Arthur H. Fulton, Inc. *and* **Gregory Carder** *and* **Ralph Hobday.** Cases 5-CA-12569 and 5-CA-12685

July 16, 1982

DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

On February 1, 1982, Administrative Law Judge Walter J. Alprin issued the attached Decision in this proceeding. Thereafter, Respondent and the General Counsel each filed exceptions and a supporting brief. Respondent and the General Counsel each filed an answering brief to the other's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.[2]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Arthur H. Fulton, Inc., Stephans City, Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

[1] Respondent and the General Counsel each have excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

In finding a violation of Sec. 8(a)(3), the Administrative Law Judge found, in the context of a credibility resolution, that Gregory Carder would not have been discharged "but for" his union activity. The Board no longer utilizes this terminology. Cf. *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980). However, the Administrative Law Judge also finds, with clear support in the record, that Carder was subjected to disparate treatment as to discipline and that Respondent's asserted reasons for the discharge were pretextual. We agree. See *Limestone Apparel Corp.*, 255 NLRB 722 (1981).

[2] In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

APPENDIX

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

WE WILL NOT discharge or otherwise discriminate against our employees in regard to hire or tenure of employment, or any term or condition of employment, because they engage in union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their right to engage in or refrain from engaging in any or all of the activities specified in Section 7 of the Act.

WE WILL offer Gregory Carder immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent job, without prejudice to his seniority or other rights and privileges, and WE WILL make him whole for any loss of earnings he may have suffered as a result of our discrimination against him, with interest.

ARTHUR H. FULTON, INC.

DECISION

STATEMENT OF THE CASE

WALTER J. ALPRIN, Administrative Law Judge: This case was heard at Winchester, Virginia, on July 31, 1981, and on August 25 and 26, 1981.[1] The charge concerning Gregory Carder was filed September 4 (amended September 5), and a complaint issued October 3. The charge concerning Ralph Hobday was filed October 16, and a complaint issued November 10. Respondent timely responded to both, and the matters were joined by order dated December 3. The issues involved are whether Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, by interrogating Hobday, and by discharging Hobday or Carder.

Upon the entire record, including my observations of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel and by Respondent, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Arthur H. Fulton, Inc., Respondent, is a Virginia corporation engaged in trucking, with its principal office at Stephans City, Virginia. During the 12 months prior to this proceeding it received gross revenues in excess of $50,000 for the interstate transportation of freight. Re-

[1] All dates are in 1980 unless otherwise indicated.

spondent admits, and I find, that it is an employer as defined by Section 2(2), (6), and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Actions Relative to Gregory Carder*

During the involved period, Respondent employed between 50 and 75 over-the-road drivers. For some time before the events described, there existed ill feeling between drivers and management but, though some drivers advocated unionizing, Respondent had not been successfully organized in its 15 years of existence.

Carder was hired as an over-the-road driver in February 1979. By October of the following year he had advanced in seniority to about 10th from the top, and had been recognized as a competent driver. In June 1980 the discussions among drivers of the possibility of organizing had reached a point where Carder, whose father was a union steward for another carrier in another State, decided with two other drivers, Bowman and Parrish, to investigate the extent of driver sentiment in favor of unionizing. During the latter part of June, and the early part of July, Carder sounded out a majority of the drivers, including Scott Goen, with whom he was then "riding double." Goen opposed the idea of unionizing and shortly after the conversation with Carder he approached Respondent's president, Arthur Fulton, suggesting that employee complaints be channeled to management through him, Goen, and that management distribute to the drivers a letter which Goen had prepared. Fulton authorized Goen to act as conduit for complaints, and offered to pay any long-distance phone charges. The letter which Goen had prepared, encouraging drivers to "maintain the unique status of being a nonunion company," was distributed to drivers on July 14, over Fulton's signature.

An incident occurred during the middle of July in which Carder objected to being dispatched south in the summer heat in an un-air-conditioned cab. He shouted to another employee that "if the union was in here, when we get the union in here, we would not have to put up with things of this sort." Fulton was 25 to 35 yards away at the time, within hearing distance, and he turned to look at Carder and then walked away. Though another witness verified the fact that some statement of that nature was made at this time, Fulton denies having heard it.

On August 1, Carder met with a union official of the local with which his father was affiliated, and was advised of the manner in which to go forward with organizing and the name of the union official to contact in the Virginia area.

On August 9, a Saturday, Carder returned to the trailer yard from a trip. His testimony is that he entered the yard in second gear, at or about 2 to 4 miles per hour, followed by another vehicle driving at the same speed. The driver of the second vehicle was not called as a witness herein. Fulton and his son Robert, Respondent's vice president, testified that they observed a vehicle entering the yard at an unsafe speed, and Robert Fulton went to the vehicle to see who was driving. Carder testified that, he saw Robert Fulton come up, told Fulton that he had a cracked side-view mirror, which he had discovered upon returning to the vehicle from lunch at the Pennsylvania Turnpike "Breezewood Interchange" a few hours before, and that Fulton's only comment was to "write it up" so that it would be repaired. Robert Fulton's testimony is that he discovered the damage himself, and that he then followed normal procedure by preparing a "Notice of Observation" as to entering the yard at excess speed, also noting "Broken mirror driver's side. He said someone hit it at Breezewood. Did not call in to report it." He placed the notice of observation on the desk of Safety Director Barney, who was not at work that day.

Carder was scheduled to be dispatched the following day, Sunday, August 10, but since he had just returned he requested not to be dispatched until Monday, August 11. On that day he phoned the dispatcher to determine the destination of his next trip. The dispatcher advised it would probably be Detroit, and told him to phone again in the afternoon. In the interim, Carder phoned the Virginia union representatives and arranged for a meeting of drivers 2 weeks later.

In the afternoon, Carder again phoned the dispatcher, who advised that he would not be dispatched until he had spoken to Safety Director Barney, to whom the call was then transferred. Carder's testimony of the ensuing conversation is that he asked why he was not being dispatched, that Barney told him to come in and speak with him in person, that Carder wanted to speak then and there by phone, that Barney insisted he come for a personal interview, that Carder told Barney he recognized that this was the manner in which a driver was fired, and that Barney responded, "You are right, you are fired." Carder's testimony continues that, when asked, Barney stated the reasons for being fired were "a few problems with your logs and all, and Art's seen you come in the yard too fast," and that Barney could not "stand up for him" because, in Barney's words, "It came from over my head. It came from higher up." Carder testified that he then requested a letter specifying why he had been fired, and was promised that such a letter would be sent.

Barney's version of the conversation is similar as to insisting that Carder come in for a personal interview, but denies that he then had any present intention to or did fire Carder. Barney testified that Carder made a second phone call, at a later date, during which Carder again refused to come for a personal interview, requested a letter specifying the grounds for dismissal, and accused Barney of firing him because of union activities.

On August 28, Barney sent Carder a letter specifying the following as the grounds for dismissal:

1. An instance of load damage.
2. Failure to turn in logs for entire month of May.
3. Being reported by Ohio authorities as 2 days behind in maintaining logs.
4. Failure to turn in logs July 28–31.
5. Entering yard August 9 at excessive speed.
6. Failure to report broken mirror accident.

The disciplinary portion of Carder's personnel record, as kept by Respondent, is in the following form, and indicates:

> *July 26, 1979*: Overweight in Tenn. $56.25; action taken: Investigation proved Gregg not at fault. Company reimbursed.
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> *Aug. 10, 1979* (1): Greg pulled from Detroit, had load damage $114.84; action taken: Gregg said he felt he caused damage due to tired and in a hurry.
>
> *Jan. 15, 1980*: Ticket for tailgating in Ohio; action taken: Verbal warning and ticket copy in file.
>
> *July 21, 1980* (3): Damaged load $6.10; action taken: Deduction from pay. Copy on file.
>
> *April 25, 1980* (2): Load damage 25 cases; action taken: NOT deducted from pay.
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> *May 31, 1980*: No logs turned into company for month of May; action taken: Personnel Dir. Fred Zimmerman request these logs or duplicate copies be produced.
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> *June 2, 1980*: Ohio PUCO gave Gregg a written warning—Logs two days behind; action taken: Copy in file.
>
> *Aug. 18, 1980*: Paycheck held for logs not turned in July 28, 29, 30, 31; no action taken.
>
> *Aug. 9, 1980*: Observation by Art & Bob Fulton excess speed entering Steph. City terminal. Drivers side mirror broken; action taken: Copy in file. Gregg said mirror got hit at Breezewood. Did not report until arrival at terminal. Write-up.
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> *Aug. 11, 1980*: Phone call from Gregg asking why I needed to see him? Gregg asked if I was going to fire him?; action taken: I told Gregg I would rather see him in person but since he anticipated my intentions I would tell him by phone. I suggested he come in and discuss the situation or let me know and I would mail a copy.
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> *Aug. 28, 1980*: Letter on termination sent.

As to the entry dated May 31, 1980, relating to logs for the month of May, it is Carder's undisputed testimony that Personnel Director Zimmerman asked about these logs in August, the week Carder was fired, that Carder told him such logs had been timely submitted in the usual manner, by putting them through a slot in the door, but that if they were missing he would prepare duplicates from his copies. He was thereafter dispatched on a trip, and fired prior to being about to do so.

The erratic numbering, and failure to continue numbering, is as appears on the original document. Barney testified that he entered the material dated August 9 on August 11, his next day at the terminal, from information on the report of observation, and entered the material dated August 11 on that day, after the phone conversation with Carder.

Records and testimony establish that without being fired other drivers have on occasion turned in logs late, or entered the terminal at excessive speed, or, in one instance, failed to report that lights were sheared off the side of a trailer. It was also established that Respondent had a progressive system of discipline, which, however, was frequently not followed. Respondent's policy requirements include that logs be turned in on time, that any accident be reported immediately, and that any damage whether or not accidental be reported immediately. General policy was to withhold pay until delinquent logs were filed.

B. *Actions Relative to Ralph Hobday*

Hobday was hired as an over-the-road driver in July 1979. In late August or early September 1980, Hobday attended a union meeting, and signed an authorization card. He distributed cards to two other drivers.

On September 28, Hobday was operating a tractor-trailer on the Pennsylvania Turnpike. His testimony is that, while going uphill and attempting to downshift gears, the throttle return spring broke, causing a rush of fuel to the engine, resulting in a marked increase in engine revolutions per minute before he could stop the engine and pull off the road. He replaced the spring, but when the engine restarted it had a miss, and he drove only 3 or 4 miles to a point where he could phone for assistance. He was provided another tractor, and completed his run. The disabled tractor was towed to a manufacturer's representative for repair, in the belief that the engine failure was covered by warranty.

Mechanical inspection of the engine showed damage which could have only been caused by an overspeeding of the engine; i.e., increasing RPM over the operable limit. Expert testimony is that there are only two ways in which this could have occurred in the involved vehicle—either the throttle raced the engine while the governor protecting against such occurrence by cutting off the fuel was defective, or the engine was raced by the effect of gravity while traveling downhill. Inspection showed the governor to be operating properly, and expert testimony is that the damage could not have been induced in the manner described by Hobday. Barney testified that personal examination of the area where the incident took place revealed a downgrade nine-tenths of a mile long, of from 2.3 to 2.9 percent, which he describes as "fairly steep."

Hobday had previously complained that the vehicle was using too much oil, and that the governor was not operating properly. On May 23, 1980, the manufacturer's representative repaired a fuel leak and replaced a "tach drive," which is part of the fuel pump. As part of the repair it was necessary to recalibrate the governor.

In February 1980, Hobday had been operating another vehicle when the stem broke off a valve, but he was not disciplined for that occurrence. It is general company policy not to discipline a driver for mechanical defects or damages resulting from other than driver fault or negligence. Three other drivers who had willfully or carelessly damaged their equipment had been fired by Respondent prior to Hobday.

On October 6, Hobday was told that he would have to speak to Barney before he could be dispatched. Barney asked for details regarding the engine damage, and Hobday repeated his statement. They argued the point for a time, after which, according to Hobday's testimony, Barney inquired whether Hobday had attended the recent union meeting, to which Hobday responded in the affirmative. Barney's testimony was that he had no idea

of Hobday's union activities, which I take to constitute a denial of the alleged interrogation. The interview concluded with Barney advising Hobday that he was being fired for negligently damaging his vehicle.

C. *Discussion*

The General Counsel alleges that the true reason for the discharges was the protected activities of the workers involved, while Respondent alleges that it was unaware of prounion activities in general or by these employees specifically, and that the employees were discharged solely because of their disciplinary records.

I find that Respondent was in fact aware that employees were engaging in protected activities prior to the discharge here. The letter drafted by driver Goen and adopted by management clearly identifies unionism as the threat to the status quo, and the Employer may not now be heard to say that it was unaware of the protected activity until later notified by the Union.

I also find that Respondent was in fact aware prior to his discharge that Carder was involved in the protected activity. I credit Carder's testimony that Arthur Fulton overheard his prounion outburst, and that he would not have been discharged but for his union activity. Of the six grounds stated in the letter of Carder's discharge, four were common to a number of undischarged drivers. A fifth, failure to turn in logs for the entire month of May, was not called to anyone's attention until August, was categorically denied by Carder, and is suspect in view both of Respondent's policy of withholding pay when logs were only a few days overdue, and the fact that the entry is made on the discipline sheet prior to an entry for June even though it was not reported until August. The final ground alleged for discharge was failure to report an accident, which I recognize as an allegation of serious violation of company policy. However, the delay in reporting was no more than a few hours, Carder testified that he had not considered the cracking of a mirror while the vehicle was parked and unattended to constitute an accident, and other instances of the flexibility of policies have been noted. It is apparent that Respondent reached out to the occurrence, grasping it as an excuse for discharging an employee it knew to be active in a union organizational attempt. As to the time of the discharge, I find it to have been during the phone conversation of August 11, regarding which the Employer's report is, in part, "Gregg asked if I was going to fire him? [sic] . . . I told Gregg I would rather see him in person but since he anticipated my intentions I would tell him by phone." While the Employer may argue it was willing to later rescind the discharge if the employee physically came to a discussion, there is no doubt that both the Employer and the employee considered the discharge a *fait accompli* at the time of the phone conversation.

Finally, I find that Hobday was not interrogated prior to his discharge and that Respondent did not have knowledge of any protected activities on his part. The only evidence of interrogation is the disputed testimony of Hobday himself. In view of his other testimony as to the manner in which his engine was damaged being so completely refuted by credible expert testimony, I cannot accept Hobday's version of his conversation with Barney. Further, even if interrogated as alleged so that Respondent was aware of his having attended a union meeting, Respondent has adequately demonstrated that a company policy existed to discharge employees for negligently or willfully damaging equipment, and has successfully rebutted the General Counsel's allegations as to this employee.

THE REMEDY

Having found that Respondent engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

As I have found that Respondent unlawfully discharged Gregory Carder, I shall recommend that Respondent be ordered to offer him immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent job, without prejudice to his seniority or other rights and privileges. I shall further recommend that Respondent be ordered to make him whole for any loss of earnings he may have suffered as a result of the discrimination against him by payment to him of the amount he normally would have earned from the date of his termination until the date of Respondent's offer of reinstatement, less net earnings, to which shall be added interest to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).[2]

Upon the basis of the above findings of fact and the entire record in this case, I make the following:

CONCLUSIONS OF LAW

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

2. By discharging Gregory Carder because of his union activities, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[3]

The Respondent, Arthur H. Fulton, Inc., Stephans City, Virginia, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging or otherwise discriminating against employees in regard to hire or tenure of employment, or any term or condition of employment, because they engage in union activities.

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[2] See also *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[3] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their right to engage in or refrain from engaging in any or all of the activities specified in Section 7 of the Act.

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

(a) Offer Gregory Carder immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of earnings he may have suffered as a result of discrimination against him in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, timecards, social security payment records, personnel records and reports, and all other records relevant and necessary to a determination of compliance with paragraph (a) above.

(c) Post at its Stephans City, Virginia, place of business copies of the attached notice marked "Appendix."[4] Copies of said notice, on forms provided by the Regional Director for Region 5, after being duly signed by Respondent's representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 5, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

IT IS ALSO ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found.

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[4] In the event that 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."