

Hudson Neckwear, Inc. and National Organization of Industrial Trade Unions and New York Joint Board of Neckwear Workers, Amalgamated Clothing & Textile Workers Union, AFL-CIO. Cases 2-CA-24511 and 2-CA-24511

January 29, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT
AND RAUDABAUGH

On August 23, 1991, Administrative Law Judge D. Barry Morris issued the attached decision and on September 30, 1991, issued the attached supplemental decision. The General Counsel and the Charging Party, New York Joint Board of Neckwear Workers, Amalgamated Clothing & Textile Workers Union, AFL-CIO, each filed exceptions and a supporting brief. The Respondent filed an opposition to the exceptions and briefs of both the General Counsel and the Charging Party.¹

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision, the supplemental decision, and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,² and conclusions and to adopt the recommended Order dismissing the complaint.³

ORDER

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

¹ We deny the Respondent's motion to strike the Charging Party's exceptions and brief.

² The Charging Party and the General Counsel have 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.

³ Members Oviatt and Raudabaugh find that, even assuming *arguendo* that the judge correctly found that the General Counsel presented a *prima facie* case with respect to the plant closing, the judge properly found that the Respondent met its burden under *Wright Line*, 251 NLRB 1083 (1980).

Mindy E. Landow, Esq., for the General Counsel.
Gary C. Cooke, Esq. (Horowitz & Pollack), of South Orange, New Jersey, for the Respondent.
Judith F. Buckley, Esq., of New York, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

D. BARRY MORRIS, Administrative Law Judge. This case was heard before me in New York City on June 11 and 12, 1991. On charges filed on July 24 and August 23, 1990, a complaint was issued on January 16, 1991, alleging that Hudson Neckwear, Inc. (Respondent) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) by temporarily closing its facility and laying off certain employees and refusing to reinstate its employee, Antoine St. Hilaire. Respondent filed an answer denying the commission of the alleged unfair labor practices.

The parties were given full opportunity to participate, produce evidence, examine and cross-examine witnesses, argue orally, and file briefs. On the entire record of the case, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a New York corporation with an office and place of business in New York City, has been engaged in the manufacture of neckwear. It annually sells and ships products valued in excess of \$50,000 directly to consumers located outside the State of New York. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. In addition, it has been admitted, and I find, that National Organization of Industrial Trade Unions (NOITU) and New York Joint Board of Neckwear Workers, Amalgamated Clothing & Textile Workers, AFL-CIO (ACTWU) are labor organizations within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

1. Background

Pursuant to a Stipulated Election Agreement signed on June 11, 1990,¹ an election by secret ballot was conducted among Respondent's production and maintenance employees on July 25. On December 13 the Board issued a Decision and Certification of Representative, certifying ACTWU as the exclusive collective-bargaining representative of Respondent's production and maintenance employees.

2. Closing of facility and layoff of employees

From July 20 to July 30 Respondent temporarily closed its facility and laid off all of its production and maintenance employees. General Counsel contends that this was done to hamper the Board's being able to conduct the election which was scheduled to take place at Respondent's facility on July 25. The election did, in fact, take place on July 25 but since the facility was closed the election was held in the lobby of the building in which Respondent's facility was located.

Respondent contends that the layoff was due to lack of work. William Berger credibly testified that business was particularly bad during the first 6 months of 1990, and be-

¹ All dates refer to 1990 unless otherwise specified.

cause of lack of work there were layoffs in April, May, and June as well as July. This testimony was not controverted. Indeed Balkaraan, who appeared to me to be a credible witness, testified that there had been layoffs in both April and May. King, who also appeared to me to be a credible witness, testified that there was a layoff for 2 weeks in June prior to the vacation. The plant was closed for vacation from July 2 through 13.

I granted General Counsel's request that I take judicial notice of the decision in *Hudson Neckwear*, 302 NLRB 93 (1991).² In that case Respondent was found to have engaged in unfair labor practices by discharging three employees because they signed union authorization cards, by interrogating employees concerning their union activities, by creating an impression among employees that their union activities were under surveillance, and by advising their employees that they could not select a collective-bargaining representative of their own choice. These unfair labor practices occurred up to June 28, 1989. General Counsel requested that I take judicial notice of the prior decision to show animus on the part of Respondent. However, the record does not show the existence of animus subsequent to June 1989. Nevertheless, I do believe that General Counsel has established a prima facie case that protected conduct was a factor in Respondent's decision to close the facility on July 20. Respondent had been aware at least since June 11 that the election was scheduled to take place on July 25. Closing the plant on July 20 for an indefinite period could clearly support an inference that a motivating factor was to make it difficult for the employees to vote in the scheduled election.

Under *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), the Board requires 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 shifts to the Employer to demonstrate that the "same action would have taken place even in the absence of the protected conduct."

I find that Respondent has satisfied its burden of showing that it would have closed its facility even were the election not scheduled during that time. Berger testified that during the first 6 months of 1990 sales were running considerably lower than during the comparable period in 1989. The record indicates that during the first 6 months of 1989 sales totaled \$2,317,000. During the same period in 1990, however, sales dropped to \$1,297,500.

Berger also testified that the Company overproduced during April, May, and June. Because of poor sales and overproduction Respondent was required to lay off its employees for 2-week periods in April, May, and June. The plant was closed for vacation during the first 2 weeks of July. Berger credibly testified that he had hoped during that time that additional orders would come in. However the orders did not materialize. This testimony was not controverted. During the third week of July the employees returned to work but again there was insufficient work to keep the plant open. Berger testified that sales during July were considerably below

July's sales of the prior year. The record shows sales of \$196,248 during July 1989 as compared to sales of only \$48,604 during July 1990.

Because of poor sales Respondent decided to close the plant on July 20. No date was given for reopening because Respondent did not know when substantial orders would be placed. On July 26 or 27 Respondent obtained assurances that a sizeable order would be placed on August 1 for immediate shipping. This order alone represented sales of \$150,000. At that time Respondent immediately arranged to call back its employees.

Based on the above I find that because of poor sales and prior overproduction, on July 20 Respondent closed its facility and laid off its employees. On July 26 or 27 on receiving assurances of a very substantial order to be placed on August 1, it decided to recall its employees. Accordingly, I find that Respondent has satisfied its burden and the allegation is dismissed.

3. Refusal to reinstate St. Hilaire

St. Hilaire was one of the employees laid off on July 20. General Counsel contends that Respondent refused to reinstate St. Hilaire because of his union activities. Respondent, on the other hand, contends that it never refused to reinstate St. Hilaire and, to the contrary, it regarded him as a very valuable employee and on August 6 wrote to him requesting that he return to work. Berger credibly testified that he mailed the letter to St. Hilaire on August 6 requesting that he return to work.

St. Hilaire testified that he collected several union authorization cards from employees during May 1989. No showing has been made that St. Hilaire played an active role in union activities since that time. General Counsel contends, however, that some 14 months later Respondent decided to discriminate against St. Hilaire because of his union activities. Indeed, not only did Respondent not refuse to offer reinstatement to St. Hilaire but it sent St. Hilaire a letter dated August 6 requesting that he return to work.

Berger credibly testified that the manner in which employees were requested to return to work was that several employees were called and asked to contact the other employees. St. Hilaire himself testified that a fellow employee, George Clarger, telephoned him on July 29 telling him that the plant was reopening. St. Hilaire never took any steps to pursue the matter. Similarly, King testified that a fellow employee, George Harewood, called her and told her that the plant reopened.

Among the factors considered in whether a prima facie case has been established, cases look towards timing, animus, knowledge, and the reason for the discrimination. *Salem Paint*, 257 NLRB 336, 339-340 (1981). Had Respondent wished to terminate the services of St. Hilaire because of his role in collecting several authorization cards in May 1989, it certainly would have done so prior to August 1990. In addition, the record does not show animus on the part of Respondent beyond June 1989. I find that General Counsel has not made a prima facie showing sufficient to support the inference that protected conduct was a motivating factor in Respondent's decision. I have already found that Respondent's layoff of its employees on July 20 was not unlawful. With respect to the allegation that Respondent refused to offer St. Hilaire reinstatement, I find that the record does not show

²See *Seine Union*, 136 NLRB 1, 3 (1962), enfd. 374 F.2d 974 (9th Cir. 1967); *Advertisers Mfg. Co.*, 275 NLRB 100, 102 (1985).

that there was any such refusal. To the contrary, on August 6 Respondent sent St. Hilaire a letter requesting that he return to employment. Accordingly, the allegation is dismissed.

CONCLUSIONS OF LAW

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

2. The Unions are labor organizations under Section 2(5) of the Act.

3. Respondent has not engaged in the unfair labor practices alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³

ORDER

The complaint is dismissed.

³If 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.

Mindy E. Landow, Esq., for the General Counsel.
Gary C. Cooke, Esq. (Horowitz & Pollack), of South Orange, New Jersey, for the Respondent.
Judith F. Buckley, Esq., of New York, New York, for the Charging Party.

SUPPLEMENTAL DECISION

D. BARRY MORRIS, Administrative Law Judge. On September 11, 1991, the Board issued an order remanding this proceeding to me to consider General Counsel's brief. I have now fully reviewed General Counsel's brief. Based on such review and on further review of the entire record, I hereby issue the following Supplemental Decision.

St. Hilaire

In my decision I found that it had not been demonstrated that St. Hilaire played an active role in union activities since May 1989. General Counsel's brief states that St. Hilaire was viewed by other employees as the "head" of the organizing campaign and was the conduit for information to and from employees. King testified that St. Hilaire was the "head" of the Union. When asked what he told her which indicated his involvement with the Union, King testified that St. Hilaire said, "We [are] fighting to get benefits, because we don't have any benefits, so we are having a meeting at the union" When asked when the meeting took place which St. Hilaire referred to, King testified "about two years ago . . . in [19]89." In addition, Greenberg, ACTWU's business agent, testified that St. Hilaire was "instrumental in getting some of the people" to the union meeting held in April 1989. He further testified that St. Hilaire was "a prime help for the Union. The intermediary spokesman."

I reaffirm my finding that General Counsel has not demonstrated that St. Hilaire played an active role in union activities after May 1989. While King testified that St. Hilaire was the "head" of the Union, a reading of her testimony indicates that she felt he was the "head" of the Union because he said that "we" are fighting for benefits and that "we"

are having a meeting. That meeting took place in April 1989. In addition, while Greenberg referred to St. Hilaire as "a prime help for the Union" and as the "intermediary spokesman," again, it appears from a reading of the transcript that this was in connection with the meeting held in April 1989. Furthermore, while King may have regarded St. Hilaire as the "head" of the Union and while Greenberg may have regarded him as a "prime help" and as an "intermediary spokesman," no showing has been made in the record that Respondent was aware of St. Hilaire's alleged role. Accordingly, I reaffirm my finding that General Counsel has not made a prima facie showing sufficient to support the inference that protected conduct was a motivating factor in Respondent's decision.

August 6 Letter

In my decision I found that the record did not demonstrate that Respondent refused to offer St. Hilaire reinstatement. I noted that, to the contrary, on August 6, 1990, Respondent sent St. Hilaire a letter requesting that he return to work. In her brief, General Counsel for the *first time*, states:

This letter clearly falls within the scope of documents contemplated by Counsel for the General Counsel's subpoena (G.C. Exh. 1(1), par. 6). Inasmuch as Respondent did not produce this letter pursuant to subpoena, it should be precluded from relying on it as evidence, *Bannon Mills*, 146 NLRB 611 (1964).

The August 6 letter, which was admitted into evidence as Respondent's Exhibit 4, was not objected to by General Counsel (Tr. p. 115). Subdivision (a)(1) of Rule 103 of the Federal Rules of Evidence provides that error cannot be predicated on a ruling admitting evidence unless a "timely objection or motion to strike appears of record, stating the specific ground of objection." Indeed, Wigmore states that "a rule of evidence not invoked is *waived*." 1 Wigmore, *Evidence*, § 18 at 817 (Tillers rev. 1983). Not only did General Counsel not object to the receipt into evidence of the letter but she was given time immediately afterwards to review subpoenaed documents. At no time prior to the brief did General Counsel request that the letter should be precluded from evidence pursuant to *Bannon Mills*, supra.

Based on the above I find that General Counsel has waived her objection to the receipt into evidence of the August 6 letter. Nevertheless, even had the August 6 letter not been admitted into evidence, the result would not have changed. There has been no showing that Respondent refused St. Hilaire reinstatement. St. Hilaire was notified of the plant's reopening in the same manner that other employees were notified. As pointed out in my decision, Clarger telephoned St. Hilaire on July 29 telling him that the plant was reopening. In addition, Berger credibly testified that he regarded St. Hilaire as a "key worker," that Respondent "wanted him to come back," and that he personally mailed the August 6 letter.

Conclusion

Based on my review of the entire record, including the briefs of General Counsel and Respondent, I reaffirm the findings, conclusions, and recommended Order in my decision dated August 23, 1991.