University Sand & Gravel, Inc. *and* Richard E. Hubbell

University Sand & Gravel, Inc. *and* James E. Shaw, Petitioner and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 65. Cases 3-CA-11160 and 3-RD-777

27 April 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 18 January 1984 Administrative Law Judge Edwin H. Bennett issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel submitted an answering brief to the Respondent's 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 has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, University Sand & Gravel, Inc., Brooktondale, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

IT IS FURTHER ORDERED that Case 3-RD-777 be severed from the proceedings herein, and that the case be remanded to the Regional Director for Region 3 for further proceedings.

IT IS FURTHER ORDERED the the Regional Director for Region 3 shall, pursuant to the National Labor Relations Board Rules and Regulations, within 10 days from the date of this Order, open and count Richard E. Hubbell's ballot and thereafter prepare and serve on the parties a revised tally of ballots, on the basis of which he shall issue the appropriate certification.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent further contends that the judge was biased in that he prejudged the issues before him. We have carefully reviewed the entire record and the judge's decision in light of the Respondent's contentions and conclude that the contentions are without merit.

DECISION

STATEMENT OF THE CASE

EDWIN H. BENNETT, Administrative Law Judge. This proceeding was heard in Ithaca, New York, on July 18 and 19, 1983. The charge was filed by Richard E. Hubbell on August 4, 1982, and the complaint, which issued on March 4, 1983, alleges that University Sand & Gravel, Inc. (herein called Respondent) laid off and has failed and refused to recall Hubbell because of activities on behalf of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 65 (herein called the Union), in violation of Section 8(a)(3) and (1) of the Act.

The representation case was consolidated for hearing with the complaint by an order dated April 4, 1983, because Hubbell's ballot in a decertification election conducted on March 24, 1983, was challenged by the Board and it is a determinative vote, one vote having been cast for, and one against, union representation.

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

FINDINGS OF FACT

I. JURISDICTION

Respondent, incorporated under New York law, maintains its principal office and place of business at Lansing, New York, and a plant and place of business at Brooktondale, New York, where it is, and has been at all times material herein, engaged in the production, sale, and distribution of sand, gravel, and related products. Respondent annually sells and delivers such goods and materials valued in excess of $50,000 to several New York State enterprises which themselves are directly engaged in interstate commerce. The complaint alleges, Respondent admits, and I find that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. Further, it is admitted and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE UNFAIR LABOR PRACTICES

A. *Background*

In 1971 Louis Ettinger, a principal owner of several family owned businesses,[1] asked Glenn Strauf, a vice president in one of the companies, and in charge of operations of all the Ettinger enterprises, to find another business which Ettinger could purchase. Strauf, who retired in July 1980, arranged for Ettinger's purchase of Respondent, whose employees then were represented by the Union, a status which continued thereafter.

[1] The record is not entirely clear as to the extent of the companies owned by the Ettinger family. It appears that at least Highway Materials, Cayuga Services, University Sand & Gravel, and Roto Salt are included in this group.

Until the fall of 1982 Respondent also was engaged in the production and sale of redi-mix concrete in addition to its sand and gravel business. That process entailed transporting raw aggregate from Respondent's quarry and dumping it over a hopper where it then was fed along a conveyor belt system through a feeder, a crusher, and various screens which washed and separated the final product into five different aggregates, a portion of which was used to make cement for concrete.

Respondent's quarry operation is seasonal, closing in November and reopening around the first of April. However, the quarry produced and stored sufficient quantity of aggregate to maintain the concrete business for the entire year. Although quarry (or plant) employees were laid off during the winter shutdown, truckdrivers, who transported the concrete, were generally laid off only for a brief period or not at all.

In 1980 Respondent began a gradual elimination of redi-mix concrete portion of its business. Sometime in 1982, pursuant to a decision made in December 1981 or January 1982, Respondent finally terminated its production of redi-mix concrete although it continued to complete deliveries on preexisting orders into October of that year. Eventually, the four or five redi-mix trucks were sold or retired from service and the redi-mix drivers were terminated.

In any event, as of early February 1982, Respondent had only three unit employees, Hubbell, who was actively at work and was the most senior employee, and two employees on seasonal layoff: James Shaw (the Petitioner in the decertification case) and Walter Parker. Hubbell had worked for Respondent since 1964 as a concrete truckdriver and had been union steward since 1975. Prior to the alleged discriminatory layoff on February 5, 1982, he only had been laid off briefly during Christmas in 1980 and 1981. During his period of employment he had been assigned maintenance and cleaning work in the plant whenever there had been insufficient driving work, which generally occurred during the winter months. Shaw worked the upper end of the loader, and did welding, mechanical, and repair work. He had been laid off every winter, usually in November, and recalled in February or March. Parker, a 17-year employee, had begun employment as a driver. In 1980 he became primarily a plant employee who performed essentially unskilled labor loading the hopper with stone and gravel while continuing to drive a truck on occasion.

The management team in 1982 consisted of Susan Oakes, president, and John Rodgers, plant manager. Oakes is a daughter of the elder Ettinger and she assumed the role of president in April 1980 succeeding a brother who had held that position since 1977 following the death of their father.

B. *The Alleged Violation*

1. The plan of action

About the time Oakes became president she had a discussion with Strauf concerning the possibility of getting rid of the Union. Strauf credibly testified that Oakes asked him how he had eliminated the union at another of the family's concerns, a reference to a unionized operation where, Strauf explained, he eliminated union supporters and so reduced the work force that the union abandoned its interest rather than face a decertification election. He proceeded to tell Oakes that it would be necessary to terminate the "strong [union] men" in Respondent and obtain 30 percent in favor of a decertification vote. Oakes inquired if Hubbell, the union steward, was considered a strong union man as reported by her brother. Strauf answered affirmatively and Oakes thereupon instructed him to terminate Hubbell's employment at the first opportunity.

Strauf further testified that 3 or 4 weeks later Oakes again mentioned firing Hubbell. This conversation occurred as a result of an anonymous complaint to a government agency concerning the removal of fresh drinking water from the quarry and plant areas. Oakes correctly suspected that this complaint had been filed by Hubbell and informed Strauf that if he did not have sufficient reason to terminate Hubbell then she would. Approximately 1 month later Oakes again complained about Hubbell's continued employment with Respondent. On this occasion Strauf was requested by Oakes to perform bargaining unit work during an unusually busy day. Strauf consented, but when Hubbell protested that an employee should be recalled from layoff, Strauf relented and adopted Hubbell's demand. When Oakes was informed of this incident she told Strauf, "I thought you were going to get rid of him [Hubbell] and then we can run this thing ourself instead of the Union."

In crediting Strauf's testimony I am mindful that since his retirement he has been embroiled in several controversies and legal actions with Respondent and his motives for appearing as a witness might be less than pristine. Nevertheless, his high management position certainly placed him in a position of confidence to Oakes who, as the new chief executive, reasonably might have been expected to seek the advice, in any number of areas, from an "old trusted hand" who had served her father well. More importantly, Oakes did not deny Strauf's account of the various conversations, testifying only that she did not recall them. From my observation of Oakes I believe she was not disposed to deny outright that which she knew to be true, particularly such specific events as testified to by Strauf. Finally, the subsequent treatment of Hubbell, as discussed more fully below, notably the insubstantial justification profferred for refusing to employ him, lends credence to these earlier conversations.

2. The opportunity to act

On February 5, 1982, Hubbell observed a noncompany truck being loaded with concrete and complained of this to John Rodgers, the plant manager. In Rodgers' presence he called the Union's business agent to inform him of the situation. At the end of the workday, and without any prior notice, Rodgers told Hubbell he was laid off and that the concrete operations were closing. He never was recalled although, as noted, he was the most senior employee with 18 years on the job who had performed maintenance and plant work during periods when there was a reduced need for driving work. Oakes' reaction to

Hubbell's complaint was to file her own complaint with the Union, charging that Hubbell, by complaining to the Union, had violated the collective-bargaining agreement.

Respondent asserts that Hubbell's layoff was incident to its phasing out the redi-mix concrete operation. Indeed, and as noted above, the record fully supports Respondent's position that since about 1980 it had substantially reduced that portion of its business with a concomitant reduction in the number of drivers employed. Oakes and Rodgers testified that the decision to finally terminate the redi-mix business was reached in January 1982, although Rodgers also placed conversations with Oakes in this respect as having occurred in December 1981. Their testimony on this issue was vague and uncertain but clearly that decision was not made even remotely close to Hubbell's layoff on February 5, 1982. But, it also is clear that no new concrete business was entered into in 1982 and that during that year Respondent's redi-mix operation was limited to completing deliveries on preexisting orders. Nor does the General Counsel allege that Respondent violated the Act by eliminating the concrete portion of its business which was realized with certainty by October 1982.

On February 8, 1982, Shaw was recalled, followed by Parker's recall several weeks later. Shaw, without doubt, had mechanical skills Hubbell did not possess. Shaw could weld, repair equipment, and do skilled mechanical work, and on his recall he set about preparing the plant for spring production. I find the work Shaw performed on his recall required skills and abilities not possessed by Hubbell and that Hubbell was not capable of doing that work. In prior years, Shaw (a witness called by Respondent) had been recalled in March to do this work, but, as he explained, he required additional time in 1982 because of the absence of drivers to lend a hand.

Respondent defended its recall of Parker, rather than Hubbell, on the assertion that the former was a more skilled plant worker. Parker's uncontradicted and credible testimony establishes that until 1980 he had been a driver and since that time a quarry worker. On his recall he did assist Shaw in readying the plant equipment but he also drove the cement truck until the fall on occasion. Having been a coworker of Hubbell's for 17 years, he categorically denied having any greater or special mechanical skills than that possessed by Hubbell. Further, he testified that repair work was not his primary function. Both Parker and Hubbell testified credibly, and without substantial refutation, that over the years Hubbell had performed mechanical and repair work on equipment similar to that which Parker was required to do as a plant worker.

Significantly, Rodgers, a relatively new and inexperienced plant manager without mechanical skills himself, conceded that he made no effort to ascertain the level of Hubbell's mechanical abilities prior to recalling Parker. If more need be said on the subject, we need only look to Parker's replacement upon his retirement in May 1983. One Joseph Clair was hired and given 1 day of training by Respondent. There is no evidence that Clair has any special mechanical ability or that Respondent was concerned if he had such skills. In the 3 months Clair has been on the job he has not been assigned any mechanical work. Respondent has not explained why it did not recall Hubbell instead of hiring Clair.

III. ANALYSIS

A. *The Complaint Case*

The initial inquiry under the Board's *Wright Line*[2] test for determining an 8(a)(3) violation, such as is involved here, is whether or not the General Counsel has made a prima facie showing to support an inference that Hubbell's protected conduct was a motivating factor in his layoff or his discharge. In my opinion, a preponderance of the evidence unmistakably establishes that Respondent was unlawfully motivated when it laid off, hereinafter termed discharged, Hubbell and thereafter failed to recall him.

Hubbell had been a vocal and active union steward at Respondent for approximately 7 years. Since April 1980 when Oakes assumed the presidency of Respondent, Hubbell had complained about Respondent's activities to government agencies, the Union's business agent, and Respondent's plant manager. It is undisputed that Oakes was aware of these activities and visibly irritated by them, going so far as to file a protest with the Union about Hubbell at the time of his discharge. On a number of occasions, Hubbell's actions had forced Respondent to alter its operations, further annoying Oakes who expressed the desire to fire him in order to rid Respondent of the Union entirely. Indeed, Oakes had sought to eliminate the Union from the inception of her presidency and instructed Respondent's vice president, Strauf, on three separate occasions, to find an excuse to fire Hubbell. Thus, the evidence of hostility and animus is conclusive and overwhelming.

The timing of the discharge is further compelling evidence in concluding that Hubbell's protected activity motivated his discharge. Hubbell was fired on the very day that he complained to Respondent's plant manager and the Union's business agent about an alleged contracting out of bargaining unit work at a time when Respondent was in the process of eliminating a portion of its business. Oakes of course learned of this incident and Hubbell was fired that same day, without any advance notice.

Without more the foregoing, i.e., Hubbell's union activities, Respondent's animus towards the Union and Hubbell personally, the suspicious timing of the discharge, and the expressed directives by Oakes to fire Hubbell because of his union activity present a prima facie case of an 8(a)(3) and (1) violation. Accordingly, the *Wright Line* test shifts the burden to Respondent to establish by a preponderance of the evidence that it would have fired Hubbell and not recalled him for legitimate business reasons even absent his union activities. Respondent's defenses fail this test.

Respondent contends that Hubbell's discharge resulted from the economically motivated closing of the redi-mix concrete business. Both Oakes and Rodgers testified that the decision to terminate the concrete business and the

[2] *Wright Line*, 251 NLRB 1083 (1980).

implementation thereof was a gradual one. In light of this, it is incumbent on Respondent to link its phaseout of the redi-mix business to Hubbell's discharge on February 5, 1982. This it has not even attempted to do, for the record discloses no significant change in its methods of doing business throughout the entire year of 1982, or at least until October. Although Hubbell was the last remaining driver employed by Respondent the only event of any consequence occurring at the time of his discharge which might logically explain that action was Hubbell's complaint to the Union that day, and Oakes' demonstrated annoyance by it.

Further diminishing the force of its "business justification" is the fact that Respondent continued to make redi-mix deliveries until October 1982. While these may have been sporadic, it was Hubbell's work and if Respondent had followed past business practices Hubbell would have been assigned other work when not driving. Indeed, throughout January 1982, Hubbell was utilized precisely that way. Respondent's argument that Parker and thereafter Clair were more versatile and therefore more useful than Hubbell not only is unsupported by the evidence, but directly contradicted by it. Parker and Clair essentially were unskilled laborers and, to the extent Parker assisted in certain mechanical or repair work, it was work that Hubbell equally was capable of performing, and had performed.

It is unimportant that Parker was not recalled until several weeks after Hubbell's discharge. Initially, I have concluded the discharge was unlawfully motivated. Secondly, Hubbell's prior work experience would have made him quite suitable to assist Shaw, when not driving, on Shaw's recall immediately following the discharge. Finally, the recall of Parker in place of Hubbell, under the circumstances described above, serves only to strengthen the case for a discriminatory discharge rather than to invalidate it.

Accordingly, I conclude that Respondent violated Section 8(a)(3) and (1) of the Act by firing Hubbell on February 5, 1982, and thereafter by failing to recall him. In view of this conclusion it follows that even if Respondent had sustained its burden with respect to the discharge of Hubbell on February 5, 1982, its failure to recall him when it recalled Parker, at the very latest, would have constituted a separate violation because I consider that action pretextual.

B. *The Challenged Ballot*

As stated above, the Board agent challenged the ballot of Hubbell because the validity of his vote as an employee is dependent on the disposition of the complaint. Having found that Respondent violated Section 8(a)(3) and (1) of the Act by discharging Hubbell, his status as an employee of Respondent at the time of the election is established, and thus he was eligible to vote in the election. Accordingly, I recommend that his ballot be opened and counted.

CONCLUSIONS OF LAW

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

2. Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union No. 65, is a labor organization within the meaning of the Act.

3. By discriminatorily discharging and refusing to reinstate its employee Richard Hubbell because of his activities on behalf of the Union, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

5. The challenge to the ballot of Richard E. Hubbell cast by him in the election conducted on March 24, 1983, in Case 3-RD-777, shall be overruled and his ballot shall be opened and counted.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act. Having found that Respondent discharged and failed to recall Richard E. Hubbell in violation of Section 8(a)(1) and (3) of the Act, I shall recommend that Respondent be ordered to offer Hubbell immediate and full reinstatement to his former position of employment or, if that position is not available, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed.

I shall also recommend that Respondent be ordered to make Hubbell whole for any loss of earnings he may have suffered from the date of his discharge, February 5, 1982, to the date he is offered reinstatement. His loss of earnings shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and shall include interest as set forth in *Isis Plumbing Co.*, 138 NLRB 716 (1962), and *Florida Steel Corp.*, 231 NLRB 651 (1977).

I shall also recommend that Respondent expunge from its files any reference to the discharge of Hubbell and notify him in writing that it has done so, and that evidence of this discharge will not be used as a basis for future personnel action against him. *Sterling Sugars*, 261 NLRB 472 (1982).

Having found that Hubbell retained his status as an employee because his discharge violated the Act, it further is recommended that his ballot cast and challenged in the election conducted in Case 3-RD-777 on March 24, 1983, be opened and counted and that a revised tally of ballots be issued.

On the foregoing findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

[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.

ORDER

The Respondent, University Sand & Gravel, Inc., Brooktondale, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging, laying off, or otherwise discriminating against employees in regard to hire or tenure of employment, or any term or condition of employment because of their activities on behalf of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union No. 65, or any other union.

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

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

(a) Offer to Richard E. Hubbell 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, in the manner set forth in the section of this decision entitled "The Remedy."

(b) Make whole Richard E. Hubbell who was discharged on February 5, 1982, for any loss of pay he may have suffered by reason of Respondent's unlawful activity in accordance with the section of this decision entitled "The Remedy."

(c) Expunge from its files any reference to the discharge of Richard E. Hubbell on February 5, 1982, and notify him in writing that this has been done, and that evidence of this unlawful discharge will not be used as a basis for future personnel action against him.

(d) Preserve and, on 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.

(e) Post at its places of business in Lansing, New York, and Brooktondale, New York, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 3, after being duly signed by Respondent's representative, shall be posted by it, 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.

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

IT IS FURTHER RECOMMENDED that the Board overrule the challenge to the ballot cast by Richard E. Hubbell in the election conducted in Case 3-RD-777 on March 24, 1983, and order his challenged ballot be opened and counted, and that a revised tally of ballots be issued. Further, that this case be severed and remanded to the Regional Director of Region 3 for such proceedings to be conducted as soon as feasible under the circumstances present herein.

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, it has been found that we have violated the National Labor Relations Board and we have been ordered to post this notice.

WE WILL NOT discharge, or otherwise discriminate, against our employees because of their activities, on behalf of Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union No. 65, or any other union.

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

WE WILL offer Richard E. Hubbell immediate and full reinstatement to his former position or, if that job no longer exists, to a substantially equivalent position without prejudice to his seniority or any other rights and privileges, and make him whole, with interest, for any loss of earnings he may have suffered because of our discriminatory conduct against him.

WE WILL expunge from our files any reference to the termination of Richard E. Hubbell, and we will notify him that this has been done and that evidence of this unlawful termination will not be used as a basis for future personal actions against him.

UNIVERSITY SAND & GRAVEL, INC.

[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."