

**Sunnyside Home Care Project, Inc. and Local 1199,
Drug, Hospital and Health Care Employees
Union.** Case 29-CA-15687

August 24, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND OVIATT

On April 17, 1992, Administrative Law Judge Steven Davis issued the attached decision. The Respondent filed exceptions, and the General Counsel filed a brief in response.

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 National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Sunnyside Home Care Project, Inc., Long Island City, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

¹ In finding that Supervisor Woubatu threatened employee Ducoste with discharge if she went on strike, the judge may have relied on Ducoste's subjective interpretation of Woubatu's statement to her. We note that the Board does not consider subjective reactions, but rather whether, under all the circumstances, a respondent's remarks reasonably tended to restrain, coerce, or interfere with employees' rights guaranteed under the Act. *American Freightways Co.*, 124 NLRB 146 (1959). We find that under this standard Woubatu's statement to Ducoste was coercive.

Kevin Kitchen, Esq., for the General Counsel.
Eric Rosenfeld (Seyfarth, Shaw, Fairweather & Geraldson),
of New York, New York, for the Respondent.

DECISION

STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge. Pursuant to a charge filed on April 19, 1991, by Local 1199, Drug, Hospital and Health Care Employees Union (Union), a complaint was issued by Region 29 of the Board on July 2, 1991, against Sunnyside Home Care Project, Inc. (Respondent).

The complaint alleges that the Union notified Respondent that certain of Respondent's employees would engage in a strike, picketing or other concerted activity at its facility, and that they did, in fact engage in a strike thereafter. The complaint further alleges that prior to the strike, Respondent threatened its employees with unspecified reprisals if they engaged in the strike, and also alleges that after the strike,

Respondent threatened its employees with discharge because they engaged in the strike.

Respondent's answer denied the material allegations of the complaint and asserted certain affirmative defenses, which will be set forth, *infra*.

On March 17, 1992, a hearing was held before me in Brooklyn, New York. Despite proper notification of the hearing, neither Respondent nor its attorney appeared. Immediately prior to the hearing, Respondent's attorney notified General Counsel that Respondent would not appear. General Counsel advised Respondent's attorney that the hearing would be held in their absence.

On the evidence presented in this proceeding, and my observation of the demeanor of the sole witness, and after consideration of the letter-brief filed by General Counsel, I make the following¹

FINDINGS OF FACT

I. JURISDICTION

Respondent's answer did not deny, and therefore, pursuant to Section 102.20 of the Board's Rules and Regulations, admitted the following allegations of the complaint.

Respondent, a New York corporation, having an office and place of business at 43-31 39th Street, Long Island City, New York, has been engaged in providing home health care services and related services. During the past year, Respondent derived gross revenues in excess of \$250,000 from its business operations, and during the same period of time, purchased and received at its New York location, products, goods, and materials valued in excess of \$50,000 directly from points located outside New York State. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

Respondent's answer admitted that on about April 4, 1991, the Union notified Respondent that beginning on April 17, 1991, certain of Respondent's employees represented by the Union, would engage in a strike, picketing, or other concerted activity at Respondent's Long Island City facility.

Cole Ducoste testified that she has been employed by Respondent for 4 years, as a home attendant. She takes care of clients in need of care in their homes, as assigned by Respondent. She stated that she has been a member of the Union for about 2 years, and that other employees of Respondent are also members of the Union.

¹ After the time for filing of briefs had expired, Respondent submitted a motion to dismiss the complaint, which addressed General Counsel's brief. I am treating the motion as a reply brief, as to which no permission for filing had been granted. Even if the motion had been properly filed, it is denied on its merits. The motion seeks dismissal of the complaint on the ground that the name of the employee who was threatened was not set forth in the complaint or at any time prior to the hearing. Respondent accordingly asserts that such failure to disclose the victim's name is a violation of due process of law. The motion is denied. There is no requirement that the identity of the subject of an 8(a)(1) threat be identified prior to the hearing. Moreover, Respondent could have learned the employee's identity if it had chosen to attend the hearing.

In late March 1991, Ducoste attended a union meeting near her worksite, which was also attended by other employees of Respondent. Union Organizer Caroline Buggs led the discussion concerning improved wages, and notification to officials of New York City that the Union opposed certain budget cuts imposed by the City. It was decided that a strike would take place on April 17. The employees in attendance agreed.

Ducoste stated that 2 weeks before the strike, she called her supervisor, Zeni Woubatu,² and told her that she wanted to go on strike. Woubatu told her that if she wanted to strike, "you need another agency." Ducoste responded that she believed that the Union informed Respondent that it intended to strike, adding that she wished to participate. Woubatu repeated that if Ducoste went on strike, you need another agency." Ducoste stated that she interpreted Woubatu's statement as meaning that if she engaged in the strike, she would have to get another job.

On April 16, Ducoste again called Woubatu and asked her to obtain a replacement to care for her client. Woubatu informed Ducoste that she had to give her 2 weeks' notice if she wanted to go on strike. Ducoste responded that if Woubatu would not give her the day off, she would take the day off herself. Woubatu said "okay."

On April 17, Ducoste engaged in a strike, and participated with other employees of Respondent at a union demonstration in Manhattan.

Some time after the strike, Ducoste decided to complain about Woubatu's statement to her. She asked an employee of Respondent, stationed at a desk, for Woubatu's boss. That unnamed employee told her that Joan Cohen was Woubatu's superior. Ducoste knows "nothing about" Cohen, but met with her in an office and told Cohen what Woubatu said to her concerning her intention to strike, as set forth above. Cohen responded that Ducoste could lose her job, and could be fired for going on strike, and also advised that she was supposed to give 2 weeks' notice, which is agency policy.

Respondent denied knowledge or information that Woubatu was a statutory supervisor. Ducoste testified that Woubatu was her supervisor. Woubatu works in an office at Respondent, and keeps Ducoste's time records. If Ducoste has a problem, or if a client has a problem or complaint concerning Ducoste's performance, Woubatu is contacted and attempts to resolve the matter. If Ducoste wants a day off or is sick, she calls Woubatu and asks her to obtain a replacement. On one occasion, a client complained that Ducoste was not caring for him properly, by not taking him in his wheelchair a distance which Ducoste believed was too far. The client visited Respondent's office and met with Woubatu. After their meeting, Woubatu told Ducoste that she (Ducoste) was wrong, and that she was not supposed to say "no" to a client. On another occasion, Ducoste told Woubatu that she did not like the job she was on and requested a transfer. Woubatu assigned her to a different client.

²Her name was spelled Zinny Wabato in the transcript. Inasmuch as this appears to be a phonetic spelling, I have used the name as set forth in the complaint.

Analysis and Discussion

The complaint alleges that on about April 8, 1991, Respondent's supervisor Woubatu threatened its employees with unspecified reprisals if they engaged in a strike.

Respondent denied that Woubatu is a statutory supervisor. Ducoste credibly testified that Woubatu resolves her complaints, and resolves complaints between Ducoste and her clients, and on one occasion told her she was wrong in her treatment of a client. Woubatu also assigns and reassigns Ducoste to various clients. Woubatu also granted time off to Ducoste at her request. Ducoste identified Woubatu as her supervisor.

Section 2(11) of the Act provides that an individual is a supervisor within the meaning of the Act if that person has:

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

In order to be found to be a supervisor, she is required to possess only one of the above criteria. *Superior Bakery*, 294 NLRB 256, 262 (1989).

Based on the evidence received at the hearing, I find and conclude that Zeni Woubatu is a supervisor within the meaning of the Act. I note that Woubatu assigned and reassigned Ducoste to jobs and reassigned her at her request, and resolved complaints of Ducoste and Ducoste and her client, during which Woubatu reprimanded Ducoste for not doing as her client wished. It appears that in the exercise of these responsibilities, particularly her resolution of the complaint between Ducoste and her client, and her reprimanding of Ducoste, Woubatu utilized independent judgment.

Respondent also denied that its employees ceased work concertedly and engaged in a strike on April 17. Ducoste testified that prior to the strike, she and other employees of Respondent engaged in a discussion with a union agent concerning improved wages and a protest over certain New York City budget cuts, and that she and other employees of Respondent engaged in a strike on April 17. There is no evidence that the strike was in violation of a no-strike clause in the parties' contract, or that the strike was not protected or concerted. In addition, it appears that the proper 10-day notice, pursuant to Section 8(g) of the Act, was given by the Union. Under these circumstances, I find and conclude that on April 17, Respondent's employees ceased work concertedly and engaged in a strike.

Ducoste's uncontradicted testimony establishes that about 2 weeks before April 17, Woubatu told her that if she intended to strike she needed another agency, which meant, to Ducoste, that she would have to get another job.

The complaint alleges that Woubatu threatened its employees with unspecified reprisals if they engaged in the strike. The evidence supports a finding that Woubatu threatened Ducoste with discharge if she engaged in the strike. I accordingly find and conclude that such a threat violates Section

8(a)(1) of the Act. *Parkview Gardens Care Center*, 280 NLRB 47, 50 (1986).

The complaint also alleges that Respondent, by a supervisor whose identity was unknown, violated the Act by threatening employees with discharge for engaging in the April 17 strike. This allegation apparently relates to the testimony concerning Ducoste's conversation with Joan Cohen.

I cannot find a violation based on this alleged conversation. The identity of Respondent's alleged supervisor is too vague to support a finding of violation. Thus, Ducoste testified that Cohen was identified as Woubatu's supervisor by an unidentified employee sitting at a desk. Ducoste knew nothing about Cohen, but was told by Cohen that Ducoste could lose her job and could be fired for going on strike. There is thus no credible evidence that Cohen is Respondent's supervisor or agent. The identification of Cohen by an unnamed employee as Woubatu's "boss" is too tentative to permit a finding of a violation. No other facts concerning Cohen's responsibilities or title is known. The fact that Cohen cited Respondent's alleged policy as requiring 2 weeks' notice is only evidence that Cohen was familiar with Respondent's rules. Another employee could also be aware of such a rule.

Respondent's Defenses

Respondent asserted several affirmative defenses in its answer.

Respondent asserted that its position as to the April 17, 1991 strike was the same as that expressed to the Union's president by letter dated June 6, 1991, in response to the Union's later expressed intention to strike, in June 1991.

In that letter, which was attached to Respondent's answer and therefore received in evidence, Respondent, having received notice from the Union that it intended to strike, picket, and engage in other concerted activity at all of Respondent's sites in mid-June 1991, objected to the strike because, *inter alia*, it was dangerous to its clients, and that "meaningful negotiations" had not been attempted by the Union with Respondent. The letter further stated that the Union had erroneously implied that an impasse had been reached in negotiations.

I conclude that this defense is irrelevant to the complaint allegations. The complaint alleges certain illegal threats to employees if they engaged in a strike, and because they engaged in the strike. Respondent's affirmative defense that the Union's action in calling a strike was dangerous and in bad faith, does nothing to controvert the complaint allegations of the complaint. I therefore find that this affirmative defense lacks merit.

Respondent's second affirmative defense is that the allegations are "de minimis." I do not find the allegation found to be unlawful to be de minimis. A threat to discharge an employee because she intended to engage in a strike is not de minimis.

Respondent's third affirmative defense asserts that the strike was an unprotected "partial" strike, within the meaning of *Machinists Local 76 v. Wisconsin Commission*, 427 U.S. 132, 152-153 fn. 14 (1976). However, in that case the Supreme Court held that a concerted refusal to work overtime which did not violate the Act, could not be enjoined by a state labor relations board. Respondent has not met its bur-

den of proving its affirmative defense, that the strike was not concerted or unprotected.

CONCLUSIONS OF LAW

1. The Respondent, Sunnyside Home Care Project, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 1199, Drug, Hospital and Health Care Employees Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By threatening its employees with discharge if they engaged in a strike on April 17 and 18, 1991, Respondent violated Section 8(a)(1) of the Act.

4. Respondent has not violated the Act, as alleged in the complaint, by threatening its employees with discharge because they engaged in a strike on April 17 and 18, 1991.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

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

ORDER

The Respondent, Sunnyside Home Care Project, Inc., Long Island City, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening its employees with discharge if they engaged in a strike on April 17 and 18, 1991.

(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) Post at its facility at 43-31 39th Street, Long Island City, New York, copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by 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.

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

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.

⁴If 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.

WE WILL NOT threaten our employees with discharge if they engaged in a strike on April 17 and April 18, 1991.

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.

SUNNYSIDE HOME CARE PROJECT, INC.