees have deposited personal notes, private invitations, chain letters, and Christmas cards in other employees' lockers.

In October 1995, the Union began an organizing drive at the Respondent's facility. During the organizing campaign, the Respondent allowed employee supporters of the Union to distribute union materials in nonwork areas of the facility. These employees distributed the materials directly to other employees and also left them on tables in the nonwork areas.

[1] All dates hereafter are in 1996 unless stated otherwise.

On February 15 and 16, an employee placed union literature in each of the employee lockers during nonwork time. On February 16, Supervisor Laura Blank learned that the union flyers had been distributed into the lockers. Thereafter, pursuant to instructions received from Blank, Supervisors Karen Hay and Jack Forry opened the employees' lockers and confiscated the union literature.

Also on February 16, the Respondent posted a letter to employees from Supervisor Blank. The letter stated in pertinent part:

> This is a reminder about our policy that the lockers we provide are for your use in connection with your work and we do not permit their use for other purposes.
>
> We are sorry that your privacy was invaded yet again by an unsolicited stuffing of material into your workplace lockers. That was in violation of our policy, and we removed those materials as soon as you reported the problem to us. Again, these lockers are provided to you by the Company and we have always limited their use to materials that relate to your work.

On April 19, the Respondent was informed by an employee that a chain letter had been distributed into employee lockers. The Respondent asked a number of employees about the chain letter, and these employees reported that they had not received a chain letter. The Respondent did not attempt to remove any chain letters from employee lockers.

On April 24, Supervisor Blank told employee Robert Hogge that she had learned that Hogge had distributed union literature which listed Hogge's locker number. Blank advised Hogge that the distribution was impermissible because such literature would enable employees to respond to Hogge at his locker.

B. The Parties' Contentions

The General Counsel contends that the Respondent violated Section 8(a)(1) of the Act by promulgating a rule prohibiting employees from using their lockers for distribution of union materials, and by removing and confiscating union materials that had been distributed in employee lockers. The General Counsel contends that the Respondent's locker policy constitutes an unlawful no-distribution rule and that the Respondent disparately removed and confiscated the union flyers, while allowing other distributions in the lockers.

The Respondent contends that it is not obligated to allow the distribution of union materials into employee lockers, and thus its rule prohibiting the use of employee lockers for employee distributions, and its confiscation of union materials under that rule, is not violative of the Act. The Respondent further contends that it did not disparately remove the union flyers from the lockers.

C. Discussion

The promulgation and enforcement of a rule prohibiting union solicitation by employees on company property, outside of working hours, is presumed to violate the Act in the absence of evidence of special circumstances making the rule necessary in order to maintain production or discipline. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803–804 (1945); and *Peyton Packing Co.,* 49 NLRB 828, 843 (1943). It is also well settled that rules prohibiting the distribution of union literature during nonworking times in nonworking areas are presumptively unlawful. *St. Johns Hospital*, 222 NLRB 1150 (1976), enfd. in part 557 F.2d 1368 (10th Cir. 1977); *Stoddard-Quirk Mfg. Co*., 138 NLRB 615 (1962). In order to justify the existence of a rule which is on its face presumptively unlawful, an employer must present sufficient justification to warrant the further curtailment of employee rights. *St. Johns Hospital*, supra.

Applying these principles to the instant case, we find, for the reasons set forth below and in agreement with the General Counsel, that the Respondent's rule prohibiting the distribution of union materials in employee lockers is violative of Section 8(a)(1) of the Act.

As noted above, the stipulated record establishes that on February 16, the Respondent announced, through a letter to employees, that the distribution of union materials into employee lockers was prohibited. Consistent with this prohibition, the Respondent confiscated distributed union materials from its employees' lockers.[2] The lockers are located in an area apart from the designated work areas, and there is no evidence that employees are afforded access to the locker area during worktime. Therefore, because the Respondent's rule restricts distribution during nonworking time and in nonworking areas, the rule is presumptively unlawful.

The Respondent contends the rule is necessary to ensure that its communications are received by its employees. There is no evidence in the stipulated record, however, that the Respondent's ability to communicate with its employees would be hindered by allowing employees to distribute material into the lockers. The mere assertion that a no-distribution rule is intended for a specific purpose does not prove that it is actually necessary for that purpose. *Times Publishing Co*., 231 NLRB 207, 210 (1977), enfd. in part 576 F.2d 1107 (5th Cir. 1978). Thus, we find that the Respondent has failed to establish a necessity for the rule that would overcome its presumptive invalidity.

[2] The stipulated record does not show that the Respondent had informed employees of this policy at some earlier date. Although the Respondent's orientation script stated that the use of the lockers for solicitation was prohibited, the stipulated record fails to show that this statement was, in fact, communicated to employees. Rather, the record only shows that two employees do not recall hearing such a statement during their orientation.

The Respondent also contends that its rule prohibiting the use of the lockers for employee distributions is grounded in the Board's long held doctrine that there is no statutory right of employees to use an employer's bulletin board. See *Eaton Technologies*, 322 NLRB 848, 853 (1997); *Container Corp. of America*, 244 NLRB 318 (1979), modified in part 649 F.2d 1213 (6th Cir. 1981); and *Nugent Service*, 207 NLRB 158, 161 (1973). We find this contention unpersuasive.[3]

An employer that uses a bulletin board as a means of communication with its employees may have a legitimate interest in ensuring that its postings can easily be seen and read and that they are not obscured or diminished in prominence by other notices posted by employees. Thus, while an employer may not deny employees access to its bulletin boards on a discriminatory basis,[4] the Board has long held that it is not unlawful for an employer to reserve to itself the exclusive use of its bulletin boards, and to bar any postings by employees.

Here, however, the Respondent has already ceded the locker space to the personal use of the employees to whom the lockers are assigned. Thus, the Respondent's conduct is not analogous to circumstances involving an employer's assertion of its right to prohibit employees from using its bulletin board. Rather, it is analogous to circumstances where the posting of union materials is prohibited on bulletin boards used by employees for other purposes.[5]

In addition to finding the Respondent's rule unlawful, we also find that the Respondent violated the Act by removing and confiscating the union flyers from the lockers. Indeed, the Respondent offers no justification for this conduct other than that it was enforcing its unlawful rule. As there is no lawful justification for this conduct, we find it violative of Section 8(a)(1) of the Act.[6]

In sum, we find that by announcing to employees on February 16 that employees were not permitted to distribute materials in employee lockers, and by confiscating union materials that had been distributed in the lockers, the Respondent has promulgated and enforced a rule restricting distribution of literature by employees during nonworking times and in nonworking areas. We further find that the Respondent has not shown any legitimate justification warranting this restriction on employee rights. Accordingly, we find that the Respondent's conduct violates Section 8(a)(1) of the Act as alleged.

CONCLUSIONS OF LAW

1. By promulgating a rule prohibiting employees from using their lockers for any purpose other than their use in connection with their work, the Respondent violated Section 8(a)(1) of the Act.

2. By removing and confiscating union flyers that had been distributed in employees' lockers, the Respondent violated Section 8(a)(1) of the Act.

THE REMEDY

Having found that the Respondent violated Section 8(a)(1) of the Act, we shall order it to cease and desist and to take certain affirmative action to effectuate the policies of the Act.

ORDER

The National Labor Relations Board orders that the Respondent, Sprint/United Management Company, Phoenix, Arizona, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promulgating or maintaining rules prohibiting employees from distributing union literature in employee lockers during nonwork time.

(b) Removing or confiscating union materials distributed in employees' lockers.

(c) 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) Rescind its rule prohibiting employees from distributing union literature in employee lockers during nonwork time.

(b) Within 14 days after service by the Region, post at its facility in Phoenix, Arizona, copies of the attached

[3] The Respondent also contends that the right to restrict employee access to the lockers was implicitly recognized in *Cincinnati Enquirer*, 279 NLRB 1023 (1986), where the Board found unlawful an employer's disparate refusal to allow employee distributions in employee mailboxes. The Respondent contends that because the Board found that the disparate restriction of access to an employer's mail system is unlawful, it implicitly recognized that a nondiscriminatory broad prohibition similar to the Respondent's rule would be lawful. We disagree. The right not to be subjected to disparate treatment is separate from the right, at issue here, to distribute materials in nonwork areas during nonwork time. Thus, there is no basis to assume that an employer's prohibition of distributions in nonwork areas is lawful merely because the Board has found unlawful an employer's disparate treatment of employee distributions.

[4] *Container Corp. of America,* supra; and *Vincent's Steak House*, 216 NLRB 647 (1975).

[5] The parties have stipulated that the lockers, which are 10 inches high, 10 inches wide, and 18 inches deep, are used by employees to store such things as lunches, personal writing materials, school books, clothes, bicycle helmets, magazines, and training materials. If the Respondent chooses to also use the lockers to distribute notices to employees, it has clearly already assumed the risk that the presence of other materials, including papers, in the lockers could cause its notices to be overlooked. Thus, the Respondent cannot legitimately claim that concern as a reason for refusing to allow employees to put union literature into the lockers.

Chairman Gould agrees that the bulletin board cases are distinguishable. He finds it unnecessary to pass on the continued viability of the doctrine that there is no statutory right to use an employer's bulletin board.

[6] Because we find the Respondent's removal and confiscation of the union flyers constitutes the enforcement of its unlawful rule, we find it unnecessary to pass on the General Counsel's contention that the Respondent disparately removed and confiscated the material

notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent 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 March 13, 1996.

(c) 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.

[7] 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 promulgate or maintain rules prohibiting employees from distributing union literature in employee lockers during nonwork time.

WE WILL NOT remove or confiscate union materials distributed in employees' lockers.

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 Act.

WE WILL rescind our rule prohibiting employees from distributing union literature in employee lockers during nonwork time.

SPRINT/UNITED MANAGEMENT COMPANY