Honda of America Mfg., Inc. *and* Donald Alan DeWald Jr. Case 8–CA–28313

July 23, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS TRUESDALE AND WALSH

The issue presented in this case is whether language used by the Charging Party in the course of activity protected by the Act was so offensive that the otherwise protected activity became unprotected.[1]

On the basis of the entire stipulated record and the briefs in this case, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is an Ohio corporation engaged in the manufacture of automobiles and motorcycles with a place of business in East Liberty, Ohio. Annually, the Respondent sells and ships from its East Liberty facility goods valued in excess of $50,000 directly to points outside the State of Ohio. The parties stipulated, and we find, that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The parties stipulated, and we find, that International Union, United Automobile, Aerospace & Agricultural Implement Workers of America is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Facts

One of the Respondent's core operating philosophies is respect for the individual. The associate handbook, in a message from the Respondent's president, states,

> The management policy at Honda of America has at its core the belief that the human being is the most important asset in a manufacturing operation. Under this policy each Associate is to be treated fairly, equally, and with respect.

The Respondent has at various times reiterated this policy through memoranda to its employees.

Rule 13 of the Respondent's standards of conduct states, "Associates must not . . . [u]se abusive or threatening language to/or about fellow Associates or create an intimidating, hostile, or offensive working environment." The Respondent believes that this rule furthers both its legal duties[2] and its operating philosophy of respect for the individual. The Respondent intends rule 13 to be more strict than Federal and State requirements. The Respondent has issued numerous disciplinary actions to its employees for violations of the rule.

The Charging Party, employee Donald DeWald, has been employed by the Respondent since October 1, 1990, at its East Liberty facility. During 1996 and before, he distributed numerous newsletters and other material at the East Liberty facility. In the literature DeWald expressed strong support for unions in general and the United Automobile Workers in particular, and voiced his objections to various terms and conditions of employment maintained by the Respondent.

No newsletter or other material authored by DeWald prior to the newsletters at issue in this proceeding contained vulgar or sexually explicit language or personal attacks on another employee. Although DeWald has been disciplined several times for various infractions, including violations of rule 13, he had not been disciplined before May 1996[3] for the content contained in the literature he distributed.

On March 10 Lee Siegfried, another employee at the East Liberty facility, authored and distributed a newsletter in response to a DeWald newsletter, to which DeWald replied with a newsletter. On March 20 Siegfried issued another newsletter which stated, in part, "Well, Stew [DeWald's nickname], if it's a duel of wits you want to play, I'm sorry, but I will not duel with anyone who has little if no ability to arm themselves." In April Siegfried received a verbal coaching from his department manager because the Respondent believed that Siegfried's written exchanges with DeWald were causing some disruption in the plant and that some of the language Siegfried used was potentially in conflict with the Respondent's nonharassment policy.

[1] The General Counsel issued the complaint on May 15, 1997. The complaint alleged that the Respondent violated Sec. 8(a)(3) and (1) by disciplining and suspending Donald Alan DeWald Jr. On May 29, 1997, the Respondent filed a timely answer admitting in part and denying in part the allegations of the complaint, and denying that it had violated the Act.

On December 15, 1997, the parties filed with the Board a stipulation of facts and a motion to transfer this case to the Board; agreed that the charge, the complaint, the answer, the stipulation, and the exhibits attached to the stipulation shall constitute the entire record in this proceeding; and waived a hearing before and decision by an administrative law judge. On March 16, 1998, the Board approved the stipulation and transferred the proceeding to the Board for issuance of a Decision and Order. 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.

[2] The Respondent is subject to State and Federal civil rights laws that prohibit unlawful discrimination, which include the requirement that the Respondent maintain a work atmosphere that is free of harassment and is not hostile, intimidating, or offensive to employees. See, e.g., Title VII, Civil Rights Act of 1964, 42 U.S.C. § 20000e et seq.

[3] All subsequent dates are in 1996, unless otherwise specified.

In a newsletter dated May 6, DeWald wrote in reference to Siegfried, "Quit hiding Lee, Come Out of the Closet." Also, DeWald repeatedly used the term "bone us" in a section of the newsletter criticizing the Respondent's bonus program.[4]

The parties stipulated that a common meaning of the phrase "come out of the closet" is to openly admit one's homosexuality; that the Respondent interpreted DeWald's comment to be a public accusation that Siegfried is homosexual; that the Respondent considered such comments inappropriate and disrespectful; that a common meaning of "bone" is "fuck," "copulate," or "to have anal intercourse with"; that the Respondent interpreted DeWald's use of the phrase "bone us" to be equivalent to accusing the Respondent of "fucking" its associates through the Respondent's bonus program; and that the Respondent considered such language to be inappropriate, profane, vulgar, and offensive. The Respondent received complaints from associates who were offended by the language in DeWald's newsletter.

The Respondent believed that language in DeWald's May 6 newsletter violated rule 13. On May 10 DeWald received a coordinator level counseling. During the counseling, DeWald denied that he intended the terms in question to be taken in either a sexual or demeaning manner. The Respondent rejected DeWald's explanation because it was inconsistent with what the Respondent believed to be the generally accepted understanding of the terms "bone us" and "come out of the closet" and because, given the context of the language, the Respondent believed DeWald intended to convey a vulgar and disrespectful message through his use of those terms.

On May 23 DeWald distributed a modified version of the May 6 newsletter. The headline that previously read "Quit Hiding Lee, Come out of the Closet" was revised to read "Hey Lee, it's time to come out of hiding." The May 23 newsletter continued to use the phrase "bone us" to refer to the Respondent's bonus program, but added a footnote stating, "Also, some people have interpreted 'bone us' as vulgar, actually it's from a definition of bone(up): to study hard. Look at and examine our system vs. theirs." On May 29 DeWald received a managerial level counseling, a 3-day suspension, and a 1-year suspension of transfer and promotion rights.

B. The Contentions of the Parties

The General Counsel contends that, by publishing newsletters in which he discusses his views about the need for union representation at the East Liberty facility, DeWald is engaged in activity protected by the Act. The Respondent claims that DeWald's repeated use of "bone us" and "Quit hiding Lee, Come out of the Closet" constitutes offensive language that places the newsletters outside the Act's protection. The General Counsel responds that the language the Respondent finds offensive does not render the newsletters unprotected under Board precedent.

C. Discussion

Section 7 guarantees employees the right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection." An employee's Section 7 rights "may permit some leeway for impulsive behavior." *Webster Men's Wear*, 222 NLRB 1262, 1267 (1976), quoting *NLRB v. Illinois Tool Works*, 153 F.2d 811 (7th Cir. 1946). Nevertheless, an employee's otherwise protected activity may become unprotected "if in the course of engaging in such activity, [the employee] uses sufficiently opprobrious, profane, defamatory, or malicious language." *American Hospital Assn.,* 230 NLRB 54, 56 (1977).

Southwestern Bell Telephone Co., 200 NLRB 667 (1972), illustrates the application of the above principles to a set of facts similar to the instant case. In *Southwestern Bell*, while negotiations for a new contract were in progress, unit employees appeared at work wearing sweatshirts displaying the slogan "Ma Bell is a Cheap Mother." The employer asked the employees to leave the premises or cease displaying the slogan. The General Counsel alleged that the employees' conduct was protected and that the employer's direction to leave or cease displaying the slogan violated the Act.

The judge found that the slogan printed on the sweatshirts was obscene and that the employer's request that employees cease displaying the slogan or leave the premises did not violate the Act. In reaching this conclusion, the judge relied on several factors. First, the judge observed that the parties had stipulated that the language could be (and was) construed as obscene and offensive. Second, the manner in which the offensive language was used—"worn on shirts to be exposed to employees and management all hours of the day"—did not constitute "impulsive behavior." Third, the employer had not threatened reprisal, but had simply requested employees to cease displaying the offensive slogan. Fourth, there was no evidence that the company was an antiunion employer or that the company had exhibited any union hostility in conjunction with the request to cease displaying the slogan. Fifth, no one was discharged and the only adverse consequence was that individuals who elected to leave the premises were not paid for the time they did not work. Finally, employees could, and without company

[4] For example, DeWald wrote, "In our last wage and benefit booklet, the president included in his message that the bonus (bone us) sharing program will be changed."

objection did, use other means to pursue their Section 7 rights.

These factors bear a striking resemblance to the facts of the instant case.[5] First, the parties stipulated that one meaning of the slang phrase "come out of the closet" is to openly admit one's homosexuality and that the Respondent believed the language was inappropriate, disrespectful, and in violation of rule 13, which prohibits language that could create an intimidating, hostile, or offensive working environment.[6] Further, the parties stipulated that one meaning of the slang phrase "bone" is "'fuck,' 'copulate' or to have anal intercourse with" and that the Respondent considered such language to be inappropriate, profane, vulgar, offensive, and in violation of rule 13.

Second, we do not believe the placing of the offensive language in newsletters that were available to employees and management throughout the plant can be dismissed as impulsive behavior.

Third, the Respondent's discipline of DeWald—advising him to be more sensitive to the feelings of other employees after the May 6 newsletter and a 3-day suspension and 1-year suspension of transfer/promotion rights when he repeated the offensive conduct in the May 23 newsletter—was typical of the discipline the Respondent imposed for similar violations of rule 13. DeWald was also advised that future similar conduct would result in termination. This discharge warning was clearly directed at further use of offensive language, not at protected activity. We find nothing in the type of discipline imposed that suggests the Respondent was threatening reprisal for protected activity.

Fourth, the stipulation contains no indication that the Respondent is an antiunion employer; nor that the Respondent evidenced any union hostility during the counselling sessions with DeWald. Fifth, DeWald was not discharged and, as mentioned above, the discipline was not disproportionate to that imposed on others for violating rule 13. Finally, the stipulation shows that DeWald has frequently distributed, without company objection, newsletters espousing his support for unionizing.

The General Counsel argues that the language the Respondent finds offensive does not render the newsletters unprotected under Board precedent. We find the cases on which the General Counsel relies distinguishable from the instant case.

In *American Hospital Assn.*, supra, the judge considered whether language used in five leaflets justified the discharge of the leaflets' authors. In finding that the language did not justify the discharges, the judge discredited management's testimony that the company considered the language outrageous and insulting. Id. at 56–57. The judge also found it significant that the employees had not been warned in some way that continued use of the allegedly offensive language would result in discipline. Id. at 57. In the instant case, the General Counsel has stipulated that the Respondent found the "come out of the closet" and "bone us" language inappropriate and disrespectful, and the record shows the Respondent believed the language could create an offensive working environment. The General Counsel argues that an employer cannot be the final arbiter of acceptable language. Concededly, the Board has the authority to declare that certain statements are protected by Section 7, even if they are somewhat distastefully expressed. However, in making that judgment, the Board must take into account an employer's legitimate interest (and perhaps legal obligation) to refrain from having an offensive working environment.

Here, the Respondent's concerns in this regard were reasonable. The stipulation contains nothing comparable to the credibility resolution in *American Hospital Assn.* on which to base a finding rejecting the reasonableness of the Respondent's belief. As stated in *Southwestern Bell*, 200 NLRB at 671, "Absent the stipulation . . . the result reached might well [be] otherwise." Further, based on the Company's well-publicized philosophy and strict enforcement of rule 13, we find that DeWald was or should have been aware that the Respondent would find the language he used offensive.

In *Webster Men's Wear*, supra at 1262, employees, during a meeting with management about working conditions, used vulgar and improper statements. The judge, however, found that a company official's statements and

[5] Our dissenting colleague cannot distinguish *Southwestern Bell* and, consequently, would overrule it. We would not do so. We adhere to this well-established precedent dating back almost 30 years.

The cases cited by the dissent are inapposite. In *Dreis & Krump Mfg.*, 221 NLRB 309 (1975), enfd. 544 F.2d 320 (7th Cir. 1976), and *Nor-Cal Beverage Co.*, 330 NLRB 610 (2000), the language found protected was not marked by obscenities or sexual innuendo. While Chairman Hurtgen agrees that *Nor-Cal* is distinguishable, he notes that he dissented in that case.

[6] At points in his statement of position, the General Counsel argues that the "out of the closet" and "bone" language could have innocuous meanings. We find this argument unpersuasive. The parties stipulated that the Respondent's interpretation of the phrases was, in fact, a common meaning of the phrases. In any event, even if the language was capable of an innocent as well as an offensive interpretation, under the circumstances presented by the stipulated record, "it is no answer that [DeWald] did not in fact intend the derogatory and insulting connotation." *Southwestern Bell Telephone,* supra at 670.

The General Counsel also appears to argue that DeWald retracted his use of the offensive language in the May 23 newsletter by offering an innocent definition of "bone us" and substituting "hiding" for "closet." It is clear, however, that the May 23 newsletter was not a retraction, but rather a reference back to the May 10 newsletter in a way that repeated the same message.

profanity provoked the employees' vulgar statements. These facts fit snugly into the impulsive behavior rule mentioned above. DeWald, however, placed the offensive language in newsletters that were available to employees and management throughout the plant, and thus was clearly not engaged in impulsive behavior.

We conclude that the "out of the closet" and "bone us" language DeWald used in the May 6 and 23 newsletters was so offensive as to render the otherwise protected newsletters unprotected and that therefore the Respondent's May 10 and 29 discipline for language violating the Company's rule prohibiting the use of abusive language did not violate Section 8(a)(3). We find the following statement from the judge's decision in *Southwestern Bell* an apt summary of our view of the facts of this case:

> In view of the controversial nature of the language used and its admitted susceptibility to derisive and profane construction, [the employer] could legitimately ban the use of the provocative [language] as a reasonable precaution against discord and bitterness between employees and management, as well as to assure decorum and discipline in the plant. [Id. at 670.]

ORDER

The complaint is dismissed.

MEMBER WALSH, dissenting.

My colleagues find that the Respondent lawfully disciplined employee Donald DeWald because of language he used in two prounion newsletters he authored and distributed. Contrary to my colleagues, I would find that the Respondent violated Section 8(a)(3) and (1) of the Act when it disciplined DeWald because of the content of his newsletters.

There is no dispute that the underlying prounion message espoused in these newsletters is protected by the Act. Indeed, dissemination of union-related information at work lies at the core of the protections afforded employees. *NLRB v. Magnavox Co*., 415 U.S. 322, 325 (1974).

The Respondent does not claim that the newsletters were distributed during working time or in working areas. Rather, the Respondent disciplined DeWald because of phrases used in the newsletters that the Respondent found offensive and in violation of its rule 13, which prohibits employees from creating an "intimidating, hostile or offensive working environment." Thus, as stated by the majority, the issue presented is whether the language the Respondent found objectionable removed the newsletters from the protections of the Act.

It is well established that our national labor policy favors "freewheeling," "uninhibited," "robust," and "wide-open debate in labor disputes." *Letter Carriers v. Austin*, 418 U.S. 264, 272, 273 (1974).

Consistent with this policy, the Board, with court approval, has deliberately set a high standard to justify removing labor-related speech from the Act's protections. In *Dreis & Krump Mfg.*, 221 NLRB 309 (1975), for example, the Board stated that the "test by which the Board examines speech in the context of protected activity . . . appropriately recogniz[es] that the economic power of the employer and the employee are not equal, that tempers may run high in this emotional field, that the language of the shop is not the language of 'polite society,' and that tolerance of some deviation from that which might be the most desirable behavior is required." Id. at 315. The *Dreis & Krump* Board summarized prior precedent as holding that "offensive, vulgar, defamatory or opprobrious remarks uttered during the course of protected activities will not remove activities from the Act's protection unless they are so flagrant, violent, or extreme as to render the individual unfit for further service." Id.

The *Dreis & Krump* Board's statement of the governing standard was expressly endorsed by the Seventh Circuit. *Dreis & Krump Mfg. v. NLRB*, 544 F.2d 320 (7th Cir. 1976). The court stated that it "is committed to the standard for determining whether specified conduct is removed from the protections of the Act as articulated by the Board: communications occurring during the course of otherwise protected activity remain likewise protected unless found to be 'so violent or of such serious character as to render the employee unfit for further service.'" Id. at 329 (quoting *NLRB v. Illinois Tool Works*, 153 F.2d 811, 816 (7th Cir. 1946)).

Applying this high standard here, I would find that DeWald's newsletters remained protected by the Act. The record shows that for many years DeWald has distributed literature at the Respondent's East Liberty, Ohio facility espousing his strong support for unions in general and the International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW) in particular. In DeWald's view, the benefits and working conditions at the Respondent's plant compared unfavorably with those at UAW-represented plants. In March 1996, another employee (Lee Siegfried) wrote an "open letter to all Honda associates," responding to, and disagreeing with, many of DeWald's positions. DeWald then answered Siegfried in a letter of his own, prompting Siegfried to write a rebuttal in which he stated to DeWald: "[I]f it's a duel of wits you want to play, I'm

sorry, but I will not duel with anyone who has little if no ability to arm themselves."

In May 1996, DeWald responded to Siegfried in the two newsletters in controversy here. In these communications, DeWald challenged Siegfried to "come out of the closet" and "to come out of hiding." DeWald argued that although he had asked Siegfried "to prove his claims," Siegfried "ran for his closet and hid. Now, he wants you to forget how he couldn't explain all of [Honda's] inferiority's [sic]. He hopes you'll forget how I showed my facts, and how he ran away." The May newsletters also claimed that the profit-sharing plans of union-represented plants are far superior to the Respondent's bonus sharing program, which DeWald referred to as the "bone us" sharing program.

DeWald's statements must be considered in context and viewed as a whole. With respect to Siegfried, the principal aim of the newsletters was to challenge him to continue the debate over the merits of unionization. With respect to the bonus sharing plan, the newsletters continued the familiar theme in DeWald's writings that the Respondent's benefit programs were inferior to those enjoyed by UAW-represented employees. As stated above, there is no question that the newsletters' central messages fell well within the ambit of Section 7 protected activities. In the course of presenting his protected arguments, DeWald may have used language that many would find offensive. In order to prevent interference with statutorily protected rights, however, the law does not permit an employer to define such language as worthy of discipline for that reason alone. Under NLRA law, DeWald may use "offensive, vulgar, defamatory or opprobrious" language to make his points, so long as his rhetoric was not so extreme as to "render [him] unfit for further service." *Dreis & Krump*, supra, 221 NLRB at 315.

There is no evidence that DeWald's newsletters disrupted discipline or production or otherwise rendered him unfit for further service. Indeed, the Respondent's brief does not even attempt to justify the discipline under the "unfit for further service" standard.[1] Instead, the Respondent argues that DeWald's use of the "come out of the closet" and "bone us" language served to create an "intimidating, hostile or offensive working environment" in violation of its rule 13 and, absent a prompt response, had the potential to subject the Respondent to liability under Federal and State civil rights laws.

A similar argument was rejected in *Nor-Cal Beverage Co.*, 330 NLRB 610 (2000). In that case, the employer had a policy prohibiting harassment based on "race, color, religion, sexual preference, national origin, marital status, physical disability, age or any other protected status categories or conditions." Id. at 1 fn. 3. Relying on its antiharassment policy, the employer gave an employee a written warning for calling another employee a "scab" in the course of a conversation intended to encourage support for a strike. The judge found that the warning was lawful on the ground that the employer had acted reasonably under its antiharassment policy.

The Board reversed by a 2-to-1 vote. Citing, inter alia, *Dreis & Krump*, the Board majority held that the employee's use of the word "scab" in the course of his otherwise protected activity did not, in and of itself, deprive him of the protections of the Act. The Board majority also held that the employer was not privileged to warn the employee by virtue of its antiharassment policy. Responding to the dissent, the Board majority stated that "an employer's punishment of an employee's exercise of [a Section 7] right can[not] be justified by an assertion that language used by the employee in the course of exercising that right, although nonthreatening, was viewed as 'harassment' . . . . The point is that the Act prohibits an employer from punishing an employee's expression of . . . prounion . . . views unless they are manifested in a manner that exceeds the protection of the Act." Id. at fn. 5.

I agree with the panel majority decision in *Nor-Cal*, and I would apply its sound principles here. While the Respondent certainly has a legitimate interest in preventing harassment in its workplace, it cannot magically convert DeWald's NLRA-protected newsletters into unprotected status by claiming that they constitute "harassment" in violation of its rule 13. As *Nor-Cal* makes clear, the determination of whether employee conduct loses the protections of the Act is to be made by the Board (not the employer) and the governing standard is NLRA law (not an antiharassment policy).

Accordingly, for all the above reasons, I would find that the Respondent violated Section 8(a)(3) and (1) of the Act by disciplining DeWald because it was offended by the protected content of his newsletters.[2]

[1] The Respondent contends that that standard "runs counter" to its "workplace culture" and is "outdated."

[2] The majority relies heavily on *Southwestern Bell Telephone Co*., 200 NLRB 667 (1972), a case that I view as poorly reasoned and something of an aberration in the corpus of Board law. Most of the authority cited in *Southwestern Bell* consisted of court of appeals cases denying enforcement to Board Orders. In fact, the primary case cited (*Caterpillar Tractor Co. v. NLRB*, 230 F.2d 357 (7th Cir. 1956) (upholding a ban on "Don't be a scab" buttons)), is clearly inconsistent with Board precedent and has been rejected by other courts. See *Escanaba Paper Co*., 314 NLRB 732, 734 fn. 10 (1994), enfd. 73 F.3d 74 (6th Cir. 1996). Accordingly, I would overrule *Southwestern Bell*.