

**Gary Enterprises, Inc. and Jerry B. Whitaker.** Case  
9-CA-26846

December 31, 1990

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS  
DEVANEY AND OVIATT

On May 29, 1990, Administrative Law Judge Thomas A. Ricci issued the attached decision. The General Counsel filed exceptions and a supporting brief.

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 brief and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The complaint alleges that the Respondent laid off employee Jerry Whitaker in violation of Section 8(a)(4) and (1) of the Act because he had filed charges with the Board.<sup>1</sup> The judge recommended dismissal of the complaint. The General Counsel filed exceptions to the judge's decision. We find merit in the General Counsel's exceptions, and we conclude, for the reasons set forth below, that the Respondent's discharge of Whitaker violated Section 8(a)(4) and (1) of the Act.

I. BACKGROUND

The facts of this case may be summarized as follows. The Respondent, a corporation owned by Homer Hopkins, William (Bud) Smith, and Ted Osborne, operates a coal mine in Gary, West Virginia. It bought the mine from U.S. Steel in 1987, agreeing to recognize the United Mine Workers of America (the Union) as the representative of its employees and to staff its facility with employees who had been laid off by U.S. Steel. By the time of the hearing in this case, the Respondent had hired 44 former U.S. Steel employees from a panel of about 1200. The panel included people who had worked at mines other than the Respondent's.

In December 1987, an arbitrator ruled against the Union on a grievance filed by the Union concerning the right of a former U.S. Steel employee to hold a full-time job operating an endloader at the facility at issue in this case. The arbitrator concluded that insufficient evidence had been presented to show that a full-time endloader job existed.

Jerry Whitaker, the subject of the instant complaint, had worked for Hopkins, Osborne, and Smith at other mines, including Faith Mining, where he operated an

endloader for several years before being laid off in November 1987. At Faith Mining, Whitaker had been a dues-paying member of the Union; his dues were deducted from his paycheck. On January 31, 1988, Smith called Whitaker at home. He told Whitaker to come to Faith Mining the next morning to drive the Faith endloader to Gary, West Virginia, about 60 miles away. Whitaker did so. At Gary, Smith told Whitaker that the job at Gary, which involved moving coal from the loadout chutes, was temporary and that he was to come in every weekday morning until told otherwise. Whitaker operated the endloader at the Gary facility until September 1, 1989, when he was discharged. While he worked at Gary, Whitaker was paid a flat \$100 per day. No deductions were taken from his paycheck.<sup>2</sup>

The Respondent determined Whitaker's pay rate and his hours, which were never fewer than 8 per day. The Respondent directed Whitaker's work and provided the equipment, fuel, supplies, and maintenance necessary to the performance of his job. Whitaker could not increase his income by working on Saturday unless ordered to do so. Whitaker reported to the Respondent the number of days he worked and the amount of fuel the truckers used.

In January 1989, Whitaker asked the Respondent to provide him with health or hospitalization insurance, at the Respondent's expense. The Respondent did not do so. In February 1989, the Respondent requested that Whitaker sign a "lease." The "lease" stated, among other things, that (1) the "lessee" would load coal for \$100 per day or according to demand; (2) the "lessor" would perform maintenance on the vehicle leased to the "lessee" (there is no evidence that Whitaker ever paid the Respondent for the use of the endloader); (3) the "lessee" would "be responsible to pay all compensation, FICA, taxes, unemployment taxes, and any insurance for hospitalization and life insurance"; and (4) the "lessor" would not collect union dues or pay "any UMWA man hours." Whitaker did not sign the "lease."

In June 1989, Whitaker informed Superintendent Harry Harmon that he was quitting to take a job that provided health insurance. Harmon told Whitaker that the owners promised to provide Whitaker with health insurance after the miners' vacation at the end of June. (Unlike the other workers, Whitaker was not paid for the vacation.) Whitaker did not get the insurance. On August 14, 1989, he filed an unfair labor practice charge against the Respondent, alleging that about February 20, 1989 (when the Respondent presented Whitaker with the "lease"), the Respondent had placed him in the status of a contract laborer in retalia-

<sup>1</sup>Although the complaint alleges that Whitaker was unlawfully "laid off" by the Respondent, the record reflects that he was, in fact, discharged. Accordingly, in this decision, we will refer to Whitaker's termination as a discharge.

<sup>2</sup>In January, Whitaker signed a dues-checkoff authorization card and gave it to the union representative at the mine. Whitaker also gave the Respondent a copy of the card. The Respondent never deducted Whitaker's union dues.

tion for his union activities (filling out the authorization card). The Regional Director dismissed the charge on September 20, 1989.

The August 14 charge was served on the Respondent on August 22, 1989. On that date Smith responded to the charge in a letter to the Region, stating that Whitaker's job was not permanent and that, when another loader was repaired, the truckdrivers would load their own trucks and Whitaker would no longer be needed. On August 28, 1989, Whitaker's second day at work after the charge was served, Osborne and Smith told Whitaker that he would not be needed after September 1 because they were getting another endloader and the independent truckers would load their own trucks. On September 1, Whitaker's last day, he asked Co-owner Homer Hopkins for a layoff slip. Hopkins refused to write the slip, citing the pending National Labor Relations Board charge. At the hearing in the case, Hopkins admitted that he was "shocked" and "upset" by the charge. Hopkins also said that he did not want to lay Whitaker off, and that he had not known in advance of the decision.

For a few days after Whitaker's discharge, the drivers loaded their own trucks. Then, a man identified at the hearing as Johnny Charles performed the task for about 5 or 6 days. After Charles, Gary Davis took over the loading duty, for which he was paid \$100 per day. On October 16, 1989, Davis signed the "lease" that Whitaker had not signed.

## II. DISCUSSION

At issue in this case is whether Whitaker was an independent contractor and, if not and therefore an employee under the Act, whether his discharge was in retaliation for his filing a charge with the Board. The judge found that Whitaker was an independent contractor. He emphasized Whitaker's flat \$100-per-day earnings. He also stressed the Union's apparent lack of interest in (1) having a more senior union member on the recall list perform Whitaker's job; (2) securing dues payments from Whitaker; or, (3) filing a grievance on Whitaker's behalf in this case despite Whitaker's previous experience as a dues-paying employee. The judge recommended that the complaint be dismissed, without reaching the question whether Whitaker's discharge was retaliatory.

We hold, for the reasons set forth below, that Whitaker was not an independent contractor and that his discharge violated Section 8(a)(4) and (1) of the Act.

### A. *The Independent Contractor Issue*

In determining whether a worker is an employee or an independent contractor, the Board uses a "right of control" test:

If the person for whom the services are performed retains the right to control the manner and means by which the results are to be accomplished, the person who performs the services is an employee. If only the results are controlled, the person who performs the services is an independent contractor.

*Fort Wayne Newspapers*, 263 NLRB 854, 855 (1982). In *Standard Oil Co.*, 230 NLRB 967, 968 (1977), the Board elaborated:

Among factors considered significant at common law in connection with the "right to control" test in determining whether an employment relationship exists are (1) whether individuals perform functions that are an essential part of the Company's normal operation or operate an independent business; (2) whether they have a permanent working arrangement with the Company which will ordinarily continue as long as performance is satisfactory; (3) whether they do business in the Company's name with assistance and guidance from the Company's personnel and ordinarily sell only the Company's products; (4) whether the agreement which contains the terms and conditions under which they operate is promulgated and changed unilaterally by the Company; (5) whether they account to the Company for the funds they collect under a regular reporting procedure prescribed by the Company; (6) whether particular skills are required for the operations subject to the contract; (7) whether they have a proprietary interest in the work in which they are engaged; and, (8) whether they have the opportunity to make decisions which involve risks taken by the independent businessman which may result in profit or loss.

Applying these principles, we conclude that the Respondent retained the right to control the manner and means by which Whitaker performed his assignment. The Respondent directed Whitaker's work and provided him with, and maintained, all his equipment. The functions Whitaker performed were an essential part of the Respondent's normal operation. His reports to the Respondent were limited to the truckers' fuel use and the number of days Whitaker had worked. Although the Respondent called Whitaker's employment temporary, by the time he was discharged he had worked at least 5 days per week for 19 months.

Whitaker had neither a proprietary interest in his work nor the chance to make decisions involving risks that could result in profit or loss.<sup>3</sup> The Respondent

<sup>3</sup>That no deductions were made from Whitaker's paycheck, though relevant to the inquiry, is not dispositive. *Mission Foods Corp.*, 280 NLRB 251 (1986); *Checker Cab Assn.*, 185 NLRB 182, 184 (1970). Here, it is outweighed by the factors militating against independent-contractor status.

fixed Whitaker's pay, which he could not increase unless the Respondent directed him to work an extra day. He could neither adjust his hours nor hire employees. Whitaker worked exclusively for the Respondent.

The judge, in finding that Whitaker was an independent contractor, emphasized the fact that he received \$100 per day, regardless of how many hours he worked. This fact may show that Whitaker was treated more like a salaried employee than an hourly employee, but it hardly demonstrates independent-contractor status. The judge also emphasized the Union's acquiescence in Whitaker's hiring and its failure to secure dues payments from him or to file a grievance on his behalf. But these facts, which the judge found supported the view that Whitaker was an independent contractor, are at least equally consistent with the possibility that the Union believed Whitaker was a salaried employee doing nonbargaining unit work. In any event, the Union's inaction does not outweigh the aforementioned factors leading to our conclusion that Whitaker was an employee of the Respondent, not an independent contractor.

#### B. *Whitaker's Discharge*

In *Wright Line*, 251 NLRB 1083, 1089 (1980), the Board set forth its causation test for cases alleging violations of the Act hinging on employer motive:

First, we shall require that the General Counsel make a *prima facie* showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

Whitaker was notified of his impending dismissal 6 days after the Respondent received notice of his National Labor Relations Board charge (it was the second day he had been at work after the charge was served). Hopkins, an owner, testified at the hearing that he was "shocked" and "upset" by the charge and that he refused to give Whitaker a layoff slip because of it. Based on the timing of the dismissal and Hopkins' comments, we conclude that the General Counsel has made a *prima facie* showing that Whitaker's protected activity of filing a charge with the Board was a motivating factor in the Respondent's decision to discharge him.

The remaining question is whether the Respondent has shown that it would have discharged Whitaker in the absence of his protected conduct. At the hearing, the Respondent asserted that it discharged Whitaker to save costs.<sup>4</sup> The record does not support this contention. After Whitaker's discharge, only a few days

elapsed before the Respondent hired a replacement for him. Gary Davis, Whitaker's replacement, is paid at the same rate Whitaker was paid. The Respondent offered no evidence that it even considered recalling or rehiring Whitaker, an experienced employee, once it was clear that it could not do without his services.

The Respondent also argued that Whitaker was discharged because the circumstance that made his employment temporarily necessary (one of the Respondent's endloaders was unusable) had been resolved and his services were no longer required. The record, however, is to the contrary. Apart from the long duration of Whitaker's employment, which belies the Respondent's contention that Whitaker's job was temporary, this argument also is belied by the fact that the Respondent quickly replaced Whitaker with others to do the same work. The Respondent not having advanced any other reason for Whitaker's dismissal, we conclude that it has not met its *Wright Line* burden.

#### CONCLUSION OF LAW

By discharging Jerry B. Whitaker on September 1, 1989, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(4) and (1) and Section 2(6) and (7) of the Act.

#### REMEDY

Having found that the Respondent has violated Section 8(a)(4) and (1) of the Act, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. We shall order the Respondent to offer Jerry B. Whitaker immediate and full reinstatement to his former position, without prejudice to his seniority or other rights and privileges. We shall further order the Respondent to make Whitaker whole for any loss of earnings or other benefits he may have suffered as a result of the discrimination against him. Backpay shall be computed as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

We further shall order the Respondent to remove from its records and files any reference to the unlawful discharge and to notify Whitaker, in writing, that this has been done and that the discharge will not be used against him in the future. *Sterling Sugars*, 261 NLRB 472 (1982).

#### ORDER

The National Labor Relations Board orders that the Respondent, Gary Enterprises, Inc., Gary, West Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

<sup>4</sup>The Respondent did not submit a brief to the judge or to the Board.

(a) Discharging or otherwise discriminating against any employee because he has filed charges or given testimony under the Act.

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

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

(a) Offer Jerry B. Whitaker 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 any other rights or privileges previously enjoyed, and make him whole with interest for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

(b) Remove from its files any reference to Whitaker's unlawful discharge and notify him, in writing, that this has been done and that evidence of his unlawful discharge will not be used as a basis for further personnel action against him.

(c) 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.

(d) Post at its place of business in Gary, West Virginia, copies of the attached notice marked "Appendix."<sup>5</sup> Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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

<sup>5</sup> 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."

#### APPENDIX

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

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against any of you for filing charges or giving testimony under the Act.

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

WE WILL offer Jerry B. Whitaker 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 or privileges previously enjoyed and WE WILL make him whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL remove from our files any reference to the unlawful discharge of Jerry B. Whitaker and WE WILL notify him in writing that we have removed from our files any reference to his discharge and that the discharge will not be used against him in any way.

GARY ENTERPRISES, INC.

*Patricia Rossner Fry, Esq.*, for the General Counsel.

*Richard E. Hardison, Esq.*, of Beckley, West Virginia, for the Respondent.

#### DECISION

##### STATEMENT OF THE CASE

THOMAS A. RICCI, Administrative Law Judge. A hearing in this proceeding was held on February 7, 1990, at Beckley, West Virginia, on complaint of the General Counsel against Gary Enterprises, Inc. (the Respondent or the Company). The complaint issued on November 7, 1989, upon a charge filed on September 26, 1989, by Jerry Whitaker (the Charging Party). The issue presented is whether the Respondent discontinued using Whitaker's service in violation of Section 8(a)(4) of the Act. A brief was filed by the General Counsel.

On the entire record and from my observation of the witnesses, I make the following

##### FINDINGS OF FACT

###### I. THE BUSINESS OF THE RESPONDENT

Gary Enterprises, Inc., is engaged in the coal mining business, and operates a mine at Gary, West Virginia. During the 12-month period preceding issuance of the complaint, in the course of its operations, it sold and shipped from its Gary, West Virginia facility products, goods, and materials valued

in excess of \$50,000 directly to points outside the State of West Virginia. I find that the Respondent is an employer within the meaning of the Act.

## II. THE ALLEGED UNFAIR LABOR PRACTICE

The Respondent purchased this mine from U.S. Steel in 1987, which had been operating it for sometime. When the Respondent took over it agreed with Local 7635 of the United Mine Workers of America to recognize it as the exclusive representative of its rank-and-file employees. The agreement included an understanding that the Respondent would hire all its employees from a panel list of Mine Workers members who are out of work. The panel had about 1200 names, listed according to seniority. Consistent with that agreement the Respondent hired properly from the list. By the time of the hearing in this case it had about 44 employees, all union members and all precisely selected from the panel according to seniority.

The relationship between Whitaker and Gary Enterprises was established on February 1, 1988, when he agreed to operate an endloader which the Company had rented from a company called Faith Mining. An endloader is a machine which moves about the mine premises and is used to load coal on trucks. The arrangement was that he would be paid \$100 a week, no matter how many hours he had to work to fulfill his obligation to load all the necessary trucks. His work required from 8 to as much as 16 hours in a single day. His pay was never raised and if he worked the 16 hours in one day; he was still paid \$100 each day. It was an independent contractor arrangement.

In January 1989, Whitaker decided he needed health or hospitalization insurance, and asked the Company to provide it for him at their expense. The Company did not do that. That same month Whitaker signed a dues-checkoff authorization card for Local 7635 and gave it to the Mine Workers representative at this mine, Robert Wade. He also gave a copy of the dues-checkoff card to the Company. At about the same time the Respondent handed Whitaker a 1-page statement setting out the details of their independent contractor arrangement under which Whitaker had been operating for almost a year. He did not sign it.

For a number of months things remain unchanged. Whitaker never paid any union dues. The Union never asked him to do so. More importantly, the Union never contacted the Company to ask that the dues be deducted from Whitaker's pay. This, of course, is explained by the fact that about 2 years earlier there had been a dispute over the Respondent using another independent contractor in its operations, and the arbitrator in that dispute had ruled that the Company had a right in its arrangement with the Mine Workers to take on independent contractors.

On August 14, 1989, Whitaker filed an NLRB charge against the Respondent, alleging that on February 20, 1989, it had made him an independent contractor in retaliation for his union activities. This, of course, was reference to the 1-page statement detailing his working arrangement with the Company. That charge was dismissed by the Board on September 20, 1989. This means that upon investigating the Regional Office was satisfied that Whitaker had always been an independent contractor, and that there was nothing wrong in the Respondent having asked him to document their relationship.

Whitaker left the Company on September 1, 1989. On September 26, he filed the charge which underlies this complaint. Now he said the reason he had been released was because he had filed the earlier charge. The complaint repeats that allegation.

Was Whitaker an independent contractor during his tenure with this company from February 1988 to September 1989? I think yes.

If he was, the complaint must be dismissed, because this statute has nothing to do with people who are not employees as defined in the Act, but instead are in business for themselves or independent contractors. If a man is an independent contractor it matters not why the person, or company who does business with him, decides to end their relationship.

In support of the complaint the General Counsel relies entirely upon the assertion that the kind of work Whitaker did with the endloader is ordinary work that is found in all coal mines and performed by ordinary regular employees. And she is correct in that. Indeed, there is indication that both before and after Whitaker's stay at this mine, like work had been performed by rank- and-file employees. But while detailing this reality in her brief, the General Counsel completely ignores other facts of record truly relevant to the issue of the case.

Whitaker wanted this work badly; he need the money. And Homer Hopkins, the management representative who took him on, was an old friend and wished to help him. But they both knew that as an ordinary employee the man could not be given any work at all, because in the Mine Workers' panel of out-of-work employees, Whitaker was way down on the seniority list. Whitaker had been a dues-paying member for years at his prior employment with Faith Mining Coal, where he had also operated an endloader. If there was one thing he knew, it was that as a regular employee, which he now contends he was all the 2 years he worked for the Respondent, he must be paid overtime when he did over 8 hours of work in one day. He also knew he would have to be covered with health insurance, automatically. And, most important of all, he very well knew that only in the status of independent contractor could he work here without paying one cent of dues to the Mine Workers Union. For him now to insist, together with the General Counsel, that he really was just an ordinary employee, is simply not true.

Equally significant is the position of the Union here. Would anyone believe that the Mine Workers of America would knowingly permit a man who is low down in its agreed-on recall list be taken on a job while many more union members sit by and wait? Never. And there is no question but that the Union knew of Whitaker's presence at this mine. Whitaker gave his union dues checkoff to Union Representative Wade 6 months before leaving the place. Does the Mine Workers Union hold a dues-checkoff card for so long without even making the man pay the money or asking his employer to pay it from the weekly earnings? Never. When a mine worker files a Board charge of having been prejudiced by the employer because of his union activity, does not his union file a grievance on his behalf? Not here. No need to carry it further. The Union chose to have nothing to do with this entire proceeding, because it knew the complaint had no merit. Its agreement with the Respondent was that the Company could take on an independent contractor to

operate the rented endloader. It adhered its agreement with the Employer.

The end object of this statute is to encourage the practice and procedure of collective bargaining. For the Board to intrude upon the peaceful arrangement made by the parties is a mistake. I find that Whitaker was an independent contractor, and not a regular employee of the Company. I shall therefore recommend that the complaint be dismissed.<sup>1</sup>

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<sup>1</sup>The General Counsel cites an Internal Revenue Service letter addressed to the Company, expressing the opinion that, based on what facts were available

[Recommended Order for dismissal omitted from publication.]

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to that office, it was of the opinion that Whitaker was not an independent contractor. But there was also received in evidence a letter addressed to Whitaker by the West Virginia Department of Employment Security, dated November 8, 1989, finding that he was ineligible for unemployment benefits because that office concluded he had been self-employed when he was with the Respondent. The issue raised by the complaint here is decided by the Board, not by outside agencies.