Handleman Company *and* Teamsters Professional, Public, Medical & Miscellaneous Employees Local 165, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 20–CA–19388

31 March 1987

DECISION AND ORDER

BY MEMBERS JOHANSEN, BABSON, AND STEPHENS

Upon a charge filed 29 November 1984 the General Counsel of the National Labor Relations Board by the Regional Director for Region 20 issued a complaint and a notice of hearing 15 January 1985. The complaint alleges[1] that the Respondent, Handleman Company, violated Section 8(a)(1) of the National Labor Relations Act by maintaining an employee stock ownership plan that precludes employees covered by a collective-bargaining agreement from participating unless the Respondent agrees to coverage under a negotiated agreement.

On 5 December 1985 all parties including the General Counsel filed a stipulation of facts and a motion to transfer proceedings to the Board. The parties waived a hearing and an administrative law judge's decision and submitted the case directly to the Board for findings of facts, conclusions of law, and a decision and order.

On 7 February 1986 the Board issued an order granting the motion, approving the stipulation, and transferring the proceeding to the Board. The Respondent and the General Counsel filed briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a Michigan corporation with headquarters in Detroit, Michigan, and an office and warehouse in Sacramento, California. The Respondent is engaged in the wholesale distribution of records, tapes, and related products. During the 12 months preceding issuance of the complaint, the Respondent purchased and received at its Sacramento, California facility products, goods, and materials valued in excess of $50,000 directly from suppliers outside the State of California. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

Teamsters Professional, Public, Medical & Miscellaneous Employees Local 165, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Facts*

Since 1983 the Respondent has maintained an employee stock ownership plan under which qualified employees are entitled to acquire stock in the Respondent's corporation. The plan defines eligible employees as:

> (1) "Covered Employee" means any Employee who is classified by the Company as full-time and who:
>
> . . . .
>
> (ii) Is not covered by a collective bargaining agreement entered into by the Company unless such agreement, by specific reference to the Plan, provides for coverage under the Plan.

B. *Parties' Contentions*

The General Counsel contends that the Respondent's promulgating, maintaining, and publicizing the stock ownership plan is a per se violation of Section 8(a)(1) of the Act because it automatically excludes from coverage employees who become represented by a labor organization and covered by a collective-bargaining agreement. The General Counsel argues that the plan's exclusionary language punishes employees who choose a union because they become subject to risking loss of the plan's benefits in negotiations while unrepresented employees would continue to enjoy the benefits. Thus, the General Counsel argues that the exclusionary language interferes with, restrains, and coerces employees because it creates the potential of discrimination or a loss to employees for choosing union representation.

The Respondent contends that the plan merely recognizes that Respondent's duty to bargain with its employees' bargaining representative over mandatory bargaining subjects, including participation in employee benefit plans. Thus, the Respondent argues that an employee benefit plan may lawfully point out that employees covered by a bargaining agreement are not eligible to participate unless the bargaining agreement provides for coverage. The Respondent argues that its plan does not exclude any of its employees from participation but that all

[1] Other complaint allegations were settled by the parties and have been withdrawn from the complaint.

employees are eligible to participate, subject to its statutory bargaining obligations. The Respondent argues that the plan's exclusionary language simply points out that participation by employees covered by a bargaining agreement is governed by the bargaining agreement. Accordingly, the Respondent contends that the plan does not interfere with, restrain, or coerce any of the Respondent's employees.

C. *Discussion*

The Board has held that an employer violates Section 8(a)(1) of the Act by maintaining a benefit plan excluding employees who join a union, choose union representation, are members of a bargaining unit, or are covered by a bargaining agreement. See respectively *Toffenetti Restaurant Co.*, 136 NLRB 1156 (1962), enfd. 311 F.2d 219 (2d Cir. 1962), cert. denied 372 U.S. 977 (1963); *Channel Master Corp.*, 148 NLRB 1343 (1964); *Dura Corp.*, 156 NLRB 285 (1965), enfd. 380 F.2d 970 (6th Cir. 1967); and *Niagara Wires*, 240 NLRB 1326 (1979). Such plans interfere with, restrain, and coerce currently unrepresented employees because the exclusionary clauses automatically eliminate the benefits on selection of a representative and do not allow for their continuation pending negotiations. What is unlawful is the suggestion inherent in the exclusionary language that unrepresented employees will forfeit the plans' benefits if they choose union representation. In other words, the plans constitute threats to discontinue the benefits or to refuse to bargain over continuation of the benefits. Such threats violate the Act. *Como Plastics*, 143 NLRB 151 (1963).

The Respondent's employee stock ownership plan defines a covered employee as one who: "Is not covered by a collective bargaining agreement entered into by the Company unless such agreement, by specific reference to the Plan, provides for coverage under the Plan." This exclusionary language, unlike that in the above cases, indicates that coverage for the employees is subject to negotiations. The distinction is a critical one. The Respondent's plan does not cut off the benefit prior to negotiations, but contemplates the continuation of the benefits during the negotiations. Rather than automatically withdrawing or completely foreclosing coverage for represented employees, the Respondent's plan leaves continued coverage to collective bargaining, allowing the parties to agree to continued coverage or not. The Board has found that plans containing similar exclusionary provisions are not unlawful. Thus, in *Sarah Neuman Nursing Home*, 270 NLRB 663, 680 (1984), the Board found no violation where the employer maintained a profit-sharing plan excluding "any person who is covered under a collective bargaining agreement . . . unless the collective bargaining agreement provides for the inclusion of such person under the plan." Further in *Rangaire Corp.*, 157 NLRB 682, 683–684 (1966), the Board found lawful the employers' maintenance of a pension plan excluding "any person covered by a collective bargaining agreement entered into with the employer, which agreement does not provide for coverage of such person by this plan."

For the foregoing reasons we find that the Respondent's maintenance of an employee stock ownership plan does not violate the Act as alleged.[2]

CONCLUSIONS OF LAW

1. Handleman Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. Teamsters Professional, Public, Medical & Miscellaneous Employees Local 165, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America is a labor organization within the meaning of Section 2(5) of the Act.
3. Handleman Company has not violated the Act as alleged.

ORDER

The complaint is dismissed.

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[2] Member Stephens agrees with this finding for the reasons stated in this opinion and for the reasons stated in his concurring and dissenting opinion in *Lynn-Edwards Corp.*, 282 NLRB 52 (1986).