Universal Fuels, Inc. *and* **Michael W. Anderson.** Cases 5–CA–18660 and 5–CA–18978

April 19, 1990

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

Upon a charge filed by the Charging Party on February 17, 1987, and amended on May 26, 1987, in Case 5–CA–18660, and a charge filed by the Charging Party on July 2, 1987, in Case 5–CA–18978, the General Counsel of the National Labor Relations Board, on August 28, 1987, issued an order consolidating cases, amended complaint, consolidated complaint, and notice of hearing against the Respondent alleging that it violated Section 8(a)(1) of the Act.[1] The Respondent filed a timely answer to the complaint denying that its conduct violated the Act and moving to dismiss.

On January 13, 1989, the parties jointly moved to transfer the proceedings to the Board, without benefit of a hearing before an administrative law judge, and submitted a proposed record consisting of the parties' stipulation of facts and attached exhibits including the formal papers. On March 8, 1989, the Deputy Executive Secretary, by direction of the Board, issued an order granting the motion, approving the stipulation, and transferring the proceedings to the Board. The Respondent and the General Counsel subsequently filed briefs.

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

On the entire record in the case, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, Universal Fuels, Inc., an Alabama corporation, with an office and place of business in Lexington Park, Maryland, is engaged in aircraft fuel transportation for the United States Navy at the Patuxent River Naval Air Station, Lexington Park, Maryland. During the 12 months preceding August 28, 1987, a representative period, the Respondent, in the course and conduct of its business, performed aircraft fuel transportation services for the United States Navy valued in excess of $50,000. In the same period the Respondent purchased and received supplies valued in excess of $5000 directly from points outside the State of Maryland. The Respondent's operations have a substantial impact on the national defense of the United States. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. We further find that the Union, the American Federation of Government Employees, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The issue is whether the Respondent has violated Section 8(a)(1) of the Act by maintaining certain rules permitting the imposition of discharge or discipline on employees for misrepresentations concerning their benefits or claims for pay or employment.

A. *Facts*

The Respondent and the Union had a collective-bargaining agreement effective from May 1, 1986, until September 1, 1989, which covered wages, hours, and other terms and conditions of employment. Since August 19, 1986, the Respondent, pursuant to article IX, section 2 of the collective- bargaining agreement has maintained the following rules:

> Just cause for the purpose of discipline or for the purpose of discharge, or either, shall include: . . . misrepresentation in connection with any employee benefit . . . misrepresentation of any material fact in connection with any claim concerning his employment or his pay. . . .

During contract negotiations the Respondent proposed the language of article IX and the Union sought and obtained three modifications to the article unrelated to the quoted portion.

B. *Contentions of the Parties*

1. The General Counsel's contentions

The General Counsel argues that the rules constitute an impermissible restriction on the employees' Section 7 rights to discuss wages and benefits. The General Counsel argues that the Board has consistently held that communications that are otherwise protected concerted communications do not lose their protected character merely because they are false, but only when they are deliberately and maliciously false. Because the quoted rules prohibit mere misrepresentations on topics that may well be

[1] The amended consolidated complaint superseded a complaint issued earlier in Case 5–CA–18660. The Regional Director subsequently granted the Charging Party's request to withdraw certain allegations of the underlying charges and ordered that the corresponding paragraphs of the amended consolidated complaint be withdrawn.

part of protected concerted activities, the General Counsel argues that the rules are unlawfully broad.

The General Counsel argues that the inclusion of the quoted rules as part of a collective-bargaining contract agreed to by the Union does not make it lawful because the Supreme Court and the Board have held that an agreement cannot waive employees' Section 7 rights to communicate.[2]

2. The Respondent's contentions

The Respondent argues that the challenged rules could not reasonably be interpreted by an employee to prohibit protected activity[3] because they do not facially apply to union or concerted activities, but rather appear to deal with matters such as falsifying insurance claims, reasons for absence, or timecards. With regard to the first rule (misrepresentation in connection with an employee benefit), it argues that "employee benefits" is universally understood to refer to subjects such as insurance or vacations, which are expressly provided for in the collective-bargaining agreement. It argues that the rule reasonably requires that employees refrain from making false representations concerning entitlement to benefits and that no reasonable employee could interpret it to restrict protected activities. With regard to the second rule (misrepresentation of any material fact in connection with any claim concerning his employment or pay), the Respondent argues that this "obviously" deals with timekeeping requirements. Further, it argues that because prohibited misrepresentations must be "in connection with a claim" for an individual's employment or pay, the rule cannot reasonably be interpreted to encompass general misrepresentations concerning employment or pay.

Finally, the Respondent argues that the Union waived the employees' Section 7 rights that are involved in this case by agreeing to the quoted rules.[4]

C. *Discussion*

The rules in question concern employee benefits and pay, both of which are common topics for protected concerted communications. The second rule also encompass most protected communications, including those about benefits and pay. Truthful communications about these topics are clearly within the protection of the Act. Moreover, because of the importance of communication between employees to other protected concerted and union activities, the Act's protection extends to statements that are false, provided that the misrepresentation is not deliberate or malicious. As the Board stated in *Walls Mfg. Co.*:[5]

> Employees do not forfeit the protection of the Act if, in voicing their dissatisfaction with matters of common concern, they give currency to inaccurate information, provided that it is not deliberately or maliciously false.

The Board has consistently found that rules which prohibit the making of "false, vicious or malicious statements" violate Section 8(a)(1) because they include within their proscription false statements that may nonetheless be protected.[6] As the court stated in enforcing the Board's Order in *American Cast Iron Pipe Co.*, supra:

> We agree with the Board that the major flaw in [these] rules is that they proscribe "false" as well as "vicious or malicious" statements. . . . Punishing employees for distributing merely "false" statements fails to define the area of permissible conduct in a manner clear to employees and thus causes employees to refrain from engaging in protected activities. . . . These rules prohibit and punish employees severely for "false" statements about the company; the rules are not limited to disloyal false statements. If disloyalty is the problem [the employer] seeks to address, it must do so directly rather than through an impermissibly broad rule.

Similarly, the Board has found unlawful a rule that prohibited discussion of the "hospital affairs, patient information and employee problems." In *Pontiac Osteopathic Hospital*, 284 NLRB 442 (1987), the Board adopted the judge's finding that this rule was unlawfully overbroad and his reasoning that:

> [The] ban could reasonably be construed by employees to preclude discussing information concerning terms and conditions of employment, including wages, which, could fall under the broad categories of hospital affairs and employee problems. While Respondent might have a substantial and legitimate interest in limiting or prohibiting discussion of some aspects of its affairs, or of its employees' personal problems, and certainly of patient information, it has offered no justification for the

[2] Citing *Massey-Ferguson, Inc.*, 246 NLRB 1100, 1101 (1979), and *NLRB v. Magnavox Co. of Tennessee*, 415 U S. 322 (1974)

[3] Citing *NLRB v. Certified Grocers of Illinois*, 806 F.2d 744 (7th Cir. 1986).

[4] Citing *Magnavox*, supra; *NLRB v. Mid-States Metal Products*, 403 F.2d 702 (5th Cir. 1968), and *NLRB v. United Technologies*, 706 F.2d 1254 (2d Cir. 1983).

[5] 137 NLRB 1317, 1319 (1962), enfd. sub nom. *Ladies Garment Workers*, 321 F 2d 753 (D.C. Cir. 1963).

[6] *American Cast Iron Pipe Co.*, 234 NLRB 1126 (1978), enfd. 600 F.2d 132 (8th Cir. 1979), *Radisson Muehlebach Hotel*, 273 NLRB 1464 (1985), *St. Joseph Hospital Corp*, 260 NLRB 691 (1982)

broad policy stated in its confidential information rule.

We find that the rules here are unlawfully broad because they could reasonably be understood as encompassing conduct protected by the Act, including conduct manifesting employees' disagreement with their collective-bargaining representative's position regarding contractual provisions.

The rule pertaining to misrepresentations concerning employee benefits, for example, might reasonably encompass the employees' good-faith misinterpretation of a provision in the collective-bargaining agreement—one that perhaps the union and the employer did not agree with or one that compared contractual benefits unfavorably with benefits provided under a rival union's contract.

The rule pertaining to misrepresentations of material fact concerning employment or pay claims has similar problems. It could reasonably be understood as encompassing claims for pay or employment entitlements that failed to disclose facts that employees might inaccurately believe were not material to their entitlements under the contract. Furthermore, it is not an unreasonable reach to read the term "claim" in the broader sense of grievance of some sort, so that this rule might also reasonably be read as threatening disciplinary sanctions for voicing employment grievances on the basis of facts that turn out to be wrong. And again, such claims might imply criticism of the incumbent union that negotiated the collective-bargaining agreement or might represent interpretations of the agreement with which the Union disagreed. We certainly cannot agree with the Respondent's contention that the rule "obviously deals with timekeeping requirements," because it does not even mention timekeeping.[7]

We, of course, do not dispute that the Respondent has a substantial and legitimate interest in prohibiting, as it argues, "such matters as falsifying insurance claims, falsifying the reasons for absence, falsifying a claim for funeral leave, [or] falsifying time cards." Furthermore, we do not dispute that the rules might reasonably be read as applying to such matters. As noted above, however, they can reasonably be read as *also* encompassing activity protected by Section 7 of the Act. To paraphrase the court of appeals' statement in *American Cast Iron Pipe Co.*, quoted above, if falsification of time-cards or claims for funeral leave are the problems that the respondent seeks to address, it must do so directly, not through an impermissibly broad rule.

Finally, we reject the Respondent's contention that the rules are lawful because they are included in a collective-bargaining agreement with the Union. Under the principles of *NLRB v. Magnavox Co. of Tennessee*, supra, 415 U.S. at 325, a union may not waive employees' rights relating to their choice of a bargaining representative—"whether to have no bargaining representative, or to retain the present one, or to obtain a new one."[8] Although *Magnavox* dealt with a general prohibition on the distribution of literature that prohibited the distribution of views opposing or supporting the incumbent union, and the rules at issue here are not expressly related to the status of an incumbent union, we believe the rules here are equally destructive of employees' rights to oppose or support an incumbent union. Employees should be free, for example, to voice their views concerning what the contract grants them as to pay and benefits, whether or not their union and their employer take a different view; and, unless they are engaging in deliberate or malicious falsehoods, they should be free to make invidious comparisons between their pay and benefits and those of employees working under contracts with other unions. Because the rules here reasonably can be read as infringing on these freedoms, the Union effected an invalid waiver of the employees' rights by agreeing to the rules.[9] We

[7] Because we are applying a reasonableness standard in determining how these rules might be read, we are not at odds with the standard applied by the Seventh Circuit in *Certified Grocers*, supra, on which the Respondent relies. The court declined to enforce the Board's order in that case because it deemed the Board's construction of the particular "rule" in that case unreasonable. The rules here are different and, for the reasons set forth above, we believe they could be reasonably read as infringing on Sec. 7 rights.

[8] In the underlying decision in *Magnavox* (195 NLRB 265 (1972)), the Board had abandoned a distinction made in *Gale Products*, 142 NLRB 1246 (1963), between employees' Sec. 7 conduct in support of a union (which the Board had found a union could waive) and protected conduct in opposition to the incumbent (which could not be waived).

[9] We do not agree that our holding here is necessarily inconsistent with *United Technologies*, supra, on which the Respondent relies. The court's decision was based in part on its view that the Board was collaterally estopped by an earlier decision finding a lawful waiver of the rule in question. Although the court also held that finding the waiver lawful was consistent with the Supreme Court's decision in *Magnavox*, such a holding would not control the instant case. The Court found the rule there acceptable because it viewed it not as a total ban on in-plant solicitations, but only a time- and-place limitation—barring such activity during "paid" time on the employer's premises. As explained above, the rules at issue here could be read as totally prohibiting employee communications concerning pay or benefits if they are inaccurate.

The Respondent's reliance on *Mid-States Metal Products*, supra, is misplaced. That decision, which enforced a Board order requiring the employer to cease and desist from maintaining an overbroad no-solicitation and no-distribution clause in the collective-bargaining agreement, in fact essentially foreshadowed the Supreme Court's later decision in *Magnavox*. The Respondent's reliance on *Electrical Workers IBEW Local 1212 (WPIX, Inc.)*, 288 NLRB 374 (1988), is also misplaced. That case involved a contract provision governing seniority for employees who took leaves of absences to work for their union—a provision the Board found lawful because it neither conferred gains nor imposed losses on those employees in comparison with employees who continued to work in the unit and thus it neither encouraged nor discouraged union activity. The provision had nothing to do with employee communications concerning employment conditions.

find that the Union here could not waive the employees' rights to protected communications by agreeing to the rules in question.

CONCLUSIONS OF LAW

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

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has violated Section 8(a)(1) of the Act by maintaining in its collective-bargaining agreement with the union rules that state:

> Just cause for the purpose of discipline or for the purpose of discharge, or either, shall include: . . . misrepresentation in connection with any employee benefit, . . . misrepresentation of any material fact in connection with any claim concerning his employment or his pay. . . .

4. The unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in an unfair labor practice in violation of Section 8(a)(1) of the Act, we shall order it to cease and desist and take certain affirmative action designed to effectuate the policies of the Act.[10]

ORDER

The National Labor Relations Board orders that the Respondent, Universal Fuels, Inc., Lexington Park, Maryland, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining rules in its collective-bargaining agreement with the American Federation of Government Employees, AFL–CIO to the extent that they provide that

> Just cause for the purpose of discipline or for the purpose of discharge, or either, shall include: . . . misrepresentation in connection with any employee benefit, . . . misrepresentation of any material fact in connection with any claim concerning his employment or his pay. . . .

(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 necessary to effectuate the policies of the Act.

(a) Expunge from its collective-bargaining agreement the following definitions of what constitutes just cause for the purpose of discipline or for the purpose of discharge:

> misrepresentation in connection with any employee benefit, . . . misrepresentation of any material fact in connection with any claim concerning his employment or his pay.

(b) Post at its facility in Lexington Park, Maryland, copies of the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 5, 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.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[10] The complaint requested a visitatorial provision. Under the circumstances of this case, we find it unnecessary. See *Cherokee Marine Terminal*, 287 NLRB 1080 (1988)

[11] 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 give effect to any rules in our collective-bargaining agreement with the American Federation of Government Employees, AFL–CIO, to the extent that they provide that

> Just cause for the purpose of discipline or for the purpose of discharge, or either, shall include: . . . misrepresentation in connection with any employee benefit, . . . misrepresentation of any material fact in connection with any claim concerning his employment or his pay.

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

WE WILL expunge from our collective-bargaining agreement with the American Federation of Government Employees, AFL–CIO the following definitions of what constitutes just cause for the purpose of discipline or for the purpose of discharge:

> misrepresentation in connection with any employee benefit, . . . misrepresentation of any material fact in connection with any claim concerning his employment or his pay.

UNIVERSAL FUELS, INC.