

**E. T. Marshall & Associates, Inc. and 409
Edgecombe Avenue Tenants Association and
Fred Hudson.** Case 2-CA-23725

May 20, 1991

DECISION AND ORDER

BY MEMBERS CRACRAFT, DEVANEY, AND OVIATT

On September 18, 1990, Administrative Law Judge Raymond P. Green 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,¹ and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

¹The General Counsel 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 they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Rhonda Gottlieb, Esq. and *James G. Paulson Esq.*, for the General Counsel.

Kevin J. McGill Esq. (Clifton, Budd & DeMaria), for the Respondent.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. This case was tried in New York, New York, in February and April 1990. The charge was filed on July 11, 1989, and the complaint was issued on August 18, 1989. In substance, the complaint alleges that the housing company and its managing agent, after the lawful discharge of Fred Hudson, refused to reinstate him to his former job because he joined or supported Local 32B-32J, Service Employees International Union, AFL-CIO and because he engaged in other concerted activities.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondents admit, and I find, that they are each employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

Respondents do not admit however that they are joint employers.

II. ALLEGED UNFAIR LABOR PRACTICES

409 Edgecombe Ave. is an apartment building in Harlem. It has a Board of Managers and a tenants association. For many years it has had a collective-bargaining relationship with the Union and it executed the Apartment House Agreements in 1982 and 1985 with respect to the service and maintenance employees. The most recent contract expired in 1988 and no new contract was executed. Although it is not entirely clear why the Union and the building did not make a new contract, it appears that the building, because of its financial condition, was unable to meet the Union's demands for a new contract and the Union did not press the matter. In any event, it seems that as of the time of the events in this case, the Union was recognized by the company as the representative of the employees and that apart from arrearages in benefit payments, other aspects of the expired contract were maintained in force and effect.

Fred Hudson who is a tenant of the building, was employed since 1984 in the job classification of doorman/porter. His job duties entailed the normal responsibilities of a doorman and he also was responsible for cleaning the doors and glass in the lobby. He joined the Union in 1986 and his position was encompassed by the union contract.

The record indicates that prior to 1986 the building employed four doormen including Hudson who worked at different times during the week. However, in or about 1986 and apparently after the retirement of two of the doormen, the building engaged a guard service company to furnish guards to cover the door at those times that the remaining two doormen were not on duty. While it appears that the Union made some protest about this contracting out, the fact is that as of February and March 1989, the building utilized two of its own employees to man the doors and a guard service to man the doors at other times. The utilization of a guard service was instituted because of the buildings location.

In January 1989 the building retained the services of E. T. Marshall Associates to manage the building. The responsibilities of that company (headed up by Edward T. Marshall), was to take care of the day to day operations of the building and entailed the supervision of the building's employees. His contract, similar to other management contracts in the industry, stated that he was to assist the building in the hiring and discharging of employees. Also, Marshall was delegated the authority to act on behalf of the building in its dealings with the Union, both in terms of negotiating a contract and in administering the terms of any agreement. (In the latter respect, Marshall in February 1989 appeared on behalf of the building in an arbitration case involving another employee). It is noted that Marshall had previously been employed by the Union as a representative and therefore had considerable experience in labor relations matters.

On February 16, 1989, Hudson was discharged because he took down a sign in the lobby after he had been warned not to do so. His actions were clearly insubordinate to the managing agent's representative, Beverly Stephens. Immediately after Hudson's discharge, E. T. Marshall arranged for the Security Service to replace Hudson with a guard. However, when the guard showed up for work on his first two nights of duty, Hudson told him to leave and he did.

As noted above, the General Counsel concedes that the discharge of Hudson on February 16 was for cause of was not in any way discriminatory under the Act.

On February 28, 1989, the building's board of managers conducted their regular monthly meeting. At this meeting, Mrs. Hudson, who is the Board's secretary raised the issue of her husband's discharge and this generated a considerable amount of discussion.¹ The tape recordings of this meeting, were audible but involved a great deal of heated cross talk. The following points emerged from my listening:

1. Everyone thought that Hudson misbehaved and should be punished in some way.

2. McLean and some others expressed the opinion that Hudson's discharge should be reduced to a suspension.

3. Some felt that the discharge should be sustained.

4. Some expressed the opinion that as a matter of principle, no tenants should be employed by the building; that such employment led to conflicts of interest and prevented management from treating them impartially.

5. Some, particularly Tillman, expressed the opinion that irrespective of the merits, the Board should not second guess the managing agent who was hired to take care of such matters.

6. Stephens, an employee of E. T. Marshall, told the Board that Marshall was confident that if the Union sought to arbitrate Hudson's discharge, the Union would lose.

7. Tillman, who in his regular job was a shop steward, expressed the opinion that Hudson did not have a leg to stand on if his case went to arbitration.

8. At least one person expressed the opinion that there were problems with all of the maintenance staff and that the Board should let Hudson's discharge stand as an example to the others.

Midway through the meeting, Mrs. Hudson had to leave and the quality of the tape recording became so poor that the second tape of this meeting, (G.C. Exh. 3B) was barely understandable. Nevertheless, the tape reveals that at some point a vote was taken and by a 5 to 2 margin, the Board of Managers voted to revoke the discharge of Hudson and to suspend him instead. (There was, however, no decision as to how long the suspension was to last.)

The February 28 tape recording also shows that after the vote and toward the end of the meeting, Stephens brought up for discussion the building's relationship with the Union. She said that the Union was complaining about the fact that its proposed new contract had not been signed. She also related that Marshall, in a discussion with the Union, had indicated that he wanted to do away with the position of doorman/porter because that was a security position which did not require union employees. Additionally, the tape reveals that Stephens asked the Board if they were interested in getting rid of some of the union salaries, whereupon a few

of the Board members expressed the opinion that they would be better off if there was no union at the building at all.

In early March 1989 Marshall, at an arbitration hearing involving another of the building's employees, was told by a union agent that he heard that the Board had overruled Marshall's decision to discharge Hudson and that the Union therefore did not have to do anything to get Hudson his job back.

On March 14, 1989, the Board of Managers had another meeting which was recorded and memorialized as General Counsel's Exhibits 5A and 5B. At this meeting Marshall objected to the Board's previous action in overruling his decision to discharge Hudson without consulting him. He also objected to the fact that the Board's action had been leaked to the Union. Marshall pointed out to the Board that it should set policy but that the managing agent should run the day to day operations. Marshall stated that if the Board reverses his decisions this undermines his authority to manage the building and that if the Board does not give him authority to supervise the staff, he would have to review his position as managing agent (i.e., a veiled threat to quit).

When one of the Board members asked about the situation with the Union, Marshall responded that they had operated for a year and a half without a contract and that the Board should look at its options. He thereupon listed the options as either refusing to recognize the Union which would probably cause a strike, or asking the Union for a contract with special consideration for the building's financial situation. Marshall told the Board that they should decide what they wanted to do as soon as possible so that the attorney could be advised. He also told the Board that in a pending grievance regarding the building's use of the security service, he felt that they were on solid ground because the Union was not allowed to represent guards under the National Labor Relations Act.

One of the Board members, returning to the subject of Hudson, stated that they decided to revoke the discharge because it was felt that discharge was too harsh a penalty; that Hudson was a neighbor and that the Board did not feel that its decision undermined Marshall's authority. Marshall responded that this was a business not a political club; that when the Board reverses his decisions without first consulting him and then leaks it to the Union, it becomes impossible for him to deal with the Union on grievances in a business like manner. He stated that in such circumstances the Union feels that it does not have to do anything because it has allies on the Board. Marshall stated that he cannot have a referendum on every personnel action and that if the Board members want to make these kinds of decisions they should not hire a managing agent. He recommended that the Board should honor the original decision to discharge Hudson, but that he (Marshall) would try to find Hudson another job.

When one of the Board members asked Marshall is there a possible compromise position, Marshall stated that he had intended anyway to recommend that the night doorman position be changed to a security guard job because that is when the building was most vulnerable. He stated that the Board's action would undermine his position and make him a non-entity in negotiations with the Union because the Union could rightly feel that they could bypass him. Marshall said that they needed law and order; that they cannot have employees saying that they will not follow orders and cannot

¹ I received into evidence the original tape recordings of the Board meetings held on February 28, March 14 and March 20. These recordings were made during the meetings, generally by Mrs. Hudson, whose duties included operating a portable tape recorder and making the minutes from the tapes. In reviewing this record I have relied on the original tapes only and only to the extent that they were audible to me. In this respect, although the handling of these tapes and duplicate copies of the tapes before and at the trial left a lot to be desired, I did set aside one day of hearing so that all parties could listen to the original tape recordings. The Respondents did not avail themselves of the opportunity to listen to the original tape recordings.

be disciplined because they have allies on the Board. Marshall reiterated that he would try to get Hudson another job.

Before leaving, Marshall told the Board that they had to make a decision as to whether to recognize the Union. When pressed for his opinion, he said that he would recommend that they not recognize the Union because they cannot afford to pay the benefits and the worst the Union could do was to strike the building. Marshall stated that even though the building superintendent (Felix Dookie), was a union member who probably would strike, an argument could be made that the superintendent was a supervisor and should be out of the bargaining unit. Marshall also said that in the event of a strike, they could operate with replacements for the other maintenance staff.

After Marshall was asked to leave, the Board members continued to discuss the situation with the tape recorder on. Again there was a good deal of disagreement with the following points made.

1. There was speculation as to whether Marshall would really quit if the board did not reverse its decision on Hudson.

2. Callender reiterated her position that tenants should not be employed because of the conflict of interest.

3. There was discussion as to whether the Board's decision to revoke Hudson's discharge was a violation of the contract between the building and E. T. Marshall.

4. There was discussion as to whether Hudson's actions deserved suspension or discharge.

5. There was discussion as to whether the building could afford union benefits and whether they should cease recognizing the Union. Some were in favor of getting rid of the Union.

Toward the end of the March 14 meeting, the February 28 minutes (prepared by Mrs. Hudson), were adopted with modification. At the conclusion of the meeting, it was decided that there should be a special meeting on March 20, 1989. After much debate, nothing was decided at the March 14 meeting with respect to either Hudson, Marshall or the Union.

Another meeting was held and taped on March 20, 1989. At the beginning of the meeting Marshall said that he wanted to know the Board's position regarding his authority under his contract. He told the Board that if they wanted to hire, fire and supervise employees then that was OK with him but that he wanted his contract amended so that they would take responsibility for such actions.² For the benefit of a Board member who was not present at the March 14 meeting, Marshall reiterated the history of the situation, indicating that Hudson had been fired for insubordination; that the Board had overruled his decision and that he, (Marshall), found out about the Board's action from the Union when he was at an arbitration hearing. Marshall stated that the Board's action undermined his authority vis a vis the Union in arbitrations; that the Board should not take contrary positions when he is dealing with the Union, and that this was no way to run a business.

Mrs. Hudson stated that a discharge decision should not have been taken without prior clearance by the Board, and there was discussion again about the relationship between the

managing agent and the Board with respect to such decisions. In this respect, one Board member stated that it was not proper for the Board to be involved in hiring and discharge decisions which should be left to the managing agent. On the other hand, another member stated that the managing agent's contract only said that he was to assist the Board in such matters.

Hudson who attended the meeting, explained his position and recounted, from his perspective, the events leading up to his discharge. He admitted that he was wrong, but asserted that the punishment did not fit the crime.

At one point, Marshall said that the Union was the proper authority to represent Hudson and that Hudson should not go to the Board to reverse the managing agent's decision.

Marshall told the Board that under his license he was responsible for the actions of employees. He stated that if he cannot supervise employees with the authority to discharge, then he wanted the Board to hold him harmless. At the conclusion of the meeting, Marshall said that he would talk privately to Hudson about his situation, but that he cannot tolerate the Union telling him what he (Marshall), must do.

The evidence indicates that after the conclusion of the meeting, (or at least the taped portion of it), Marshall took Hudson aside and offered him a job as a handyman. (This would be a higher paying job than a doorman/porter.) However, on March 25, 1989, Hudson told Ronald Jackson, the on site manager that he would accept the job only if the hours were from 9 p.m. to 7 a.m. Because such hours are totally inappropriate for the job of a handyman, Hudson remained unemployed.³

With respect to the March 20 meeting, I note that there was no discussion about contract negotiations with the Union and there was no mention of withdrawing union recognition. I also note that no vote was taken regarding Hudson's discharge or suspension. Although not entirely clear, it may be that the implicit consensus was that Marshall would offer Hudson another job as the means of sidestepping the fundamental issue which revolved around the relationship of E. T. Marshall to the building and their respective authority regarding the supervision of employees.

In September 1989, after negotiations failed to produce a new contract, the Union went on strike. (As the General Counsel has not alleged that the Respondents bargained in bad faith or unlawfully withdrew recognition, I shall assume that the Union was continuously recognized and that the bargaining was in good faith.)

On September 25, 1989, Marshall wrote to Hudson as follows:

We have been instructed by the 409 Edgecombe Housing Corp. to unconditionally offer your Doorman/Porter position back. Please contact Mr. Ronald Jackson at 491-5920, in order to arrange your return to employment.

Please respond to this offer on or before Oct. 9, 1989.

²E. T. Marshall's contract with the building provides that Marshall has the responsibility of managing and supervising the maintenance employees and that he is to assist in the hiring and firing of such employees.

³I do not credit Hudson's assertion that Marshall told him on March 20 that he could work any hours he wished. Further, I think that the major reason that Hudson in effect turned down the handyman job was because he wanted to have the afternoons available to play golf.

If you have any questions regarding this unconditional offer of reinstatement please contact the undersigned.

On October 4 Hudson replied:

This letter is in response to your letter of September 26, 1989. I will accept your unconditional offer to reinstate me to my job as Doorman/Porter; however, I'm withholding my services due to the current strike. I will return to work as soon as the strike is over.

On January 30, 1990, Hudson unconditionally offered to return to work and he was rehired in early February 1990.

III. DISCUSSION

The evidence establishes and the General Counsel concedes that the original discharge of Hudson was a lawful response to what clearly was his insubordinate refusal to follow the orders of his superiors. She argues however, that both the building's Board of Managers and the Managing Agent violated the Act when, after the Board of Managers displayed a degree of generosity in revoking Hudson's discharge, they and E. T. Marshall failed to reinstate Hudson for antiunion reasons.⁴ As set forth in her brief, the General Counsel asserts:

[B]eginning on February 28, 1989, the Association voted to convert Hudson's discharge to a suspension. However, this action was never implemented because the Association and E. T. Marshall engaged in discussions with the intent to eliminate the Union as the employees bargaining representative and/or rid the facility of union personnel.

Counsel for the General Counsel further contends that as a result of these discussions, the Association resolved to uphold the February 16, 1989 discharge of Hudson by E. T. Marshall, as opposed to merely suspending him. Thus, the decision to discharge Hudson was motivated by antiunion considerations and is unlawful.

It is my opinion that after February 28, 1989, the Board of Managers literally did not decide anything. While there was a great deal of discussion at the board meetings on March 14 and 20, the fact is that no votes were taken and no real decision was ever reached by the board. Rather, the tape recordings show a high degree of disagreement among the board's members as to what to do with Hudson. If any action at all was undertaken it was an implicit decision to shove the problem under the rug by having Marshall take Hudson aside and offer him another job.

Moreover, I do not think that this record supports the proposition that the Respondents' actions, (or inaction), was motivated by a desire to get rid of the Union or the unionized personnel.

E. T. Marshall was hired by the building to manage its day to day operations and to supervise its maintenance employ-

ees. Included in Marshall's duties was the responsibility to act as the building's agent in its contract and grievance dealings with the Union. When Marshall was retained, the building had no contract with the Union and the last contract had expired more than a year ago. Although there was some talk at the board meetings to the effect that the building was not recognizing the Union, this simply meant that the building had no extant contract with the Union. In fact, the Union continued to enjoy recognition status both before and after the events of this case.

The fundamental problem in this case was that the board, having contracted with Marshall to manage the building, nevertheless reversed his decision to discharge Hudson without first consulting him. What's worse, that decision was leaked to the Union and Marshall discovered that the Union knew of the board's action when he was at an arbitration hearing to represent the building in some other case. When the union agent indicated that he did not have to do anything regarding Hudson's discharge because the board had already revoked the decision, Marshall understandably became upset as he realized that the Board's action, if allowed to stand, would undercut his ability not only to deal with the Union in contract and grievance matters, but also would undermine his authority to supervise the employees. The issue from Marshall's point of view was whether his authority to act as the managing agent was being undermined by the board which had hired him to perform the functions of a managing agent. Thus, Marshall rightfully perceived that his ability to supervise the employees and his ability to negotiate with the Union would be seriously compromised if employees or union agents could simply bypass him and go directly to the board. To me this represents a legitimate business concern and does not indicate any antiunion animus.

In my opinion the evidence indicates that the primary and overwhelming concern of Marshall and the board was not the Union as such. On the contrary, the focus of the discussions was the nature and scope of the authority delegated by the board to E. T. Marshall and the extent to which the board's decision of February 28 undermined Marshall's authority. The evidence also shows that the board's members were deeply divided over this issue and it appears that the issue was never finally decided. While there was some talk by some of the board members and by Marshall about whether or not the building should withdraw recognition from the Union, I do not feel that the Board intended to use Hudson's reinstatement as a means or lever to gain an unfair advantage over the Union in any upcoming negotiations.

In conclusion I do not think that the evidence supports the General Counsel's theory. On the contrary, the evidence indicates that Hudson was discharged for cause; that the subsequent discussion regarding his discharge focused not on the Union but rather on the relationship and division of authority between the building and the managing agent; and that when no resolution could be reached, Marshall offered and Hudson rejected a job as a handyman. As I conclude that the board and Marshall did not take or fail to take any actions motivated by antiunion considerations, I shall recommend that the complaint be dismissed in its entirety.

⁴Whereas the complaint literally alleges that Hudson was not reinstated because of his union membership or support, this is not supported by any evidence.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁵

⁵If 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

ORDER

The complaint is dismissed.

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.