

**De Jana Industries, Inc. and Local 831, International Brotherhood of Teamsters, AFL-CIO,<sup>1</sup> Case 29-CA-15726**

September 14, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS  
DEVANEY AND RAUDABAUGH

On November 20, 1992, Administrative Law Judge D. Barry Morris issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed a brief answering the General Counsel's exceptions.<sup>2</sup>

The National Labor Relations 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,<sup>3</sup> and conclusions and to adopt the recommended Order.

ORDER

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

<sup>1</sup> The name of the Charging Party has been changed to reflect the new official name of the International Union.

<sup>2</sup> The Respondent's unopposed motion to correct errors in the transcript is granted.

<sup>3</sup> The 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 that 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.

*Rosalind Rowen, Esq.*, for the General Counsel.

*Stanley Israel, Esq. (Israel & Bray)*, of New York, New York, for the Respondent.

*Michael S. Lieber, 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 Brooklyn, New York, on June 30 and July 1, 1992. Upon a charge filed on May 10, 1991, a complaint was issued on July 9, 1991, alleging that De Jana, Industries, Inc. (Respondent) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act), by refusing to recall two former employees. 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. Briefs were filed by the General Counsel and by the Respondent.

On the entire record of the case,<sup>1</sup> 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 Port Washington, New York, is in the business of providing private sanitation and trash removal and related services. Respondent admits, and I so find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent also admits, and I so find, that it meets the Board's standard for the assertion of jurisdiction. In addition, it has been admitted, and I so find, that Local 813, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO (Local 813 or the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

1. Background

On October 10, 1989, the Union filed a representation petition to represent Respondent's drivers and helpers at the Port Washington facility. A secret-ballot election was held on December 22, 1989. The revised tally of ballots showed that the Union won the election by a vote of 9 to 5. On March 14, 1991, Administrative Law Judge James F. Morton issued a decision finding that Respondent engaged in various unfair labor practices in violation of Section 8(a)(1) and (3) of the Act during the period September 1989 through January 1990. The Board affirmed Judge Morton's decision. *De Jana Industries*, 305 NLRB 845 (1991).

2. George Middlebrook

George Middlebrook began his employment with Respondent in May 1989. He testified that when he applied for the position he put on his application that he worked for another garbage company in 1988, the Donno Company. Middlebrook stated that Steven Lapham, the manager of the solid waste division, was "aware that Donno was a union shop and you had to join the union in order to work there." Middlebrook testified that 2 weeks before the election he had a conversation with Barry Zapellius, another driver, at which time Zapellius asked him "what I thought of the union and I told him . . . it is probably going to benefit us, it looks like it is good for us, it is going to give us good benefits . . ." Subsequent to the election, Zapellius became a supervisor. During the second week of December 1989, Middlebrook signed a union authorization card and he voted for the Union in the election.

Middlebrook testified that in May 1990 he had a meeting with Lapham and Zapellius, at which time he was told that Respondent was losing the Kingspoint route and that therefore it was necessary that he be moved to the Plandome Heights route. Middlebrook testified that during June he worked on the Plandome Heights route for approximately 2 weeks, after which Lapham told him that he was going to

<sup>1</sup> Respondent's motion to correct transcript is granted.

be “demoted” to the position of tree spraying. Middlebrook stated that he worked for 1 day on tree spraying and the next 2 days it rained and he was sent home. Middlebrook testified that his supervisor told him “when we need you, we will call you. And I never got a call back and that was it.” Middlebrook applied for a position with Respondent in September 1990 and again in May 1991 but he was not hired. On cross-examination Middlebrook conceded that while he was employed at Respondent he was involved in several automobile accidents in which he backed into a police car and also damaged a mailbox. He also conceded that in an affidavit given to a Board agent on May 31, 1991, he stated “I do not know if the employer was ever aware that I had joined or otherwise supported the Union at any time while working there.” In the same affidavit he also stated that he was not “open or outspoken about my support for the union.”

Lapham testified that since May 1990 he hired two employees who had previously worked for the Donno Company. He stated that he was aware that Donno was a “union company.” He further testified that Respondent does not have a recall policy and that seniority plays no role with respect to the hiring of employees. He testified that he had not been aware that Middlebrook signed a union authorization card nor did he know how Middlebrook voted in the union election. He stated that in May 1990, Middlebrook had been working on the Kingspoint route and that Respondent was losing that route. Lapham testified that the company tried out Middlebrook for a day or two on the Plandome Heights route but decided instead to use another driver for that route. Lapham then offered Middlebrook a position in the spray division. Lapham credibly testified that Middlebrook told him he was concerned about the inhalation of the chemicals “whether they were toxic or not.” Lapham testified that in May 1991, Middlebrook applied for a position. Lapham stated that there were approximately 70 applicants and the reason why Middlebrook was not rehired was “I guess I would term it immaturity and recklessness . . . he did have his accident with a police car.” Lapham stated “I made a judgment that other people would be better suited for the level of service I wished to provide our customers.”

### 3. Pasquale Bicchetti

Pasquale Bicchetti began his employment with Respondent in July 1989. He was a helper on the Kingspoint route in which Middlebrook was the driver. In January 1990 he was switched to the Thomaston route where he was the helper and Robert Anchelowitz was the driver. While he obtained a learner’s permit, he never obtained a license to be able to drive the trucks. He testified that in February 1990 he was informed by Lapham that Respondent lost the contract for Thomaston and there was “no other work at the present time.” Bicchetti was laid off in February. Bicchetti testified that in September 1989 he signed a union authorization card and that he voted for the Union in the election. He testified that prior to the election he discussed the Union with two fellow employees, Middlebrook and Anchelowitz. He further testified that in January or February 1990 Lapham told him that “I’ll be needing drivers” and that it would be necessary for him to obtain a Class 3 license.

Lapham was asked the reason why Bicchetti was not offered a position after December 20, 1990. He testified “Mr.

Bicchetti does not have . . . as far as I know has never had a Class C or a Class B or a Class Three license which is what we needed. And when I’ve been hiring subsequently I require people to have a Class B license. He doesn’t have it.” Lapham also testified that he had no knowledge whether Bicchetti had signed a union authorization card or whether he voted for or against the Union.

## B. Discussion and Conclusions

### 1. Complaint allegations

The complaint does not allege that Middlebrook’s termination in June 1990 or that Bicchetti’s termination in February 1990 in any way violated the Act. The only allegation in the complaint is that since December 20, 1990, Respondent has refused to recall or reemploy Middlebrook and Bicchetti. General Counsel’s theory of the case was stated at the hearing as follows:

MS. ROWEN: . . . It is our theory that the retaliatory plan engaged in by this employer was not directed to specific individuals who were known leaders for the union. Rather, it is our theory that the employer was systematically eliminating from its staff anybody who voted in the election in December of 1989, to insure no union supporters would be left.

ADMINISTRATIVE LAW JUDGE: Now are you saying that anybody who voted, irrespective of whether the person voted for the union or against the union?

MS. ROWEN: Yes, Your Honor . . . .

### 2. Middlebrook

I credit Lapham’s testimony that he did not know that Middlebrook had signed a union authorization card nor did he know how Middlebrook had voted in the union election. Indeed, in an affidavit given to a Board agent, Middlebrook conceded that he was never “open or outspoken about my support for the union.” Middlebrook conceded that he was involved in several automobile accidents, in one of which he backed into a police car. I credit Lapham’s testimony that Middlebrook’s application was considered along with approximately 70 other applications and that Middlebrook was not rehired because of his prior driving record which Lapham regarded as “reckless.” I find that General Counsel has not established a prima facie showing that union activity was a motivating factor in the decision not to rehire Middlebrook.<sup>2</sup>

### 3. Bicchetti

I credit Lapham’s testimony that he was not aware of Bicchetti’s having signed the union authorization card nor did he know how Bicchetti voted in the union election. Bicchetti testified that he never observed anyone from management having knowledge of his union activities. Prior to Bicchetti’s termination, Lapham told Bicchetti that it was necessary to obtain a Class 3 license. I credit Lapham’s testimony that Bicchetti was not rehired because he did not have

<sup>2</sup>Even were I to conclude that a prima facie showing had been made, I believe that the employer has demonstrated that the “same action would have taken place even in the absence of the protected conduct.” *Wright Line*, 251 NLRB 1083, 1089 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982).

the necessary license to drive the trucks. Accordingly, I find that General Counsel has not established a prima facie showing that union activity was a motivating factor in the decision not to rehire Bicchetti.<sup>3</sup>

#### 4. Legal principles

As noted earlier, General Counsel's theory is that "the employer was systematically eliminating from its staff anybody who voted in the election in December of 1989, to insure that no union supporters would be left." In her brief, General Counsel cites *Link Mfg. Co.*, 281 NLRB 294, 299 fn. 8 (1986), which states, as follows:

The Respondent's reaction was thus in the nature of a "power display" in response to the advent of the Union and was unlawful without regard to specific knowledge of the prouion activities of particular employees. See *Majestic Molded Products v. NLRB*, 330 F.2d 603, 606 (2d Cir. 1964) . . . .

General Counsel further clarified her position by stating that Respondent was intent on eliminating anyone who voted in the election, irrespective of whether they voted for or against the Union. General Counsel appears to rely on the fact that the election took place in December 1989 and the finding that Respondent engaged in certain unfair labor practices during the period September 1989 through January 1990. Other than those unfair labor practices, General Counsel has not pointed to any evidence which would indicate a desire or intention on the part of Respondent to engage in a "power

<sup>3</sup>As in the case of *Middlebrook*, even were I to have found a prima facie showing, I believe that the employer has demonstrated that the "same action would have taken place even in the absence of the protected conduct." See *Wright Line*, supra at 1089.

display." Indeed, subsequent to the election Respondent hired two employees who, while at Donno, were members of Local 813. Had Respondent wished to "insure [that] no union supporters would be left" it would hardly have hired two employees who had been members of Local 813. In addition, it should be noted that in *Link Mfg. Co.*, supra, the unfair labor practices were committed prior to, and immediately after, the election. In the instant proceeding, the election took place on December 22, 1989. The alleged unfair labor practice, however, took place 1 year later, on December 20, 1990. Under the circumstances, I believe General Counsel has not satisfied its burden of showing that Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act. Accordingly, the allegations are dismissed.

#### CONCLUSIONS OF LAW

1. De Jana Industries, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of 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 recommended<sup>4</sup>

#### ORDER

The complaint is dismissed.

<sup>4</sup>If 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.