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A.P. Painting & Improvements, Inc., t/a All Pro Painting Co. and International Union of Painters and Allied Trades, District Council No. 9. Cases 29–CA–24353 and 29–CA–24368

August 21, 2003

DECISION AND ORDER

BY MEMBERS SCHAUMBER, WALSH, AND ACOSTA

On February 22, 2002, Administrative Law Judge Howard Edelman issued the attached decision. Respondent filed exceptions, the General Counsel filed a brief in support of the judge's decision and cross-exceptions to the judge's decision, and Respondent filed a reply to the General Counsel's cross-exceptions.

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 briefs and affirms the judge's rulings, findings, and conclusions as discussed below and adopts the recommended Order as modified.¹

There are two issues before us. (1) The General Counsel contests the judge's failure to address the allegation that statements made by the Respondent's Vice President Stephen Dunne while unlawfully discharging employee John Koshmieder violated Section 8(a)(1) of the Act.² (2) The Respondent contests the judge's finding that its offer to reinstate Koshmieder was invalid because it was conditioned on his acceptance of a restriction on his statutory right to organize fellow employees. For the reasons set forth below, we find the additional violation sought by the General Counsel, and we affirm the judge's finding that the Respondent's reinstatement offer was invalid.

Facts

The facts are more fully set forth in the judge's decision. Koshmieder was hired by Respondent's President Edward Dunne in early May 2001.³ Respondent was not aware of Koshmieder's union membership until Friday, June 29, when Koshmieder told Stephen Dunne, Edward's brother, that he was a member of the Union and

that his primary purpose was to organize Respondent's employees. Stephen Dunne responded, *inter alia*, that he was "not interested," he didn't know if Koshmieder was going to continue to have a job, and "[i]t's a non-union job. We're a non-union shop." When Koshmieder persisted in declaring his intent to come to work on Monday and to organize the Respondent's employees, Stephen Dunne finally said, "No thank you, good bye, good luck. You're not going to have a job on Monday." At the end of this discussion, witnessed by other employees, Stephen Dunne informed Koshmieder that Edward Dunne had confirmed the decision to terminate Koshmieder.

On Tuesday, July 3, Koshmieder received a letter sent the day before by Edward Dunne. The relevant portions of the letter instructed Koshmieder to contact Dunne and to report back to work by Thursday, July 5. The letter stated, "If you are found to be organizing during company time, it will constitute grounds for immediate discharge." The letter also stated that Dunne would consider Koshmieder's employment voluntarily terminated if he did not report by Thursday, July 5.

On receipt of the letter, Koshmieder telephoned Edward Dunne and asked him what he meant by the foregoing language.⁴ Dunne responded, "It means, if you do it on company time, that's illegal and you're terminated."⁵

On further questioning by Koshmieder about what organizing was allowed on company time, Dunne said that Koshmieder could talk about the Union at lunchtime. Koshmieder asked Dunne how he felt about Koshmieder's organizing in the morning, and Dunne stated, "John, you can come in. Like the letter says, if any organizing is done on my time, you'll be terminated." Koshmieder asked, "What do you mean, in the eight hours that I'm working or the 12 hours that I'm around your shop, you're saying?" Dunne replied, "You're not going to be around my shop. You're gonna go straight to a job and meeting a foreman on the job." Dunne also stated, "If your goal is to be there and organize the shop, you're not going to have any luck." On further questioning, Dunne stated, "You can do whatever you want on your own time. If you do anything on the job, the job site, you'll be terminated."

⁴ Although this conversation was not discussed or relied on by the judge in his decision, the contents of the conversation are undisputed. It was tape recorded by Koshmieder and a transcript of the conversation was admitted into evidence with the tape recording.

⁵ Koshmieder also proposed wearing his union hat and shirt. Dunne responded, "Part of our company rules is to wear our T-shirts that we give out." When Koshmieder asked later in the conversation if he could wear his union hat and shirt, Dunne replied, "You can wear painters' whites and an All Pro shirt. That's what was given out."

¹ We modify the judge's recommended Order in accordance with our decisions in *Indian Hills Care Center*, 321 NLRB 144 (1996), and *Excel Container*, 325 NLRB 17 (1997). We also modify the judge's recommended Order to more closely conform to current standard Board language.

² There are no exceptions to the judge's finding that Koshmieder's discharge violated Sec. 8(a)(3) and (1) of the Act.

³ All dates are in 2001 unless otherwise stated.

Koshmieder agreed to report to work, but later that evening he called Dunne and left a message stating that he could not report to work at that time due to a previous appointment. The parties had no further correspondence or contact other than Respondent's July 6 letter terminating Koshmieder for failing to report to work.

Judge's Decision

The judge concluded, and it is no longer disputed, that Respondent's termination of Koshmieder violated Section 8(a)(1) and (3) of the Act. He did not consider whether statements made by Stephen Dunne to Koshmieder at the time of the discharge independently violated Section 8(a)(1), as alleged in the complaint. The judge also concluded that the Respondent's July 2 letter offering to reinstate Koshmieder was invalid because it conditioned reinstatement on Koshmieder's compliance with an overbroad restriction of organizational activity, but he did not consider Koshmieder's subsequent conversation with Edward Dunne in reaching this conclusion.⁶ Considering those matters overlooked by the judge, we find that Stephen Dunne's statements violated Section 8(a)(1) and that Edward Dunne's conversation with Koshmieder did not redress the overbroad restriction on solicitation that invalidated Respondent's reinstatement offer.

Discussion

1. The Alleged 8(a)(1) Discharge Statements

As summarized above, Stephen Dunne made numerous statements linking Koshmieder's organizing activity to his discharge during their June 29 conversation. The record indicates that several employees witnessed this conversation.

The Board has found an independent 8(a)(1) violation where an employer's unlawful threat of discharge is contemporaneous with the employee's actual discharge in violation of Section 8(a)(3). For example, in *Baker Electric*, 317 NLRB 335, 339 (1995), enfd. 105 F.3d 647 (Table) (4th Cir. 1997), cert. denied 522 U.S. 1046 (1998), two other employees were present when a foreman discharged an employee because of union activity, telling the employee that the company president became "furious" on learning that the employee talked about the Union on his lunch break and directed the foreman to discharge the employee. *Id.* at 339. Both an 8(a)(3) violation for the discharge and an independent 8(a)(1) violation were found because expression of the discriminatory reason for the discharge tended to coerce the two em-

⁶ The judge found Respondent's prohibition of union T-shirts irrelevant to the issues in this case. There are no exceptions to this finding. We, therefore, will not consider this restriction in our analysis.

ployee witnesses in the exercise of their rights under Section 7 of the Act. *Id.*

Similarly, in this case, the fact that other employees witnessed the conversation between Stephen Dunne and Koshmieder provides a basis for concluding that Dunne's remarks linking Koshmieder's union activity with discharge reasonably tended to coerce employees in the exercise of their Section 7 rights. We therefore find that Dunne violated Section 8(a)(1) by threatening to discharge employees for engaging in union activities.⁷

2. The Reinstatement Offer

Respondent excepts to the judge's finding that it imposed a broad condition against any kind of organizing on company time and thereby invalidated the reinstatement offer to Koshmieder. It contends that Edward Dunne clarified Koshmieder's rights to organize the Respondent's employees during his nonworking time in a telephone conversation on July 3. For the reasons stated below, we affirm the judge's finding that the reinstatement offer was invalid.

A rule that prohibits union solicitation or activities on "company time" is overbroad and presumptively invalid because it could reasonably be construed as prohibiting solicitation at any time, including break times or other nonwork periods. *M.J. Mechanical Services, Inc.*, 324 NLRB 812, 813 (1997), enfd. 172 F.3d 920 (Table) (D.C. Cir. 1998) (citing *Gemco*, 271 NLRB 1190 (1984)). Even a rule that is presumptively valid on its face will be invalid if it is applied discriminatorily or modified orally to prohibit solicitation during nonworking time. *Our Way, Inc.*, 268 NLRB 394, 395 (1983). In *Colburn Electric Co.*, 334 NLRB 532 (2001), a rule that specifically prohibited union activities during working hours was found to be unlawful on its face because it singled out union solicitation, and evidence of other solicitations was not needed to establish a violation of Sec-

⁷ Member Walsh agrees with his colleagues that the threat to discharge Koshmieder independently violated Sec. 8(a)(1), but Member Walsh does not join their rationale to the extent that they suggest that the presence of the other employees was a necessary element of the violation. The presence of the additional employees was not necessary to establish the violation because, at all material times, Koshmieder himself was an employee of the Respondent and an employee within the meaning of the Act. See, e.g., *Extendico-Professional Care*, 272 NLRB 599, fn. 1 (1984) (finding merit in the General Counsel's contention that the respondent violated Sec. 8(a)(1) by individually informing two employees on separate occasions that they were each discharged for having engaged in union activity), enfd. 767 F.2d 926 (7th Cir. 1985) (Table); *R & H Masonry Supply, Inc.*, 238 NLRB 1044, 1048 (1978) ("As Lippe was unlawfully discharged, his status as an employee continues, and the Order herein will call for his reinstatement. [The respondent's] remark [that Lippe was discharged because of his union activity], therefore, has a future impact and a remedy is appropriate."), enfd. in pertinent part 627 F.2d 1013 (9th Cir. 1980).

tion 8(a)(1). *Id.* at 552.⁸ The fact that the employer in *Colburn* had not previously announced any neutral no-solicitation rule to its employees also supported the finding of a violation based on the discriminatory rule. *Id.* at 552 fn. 44.

Further, it is well established that to toll the backpay period, an offer of reinstatement to a discriminatee must be “specific, unequivocal, and unconditional.” See *Cassis Management Corp.*, 336 NLRB 961, 969 (2001), and cases cited therein. With respect to conditions contained in a reinstatement offer, the Board has noted: “It can hardly be contended that a reinstatement offer that includes what amounts to an independent violation of the Act is a valid offer.” *Consolidated Freightways*, 290 NLRB 771, 772 fn. 4 (1988), *enfd.* in pertinent part, 892 F.2d 1052 (D.C. Cir. 1989), *cert. denied*, 498 U.S. 817 (1990).

Finally, the employer bears the burden of proving that a reinstatement offer was valid. See *Cassis Management Corp.*, *supra*, and cases cited therein. Any ambiguity in the explanation of the offer should be construed against the employer. See *Cliffstar Transportation Co.*, 311 NLRB 152, 153 (1993).

Applying the law to the facts in this case, we find that Respondent failed to meet its burden of proving that its offer of reinstatement to Koshmieder was “specific, unequivocal, and unconditional.” The July 2 letter and the July 3 telephone conversation between Koshmieder and Edward Dunne established that Koshmieder would be restricted in communicating with employees about the Union and that he would be subject to discharge if he failed to abide by the restriction.

The July 2 letter contained the express condition that Koshmieder would be fired if he engaged in union activities during “company time,” a prohibition that is overbroad and presumptively invalid, as noted above. Further, as in *Colburn*, *supra*, there is no evidence that the Respondent had promulgated or enforced any rules regarding any kind of solicitation prior to this prohibition against union organizing. Thus, the restriction on organizing activity contained in the reinstatement offered was both facially invalid and discriminatory.⁹

⁸ A no-solicitation rule covering “working hours” (as in *Colburn*) is considered presumptively invalid. *Our Way*, *supra*, 268 NLRB at 394–395. However, this factor was not determinative in *Colburn* because there were no exceptions to the judge’s failure to find the rule overbroad on that basis. 334 NLRB 532 at fn. 4.

⁹ The restriction of Koshmieder’s right to engage in solicitation, though not specifically alleged as an unfair labor practice, is similar to rules that violate Sec. 8(a)(1). As noted above, a reinstatement offer containing what amounts to a violation of the Act is not a valid offer. *Consolidated Freightways*, *supra*, 290 NLRB at fn. 4. Because the offer proscribes lawful protected Sec. 7 activity, it follows that it cannot

Contrary to our dissenting colleague, we do not find that the conditional aspect of the written reinstatement offer was clarified or cured during the July 3 telephone conversation between Edward Dunne and Koshmieder. Although Dunne told Koshmieder at certain points of the conversation that Koshmieder could do what he wanted “on [his] own time,” at other points Dunne told Koshmieder that if he did “anything on the job, the job site, you’ll be terminated,” or words to that effect. For example, when Koshmieder asked whether he could engage in conversation about the Union with other employees while painting, Dunne responded, “You go ahead and do it, and you’ll find out, alright?” Although Dunne eventually stated that Koshmieder was free to do what he wanted during his lunch break, he did not acknowledge the lawfulness of other jobsite conversations about the Union.

Our colleague states that “working time is for work,” and therefore that Dunne’s “statements correctly laid out lawful restrictions on solicitation.” As stated above, however, an employer may not prohibit only those working time conversations relating to union organizing. There was no evidence that, either prior to Koshmieder’s reinstatement offer or afterwards, the Respondent maintained a general ban on working time conversation among employees.

Our colleague also places great weight on the fact that the conversation ended amicably, and that Dunne concluded by stating that “[a]s long as you’re out there at 8:00, there’s no problem.” Although this may have amounted to a retraction of an earlier statement during the conversation—that Koshmieder, unlike other employees, would have to report directly to the jobsite instead of to Respondent’s facility—it did not blunt Dunne’s larger message, that union talk was uniquely prohibited.

In sum, Respondent failed to show that it made Koshmieder a valid reinstatement offer; therefore, Respondent’s liability for backpay will not be tolled. Respondent contends in its exceptions that Koshmieder was ultimately lawfully terminated for failing to report to

be “specific, unequivocal, and unconditional.” Under similar facts, the Board found an offer of reinstatement insufficient to toll backpay because it was conditioned on employees following a no-solicitation rule that the Board found to be unlawful. *M.J. Mechanical Services, Inc.*, *supra*, 324 NLRB at 818. In that case, union salts who did not reveal their status as organizers until after beginning work were discharged in violation of Sec. 8(a)(3). Several days later, they were offered reinstatement but told not to engage in union activities on company time or during breaks, although they could do so before or after work. The Board found the restriction on organizing to be overly broad and invalid, and consequently, the Board found the reinstatement offer containing this condition to be invalid. *Id.* at 817–818.

work pursuant to the offer of reinstatement. However, we find no merit in this exception because the Board does not evaluate an employee's response until there has been a valid, unconditional offer of reinstatement. *Tony Roma's Restaurant*, 325 NLRB 851, 852 (1998) (citing *CleanSoils, Inc.*, 317 NLRB 99, 110 (1995) and *Consolidated Freightways*, supra, 290 NLRB at 772-773). Furthermore, as set forth in a case cited by Respondent in its exceptions, "the acceptance of an invalid reinstatement offer does not toll the backpay period." *NLRB v. Browne*, 890 F.2d 605, 610 (2d Cir. 1989) (citing *IMCO/International Measurement & Control Co.*, 277 NLRB 962 (1985), enf'd. 808 F.2d 837 (Table) (7th Cir. 1986) and *Sumco Mfg. Co.*, 267 NLRB 253, 258 (1983), enf'd. 746 F.2d 1189 (6th Cir. 1984) (per curiam), cert. denied 471 U.S. 1100 (1985)). Therefore, because Respondent has not established a valid offer of reinstatement, we find it unnecessary to examine Koshmieder's response to the offer.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that Respondent, A.P. Painting & Improvements, Inc., West Hempstead, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for supporting International Union of Painters and Allied Trades, District Council No. 9 or any other labor organization.

(b) Threatening to discharge any employee for supporting International Union of Painters and Allied Trades, District Council No. 9 or any other labor organization.

(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) Within 14 days from the date of this Order, offer John Koshmieder full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make John Koshmieder whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify the employee in writ-

ing that this has been done and that the discharge will not be used against him in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its West Hempstead, New York facility copies of the attached notice marked "Appendix."¹⁰ Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by Respondent's authorized representative, shall be posted by 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 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, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since June 29, 2001.

(f) 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 Respondent has taken to comply.

Dated, Washington, D.C. August 21, 2003

Dennis P. Walsh, Member

R. Alexander Acosta, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER SCHAUMBER, dissenting in part.

Summary

Contrary to my colleagues, I find that Respondent made a valid offer to reinstate employee and union salt

¹⁰ 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."

John Koshmieder, untainted by an unlawful no-solicitation condition.¹

As the majority points out, the Board has held that a rule that prohibits union solicitation or activities during “company time” is overly broad and presumptively invalid because it can be construed as prohibiting such activities during nonworking time on the job. However, it is settled Board law that an employer can rebut the presumption that an overly broad no-solicitation rule is invalid by communicating or applying the rule to permit solicitation during breaktime or nonworking time. *Our Way, Inc.*, 268 NLRB 394, 395 fn. 6 (1983). I believe that is exactly what occurred here.

I think a fair reading of the transcript of their July 3, 2001 telephone conversation—the conversation was surreptitiously tape-recorded by Koshmieder—shows Koshmieder baiting Dunne a bit and trying to catch him in misstatements. While it also reflects some misstatements by Dunne, by the end of the conversation, Dunne had explained to Koshmieder that he did not intend by the term “company time” to restrict Koshmieder’s right to organize during his lunch break or on his own time, such as before work. Koshmieder understood as much and he accepted Dunne’s reinstatement offer on the basis of that understanding.

Remarkably, in his decision the administrative law judge ignores this conversation entirely. Consequently, I believe we should reverse the judge and find on a review of the record *de novo* that the reinstatement offer Koshmieder accepted did not contain an overly broad no-solicitation rule. Thus, by failing to report to work, Koshmieder quit, which tolled the Respondent’s backpay obligation to him.

Facts

Respondent unlawfully terminated Koshmieder, a Union salt, after he announced his intent to organize Respondent’s employees on June 29, 2001.² However, in a letter dated July 2, Respondent offered him reinstatement. In that letter, Edward Dunne, Respondent’s president, advised Koshmieder: “If you are found to be organizing during company time, it will constitute grounds for immediate discharge.” Dunne’s letter provided telephone contact numbers and directed Koshmieder to report to work by Thursday, July 5, or Dunne would consider him to have voluntarily terminated his employment.

On July 3, Koshmieder called Dunne to discuss the letter and its restriction on organizing activities during

company time. During that secretly tape-recorded conversation, Koshmieder repeatedly asked Dunne what the letter’s statement meant. For example, he asked, “So, you say no organizing during company time, what do you mean by that?” “Are you going to let me organize at all on company time?” “Can I talk at lunchtime to the guys?” and “[D]oes that mean anytime, during my lunch or anything else?” When, at one point, Dunne responded, “You can do whatever you want on your own time,” Koshmieder misstated his response, asking, “So, I can’t, I can’t organize? You’re saying, while I’m working, even on my lunchtime, or anything else?” Dunne repeated, “Your lunchtime is your business. Lunchtime you can do whatever you want on your lunchtime.”

Significantly, the conversation ended as follows:

KOSHMIEDER: Alright, whatever, that sounds good to me. I, I still say that I’m going to be there [at Respondent’s shop] at 6:30. I’ll be back at the Hamptons [jobsite] at 8:00 because I have an hour and a half to travel and that’s no big deal ‘cause Steve don’t leave the shop until 6:30, you know, in the morning anyway. I just want to see some of the guys. I want to organize starting on Thursday, alright?

E. DUNNE: As long as you’re out there at 8:00, there’s no problem.

KOSHMIEDER: No problema, alright man.

E. DUNNE: Alright.

KOSHMIEDER: Thank you for hiring me back.

Analysis

As mentioned above, the restriction on union organizing during “company time,” while presumptively invalid, can be rebutted by the employer showing that the “rule was *communicated* or *applied* in such a way as to convey an intent clearly to permit solicitation during breaktime or other periods when employees are not actively at work.” *Our Way, Inc.*, 268 NLRB 394, 395 fn. 6 (1983)(quoting *Essex International*, 211 NLRB 749, 750 (1974)) [emphasis in original]. For this reason, Dunne’s July 2 letter to Koshmieder cannot be considered in isolation but must be read together with the transcript of the follow-up conversation of the parties on July 3. This conversation resolves any ambiguity over the nature and scope of the letter’s restriction on union organizing activities.

Unlike my colleagues, in evaluating whether Dunne communicated an intent to permit solicitation during nonworking time, I would rely on the understanding reached by the parties by the end of their conversation rather than on earlier fragments of it. The majority’s emphasis on earlier parts of the conversation focuses on

¹ I agree with my colleagues that Respondent’s statements on June 29 independently violate Sec. 8(a)(1) of the Act because other employees were present during the conversation.

² As the majority notes, there are no exceptions to the finding that the termination was unlawful.

misstatements by Dunne, obscuring Dunne's message that Koshmieder finally understood and agreed on. In addition, as a union salt surreptitiously tape-recording his telephone conversation with his employer, Koshmieder may reasonably be suspected of being less interested in clarifying Respondent's reinstatement offer and in its solicitation rules than in capitalizing on any misstatements, as the latter could serve as the basis for an unfair labor practice charge that may be viewed as helpful to the Union's organizational drive.³ Indeed, had Koshmieder stopped earlier in the conversation, he might have actually "caught" Dunne. By pressing Dunne further, however, he gave Dunne the opportunity to fully explain his intentions.

By the end of the conversation, Dunne had repeatedly indicated that Koshmieder could engage in organizing activity on his breaks, at lunchtime, on his own time, at any time when he was not actively at work. These statements correctly laid out lawful restrictions on solicitation, i.e. the "long-accepted maxim of labor relations" that "[w]orking time is for work." *Our Way*, supra, 268 NLRB at 394 (quoting *Peyton Packing Co.*, 49 NLRB 828, 843 (1943)). Dunne also left no ambiguity about Koshmieder's right to organize prior to beginning work. At the conclusion of the conversation, Koshmieder said that he would be at the shop at 6:30 a.m. and at the job site by 8:00 a.m., stating, "I want to organize starting on Thursday, alright?" Dunne replied, "As long as you're out there at 8:00, there's no problem."

Conclusion

In sum, Dunne and Koshmieder fully discussed the meaning of the phrase "during company time" as used in Dunne's July 2 letter and came to an understanding the following day that it referred to working time but not lunchtime or nonworking time such as in the morning before work. Koshmieder, a knowledgeable union organizer who obviously knew his rights, should have had no trouble understanding Dunne's clarifications of the permissible restriction he was placing on organizing activities. Koshmieder evidenced his understanding when he accepted Dunne's reinstatement offer at the end of their conversation.

For these reasons, I respectfully disagree with my colleagues. I find that Koshmieder's right to employment with Respondent, and its backpay obligation to him, ended when Koshmieder failed to report to work in accord with this valid reinstatement offer.

³ The judge found that as a union salt, Koshmieder "seeks work from non union contractors for the primary purpose of trying to organize the employees of non union contractors." Decision at 2, fn. 1.

Dated, Washington, D.C. August 21, 2003

Peter C. Schaumber, Member

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 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 discharge or otherwise discriminate against any of you for supporting International Union of Painters and Allied Trades, District Council No. 9, or any other labor organization.

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, within 14 days from the date of the Board's Order, offer John Koshmieder full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make John Koshmieder whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of John Koshmieder, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

A.P. PAINTING & IMPROVEMENTS, INC.

Emily De Sa, Esq., for the General Counsel.
Kevin Quill, Esq., for the Respondent.

DECISION

STATEMENT OF THE CASE

HOWARD EDELMAN, Administrative Law Judge. This case was tried before me on November 15, 2001 in Brooklyn N.Y.

Pursuant to charges filed by the International Union of Painters, and Allied Trades, District Counsel No. 9, herein called the Union, against A. P. Painting & Improvements Inc., t/a All Pro Painting Co., herein called Respondent, a consolidated complaint issued on October 3, 2001 alleging a violation of Section 8(a)(1) and (3) of the Act.

Based on the entire record herein, my observation of the demeanor of the witnesses, and the briefs submitted by Counsel for the general counsel and counsel for Respondent, I make the following findings of fact and conclusions of Law.

STATEMENT OF FACTS

Respondent is a domestic corporation with its principal office and place of business located in West Hempstead, New York, where it is engaged in the in the business of a painting contractor for commercial and residential home customers. It is admitted and I conclude that Respondent is engaged in interstate commerce as defined in Section 2(2), (6), and (7) of the Act.

It is admitted, and I find that the Union is a labor organization within the meaning of Section 2 (5) of the Act.

Respondent is owned and controlled by Edward Dunne, President and Stephen Dunne Vice President. It is admitted, and I find that they are supervisors and agents of Respondent within the Meaning of Section 2 (11) of the Act.

John Koshmieder is a painter and has been engaged is this work for about 20 years. During the last few years he has engaged in "salting" activities on behalf of the Union.¹ Koshmieder is not employed by the Union, nor does he receive any remuneration from the Union for his organizational activities on behalf of the Union.

Koshmieder applied for work with Respondent in early May of 2001. He was interviewed, filled out an application for work, and was hired by Edward Dunne. It is admitted, and the facts establish, that the subject of membership in a union, or union activities were not discussed during this interview and that Respondent had absolutely no knowledge of Koshmieder's membership in the Union, or his activities on it's behalf until June 29, 2001.

Koshmieder initially began working under the supervision of Steven Wagner, a working foreman, but not a supervisor within the meaning of section 2 (11) of the Act. He worked under Wagners' supervision for about a week. His work was good, and at times he handled small jobs by himself. The quality of his work is not in dispute: he was a good worker.

¹ A union "salt" is defined, in this decision, as an individual engaged in a trade, and a member of a union, who seeks work from non union contractors for the primary purpose of trying to organize the employees of non union contractors.

On June 29, after work, Koshmieder walked into Stephen Dunne's office and told him that he was a member of the Union and that his primary purpose to organize Respondent's employees.² Koshmieder asked Dunne if it was "... alright with you. Dunne replied, "No it is not." Koshmieder then asked, "What about my job." Dunne replied "No, no we'll talk on Monday." June 29 was a Friday. The next working day was Monday. Koshmieder then said

"Well, because I plan to come in on Monday, in the morning early and talk to the guys. I'll talk to the guys in the morning." Dunne replied "Eddie's not going to allow that." Koshmieder replied "I'll still be doing the work that I've been doing though." Dunne then stated "No, that's alright, I'm not interested, thank you very much. I'll tell you on Monday. I don't know if you're going to have a job though. It's a nonunion job. We're a nonunion shop." When Koshmieder persisted about coming in the following Monday, Dunne replied "That's fine, we'll give you a weeks notice, something like that, we're a non-union shop. We don't want a union. When Koshmieder persisted on trying to work on Monday, Dunne replied "No thank you good bye, good luck. You're not going to have a job Monday." Stephen Dunne then telephoned Edward Dunne in the presence of Koshmieder, told him about his conversation with Koshmieder and Edward Dunne confirmed to Stephen that Koshmieder was terminated. Stephen Dunne then informed Koshmieder that this brother had confirmed his decision and that he was terminated.

To the extent that Stephen Dunne's testimony is inconsistent with the tape recording of the above June 29 tape recording, I do not credit such testimony.

Cases simply don't come any clearer than this case. Koshmieder was a good worker throughout his employment with respondent. Respondent had no knowledge of his Union membership or activities on behalf of the Union until June 29 when he came in to Respondent's office and told him he was a member of the Union and was here to organize Respondents employees. Respondent's supervisor Stephen Dunne told him that Respondent was nonunion, that they didn't want a union, and that because of his activities on behalf of the Union, he was being terminated. This termination was confirmed and approved by Edward Dunne, President and owner or Respondent. Respondent attorney contends that Stephen Dunne did not have the authority to fire employees. I find such contention without merit. Stephen Dunne was admittedly a supervisor within the meaning of the Act. In the complaint, he was described as Project Manager, however, Respondent attorney refers to him in his brief as Respondent's Vice President. In any event, he was a supervisor and agent acting on Respondents behalf. I find that Stephen Dunne did have authority to hire and fire employees. I discredit any self-serving statements by Stephen or Edward Dunne to the contrary. Moreover, as the June 29 tape recording establishes, Edward Dunne confirmed Stephen Dunne's decision to discharge Koshmieder. Accordingly, I conclude that by terminating Koshmieder, Respondent violated Section 8(a) (1) and (3) of the Act.

² This June 29 conversation was tape recorded by Koshmieder. The authenticity of the tape recording is admitted.

Respondent by a letter dated July 2 addressed to Koshmieder stated as follows:

Please contact me upon receipt of this letter to report back to work by Thursday, July 5, 2001.

If you are found to be organizing during company time, it will constitute grounds for immediate discharge.

You can reach me at the following phone numbers:

Office: (516) 481-2787

Pager: (516) 245-7745

Cell: (516) 220-1653

If you do not report by Thursday July 5th, 2001, then I will consider that you have voluntarily terminated your employment. Also, as you know I left a message on your answering machine today, Monday, July 2, 2001.

In view of my conclusion that Koshmieder was discriminatorily discharged on June 29, I consider the July 2 letter as an offer of reinstatement. However the offer of reinstatement was conditioned as follows:

If you are found organizing on company time, it will constitute grounds for immediate discharge.

In an early landmark decision in *Republic Aviation Corp. v NLRB* 324 U.S.793, (1945), the Supreme Court adopted the presumption that enforcement and promulgation of a rule prohibiting union solicitation by employees outside working time, although on company property is "an unreasonable impediment to self-organization and therefore discriminatory in the absence of evidence that special circumstances make this rule necessary for maintaining production and discipline."

Respondent's July 3 letter conditions reinstatement broadly on any kind of organizing on company time, as distinguished from working time. Respondent submitted no evidence of "special circumstances" that could make such probation necessary.

In *Sycon Corporation*, 258 NLRB 1159, 1160, (1981), the Judge, affirmed by the Board concluded that an offer of reinstatement to an employee conditioned on his agreement not to as chairman or committeeman for the local union was an unlawful offer of reinstatement and in violation of Section 8(a)(1) of the Act. See also *Romal Iron Works Corp.*, 285 NLRB 1178, 1183, (1987).

Respondent contended that Koshmieder would not be allowed to wear T-shirts with the Unions logo on them, but rather was required by its rules to wear T-shirts with Respondents logo. I find such contention irrelevant to the issues presented in this case. However, Koshmieder was not fired because he wore Union T-shirts or any other clothing with a Union logo. In fact he credibly testified that he did not at any time during his employ with Respondent wear any Union clothing. Indeed Respondent was completely unaware of his Union affiliation until June 29, when he told Stephan Dunne of his intention to organize Respondent's employees. Moreover, Koshmieder credibly testified that initially he wore T-shirts with the logos of paint manufacturers, and that other employees wore plain long sleeved white shirts to prevent sunburn. This testimony is corroborated by the affidavit of Steven Wagner, taken by the

Board Agent investigating this case, in the presence of Respondent's attorney.

REMEDY

Having found that Respondent has engaged in violations of Section 8(a)(1) and (3) of the Act, I find that Respondent must be ordered to cease and desist therefrom, and take affirmative action to effectuate the policies of the Act.

In view of my finding that Respondent unlawfully discharged its' employee, John Koshmieder, I recommend that they be reinstated to their former position of employment, or if such position of employment no longer exists, to a substantial equivalent position, without prejudice to his seniority, or other rights and previously enjoyed by him.

In addition, I recommend that Koshmieder must be made whole for any loss of earnings or other benefits suffered against him with the backpay period to commence from June 29, 2001, until Respondent offers him an unconditional offer of reinstatement as defined by Board authority.

Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950) with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

In addition, Respondent must be ordered to remove from its files any reference any reference of Koshmieder's discharge and notify him that this has been done and that this personnel action will not be used against him in any way.

Based upon my findings of fact, and conclusions of law, as described above, I issue the following recommended

ORDER³

Respondent, A. P. Painting & Improvements, Inc. t/a All Pro Painting Co., its' officers successors and assigns shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against its' employees because of their membership in, or activities on behalf of the International Union of Painters and Allied Trades, District Counsel No. 9, herein called the Union

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

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

(a) Within 14 days of this Order, offer to John Koshmieder his former position of employment, or if such position no longer exists, a substantially equivalent position without prejudice to his seniority or other rights previously enjoyed by him.

(b) Within 14 days of this Order make whole in the manner set forth in the Remedy provisions of this decision John Koshmieder from the date of his discharge, until the date of a valid offer of employment or reinstatement.

(c) Within 14 days of this Order, expunge from its files any reference to the unlawful discharge of John Koshmieder and

³ 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.

notify him in writing that this has been done and that this personnel action will not be used against him in any way.

(d) Within 14 days after service by the Region, post at its West Hempstead, New York facility copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 29 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 and members 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.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

Dated, Washington, D.C. February 22, 2002

APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

⁴ 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."

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

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist any 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 discharge or otherwise discriminate against our employees because of their membership in, or activities on behalf of the International Union of Painters and Allied Trades, District Council No. 9, herein called the Union.

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

WE WILL offer to John Koshmieder his former position of employment, or if such position no longer exists, a substantially equivalent position without prejudice to his seniority or other rights previously enjoyed by him.

WE WILL make whole in the manner set forth in the Remedy provisions of this decision John Koshmieder from the date of his discharge, until the date of a valid offer of employment or reinstatement.

WE WILL expunge from our files any reference to the unlawful discharge of John Koshmieder and notify him in writing that this has been done and that this personnel action will not be used against him in any way.

A.P. PAINTING & IMPROVEMENTS, INC.