

Revere Armored, Inc. and Lisa Carlyle Wagner.
Case 29-CA-15814

February 4, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND RAUDABAUGH

The issue in this case is whether the Respondent violated Section 8(a)(3) and (1) by discharging an employee for her union activities and interrogating and soliciting an employee to spy on the union activities of other employees.

On October 19, 1992, Administrative Law Judge Raymond P. Green issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel filed a brief in support of the judge's decision.

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 orders that the Respondent, Revere Armored, Inc., Bohemia, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

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), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Emily DeSa, Esq., for the General Counsel.
Douglas A. Durnin, Esq., for the Respondent.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. This case was tried in Brooklyn, New York, on August 19 and 20, 1992. The charge was filed on June 26, 1991, and the complaint was issued on August 20, 1991. In substance, the complaint alleges:

1. That on or about May 21, 1991, the Respondent, by Bob Scaretta, interrogated employees about their activities for United Industry Workers, Local 424.

2. That on or about May 21, 1991, the Respondent solicited an employee to report on the union activities of other employees.

3. That on or about May 21, 1991, the Respondent discharged Lisa Carlyle Wagner because of her union 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 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. Based on the testimony of Kimberly Cheselka, a business agent of the Union, I find that it is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The Respondent is engaged in the business of transporting, counting, and processing cash on behalf of its various business customers. As part of its operations, it has a money room where cash is counted and from which deposits to the Federal Reserve Bank are thereafter made on behalf of its customer's accounts. The Charging Party, Lisa Wagner, worked in the money room.

As of April and May 1991, the hierarchy of the Company in relation to Wagner was as follows: Robert and Susan Scaretta were the owners and principal officers of the Company and Barbara Salvado was the office manager. Under Salvado's direction was Susan Brady (nee Fontaine) who was in charge of the money room. Brady in turn, directed two supervisors, Janet Flynn and Sue Nelson, who oversaw the work of the cash tellers who worked in the money room. At that time, there were about 45 to 50 people working in the money room, most of whom worked at night on two overlapping shifts; one from 6 p.m. to 2 a.m. and the other from 9 p.m. to 5 a.m.

The Union commenced an unsuccessful organizational drive at the Employer on or about May 7, 1991, after it had received a call from Lisa Wagner, the Charging Party. Initially, the Union's efforts were confined to handing out pamphlets outside the Employer's building. Wagner, for her part, in a somewhat roundabout way, indicated to other of her co-workers that she thought that they all needed a union. During the first day that the Union distributed leaflets, this activity was observed by Vincent Griff, the Employer's vice president and operations manager. There is no question but that the Respondent was aware of general union activity going on at its premises.

Sometime about the third week of May 1991, Lisa Wagner took with her a group of union literature which she left in her car parked outside the Employer's building. This literature, one document of which called for a meeting to be held on May 25, was left by her on her dashboard. She told other employees at work that if they wanted to get the literature, they could go outside to her car and pick it up as the doors were left open.

Deidre Rey, who used to work for the Company as a teller, impressed me as a credible witness. She testified that on or about May 21, 1991, she was called into the office by the Scarettas and asked if she was part of the Union. She testified that when she replied, "No," Bob Scaretta said that Lisa was the person who was the head of the union thing and that he wanted her to keep her ears and eyes open as to whether there were other people that were involved. Ac-

ording to Rey, Bob Scaretta ended the conversation by saying that they were not going to have a union in the Company; that they would fire those people and hire new ones if that was the case. The Scaretta denied these contentions.

On or about May 23 or 24, Lisa Wagner was discharged.

R. Scaretta testified that he made the decision to discharge Wagner. He states that his reasons were because of her latenesses, her absences, and "a sense of pilferage." He testified that the immediate cause of her discharge was that she was absent without permission for several days just before her discharge. Although acknowledging that he was aware of some union activity through the grapevine, he denies knowing that Wagner was involved.

Regarding B. Scaretta's assertion that there was "a sense of pilferage," the credible evidence shows that on May 1, 1991, Wagner, along with other employees, was subjected to a polygraph test conducted by an outside contractor during which she was asked about and denied stealing. She did concede, however, that from time-to-time, she exchanged her own money for coins such as Susan B. Anthony dollars. While acknowledging that she was aware that this was against company policy, Wagner testified that she spoke to her supervisor, Sue Nelson, about the polygraph interview and was merely told not to do this again. There is no dispute and R. Scaretta concedes that despite this incident, Wagner was put back to work at her same job, an action which to my mind, is inconsistent with any contention that she had "admitted" that she was stealing.

Because Wagner often used her father's car to get to work in the evening or relied on rides from others, there were occasions when she was late or absent. Nevertheless, there was credible evidence that employees such as Debra Weiner, Trish D'Amato, Rina Anastasia, and others were late or absent about as often as Wagner without suffering discharge.

According to former Supervisor Jo-Anne Ranaudo, an employee named Tina was discharged after having received three probations and even then was not discharged for her excessive latenesses and absences. Barbara Salvado, Respondent's office manager, testified about Wagner's history of latenesses and absences and asserted that she brought them to attention of Wagner's supervisor, Coreen Brady. Salvado conceded, however, that she made no recommendations regarding Wagner's employment. And in fact, there is no evidence that the Respondent, prior to the date it discharged Wagner, ever gave her a written warning or any other form of discipline on account of her absences or latenesses.¹

The Respondent contends that the proximate cause of Wagner's discharge was her absence from work, without permission, from about May 18 to 21, 1991. Although Respondent's witnesses deny that Wagner asked for permission to take these days off, Wagner credibly testified that she notified both Sue Nelson, her direct supervisor, and B. Scaretta. This was corroborated by Jo-Anne Ranaudo who testified that a few days before Wagner was discharged, Sue Nelson told her that Wagner had asked for permission to take some days off.

¹ Wagner acknowledged that she did receive in mid-May 1991, one oral reprimand from Supervisor Coreen Brady for being late.

III. ANALYSIS

Having credited the testimony of Lisa Wagner, Jo-Anne Ranaudo, and Deidre Rey, it is obvious that the General Counsel has made out a strong prima facie showing that the Respondent's motivation in discharging Wagner was because of her activities on behalf of the Union's attempt to organize the employees of the Company. Thus, the evidence shows that she was the sole employee who engaged in any significant union activity; that the Company was aware of the Union's organizing campaign and her role in it; that R. Scaretta told Rey that he would discharge employees to avoid unionization and that Wagner's discharge followed soon after she left union literature in her car located at the Company's parking area.

The General Counsel having established a prima facie showing of discriminatory motive, the Respondent has not, in my opinion, overcome its burden of showing that it would have discharged Wagner for nondiscriminatory reasons. *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Thus, the Respondent asserts a contention of pilferage which was unequivocally denied by Wagner and which did not result in any discipline taken against her at the time of the alleged incident. The Respondent contends that she was habitually late or absent. Nevertheless, it produced no evidence that this caused it to give her any written warnings or other disciplinary actions. Finally, the Respondent contends that it discharged Wagner because she was absent without permission for several days in late May. As noted above, I have credited the testimony of Wagner and Ranaudo and conclude that she did in fact ask for and obtain permission to take those days off.²

In addition to the above, I also find, based on the credited testimony of Deidre Rey that the Respondent unlawfully interrogated her about union activity and unlawfully solicited her to report on the union activity of other employees. *Electronic Data Systems*, 278 NLRB 125, 129 (1986).³

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2) of the Act.
2. By discharging Lisa C. Wagner because of her activities on behalf of United Industry Workers Union, Local 424, the Respondent violated Section 8(a)(1) and (3) of the Act.
3. By interrogating employees concerning their union activities, the Respondent has violated Section 8(a)(1) of the Act.
4. By soliciting an employee to spy on the union activities of other employees, the Respondent has violated Section 8(a)(1) of the Act.

² Moreover, even if I were to credit the Respondent's assertion that Wagner did not obtain permission to be absent from May 18 to 21, I would still find, based on the evidence of disparate treatment, that the Respondent had not overcome its burden under *Wright Line*.

³ As the complaint does not allege that the Respondent made any threats of discharge, I make no such finding even though I credit Rey's testimony that on or about May 21, 1991, R. Scaretta told her in effect, that he would discharge the employees and hire replacements if the Union were to be selected as the bargaining representative.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

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

The Respondent having discriminatorily discharged an employee, it must offer her reinstatement and make her whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴

ORDER

The Respondent, Revere Armored, Inc., Bohemia, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging Lisa C. Wagner because of her activities on behalf of the United Industry Workers Union, Local 424.

(b) Coercively interrogating any employee about union support or union activities.

(c) Soliciting employees to spy on the union activities of other employees.

(d) 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 Lisa C. Wagner immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed, and make her whole for any loss of earnings and other benefits suffered as a result of the discrimination against her in the manner set forth in the remedy section of the decision.

(b) Remove from its files any reference to the unlawful discharge and notify Lisa C. Wagner in writing that this has been done and that the discharge will not be used against her in any way.

(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 facility in Bohemia, New York, copies of the attached notice marked "Appendix."⁵ Copies of the no-

⁴If 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.

⁵If 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

tice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on 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.

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 any employees because of their activities on behalf of the United Industry Workers Union, Local 424 or any other labor organization.

WE WILL NOT coercively interrogate any employees about union support or union activities.

WE WILL NOT solicit employees to spy on the union activities of other employees.

WE WILL NOT 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.

WE WILL offer Lisa C. Wagner immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed, and make her whole for any loss of earnings and other benefits suffered as a result of the discrimination against her.

WE WILL remove from our files any reference to the unlawful discharge of Lisa C. Wagner and notify her in writing that this has been done and that the discharge will not be used against her in any way.

REVERE ARMORED, INC.