

**Dorothy Land, an Individual Proprietor d/b/a Abbey Island Park Manor and Local Union No. 1038, United Brotherhood of Carpenters and Joiners of America, AFL-CIO and Nora Townsend and Sandra Voorhis.** Cases 29-CA-8110, 29-CA-8110-2, 29-CA-8621, and 29-CA-8829

15 August 1983

**DECISION AND ORDER**

**BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER**

On 15 December 1982 Administrative Law Judge Raymond P. Green issued the attached Decision in this proceeding. Thereafter, Respondent and the General Counsel filed exceptions and supporting briefs.

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,<sup>1</sup> and conclusions of the Administrative Law Judge and to adopt his recommended Order.

<sup>1</sup> Respondent has 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*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

Respondent has further excepted to the Administrative Law Judge's finding that Respondent's 17 December 1981 offer of reinstatement to Deborah Priscoe was not valid. The Administrative Law Judge based this finding, in part, on his belief that, at the time of her discharge, Priscoe was earning 15 cents an hour more than the minimum wage. But in its exceptions Respondent correctly points out that both Priscoe's testimony and Respondent's payroll records indicate that Priscoe was earning the minimum wage at the time of her discharge. However, as the parties did not litigate the issue of the validity of the offer of reinstatement, we are unable to decide this issue based on the present record. Under these circumstances, we leave the issue for compliance proceedings.

Member Hunter would not send this issue to compliance. Given that the Administrative Law Judge's sole reason for finding the offer of reinstatement invalid was based on a misreading of the record which we have now corrected, the offer appears to have been valid on its face. Accordingly, Member Hunter finds no basis for further proceedings on this issue and, in addition, he would toll backpay as of the date of the rejected offer.

The General Counsel has excepted to the Administrative Law Judge's finding that Catherine Timmes was not an agent of Respondent. The General Counsel contends that, in March 1981 when Timmes told Sandra Voorhis that she would not be rehired because she had been an instigator for the Union, Timmes was speaking as an agent of Respondent. We find no merit in the General Counsel's contention. It is undisputed that Timmes had no authority to hire employees, nor did any employee, including Voorhis, believe that Timmes had any authority over hiring. In fact, when Voorhis went to Respondent's office to inquire about being rehired, she went to speak to Respondent's owner, Dorothy Land, not Timmes, and spoke with Timmes only while waiting to see Land. Moreover, there was no evidence adduced that Timmes had in fact ever heard Land say that she would not rehire Voorhis because of her union activities or that Land ever knew of or condoned in any way Timmes' remarks. Under these circumstances, we find that, regardless of whether

**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, Dorothy Land, an Individual Proprietor d/b/a Abbey Island Park Manor, Island Park, New York, 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.

Timmes was an agent of Respondent for certain purposes, she was not an agent for Respondent as to the hiring process and her remarks constituted nothing more than her opinion, not imputable to Respondent.

**APPENDIX**

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

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

- To engage in self-organization
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To engage in activities together for the purpose of collective bargaining or other mutual aid or protection
- To refrain from the exercise of any or all such activities.

**WE WILL NOT** discharge employees because of their membership in or activities on behalf of Local Union No. 1038, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, or any other labor organization.

**WE WILL NOT** in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

**WE WILL** offer Deborah Priscoe immediate and full reinstatement to her former job or, if her former job no longer exists, to a substantially equivalent position of employment without prejudice to her seniority or other rights and **WE WILL** make her whole for any loss of

pay that she may have suffered by reason of our discrimination against her, with interest.

WE WILL expunge from our files any references to the disciplinary discharge of Deborah Priscoe on 23 June 1980, and WE WILL notify her that this has been done and that evidence of this unlawful discharge will not be used as a basis for future personnel actions against her.

DOROTHY LAND, AN INDIVIDUAL  
PROPRIETOR D/B/A ABBEY ISLAND  
PARK MANOR

## DECISION

### STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge: These consolidated cases were tried before me in Brooklyn, New York, on December 14 and 15, 1981, and February 1, 2, and 3, 1982. The charges in Cases 29-CA-8110 and 29-CA-8110-2 were filed by Local Union No. 1038, United Brotherhood of Carpenters and Joiners of America, AFL-CIO (herein called the Union), respectively on June 23 and 24, 1980. The charge in Case 29-CA-8621 was filed by Nora Townsend on February 3, 1981, and the charge in Case 29-CA-8829 was filed by Sandra Voorhis on April 16, 1981. A consolidated complaint was issued by the Regional Director for Region 29 on August 29, 1980, in Cases 29-CA-8110 and 29-CA-8110-2. Thereafter, the Regional Director issued a complaint in Case 29-CA-8621 on June 3, 1981, and he issued another complaint in Case 29-CA-8829 on October 15, 1981. On October 15, 1981, the Regional Director for Region 29 also issued an order consolidating all of the aforesaid complaints and on December 7, 1981, he issued a consolidated amended complaint which set forth, in a single document, all of the outstanding allegations being made against the Respondent.

After the trial opened, the parties reached an agreement on certain of the allegations and accordingly a partial formal settlement was executed by them and approved by me.<sup>1</sup> Therefore only a limited number of issues remained for resolution as follows:

<sup>1</sup> Pursuant to the settlement agreement, approved by the Board on November 16, 1982, counsel for the General Counsel reserved her right to offer evidence on the settled allegations insofar as they are relevant to the remaining allegations. In pertinent part, the Respondent agreed to cease and desist from:

- (a) Refusing to bargain collectively with any lawfully recognized or duly certified representative.
- (b) Unilaterally changing existing rates of pay or other terms or conditions of employment without affording an opportunity to bargain with any lawfully recognized or duly certified representative.
- (c) Promoting bargaining unit employees to supervisory positions in an effort to undermine a bargaining representative.
- (d) Interrogating employees concerning their membership, activities or sympathies for a union.
- (e) Offering, promising or granting wage increases and other benefits or improvements in working conditions for the purpose of inducing employees to refrain from becoming members of or supporting a union.
- (f) Informing employees that it would be futile for them to select a labor organization as their bargaining representative.

(1) Whether on June 23, 1980, the Respondent discharged its employee Deborah Priscoe because of her membership in and activities behalf of the Union.

(2) Whether, since on or about September 27, 1980, "Respondent refused to reinstate its employee Sandra Voorhis, after she had returned from maternity leave," because of her membership in and activities on behalf of the Union.

The Respondent asserts that it discharged Priscoe because she was absent from work for 3 days without notice. As to Voorhis, the Respondent contends that it has no maternity leave policy, that Voorhis left its employ to have a baby, and that she subsequently notified the Company that she had obtained other employment. The Respondent further asserts that, when she asked to be reemployed, there were no vacancies open to her and that in any event, because of her poor attendance record, it would not have taken her back.

Based on the entire record in this proceeding, including my observation of the demeanor of the witnesses, and after reviewing the briefs filed, I make the following:

### FINDINGS OF FACT

#### I. JURISDICTION

Dorothy Land is an individual proprietor of a home for the aged called Abbey Island Park Manor which is located at 40-29 Long Branch Road, Island Park, New York. The parties stipulated and I find that annually the Respondent derives gross revenues in excess of \$100,000 and purchases goods and materials valued in excess of \$50,000 which are transported and delivered directly to it from States other than the State of New York. Accordingly, it is concluded that the Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

#### II. THE LABOR ORGANIZATION INVOLVED

It was stipulated and I find that, at relevant times herein, Local Union No. 1038, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, was a labor organization within the meaning of Section 2(5) of the Act. It is noted, however, that on November 16, 1981, the parent organization of this Union withdrew the Local's charter and it became defunct.

#### III. THE ALLEGED UNFAIR LABOR PRACTICES

##### A. Background

It appears from the record that the organizational efforts of the Union commenced in April 1980 and that the employee who initially contacted the Union was Sandra Voorhis. During that month, Voorhis, along with employee Deborah Priscoe, solicited union authorization cards from various of the Company's employees, and on April 24, 1980, the Union filed a representation petition in Case 29-RC-4550. Thereafter, on or about May 17,

(g) Threatening employees with the closing of its business or other reprisals if they joined or supported a union.

(h) In any other manner interfering with, restraining or coercing its employees in their Section 7 rights.

1980, Voorhis left the Company to have a baby and she did not seek to return to work until September 27, 1980, well after most of the events concerning the Company and the Union had occurred.

In May 1980, Dorothy Land, after discovering the union activities of her employees, met with them on several occasions before the election was held. As set forth below in greater detail, the evidence establishes that Land told employees that she could not afford a union, that the advent of the Union would lead to the closing of the facility, and that she would prefer to enter into a private agreement with the employees rather than deal with a union. It was also established that during this month the Employer offered wage increases and other benefits to its employees, coupled with the statement that such improvements would be made whether or not the Union won the election.

On May 29, 1980, a secret-ballot election was conducted by Region 29 wherein the Union obtained a majority of the votes cast. Although not entirely clear, it appears that shortly after the election, in early June, a negotiation session was held between the Union and the Company wherein the Union tendered a form contract of the type it had with other employers.<sup>2</sup>

On June 17, 1980, a Certification of Representative was issued pursuant to which the Union was certified as the exclusive collective-bargaining representative in a unit defined as consisting of all full-time and regular part-time housekeepers, kitchen helpers, and general helpers, excluding office clerical employees, guards and supervisors as defined in the Act. By letter dated June 17, 1980, the Union formally requested bargaining and on June 19, the Company sent a letter to the Union agreeing to negotiate.

On June 18, 1980, the Company posted a bulletin advising employees that they were required to call in if they were going to be absent and further advising them that a 3-day absence without notification could be grounds for discharge.<sup>3</sup> On June 21, 22, and 23, Deborah Priscoe was absent from work and she was discharged by Land on June 23.<sup>4</sup> As will be described below, there is a dispute as to whether Priscoe gave proper or adequate notification of her absence. Land concedes that she was aware of Priscoe's interest in the Union prior to the latter's discharge.

Notwithstanding the Union's request for bargaining on June 17 and later on December 22, 1980, no further

<sup>2</sup> The Respondent asserts that this meeting was held on or about June 8, 1980. Deborah Priscoe's testimony also indicates that such a meeting took place in early June, inasmuch as she testified that on June 16, Land said to the employees, among other things, that she did not like certain clauses in the Union's contract. In any event, it does not appear that the date of this single negotiation session makes any difference to the outcome of the case.

<sup>3</sup> It appears that employees had previously understood that they were supposed to call in in the event they were going to be absent. However, it does not appear that this policy had previously been reduced to writing or that the employees had specifically been notified that a 3-day absence without notification would be grounds for termination. In fact, the evidence herein indicates that the Employer had tolerated a substantial amount of absenteeism from its employees, and that this bulletin was issued because the Union was voted in.

<sup>4</sup> Priscoe was not scheduled to work on June 18 and 19 and therefore was not present at the Respondent's facility when the "absence bulletin" was posted.

meetings were held despite the Company's expressed willingness to negotiate. This no doubt was due to some internal problems within the Union which ultimately led to the revocation of its charter on November 16, 1981.

On September 27, 1980, and again in March 1981 Voorhis asked for her job back. On each occasion her request was refused.

*B. Supervisory Status of Catherine Timmes*

Before setting forth a more detailed account of the events outlined above, it is noted that the status of Catherine Timmes is in dispute. In this respect, the General Counsel alternatively asserts that Timmes was a supervisor within the meaning of Section 2(11) of the Act or an agent of the Respondent. On the other hand, the Company asserts that Timmes was merely an office clerical employee and was not its agent.

As noted above, Dorothy Land is the owner of the Company which normally employs about 20 to 22 employees. In connection with the operation of the Company, her husband, Frank Land, does a major part of the hiring, although he does not appear to participate in the Company's day-to-day operations. Additionally, at the time of the events herein, Dorothy Land had two of her adult children working and living at the facility where they appeared to have exercised supervisory authority. The employee in question, Timmes, by all accounts spent most of her time in the office where she worked on patients' records and answered phones. She was hourly paid and was one of the most senior of the employees. Among the employees, she earned the highest hourly rate.

Much of the General Counsel's evidence concerning Timmes' status was abbreviated and conclusionary in nature. Typical of the evidence proffered was the testimony of Sandra Voorhis as follows:

- Q. And do you know Catherine Timmes . . . ?
- A. Yes
- Q. And who is she?
- A. A supervisor.
- Q. And what does she do?
- A. She works in the office.

\* \* \* \* \*

Q. What from your observation, does Cathy Timmes do at Abbey Island Manor while you were employed there?

A. Well she worked in the office. She did paper work. We go to her when we have a problem with something, and she makes out work schedules.

Q. If you—does she check your work?

A. Sometimes.

Q. If you want a day off, whom do you ask?

A. I would ask Cathy Timmes.

Q. Would she give you the day off when you asked?

A. Most of the time.

Q. Were there occasions when you did that?

A. Yes.

\* \* \* \* \*

Q. Did you ever forget to punch your time card?

A. Yes, I did.

Q. And what did you do if you forgot to punch your time card?

A. I brought my time card to Cathy Timmes and she would write what time I came in and put her initials next to it.

Q. Did you wear a uniform?

A. Yes, I did.

Q. Did Cathy Timmes wear a uniform?

A. No.

Q. If you had a problem with a patient or a problem with the work that you were doing, whom would you go to?

A. Cathy Timmes.

In similar vein, Maria Castro testified for the General Counsel as follows:

Q. Do you know who Cathy Timmes is?

A. She is a supervisor of the building of Abbey Manor.

\* \* \* \* \*

Q. What did Cathy Timmes do as far as you know at Abbey Island Manor?

A. What I know and understand is that she was taking care of the phone, she was taking care of the books. She made for the girls the schedule and if we had any problems we went to the office to tell her.

Q. Did you wear a uniform?

A. Yes.

Q. Did Cathy Timmes wear a uniform?

A. No, she dressed in a regular dress.

Q. Did you wear a nameplate?

A. Yes, Maria Castro.

\* \* \* \* \*

Q. Did Cathy Timmes wear a nameplate?

A. Yes. I made it myself that plate to identify myself. Cathy said to me, Maria that is nice, you make one for me. Cathy gave me \$3.20 for me to make it for her. I make one for Cathy and one for John Santora.

Q. What did Cathy tell you to put on the nameplate?

A. Cathy Timmes, Supervisor. The girls say Cathy you supervisor, its a big deal.

Q. And did you do that for her?

A. Yes. She ordered me to do it.

Q. And do you recall when that was?

A. In 1979 before Christmas around November

Q. Did Cathy wear it?

A. Yes.

Timmes was called as a witness by the Respondent and testified that she worked mainly in the office where she answered the phone and handled patient records. She testified that, to the extent that she got involved with other employees, such involvement merely was to relay messages from employees to Land or from doctors and Land to employees. She testified that she had no authority to hire, discharge, layoff, suspend, promote, or give rewards to employees, and there is no evidence in this record to suggest that she either had the authority to do or recommend such actions. Nor is there any evidence in this record to suggest that she could discipline employees or that she could assign or direct the work of others. To the extent that certain of the General Counsel's witnesses testified that they went to Timmes with "problems," the record is barren as to what specific types of problems were involved or what she could do about them. While there is some evidence to the effect that Timmes has, on occasion, initialed timecards, there is evidence that this has also been done by other employees as well. With respect to employee schedules, Timmes testified, without contradiction, that employees have fixed schedules but are free to switch their scheduled days off among themselves. She asserts that, although she may be notified by the employees of such switches, she neither approves or disapproves them. Similarly, while employees may call in to her when they cannot come to work, this appears to be merely a function of her proximity to the telephone. As to the nameplates described by Maria Castro, Timmes testified that the nameplates were Castro's idea, that she asked Castro to get her one, and that Castro was the one who put the title of supervisor on it. She further testified that she never wore the nameplate.

With respect to the status of Timmes, it is my opinion that the evidence presented does not tend to establish that she exercised any of the supervisory indicia set forth in Section 2(11) of the Act.<sup>5</sup> As such, it is my conclusion that this employee basically performed office clerical functions and was not a supervisor or agent as defined in the Act.<sup>6</sup>

<sup>5</sup> Sec. 2(11) of the Act states:

The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

<sup>6</sup> I do not view as apposite the cases cited by counsel for the General Counsel to support her contention that, even if Timmes is concluded not to be a supervisor, she must nevertheless be held to be Respondent's agent. In *Classic Industries*, 254 NLRB 1149 (1981), the individual in question was held to be a supervisor within the meaning of Sec. 2(11) of the Act. In *Clevenger Logging*, 220 NLRB 768, 778 (1975), there was undenied testimony that a Mr. Carrell, who regularly transmitted orders and information to employees, had told an employee that he had been instructed by management to notify the employees that they would be discharged if they attended a union meeting. Although concluding that Carrell was not a supervisor, the Administrative Law Judge held, *inter alia*, that as the respondent did not deny that it had instructed Carrell to convey this message it was bound by his threat.

*C. Operative Facts—April to June 23, 1980*

As noted above, it was Sandra Voorhis who had the initial contact with the Union in early April 1980. She testified that on April 11 (more likely May 11)<sup>7</sup> she attended a meeting called by Land with various of the employees in the basement of the Company. According to Voorhis, Land said that she had received a call from the Union and that there was no way there could be a union at the Company because, if a union came in, the Company would have to close. Voorhis testified that Land asked the employees what they wanted, whereupon some of them made suggestions. According to Voorhis, Land wrote down the suggestions and told the employees that, although she could not promise anything, she would see what could be done. As far as raises are concerned, Voorhis testified that Land said that, when she received increased rates from the residents, she would give raises to the employees. Voorhis also testified that on or about May 10, 1980, Timmes asked her if she knew anything about the Union, stating that she had received a call from someone from the Union. Voorhis stated that she replied in the negative to Timmes' question.

Nora Townsend<sup>8</sup> testified that in early May 1980 Land approached her and said that she understood the employees were going to vote for a union. She stated that Land said that she had been in business for a long time and she did not want a union telling her what she could or could not do with her business. Townsend further testified that Land said that she would offer whatever the Union offered in order to change the employees' minds.

Deborah Priscoe testified that in early May 1980 Land told her that she did not want a Union and that she would like to make a private contract with the employees. According to Priscoe, Land said that she would give the employees a 50-cent raise, major medical insurance, longer vacations, sick days, and personal days off with pay. Priscoe stated that Land asked her if she (Priscoe) could arrange a meeting with the employees, and that such a meeting was thereafter held at Nora Townsend's home on May 22, 1980. According to all the witnesses, Land, at this meeting, told the employees present that she would give wage increases and other benefits. Land further told the employees that such benefits would be granted with or without a union.

Following the election on May 29, Land offered Priscoe, then a kitchen aide, a supervisory position. This occurred on or about June 19, and in connection therewith Priscoe was offered a raise and the opportunity to take a dietician's course at the Respondent's expense. Priscoe testified that Land told her that, if she accepted the supervisory position, she could not be in the Union. Priscoe indicated that she would like to think about the offer.

During the month of June, the Respondent posted a number of bulletins. One dated June 11, 1980, granted a compensatory day for employees scheduled to work

during a 7-day period in which a holiday fell. Another bulletin, dated June 16, promoted six employees, including Priscoe, to supervisory positions to be effective on July 1, 1980. However, this bulletin and the promotions were retracted before becoming operative, apparently in response to the Union's objection. Another bulletin, dated June 18, notified the employees of a policy relating to absences and stated, in substance, that employees who were absent for 3 successive days without notifying the Company could be summarily dismissed. As noted above, although the evidence indicates that employees were aware that they should call in if they intended to be absent, the evidence also indicates that a precise formulation of an absentee policy and the possible penalties had not been set forth prior to this June 18 bulletin.<sup>9</sup>

In the meantime, on June 16, Land held a meeting with some of the employees wherein she asked why they had voted for the Union in light of the offers she had made at Nora Townsend's house. Priscoe, for her part, asked Land why she did not want to deal with the Union if she were willing to offer comparable benefits, to which Land expressed dissatisfaction with certain of the Union's contract proposals. Priscoe also informed Land, after the conclusion of the meeting, that she would not accept the supervisory position as she wanted to "stay with the girls."

As previously stated, on June 17 the Regional Director for Region 29 issued a Certification of Representative on behalf of the Union, and shortly thereafter the Union transmitted to the Company a formal request for bargaining.

*D. The Discharge of Deborah Priscoe*

On June 19 and 20, Priscoe was not scheduled to work and her next scheduled days were on June 21, 22, and 23 (a Saturday, Sunday, and Monday). According to Priscoe, on Friday evening (June 20) she felt ill and called the following morning. She stated that she placed a call to the phone in the Respondent's hall outside the office as per her normal custom.<sup>10</sup> She further stated that she then spoke to John Santora, the maintenance man, and told him that she was not feeling well and to advise the office that she would not be in on Saturday, Sunday, and possibly Monday.

John Santora, however, denied that Priscoe called him at that or any other time to advise the Company that she would be out sick. He testified that during that week he was on vacation, and that on the day in question he had gone to the city to see some movies. Santora's testimony, however, was marked by considerable confusion and although it is clear that he was, in fact, on vacation there was testimony that he lives near the Respondent's facility and often goes there to socialize with employees during his off hours. Quite frankly, in view of my observation of

<sup>7</sup> Based on the record as a whole, it is my opinion that Voorhis may have been confused about the date of this meeting.

<sup>8</sup> Nora Townsend had been discharged by the Company on January 6, 1981. Although she filed an unfair labor practice charge which alleged, *inter alia*, the discriminatory nature of her discharge, that allegation was not pursued by the General Counsel.

<sup>9</sup> Additionally, bulletins were posted on June 19 and 23. The former dealt with visitations to employees at the facility and the latter announced that employees would receive paychecks for their vacation period before rather than after their vacations began.

<sup>10</sup> There is also a phone in the office which is connected directly to Land's home. Thus, as Priscoe knew the number of the office phone, she could have contacted Land at home by dialing this number.

his demeanor and considering the confused nature of his testimony, I shall not rely on it one way or the other.

On Sunday, Priscoe remained away from work and did not call in. On Monday, she also decided to stay home. According to her testimony, on that morning she made another call to the hall phone and again spoke with John Santora, asking him to advise the office that she would not be in. She stated that, about 20 minutes after the call, Santora called her back on some other matter, and she again reminded him to advise the office that she was not coming in. She stated that the reason she reminded him again to notify the office was because Santora was considered to be "slow."

In any event, it appears that Santora did not notify Land or anyone else of Priscoe's calls,<sup>11</sup> and at some point after Priscoe's starting time Land called her and asked why she had not come in and why she had not given notification. When asked, Priscoe concededly gave an answer in a sarcastic manner, asking whom she should have called. At that point, Land told Priscoe that she was discharged.

#### E. *The Alleged Refusal To Rehire Sandra Voorhis*

As noted above, Sandra Voorhis left the Company on May 17, 1980, to have a baby. She stated that, at or about the time she left, Land told her that she was a good worker and that she hated to lose her. She also stated that, before she left, she told Timmes that she would return to work when the baby was 8 weeks old.<sup>12</sup>

According to Voorhis, her baby was born on July 28, 1980, and in August she got a temporary job at another company instead of resuming her job with the Respondent. Indeed, in September, Voorhis notified Timmes that she was working elsewhere, although she allegedly told Timmes that she nevertheless planned to return. According to Voorhis, Timmes' response was, "fine."

Sandra Voorhis testified that on September 27, 1980 (when the baby was 8 weeks old), she called the Respondent to find out when to resume work. She stated that she spoke with Land who told her that her job had been filled and that she would let Voorhis know when an opening occurred.<sup>13</sup>

According to Voorhis, she had no further contact with the Respondent until sometime in March 1981 when she called and spoke to Frank Land about returning to work. She stated that he told her that there were no openings. Not satisfied with that response, Voorhis went down to the facility and spoke with Timmes. According to Voorhis, she asked Timmes what was going on, whereupon Timmes said that she did not know, but that there was some investigation going on, and that the Union had

caused a lot of problems.<sup>14</sup> Voorhis recounted Timmes as saying that Dorothy Land was in and out of court and that she could not hire or give raises or do anything at that point. According to Voorhis, Timmes then said, "Mrs. Land likes you . . . personally, but it is because of the Union, because your name came up as an instigator for the Union." Voorhis testified that, after Timmes made this statement, Dorothy Land came into the office and told her, "I like you personally . . . but we would rather not deal with you anymore because of your poor attendance." According to Voorhis, she told Land that other people whose attendance records had been even worse than her own had been rehired in the past. She stated that Land responded by saying that she had an obligation to those people.<sup>15</sup>

Notwithstanding the fact that during March 1980 and thereafter a substantial amount of hiring took place, the Respondent asserts that it chose not to rehire Voorhis because of her past poor attendance record. In fact, Voorhis' attendance record during the period of time that she worked at the Company was not particularly good<sup>16</sup> and she conceded that Land had, on various occasions, complained about her absenteeism. Counsel for the General Counsel, however, sought to counter this assertion by showing that other employees with similar absentee records had been rehired by the Respondent after having been away from the Company for various periods of time. In this respect she cites as examples, Elizabeth Filardo, Hilda Sheffield, Marilyn Lufkin, Ruth Krantz, and Margie Cobian.

#### IV. CONCLUDED FINDINGS

The General Counsel contends that the discharge of Deborah Priscoe on June 23, 1980, was motivated by her activities on behalf of the Union and that the refusal to rehire Sandra Voorhis on September 27, 1980, and later in March 1981 was motivated by the same considerations. The Respondent denies these allegations, contending that Priscoe was discharged because of her failure to notify it of her absences from work on June 21, 22, and 23. As to Voorhis, the Respondent argues that, after she left the Company's employ on May 17, 1980, it filled her position and that it chose not to rehire her when she so requested because of her past attendance record.

In cases such as this, the principal issue concerns motivation and in such cases direct evidence of unlawful intent is rarely available.<sup>17</sup> Accordingly, it is necessary to ascertain the employer's intent from the totality of the circumstances. Whereas the discharge of an employee or the refusal to hire an employee because of his or her union activities is unlawful, an employer may take such

<sup>11</sup> Nora Townsend testified that on Monday, June 23, Santora told her that he had gotten a call from Priscoe but he did not relay her message.

<sup>12</sup> There is no evidence that the Company had any type of maternity leave policy. At most, the evidence shows that other employees have, at times, been rehired by the Company after being away for extended periods of time.

<sup>13</sup> The payroll records show a significant amount of turnover during the summer of 1980. However, in September only one person was hired, and that individual (Jaime Munroe) was hired before Voorhis asked for her job back. Between September 27 and December 31, 1980, there was only one person hired, that person being Donna Mook, who was hired on October 13, 1980.

<sup>14</sup> Nora Townsend's charge in Case 29-CA-8621 was filed on February 3, 1981, and was still under investigation at the time of this alleged conversation.

<sup>15</sup> According to Voorhis, she mentioned Margie Cobian and Ruth Krantz as having worse attendance records.

<sup>16</sup> The General Counsel calculates that during 1979 Voorhis was absent about 31 percent of the time and that in 1980 she was absent about 15 percent of the time.

<sup>17</sup> *NLRB v. Hotel Tropicana*, 398 F.2d 430, 435 (9th Cir. 1968).

actions for any other reason so long as its motivation is not tainted by union considerations.<sup>18</sup>

In Priscoe's case there is no issue as to the fact that she was absent from work on June 21, 22, and 23. Also, while I am inclined to believe that she called in to report that she would be absent, I am also inclined to believe that John Santora failed to transmit Priscoe's message to Land or to the office. Thus, it is my opinion that on Monday morning (June 23) Land was not aware of Priscoe's notification and she called Priscoe at home to find out why she was absent. There is also no dispute that when Land spoke to Mrs. Priscoe, the latter answered in a sarcastic manner when she was asked if she had given notification of her absence. At this point, Land told Priscoe that she was discharged.

Although the facts upon which the Respondent rests its defense are essentially not disputed, I nevertheless find it difficult to believe that those facts were, in reality, the motivating reason for Priscoe's discharge. In the first place, it is clear to me that absenteeism among the Respondent's employees was unusually common and it was not until June 18, 1980, after the Union won the election, that the Respondent unilaterally imposed any firm rules regarding that subject. In this respect the evidence indicates that it was on June 18 when the Employer posted a bulletin notifying its employees, for the first time, that their failure to notify the Company when they were absent for 3 days could lead to dismissal. Thus, the posting of the bulletin discloses to me a departure from the Respondent's past practice, and in my opinion this bulletin, along with the others posted in June, was unilaterally issued in response to the fact that the Union had won the election. Accordingly, it seems evident that, among other things, the Respondent, by issuing these bulletins, was attempting to set the groundwork for its forthcoming negotiations with the Union and was seeking to tighten up its work rules before its freedom to act was circumscribed by a potential union contract.

Secondly, Priscoe's discharge did not occur in a vacuum, but took place against a background of other unlawful conduct, thereby indicating Respondent's willingness to retaliate against employees who supported the Union. The credible evidence establishes that the Respondent, in response to the Union campaign, threatened to close the facility,<sup>19</sup> attempted to bypass the Union by seeking to negotiate a private contract directly with its employees, and offered wage increases and other benefits to its employees.<sup>20</sup> Moreover, the evidence indicates that Land sought to use Priscoe as an intermediary between herself and the other employees, as when she asked Priscoe to set up a meeting at Nora Townsend's house where Land presented her offers.

Further, despite the fact that the Respondent placed emphasis on Priscoe's absences in the months before June (mainly due to illness), those absences did not prevent it from offering Priscoe a supervisory position shortly

before her discharge. Indeed, it is my opinion that the principal cause for Land's objections to Priscoe's continued employment was not the absences of June 21, 22, and 23, but rather the fact that Priscoe had elected to "stay with the girls" within the unit represented by the Union, her rejection of Land's offer to make her a supervisor, and the failure of Land to convince her and the other employees that unionization was not to their benefit. In short, while I can see some justification in Land's irritation at Priscoe's sarcastic response on June 23, I do not believe that this was the real reason for her discharge. Rather, it is concluded that but for Priscoe's union interest, of which Land admittedly was aware, she would not have been discharged. Accordingly, it is my opinion that, by discharging Deborah Priscoe on June 23, 1980, the Respondent violated Section 8(a)(1) and (3) of the Act.

As to Sandra Voorhis, although the complaint appears to allege that she was not reinstated after being out for maternity leave, the General Counsel now asserts that the Respondent violated the Act by refusing to rehire her in September 1980 and/or March 1981. That is, the evidence discloses that the Respondent did not have a maternity leave policy and that, when Voorhis left in May 1980 to have her baby, no commitment was made to reinstate her after the baby was born. Thus, in September 1980, Voorhis stood in essentially the same position as any other job applicant, especially as she had previously notified the Company, after her baby was born, that she had obtained employment elsewhere.

In Voorhis' case it must be recalled that she was the employee who had the first contact with the Union and who did a good deal of the initial organizational work along with Deborah Priscoe. However, Voorhis left the Company on May 17, well before the election, and therefore did not play any role thereafter on behalf of the Union.<sup>21</sup> Moreover, there is some doubt as to whether the Respondent was aware of Voorhis' union activities as she engaged in this activity in a secretive manner.

On September 27, Voorhis asked for her job back (after leaving her other job), but was told that her position had been filled. There is, in fact, no doubt in my mind that the Respondent replaced Voorhis because it needed someone to fill her position and the General Counsel has not shown to my satisfaction that any job for which Voorhis was qualified, was available at the time she asked to be reemployed. Thus, between September 27 and December 31, 1980, only one employee was hired, this being Donna Mook, who was hired on October 13, 1980.

According to Voorhis, she did nothing to get her job back from September 27, 1980 until sometime in March 1981. At that time, according to Voorhis, she had a conversation with Timmes who told her that, although Land liked her personally, Land did not want to take her back because she was involved in a legal dispute with the Union,<sup>22</sup> and had learned that Voorhis was the union in-

<sup>18</sup> *Lawson Milk Co. v. NLRB*, 317 F.2d 756 (6th Cir. 1963); *Auto-Truck Federal Credit Union*, 232 NLRB 1024, 1027 (1977).

<sup>19</sup> See, e.g., *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

<sup>20</sup> See, e.g., *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964); *NLRB v. Broyhill Co.*, 514 F.2d 655 (8th Cir. 1975); *Lasko Industries*, 217 NLRB 527 (1975).

<sup>21</sup> After the Union won the election, Nora Townsend, another employee, was chosen to be the Union's shop steward.

<sup>22</sup> As noted above, the charge in Case 29-CA-8621 was filed by Nora Townsend on February 3, 1981.

stigator. Obviously, if I had concluded that Timmes was a supervisor or agent of the Respondent, I would have to conclude that the Respondent's refusal to rehire Voorhis was illegally motivated if I credited Voorhis' account. Nevertheless, although I am inclined to credit Voorhis' testimony, I do not believe that the General Counsel has made a sufficient showing that Timmes either was a supervisor within the meaning of Section 2(11) of the Act or an agent whose remarks were binding on the Respondent. At most, it was established that, at the relevant times herein, Timmes was an office clerical employee who from time to time transmitted messages back and forth between the employees and Land. Also, while I have no doubt that Timmes' loyalty rested with the Employer, I do not believe that the evidence is sufficient to establish that she was speaking for or on behalf of Land when she spoke with Voorhis in March 1981.

Although various employees were hired by the Respondent after March 1981, there was no legal duty on the Respondent to offer Voorhis one of those jobs. While the evidence in this case shows that other employees who have had poor attendance records have been rehired by the Respondent, I am not persuaded, in the circumstances of this case, that the Respondent's refusal to rehire Voorhis, whose absentee record was decidedly poor, was unreasonable or motivated by illegal considerations. In this regard, although Voorhis was the initiator of the union campaign, she had left the Company before the election, played no role for the Union thereafter, and did not seek to return to work until September 1980 and March 1981, at times when there simply were no dealings between the Company and the Union. Indeed, by those times, the Union was making no effort to represent the employees of the Respondent, no doubt because it already was on the road to extinction. Although it might be conjectured that the charge filed by Nora Townsend in February 1981 rekindled Land's antiunion feelings, thereby resulting in her decision not to rehire Voorhis, it seems to me that such a theory, while conceivable, is far too speculative to base a finding that the Respondent violated the Act by refusing to rehire her. Therefore, to the extent that the complaint alleges that the Respondent illegally refused to rehire Sandra Voorhis, it is recommended that this allegation be dismissed.

#### V. THE REMEDY

The trial in this proceeding opened on December 14, 1980, but was adjourned on December 15, 1980, because, *inter alia*, the parties desired time to attempt to reach a settlement. Although ultimately only a portion of the case was settled, the Respondent, on December 17, 1981, sent a letter to Deborah Priscoe which read as follows:

Please take notice that I am offering you your old position back under the terms and conditions that you left said job (discharged for cause).

The rate of pay will be \$3.35 per hour. This offer in no way indicates any liability. Please reply within

seven days or I will consider your non reply to indicate a negative response to this letter.<sup>23</sup>

Priscoe did not reply to this letter.

The General Counsel contends that the offer of reinstatement was not valid and therefore should not be construed as tolling backpay or eliminate the requirement that the Respondent be ordered to offer reinstatement to Priscoe. I agree.

At the time of Priscoe's discharge the minimum wage was \$3.10 per hour but she earned \$3.25 per hour. During the intervening period of time from June 23, 1980, to December 1981, the minimum wage was raised to \$3.35 per hour and the payroll records indicate that those employees who were earning more than the minimum wage as of June 1980 continued to enjoy a differential after the minimum wage was raised. Indeed, the only employees who as of December 1981 were paid at the minimum rate of \$3.35 per hour were employees hired during that year. The remainder, except for Margarita Gatierriz who returned to work in May 1981 and who was earning \$3.50 per hour, were earning at least \$3.60 per hour. Thus, it seems certain and not a matter of speculation that had Priscoe not been discriminatorily discharged on June 23, 1980, she also would have been earning more than the minimum wage as of December 17, 1981. As the offer of reinstatement set her wage rate at the minimum level of \$3.35, it is concluded that the offer was not valid. *Carter Lumber*, 227 NLRB 730 (1977).

Based on the above, it therefore is recommended that the Respondent offer Deborah Priscoe full and immediate reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges previously enjoyed, and make her whole for any loss of earnings she may have suffered by reason of the discrimination practiced against her. Such earnings are to be computed in accordance with the formula set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest thereon to be computed in the manner prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977). See, generally, *Isis Plumbing Co.*, 138 NLRB 716 (1962).

Additionally, in accordance with *Sterling Sugars*, 261 NLRB 472 (1982), I shall recommend that the Respondent expunge from its files any reference to the discharge of Deborah Priscoe and notify her in writing that this has been done and that evidence of this unlawful discharge will not be used as a basis for future personnel actions against her.

#### CONCLUSIONS OF LAW

1. The Respondent, Dorothy Land, an Individual Proprietor d/b/a Abbey Island Park Manor, is and has been at all times material herein an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union involved herein was, until November 16, 1981, a labor organization within the meaning of Section 2(5) of the Act.

<sup>23</sup> A substantially similar letter was sent to Voorhis on the same date.

3. By discharging Deborah Priscoe on June 23, 1980, because of her membership in and support for the Union, the Respondent violated Section 8(a)(1) and (3) of the Act.

4. Except to the extent found herein, or otherwise settled pursuant to the terms of the related partial settlement agreement, the other allegations of the consolidated amended complaint are dismissed.

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

**ORDER<sup>24</sup>**

The Respondent, Dorothy Land, an Individual Proprietor d/b/a Abbey Island Park Manor, Island Park, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging employees because of their membership in or activities on behalf of Local Union No. 1038, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, or any other labor organization.

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

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

(a) Offer Deborah Priscoe full and immediate and reinstatement to her former position of employment or, if that position no longer exists, to a substantially equivalent

position, without prejudice to her seniority or other rights and privileges previously enjoyed, and make her whole for any loss of pay she may have suffered by reason of the discrimination against her in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Expunge from its files any reference to the discharge of Deborah Priscoe on June 23, 1980, and notify her in writing that this has been done and that evidence of this unlawful discharge will not be used as a basis for future personnel actions against her.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its place of business copies of the attached notice marked "Appendix."<sup>25</sup> Copies of said notice, on forms provided by the Regional Director for Region 29, after being duly signed by the Respondent's representative, shall be posted by the Respondent 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 the Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 29, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

<sup>24</sup> 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.

<sup>25</sup> 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."