

John H. Cameron & Sons, Inc. and Sheet Metal Workers International Association, Local Union No. 19. Cases 4-CA-19631 and 4-CA-20026

August 25, 1995

DECISION AND ORDER

BY MEMBERS STEPHENS, COHEN, AND TRUESDALE

On February 3, 1994, Administrative Law Judge Arline Pacht issued a decision in this proceeding. Thereafter, the Charging Party and the General Counsel filed exceptions and supporting briefs, and the Respondent filed a brief in opposition to the Charging Party's and General Counsel's exceptions.

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, and conclusions only to the extent consistent with this Decision and Order.

The judge found that the Respondent did not violate the Act by discharging two employees. We adopt this finding and dismiss those allegations.

The judge also reinstated a June 20, 1991 settlement agreement in Case 4-CA-19631 that the Regional Director had set aside and found that the General Counsel was barred from litigating any of the Respondent's presettlement conduct. The judge found that all of the alleged Section 8(a)(1) conduct was presettlement and that the General Counsel did not meet the exceptions to the "settlement bar" rule. Thus, the judge found that no complaint allegations were reserved in the settlement agreement, and that General Counsel failed to show that alleged presettlement violations were unknown to the General Counsel and not readily discoverable by investigations at the time of settlement. *Lee-ward Nursing Home*, 278 NLRB 1058 (1986). She therefore dismissed the complaint in its entirety.

The General Counsel and the Charging Party except. They contend, inter alia, that there were complaint allegations of postsettlement interrogations and evidence presented in support of these allegations. Thus, they argue, the judge was in error for reinstating the settlement agreement on the ground that all allegations were presettlement. We agree.

Paragraph 9(b) of the consolidated complaint, as amended, alleges illegal interrogations about ". . . early Summer 1991." There is testimony about interrogations in July 1991.

In this circumstance, we will remand this proceeding to the judge to examine the evidence surrounding the allegations in paragraph 9(b) and determine if postset

tlement violations occurred as alleged. If violations occurred, the judge, inter alia, is to weigh their significance in determining whether to set aside the settlement agreement. If the settlement is set aside, the judge is to determine the legality of presettlement activity alleged in the consolidated complaint.

ORDER

IT IS ORDERED that these consolidated cases are remanded to the judge to determine if there were any 8(a)(1) violations, as alleged in the complaint, which occurred after the June 20, 1991 settlement agreement. If the judge finds such violations, she is to take appropriate action regarding the settlement agreement and the other 8(a)(1) allegations in the complaint.

IT IS FURTHER ORDERED that Judge Pacht shall issue a supplemental decision containing findings of fact, credibility resolutions, and conclusions of law. The supplemental decision shall be served on the parties, after which the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

IT IS FURTHER ORDERED that sections of the consolidated complaint alleging violations of Section 8(a)(3) of the Act are dismissed.

Bruce G. Conley, Esq., for the General Counsel.

Martin R. Lentz, Esq. (Pelino & Lentz), of Philadelphia, Pennsylvania, for the Respondent.

Dennis P. Walsh, Esq. (Spear, Wilerman, Borish, Endy, Browning & Spear), of Philadelphia, Pennsylvania, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ARLINE PACHT, Administrative Law Judge. On March 12, 1991, the Charging Party, Sheet Metal Workers International, Local Union No. 19 (the Union or the Local) charged John H. Cameron & Sons, Inc. (Cameron) with violating Section 8(a)(1) of the National Labor Relations Act (the Act) in Case 4-CA-19631. Thereafter, on May 29, 1991, the parties entered into an informal settlement agreement. Subsequently, the Union filed additional charges on August 26, 1991,¹ as amended on February 25, 1992. By order dated February 27, 1992, the Regional Director for Region 4 of the National Labor Relations Board (the Board) revoked the settlement agreement and issued a consolidated complaint alleging that the Respondent violated Section 8(a)(1) through various acts including threats, surveillance, and interrogation, and Section 8(a)(3) by terminating two employees, Phillip Moore and Edward Lloyd, because of their union activity. The Respondent filed a timely answer denying that it had committed any unfair labor practices.

This matter was tried in Philadelphia, Pennsylvania, from May 4 through 7 and June 30, 1993,² at which time the par-

¹ Unless otherwise noted, all events took place in 1991.

² The hearing was adjourned on May 6 to permit counsel for the General Counsel (General Counsel) to seek enforcement of a sub-

Continued

ties had full opportunity to examine and cross-examine witnesses and introduce documentary proof.³ On the entire record,⁴ including my observation of the witnesses' demeanor, and consideration of the parties' posttrial briefs, I make the following

FINDINGS OF FACT

I.

A. *Jurisdictional Findings*

At all times material to this proceeding, the Respondent, a Pennsylvania corporation, with an office located in Chadds Ford, Pennsylvania, has installed and serviced heating and air-conditioning systems. During the past year, in conducting its business, Respondent purchased and received goods and materials valued in excess of \$50,000 directly from points outside the State. Accordingly, the complaint alleges, Respondent admits, and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (5), and (6) of the Act.

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

B. *Alleged Unfair Labor Practices*

1. Respondent is accused of unlawfully interrogating and threatening employees

Respondent has been in the business of installing and servicing air-conditioning equipment since 1964. From mid-1990 through August 1991, Local 19 representatives picketed and handbilled outside Respondent's headquarters and other sites where Cameron employees were working to protest the Company's failure to observe area standards.⁵

John H. Cameron, president of the firm which bears his name, was deeply disturbed by the Union's persistent presence at company jobsites. Consequently, he spoke with other members of management on virtually a daily basis about the Local's uncanny ability to track the employees' whereabouts. Robert Dudley, head of the commercial division, testified that he and Cameron frequently speculated about the identity of the employees who might be divulging the location of jobsites to the Union. Cameron engaged in similar discourse with Francis Sipala, Respondent's debt collection manager, and Scott Van Zandt, a foreman in the commercial division until he was demoted to the rank and file.

poena to compel the attendance of a former Cameron employee, Francis Sipala. The hearing reconvened on June 30, 1993, at which time Sipala appeared pursuant to court order.

³Documents introduced into evidence by the counsel for the General Counsel will be cited as GCX; documents introduced by the Respondent will be cited as RX and by the Charging Party as CPX, followed in each case by the appropriate exhibit number. References to the transcript will be cited as Tr. followed by the relevant page number.

⁴The General Counsel's motion to correct the transcript was unopposed and is hereby granted. The motion is admitted into evidence as GCX 10.

⁵During this period, the Union engaged in similar activity involving a number of other employers, 10 of whom filed unfair labor practice charges. A consolidated complaint issued which was resolved by way of settlement.

2. Cameron attempts to identify leaks

From July 1990 onward, Cameron voiced his suspicions about the union sympathies of various employees. He first identified employee Bob Myers as a potential "leak" of information to the Union and said, "He had to go." (Tr. 212.) Other employees whose loyalty to the Company was questioned included Brian Stockton, Anthony Dragon, Steve Lehman, and Diane Petherbridge. Cameron often attempted to determine if a correlation could be drawn between the jobs on which employees worked and the sites where union representatives most appeared as a way to identify informers. In this regard, Dudley testified that from January through July 1991, Cameron regularly noted that picketing often occurred at jobsites where the alleged discriminatees in this case, Phillip Moore and Edward Lloyd, were assigned causing him to believe that they very likely were union supporters.

Cameron's opposition to Local 19 led him to question employees directly about their union proclivities. For example, when interviewing Anthony Dragon for a job in September 1990, Cameron asked how he felt about unions. Dragon replied that he "wasn't that crazy about them" and was hired. Similarly, during Phillip Moore's employment interview, Cameron asked if he had any dealings with the Union or had a union card. Moore assured him he did not have such a card, but acknowledged he had relatives who were members of Local 19. He was hired anyway.

In early 1991, the Union mailed a packet of materials to a number of Cameron employees including Moore, Anthony Dragon, and Walter Tipton. Subsequently, Dragon and Tipton met with Union Organizer James Hochburg to discuss the information with him. Soon after the packet arrived, Cameron approached Tipton on the shop floor and asked if he had received any union literature and if so, what had he done with it. Tipton said he had received some union material but had tossed it aside. Cameron then asked Tipton if he could see what he had received. Although Dragon said he was only 6 feet away when this conversation took place, Cameron did not address him directly. Instead, he asked Tipton to have Dragon bring his information to him as well. Dragon never did so.

Tipton denied that Cameron had questioned him as Dragon claimed. He also denied that he told a Board agent about this interrogation which was described in his unsigned affidavit the agent had mailed to him for signature after interviewing him by telephone. In assessing credibility here, I bear in mind that Tipton subsequently was promoted to a position as shop supervisor and was excluded from voting in the Board election. Although a Board agent has no motive to invent a story out of whole cloth and attribute it to a witness, a witness such as Tipton has ample reason to conveniently forget his current employer's intrusive inquiries. I conclude that Cameron did ask Tipton to turn over union literature, just as Dragon maintained.

On another occasion in the spring of 1991, as Dragon was entering Respondent's parking lot, he saw a friend on Local 19's picket line. He stopped to greet and hug her before entering the facility. Afterwards, he was confronted by Dudley and Cameron who questioned him about the incident. Unassuaged when Dragon explained that the picket was an old friend, Cameron told Dragon that he knew he had friends in the Union. He then asked Dragon if he was leaking information to the Union and warned him not to do so. Again,

during the spring of 1991, Dragon was working at a particular jobsite when the Union arrived with pickets. Dudley told Dragon that Cameron suspected him of being a union informant.

Employee Phillip Moore received the same package of union literature sent to Dragon and Tipton. Moore told Robert Dudley about the material, thinking that he was the one who gave the Local his name and address. Moore further stated that at Dudley's request, he agreed to meet him after work at a local pub and was surprised when Cameron joined them there. Cameron asked Moore if he could examine and copy the union material he had with him. He also asked if Moore wanted the union authorization card returned. Moore replied he did not need it, fearing that any other answer would cost him his job. Moore further recalled that during this encounter, Cameron said that employees who were co-operating with the Union were doing away with their jobs; that he could do more good for the employees than the Union, and that if the Union prevailed, the Company would face bankruptcy. Over the next several months, Cameron asked Moore several times if he knew who was supplying the Union with information.

Cameron did not dispute Moore's account of their exchange at the alehouse. Cameron believed, however, that Moore willingly turned over the union material and gave him no reason to believe that he was anything but a loyal employee. Dudley's description of the *tete-a-tete* at the alehouse supports Cameron's view, for he testified that Moore assured his employer that he "was a dedicated company employee" and had "no intention" of signing the Union's authorization card. (Tr. 220.)

Cameron also offered uncontroverted testimony about a previous exchange with Moore which had convinced him that the employee was staunchly antiunion. Thus, Cameron recalled that on February 11, he went with Dudley to a jobsite on the understanding that Moore has asked to speak with him. There, Moore told Cameron he was upset that the Union had succeeded in contacting him by phone and assumed that Cameron must have divulged his unlisted number. After Cameron assured him he had not disclosed this information to the Union, Moore further volunteered that he received the Local's material in the mail.

3. Respondent terminates Moore and Lloyd

In reality, Moore was a union proponent. On learning that the Union had not received the first authorization card he signed, Moore and Tony Dragon, both of whom were then working at a post office project in Wilmington, Delaware, arranged to meet with several union agents during their lunch period on July 30. Just before leaving for that appointment, Dudley arrived and demanded to know where they were going, but neither Dragon nor Moore responded. When they returned to work, Dragon again refused to tell Dudley where they had been. Dudley then advised Dragon that Cameron had ordered his discharge that day because he believed he was feeding information to the Union.

Moore continued to work at the post office site until August 12 when he, Lloyd, Van Zandt, and Dudley were fired. The General Counsel claims that Respondent discharged Moore and Lloyd because Cameron suspected them of being union supporters. Respondent, on the other hand, posits that

these men were discharged because of their poor performance on the post office job.

Respondent successfully bid on the heating and air-conditioning work at the Wilmington Post Office in May under a subcontract with Aaron Vegh Plumbing and Heating. The prevailing wage rate on that project was \$26 to \$28 per hour, considerably more than the \$12 hourly rate Cameron employees typically earned at the time.⁶ Moreover, the job was supposed to be on a "fast track," meaning that multiple trades would be working together in order to complete the project quickly. Dudley, as head of the commercial division, was responsible for the project which, from the outset, was riddled with problems.

Dudley maintained that these problems stemmed primarily from the fact that the drawings for the job were deficient and failed to properly guide the employees in their work. He also said that the drawings had not been approved by the mechanical engineer as required by contract. Obtaining the mechanical engineer's imprimatur apparently was more than a formality for it was his or her function to determine from the drawings whether the work of one trade might create obstacles for another.

Several other government witnesses also claimed the drawings failed to show the proper elevation of ducts and where obstructions might be encountered which would have to be circumvented. As a consequence, Moore, who spent much of his time on the post office job, stated, without contradiction, that he installed ducts that later had to be moved.

Robert Bream, a salesman and estimator for the Respondent, was responsible for preparing the drawings to be used at the post office job. He testified that he completed the drawings in June and that they included the requisite elevations. He was less than accurate, however, for three of the seven drawings which Respondent introduced into evidence as the total number of those executed for the post office job had no elevations designated.

Bream also disputed the employees' contention that detailed shop drawings were unavailable during the first few weeks of work at the post office project. Dudley confirmed, however, the employees' testimony in this respect. Few could know better than he that the shop drawings were not available from the outset since he was blamed for their absence. Thus, in an irate letter, the Vegh Company's president criticized Dudley, stating: "You have been dragging your feet in performance of this job since the start. Detailed shop drawings have been requested on numerous occasions from you with the detailed dimensions . . . but they have not been forthcoming." (GCX 22.) This letter plainly supports the employees' claims that the drawings were not on hand when the work at the post office began and that if anyone was to blame for delay, it was Dudley, not the rank-and-file workers.

In further accounting for delay at the post office site, Moore claimed that material was not delivered in a timely fashion, scaffolding needed to install the ducts was inadequate and on occasion, the ducts were the wrong size and had to be modified at the site before they could be joined.

⁶In the beginning of 1992, a business slump led Respondent to decrease employee wages by 12 percent. Although hourly wages were increased by 5 percent in late June, the workers' wages still were below previous earnings.

Another employee, Doyle, testified that not until July 22 was a job box located at the site—that is, a secure locker where tools could be stored from day to day. Without a job box, the workers lost time transporting equipment they needed to and from the job each day Doyle also testified that after he installed standard size refrigerant piping, he was informed that a different size piping was called for, so that much of his work had to be redone.

Cameron gave little credence to the employee's explanations for the job's slow pace. As far as he was concerned, the delay was due entirely to the employees' intentionally stretching out their time on a job which paid them \$26 an hour, twice as much as they ordinarily received.

Whether because of a series of inadvertent mishaps, mismanagement, or the purposeful slowdown of the employees assigned to the post office project, Respondent's work at that site did not progress quickly enough to satisfy the general contractor who complained in writing to Vegh. Vegh's president, in turn, wrote to Dudley in mid-July, urging him to add more workers to the project.

In response to these promptings, on July 22, Respondent assigned additional men to the job; namely, Dragon, Van Zandt, and Lloyd. On July 25, still upset by the lack of progress, Cameron visited the site to warn the crew that if they did not work faster, he would replace all of them. He also asked for a volunteer to serve as foreman and move the project forward with greater speed. Van Zandt volunteered to fill that role. Cameron continued to be dissatisfied with the pace of the work, however, and on August 1, assigned Bream to supervise the project.⁷

With Bream's arrival as supervisor at the post office job, the work proceeded more swiftly. Bream testified that at Cameron's request, in the latter part of August or September, he color-coded a diagram of the post office project to reflect the amount of work completed during each of three stages: from the beginning of the onsite work on July 10 to 31; from the date of his arrival on August 1 to 9 and following the discharges from August 12 to October 10. Although he had not toured the site until August 1, he stated that he was able to chart the amount of work done during each of the three phases through notes he made on certain drawings. Based on his estimates, Bream claimed that during the first period from July 10 through 31, the employees spent 514 hours completing no more than one-fourth of the job. From August 1 to 9, he, Lloyd, and Moore completed another fourth of the work in only 191 hours. Bream maintained that 50 percent of the job was concluded in 234 hours from August 12 through October 10.

In fact, Respondent acknowledged that the post office job was not completed until sometime in late November, but the hours spent at the site after October 10 are not reflected on the blue-colored portion of Bream's chart. Thus, Bream was less than accurate in claiming that 50 percent of the task was completed in 234 hours.

At the hearing, Bream complained at that Moore and Lloyd needed constant supervision; that he continually had to goad them to work. He claimed that both men confided in him that they purposely slowed down their work pace to protest Dudley's shabby treatment of employees and the 12-per-

cent reduction of their wages. Lloyd denied making such comments. Moore recalled talking to Bream about his wage reduction, but noted that a 5-percent raise in early July had reduced the size of the decrease. He also acknowledged speaking about Dudley's mistreatment of the employees, but denied telling Bream that he was engaging in purposeful delay. In spite of Bream's dim view of Moore's and Lloyd's performance, and his absence from the job for 2 half days when he was not on hand to prod them, the employees completed a substantial amount of work on the post office job between August 1 and 9.

4. The Respondent learns of the Union's petition; Cameron returns to town; Lloyd and Moore are fired

On August 8, the Union filed a representation petition with the Board's Regional Office in Philadelphia, a copy of which was mailed to Respondent on the same day. Cameron's wife learned that a certified letter to Respondent had reached the post office. Assuming that it was the union petition, she instructed Francis Sipala, a salesman and debt collection agent for the Respondent, not to pick up the mail until her husband returned from an out-of-state conference. Cameron's wife did not deny this allegation.

At the time of these events, Sipala indicated that he had Cameron's trust and engaged in discussions with him about ways to defeat the Union. It was only after he was fired, that Sipala apparently changed his mind about his loyalties to his former employer. Thus, Sipala testified that Cameron phoned him on the same day Cameron and his wife learned of the election petition, telling him he, too, was aware of the petition and would be consulting with other contractors attending the conference to find out how best to combat the Union. Sipala stated that in a second phone call on August 9, Cameron again confided that he had discussed the union situation with other contractors and had decided to terminate four employees—Dudley, Van Zandt, Moore, and Lloyd, as a way to eliminate his union problem.

Sipala decided to seek advice on how to deal with the Union from Kenneth Sprang, a labor law professor at an area law school, and a former Cameron client. On Sunday, November 11, Sipala and Cameron's wife visited Sprang at his home, told him that an election petition had been filed and asked whether Respondent could abolish the entire commercial division, or selectively terminate certain employees. Sipala testified that he specifically mentioned Lloyd's and Moore's names to Sprang as employees who might be fired.

Sipala recalled that Sprang advised them that the commercial division could be closed and employees terminated as long as the decisions to do so were not driven by antiunion motivations. Sprang confirmed much of what Sipala said with one notable exception: he denied that Sipala alluded to any employee by name.

In resolving the conflict in their testimony, I have no hesitation in crediting Sprang's account in preference to Sipala's. Sprang was totally disinterested in the outcome of this case; he had no ties to any of the parties and, no reason to dissemble. His clearly recalled the meeting with Cameron's wife and Sipala, and was quite firm in remembering that no employee was named. Sprang's testimony in this regard was fresh, unrehearsed, and altogether reliable. Sipala, on the other hand, was an unsavory character. He altered a letter of recommendation which Sprang prepared for him, to vastly

⁷Dragon was fired on July 30. Van Zandt was assigned to a different project on August 2 and Reagan to another site on August 6.

inflate his credentials, he had criminal convictions involving offenses of moral turpitude, and he lied to Cameron about an accident involving a company car. As a consequence, Cameron fired him. Thus, Sipala had a motive to fabricate in order to retaliate against his former employer for his discharge. By claiming that Cameron specifically identified Lloyd and Moore as candidates for discharge, Sipala probably was trying to demonstrate that Cameron had a pre-conceived plan to rid himself of union supporters.

After leaving Sprang, Cameron's wife and Sipala drove to the airport to meet Cameron, who insisted on visiting the post office site immediately. Cameron stated that although he observed that some progress had been made, he still was displeased with the overall status of the job. According to Sipala, Cameron then confirmed his plan to terminate the four employees named above. Pursuant to their father's instructions, Cameron's sons arrived at the post office site at 7 o'clock the next morning and when Lloyd and Moore arrived, escorted them to Respondent's office where Cameron discharged them. Van Zandt was terminated on August 12 as well, and Dudley quit the same day, assuming that he, too, would be discharged.

Cameron maintained that his decision to discharge Lloyd and Moore was based solely on their desultory performance at the post office job. He specifically blamed them for the slow pace because they had spent the most time on that assignment. He described an occasion when he arrived at the post office to find both Moore and Lloyd walking together somewhat aimlessly looking for a fitting. He also testified that on August 6, he specifically warned Lloyd that he was dissatisfied with the pace on the post office job and asked him to tell Moore that if greater productivity was not achieved, he would "make changes down there." (Tr. 411.) Lloyd recalled an encounter with Cameron on this date but said that his employer merely told him he was unhappy with the post office job.

Cameron denied knowing that either Moore or Lloyd had anything to do with union activity. Lloyd had signed a union authorization card which he received in the mail and returned to the Union in the same fashion. There is no evidence that the Respondent was aware of that fact. Cameron did acknowledge that on one occasion, he saw Lloyd with co-worker Gerald Doyle, speaking to a union business agent at a jobsite. Respondent submits that Doyle was a known union supporter, serving as an observer for Local 19 at the Board-conducted election. Yet, he was not laid off until December 1992 when a project on which he was working was completed.

Cameron maintained that so far as he knew, Moore openly opposed the Union. Indeed, Cameron pointed out that Moore initiated a meeting to tell him he had received union literature and then berated him because he believed Cameron had divulged his unlisted phone number to the Union. Cameron also assumed that Moore had requested the second meeting at the alehouse, and pointed out that the employee voluntarily produced a letter sent by the Union. Cameron denied that he had ever suggested that Moore and Lloyd were union sympathizers because pickets appeared at jobsites where they were working. In fact, Cameron noted that Moore and Lloyd were not present at some projects when union pickets appeared. Moore added that in the weeks just prior to his discharge, Cameron asked him on more than one occa-

sion if he knew who might be feeding information to the Union.

Sipala testified that following the August 12 discharges, Cameron began to assemble evidence to support the claim that Moore and Lloyd were fired for poor work performance. Thus, Sipala stated that he and Cameron reviewed timecards of the men who worked at the post office job and used the hours and brief descriptions of the work performed which the employees recorded on those cards to guide Bream in color-coding the project chart.⁸ Sipala also alleged that Cameron solicited letters from other contractors on the post office job to confirm his contention that the work proceeded more smoothly after these employees were removed. In addition, Doyle testified convincingly that Cameron urged him to write a letter criticizing Lloyd's and Moore's performance at the post office project. Doyle refused to do so. Subsequently, Cameron gave Doyle a letter he had prepared condemning Lloyd's and Moore's conduct on the post office job. Fearing that his own job was in jeopardy, Doyle signed the letter, but not until he had crossed out some language he found untruthful.

II. DISCUSSION AND CONCLUDING FINDINGS

A. *As to the Alleged Unlawful Discharges*

The consolidated complaint alleges that the Respondent discharged Lloyd and Moore on August 12 in violation of Section 8(a)(1) and (3) because the Company's president believed the men had prounion sympathies. Denying any knowledge that they were engaged in union activity the Respondent contends that it discharged Lloyd and Moore among others, because he believed they were purposely procrastinating and delaying work on the union station job. Where, as here, both lawful and unlawful motives are offered to explain an employer's conduct, the Board requires that the evidence be assessed according to the two-part, burden-shifting analysis set forth in *Wright Line*, 251 NLRB 1083, 1089 (1980).⁹

Initially, the General Counsel must make a prima facie showing that the employer knew of the employee's protected conduct and this knowledge was a motivating factor in its decision to take adverse action. Once the General Counsel has made this showing, "the burden of persuasion shifts to the employer to prove that the employee would have . . . received the . . . claimed discriminatory action in any event because of unprotected conduct." *Champion Parts Rebuilders v. NLRB*, 717 F.2d 845, 849 fn. 6 (3d Cir. 1983).

B. *Proof of Employer Knowledge is Lacking*

There can be little doubt that John Cameron viewed the Union's campaign to organize his workers as a major battle that he was determined to win. Notwithstanding his patent hostility to the Union, in order to find that he discharged Lloyd and Moore for discriminatory reasons, the General Counsel must adduce sufficiently credible evidence to per-

⁸Cameron did not dispute Sipala's testimony regarding their review of the timecards as a means of establishing the amount of working hours the employees expended on the post office job.

⁹Enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 403 (1983).

suade that the Respondent knew or assumed they were union proponents. The evidence presented by the Government failed to meet that test.

In fact, Lloyd and Moore both signed union authorization cards, but not a scintilla of evidence exists that any management official knew they had done so. The General Counsel presented no other evidence of overt conduct by the alleged discriminatees which might have led the Respondent to detect their union sympathies. Instead, he relied principally on testimony offered by Dudley and Sipala to prove that Cameron believed that Moore and Lloyd were union supporters and fired them for that reason. Dudley's and Sipala's bias against the company president might be enough to cast doubt on their truthfulness. But other defects inhere in their testimony which compel me to discount their efforts to impose liability on the Respondent for discharging Lloyd and Moore.

First, consider Dudley's testimony. The strongest piece of evidence he could relate on this issue was that on some unspecified occasion, Cameron questioned whether Lloyd or Moore might be informants who leaked information to the Union about the Company's jobsites. However, Dudley readily admitted that they were merely among a number of employees whose names Cameron mentioned as suspicious. In fact, Dudley acknowledged that Cameron habitually referred to one employee or another on almost a daily basis as a potential spy or informant. There was no showing that Cameron did more than speculate on Lloyd's and Moore's loyalties, as he apparently did with respect to many of the workers. Without more, Cameron's musings are not sufficient to prove that he knew or assumed that Lloyd and Moore were union advocates who had to be severed from the work force.

Another employee, Dragon, described an incident which might have aroused Dudley's suspicions about Moore's attitude toward the Union. Dragon and Moore left the post office job on one occasion to meet with union agents and refused to tell Dudley where they were going. Apparently, Dudley never did discover where they had been. However, even if Dudley had learned of their union rendezvous, the record contains no evidence that he told Cameron about their unexplained departure from the jobsite. Dragon was fired later that day, but Moore was not, suggesting that he was not under suspicion.

To the contrary, Dudley's testimony leads to the conclusion that Cameron could reasonably assume that Moore's was loyal to the Company. Thus, Dudley testified that it was Moore who initiated a meeting with Cameron at the jobsite and voluntarily turned over Local 19 literature to him, while expressing chagrin and displeasure with the Union. Although Cameron, not Moore, requested the second meeting at the alehouse, it seems unlikely he would have done so if he believed Moore was a "Judas," as Dudley phrased it. Significantly, Dudley testified that during that meeting, Moore professed loyalty to the Company in sycophantic style. As presented in this record, the information available to Cameron gave him no grounds to mistrust Moore who on at least two occasions professed his commitment to the Company. Further, Moore conceded that on several occasions in the weeks preceding the union election, Cameron asked him if he knew who might be leaking information to the Union. It seems unlikely that Cameron would assume he was safe in soliciting such information from Moore if he regarded him as a union proponent.

Evidence that Cameron believed or suspected that Lloyd was a union supporter is even slimmer than the proof adduced by the General Counsel with respect to Moore. The record reveals that whatever doubts Cameron may have had about Lloyd stemmed from an incident in which Dudley and Cameron discovered that he and another employee, Doyle were talking to the union agent at the jobsite. Dudley ordered Lloyd back to the job, but there is nothing ominous about that since he was not on a break and should have been working. Further, as Respondent points out, union pickets appeared at many jobsites and engaged Cameron workers in conversation without suffering adverse consequences. Moreover, at the time that Cameron and Dudley observed Lloyd talking with the union agent, he was accompanied by a fellow employee, Doyle, who made no secret of his union sympathies. Yet, Doyle, who even served as the Union's observer at the Board-conducted election, suffered no reprisals and was not laid off until December 1992 for lack of work.¹⁰

Sipala did more to harm than help the General Counsel's case. As detailed above, he claimed that he told Professor Sprang that Cameron had targeted Lloyd and Moore for discharge. Sprang, certain that Sipala had not mentioned any employee by name, was a credible witness without any motive to fabricate. In contrast, Sipala's testimony is not reliable, since his past actions weaken any claim to credibility. In addition, he may have had revenge as a motive in testifying against his former employer.

Sipala's statement that Cameron added Dudley's and Van Zandt's names to the list of those whose discharges would help to eliminate his union problems makes so little sense that it, too, provides grounds to reject much of what he said. As far as the record reveals, Van Zandt had no ties to the Union. Further, Cameron had ordered his discharge a week before Respondent received the Union's election petition. Firing Dudley could have no bearing on the outcome of the union election since as a member of management, he was ineligible to vote. Given these serious flaws in Sipala's testimony, I cannot rely on it to find that Cameron knew that Lloyd and Moore were union proponents.

For the foregoing reasons, I am compelled to conclude that although Cameron was fiercely opposed to the Union, there is insufficient credible evidence to prove that he had knowledge of or harbored serious suspicions about Lloyd's and Moore's union sympathies. It follows that the General Counsel has failed to sustain its burden under Wright Line of establishing a prima facie case that the employees were discriminatorily discharged. Therefore, the Respondent is not obliged to prove that it would have discharged the men in the absence of union activity. See *Hemisphere Broadcasting Corp.*, 290 NLRB 394 (1988). Accordingly, the allegations that Respondent violated Section 8(a)(1) and (3) of the Act shall be dismissed.

¹⁰Doyle made it clear that he did not engage in any union activity which, to his knowledge, came to the Respondent's attention, until he served as an observer for the Union at the Board election. At the same time, he made no effort to conceal his union sympathies and shared his pronoun views with several of his coworkers. Given the small number of workers in Respondent's employ, and Cameron's ardent interest in detecting union supporters, it is hardly likely that Doyle's position was unknown to management.

C. The Allegations of 8(a)(1) Violations and the Hollywood Roosevelt Hotel Rule

In issuing the consolidated complaint in this matter, the Regional Director set aside an informal settlement agreement entered into between the parties on June 20, 1991, in which the Respondent averred it would not interrogate employees about their union activities or coerce them by asking them to surrender authorization cards and other union literature to management officials, thereby disposing of allegations in Case 4-CA-19631.¹¹

The consolidated complaint not only reinstated the allegations of 8(a)(1) violations that were the subject of the settlement agreement, it also set forth allegations that had not been levied in the earlier case. Specifically, in Case 4-CA-20026, the Respondent was accused of interrogating employees in September 1990 and March 1991 and creating the impression of surveillance in the spring of 1991. (See GCX 1(g).)

At the outset of the instant hearing, the General Counsel moved to amend the consolidated complaint to allege further 8(a)(1) misconduct committed by Company President Cameron in February and the spring of 1991 (GCX 4, pars. 7(b) and 9(b)). All of the 8(a)(1) allegations set forth for the first time in Case 4-CA-20026, as amended, charged Respondent with unlawful conduct committed prior to the date on which the settlement agreement was approved.

The Respondent submits that where a settlement agreement has been revoked, all claims of unlawful conduct must be dismissed where, as found herein, the General Counsel fails to prove unlawful postsettlement conduct. *Leeward Nursing Home*, 278 NLRB 1058, 1083-1084 (1986), citing *Hollywood Roosevelt Hotel Co.*, 235 NLRB 1397 (1978). I find merit in Respondent's argument.

In *Leeward Nursing Home*, supra at 1083, the administrative law judge set forth the *Hollywood Roosevelt Hotel* rule in definitive terms:

It is now established as a "general rule that a settlement agreement with which the parties have complied bars subsequent litigation of the settlement conduct alleged to constitute unfair labor practices." [Citation omitted.] The *Hollywood Roosevelt* Board majority . . . took pains to emphasize that a "settlement disposes of all issues involving presettlement conduct . . . and not merely those presettlement matters which may have been subjectively intended by one of more parties to be addressed by the settlement." . . . [T]he majority restated the only exceptions to its "settlement bar" rule; that a settlement disposes of all presettlement matters "unless prior violations were unknown to the General Counsel, not readily discoverable by investigation, or specifically reserved from the settlement by the mutual understanding of the parties."

Further, the administrative law judge added the following gloss to the exceptions carved out in *Hollywood Roosevelt*, id.:

¹¹ The settlement agreement contained a nonadmissions clause setting forth the parties' understanding that the Respondent did not admit it had violated the Act.

for determining the intended reach of a settlement for settlement bar purposes . . . there must be some *specific reservation* by *mutual understanding* of the parties, and not merely some unilateral intention which might be inferable from surrounding circumstances. . . . Thus, in *Ventura Coastal Corp.*, 264 NLRB 291 (1982), the Board again adopted the view that a settlement which contains no "specific reservation" disposes of all presettlement matters. [Citations omitted.]

[W]here the "prior violations" were "unknown to the General Counsel . . ." . . . it is not enough for the General Counsel to aver mere lack of awareness of other presettlement violations. Rather, he must show, in addition, that the other violations were not "readily discoverable by investigation." [Citations omitted.]

On applying the above considerations to the circumstances of the present case, I conclude that the settlement agreement executed between the parties and approved on June 20, 1991, must be reinstated since the Respondent, Cameron & Sons, did not violate the Act during the postsettlement period. Further, under the settlement bar rule, all other additional 8(a)(1) allegations in the consolidated complaint, as amended, may not be the subject of findings or a remedial order, unless they were expressly reserved from the settlement, or otherwise unknown to the General Counsel and not readily discoverable by investigation.

A review of the June 20, 1991 settlement agreement discloses no reservation, express or implied, of any presettlement conduct. Turning to the second exception, I do not find that the General Counsel made the requisite showing that the other violations were not readily discoverable by investigation. The General Counsel only explanation for the belated introduction of the alleged additional 8(a)(1) conduct was "that the region discovered (the conduct) in the course of preparation for trial." (Tr. 9.) In finding this no explanation at all, I simply echo the conclusion of the administrative law judge in *Leeward* who stated:

[I]t was incumbent upon the office of the General Counsel, if it wished to avoid an adverse inference here, to introduce affirmative evidence tending to show that it did not possess knowledge of the alleged presettlement violations *and* that such violations were not readily discoverable by investigation. [Id. at 1084, emphasis in the original.]

Since the General Counsel has failed to offer any proof about what it knew or didn't know at the time the settlement was approved, he has failed to bring himself within the second exception to the *Hollywood Roosevelt* rule. Accordingly, I am constrained to find that the Government is barred by the June 20 settlement from litigating any of the Respondent's presettlement conduct.

Based on all of the foregoing considerations, I enter the following

CONCLUSIONS OF LAW

1. Respondent 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. A preponderance of the credible evidence does not support the complaint allegation that Respondent unlawfully discharged Phillip Moore and Edward Lloyd.

4. The settlement agreement approved by the Regional Director in Case 4-CA-19631 on June 20, 1991, shall be reinstated and bars litigation of all alleged violations occurring before that date.

In light of the foregoing findings of fact and conclusions of law, I issue the following recommended¹²

¹²If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and rec-

ORDER

The consolidated complaint, as amended, is dismissed in its entirety.

ommended 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.