

**Gayston Corporation and Laborers' Local 513, affiliated with Laborers' International Union of North America, AFL-CIO.** Cases 9-CA-30678 and 9-CA-32056

October 27, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING  
AND COHEN

The issue presented here is whether the judge correctly found that the Respondent's discharge of employees Thomas Young and Robert Molnar and its announcement of changes in its training program linked to wage increases did not violate Section 8(a)(1) and (3) of the Act.<sup>1</sup> 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,<sup>2</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> On July 31, 1995, Administrative Law Judge Peter E. Donnelly issued the attached decision. The Charging Party filed exceptions. The Respondent filed an answering brief.

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

<sup>2</sup> The Charging Party 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.

The Charging Party's exceptions also allege that the judge's decision evidences his bias and prejudice. On our full consideration of the entire record in these proceedings, we find no evidence that the judge prejudged the case, made prejudicial rulings, or exhibited bias against the Charging Party in his analysis of the evidence.

*Patricia Frye, Esq.*, for the General Counsel.

*Robert T. Dunleavy Jr., Esq.*, of Dayton, Ohio, for the Respondent.

*Lawrence Oberdank, Esq.*, of Cleveland, Ohio, for the Charging Party.

DECISION

STATEMENT OF THE CASE

PETER E. DONNELLY, Administrative Law Judge. The charge in Case 9-CA-30678 was filed by Laborers' Local 217, affiliated with Laborers' International Union of North America, AFL-CIO. Thereafter, Local 217 merged with Local 513, the Charging Party in Case 9-CA-32056.<sup>1</sup> A consolidated amended complaint issued thereafter on May 19, 1995, alleging that Gayston Corporation (the Employer or

<sup>1</sup> Thereafter, the membership of Local 217 withdrew from its merger with Local 513 and was issued a new charter as Local 141.

Respondent) violated Section 8(a)(1) of the Act by promising higher wages and bonuses to employees for rejecting the Union and by threatening employees with loss of overtime if they selected union representation.<sup>2</sup> The complaint also alleges that Respondent violated Section 8(a)(3) of the Act by discharging employees Thomas Young and Robert Molnar. An answer was timely filed by Respondent and pursuant to notice, a hearing was held before me on March 30, and March 31, 1995. Briefs have been timely filed by General Counsel, Respondent, and Charging Party, which have been duly considered.

FINDINGS OF FACT<sup>3</sup>

I. THE EMPLOYER'S BUSINESS

The Employer is a corporation engaged in the manufacture of automotive parts, precision components, and assemblies at Springboro, Ohio. During the past 12 months, Respondent, in the conduct of its operations, sold and shipped from its Springboro, Ohio facility goods valued in excess of \$50,000 directly to points outside the State of Ohio. The complaint alleges, the answer admits, and I find that the Employer is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

Based on testimony elicited at the hearing, I conclude that Locals 217, 513, and 141 all are labor organizations within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Facts*

1. Speech on April 23, 1993—Promise of Higher Wages and Bonuses—Section 8(a)(1)

In the fall of 1992, Tom Young contacted Dewey Bayless, union president and business manager, with a view towards organizing Respondent's employees. It appears that Young had been a union member during some prior employment. In order to ascertain the level of interest for organizing among Respondent's employees, the Union distributed an announce-

<sup>2</sup> The loss of overtime allegation, par. 6 of the complaint, was dismissed at the hearing upon motion by Respondent as untimely.

<sup>3</sup> There is conflicting testimony regarding the discharge allegations of the complaint. In resolving these conflicts, I have taken into consideration the apparent interests of the witnesses; the inherent probabilities in light of other events; corroboration or lack of it; and consistencies or inconsistencies within the testimony of each witness and between the testimony of each and that of other witnesses with similar apparent interests. In evaluating the testimony of each witness, I rely specifically upon demeanor and make my findings accordingly. Specifically, where conflict exists between the testimony of Supervisor Robert Hammond and the testimony of Young and Molnar concerning the circumstances of their discharges, I conclude that Hammond's account is more accurate and his testimony is credited. In this connection, I also note that Hammond is no longer employed by Respondent and would have no apparent motive to fabricate testimony. And while apart from considerations of demeanor, I have taken into account the above-noted credibility considerations, my failure to detail each of these is not to be deemed a failure on my part to have fully considered it. *Bishop & Malco*, 159 NLRB 1159, 1161 (1966).

ment among Respondent’s employees in October 1992. After a period of inactivity, a handbilling by the Union was conducted on April 22, 1993, announcing an organizational meeting of Respondent’s employees to be held on April 25, 1993.

After this meeting, by letter dated April 26, 1993, from Bayless to Respondent, Young was identified to Respondent as a union organizer who would be “actively involved in organizing with the Union.” It is undisputed that thereafter Young was an active and open union adherent whose union activity was known to the Respondent.

Molnar was a new employee hired on June 6 and employed for less than 2 months at the time of his discharge on July 30, 1994. Molnar did not disclose his union sentiments to anyone and, insofar as this record discloses, neither Respondent nor the Union was aware of his union sentiments.

With respect to Respondent’s operation, it appears that in early 1993, Respondent, a manufacturer of industrial parts, was in the process of converting from the production of defense-oriented components to parts suitable for use by private industry, notably automobiles. In connection with this conversion, Respondent began in February and March 1993 to develop a new training program for employees, including a plan to relate additional employee training to increases in compensation with the introduction of a manufacturing certification program.

As a means of communicating the nature and content of these changes, a series of employee meetings were set for successive Fridays, April 9, 16, and 23, 1993. At these meetings, employees were told about the new program and informed that wage increases would be tied to the successful completion of additional training. Specifically, at the meeting on April 23, Jim Heitz, group vice president, delivered a speech devoted primarily to a more detailed explanation of a new program to provide “training classes” to become “manufacturing certified” resulting in an “ongoing bonus program” for those successful in completing the program.

The speech on April 23 also noted the union handbilling on the prior day. Heitz stated in substance that he did not believe that a union was necessary or would bring anything positive to the Respondent.

2. Discharges of Young and Molnar on July 30, 1994—  
Section 8(a)(3)

It appears that smoking is prohibited at Respondent’s facility except for certain designated areas. This policy became effective January 1, 1992, and is set out in Respondent’s Employee Manual under Safety Rules, reading:

Gayston must strictly enforce safety and security rules for the protection of the Company and its employees. Disciplinary action, up to and including termination, will be taken against any employee violating safety rules.

. . . .

15. SMOKING AND TOBACCO USE

Smoking and tobacco use of any kind is restricted and only permitted outside the building in the following areas: hourly patio area and parking areas.

Young and Molnar were both aware of the safety rule prohibiting smoking and specifically were aware that smoking was not permitted in the men’s room. No-smoking signs were also posted in the plant.

Although the Employee Manual, as set out above, does not expressly provide discharge for violating the no-smoking policy, it has been a practice of Respondent to discharge for violations of the rule, and since its adoption, five employees in addition to Young and Molnar have been discharged for violating the rule. Three of them were discharged before Young and Molnar. The record discloses that employees were not discharged unless they were either caught with the cigarettes in their hands or admitted to having been smoking.

With respect to the discharge incident itself, Hammond testified that he was employed by Respondent on July 5, 1994, as a supervisor on the third shift.<sup>4</sup> On July 30, 1994, at about 1:05 a.m., he went into the men’s room where he observed employees Young and Molnar smoking and saw the cigarettes in their hands. Hammond told them that they knew they were not to smoke in the men’s room and that they should return to their jobs while he called his supervisor to determine what action should be taken.

Hammond testified that although he was aware that company policy was termination, he, nonetheless, called Greg Bolin, production manager, at his home and told him that he had found two employees smoking in the men’s room. Bolin confirmed to him that the company policy was termination and told him that he should terminate them both. Bolin then asked who they were, and Hammond identified them. Bolin asked if he actually had seen the cigarettes in their hands, and Hammond confirmed that he had. Hammond then went to Young and Molnar who had returned to their work, terminated them, and they left the premises.

Bolin’s testimony was essentially corroborative of Hammond. He testified that he received a call from Hammond at about 1:30 a.m. and was told that Hammond had caught two employees smoking in the men’s room, whereupon he advised Hammond that he should discharge them. It was not until after this instruction that the two employees were identified to him as Young and Molnar.

Young and Molnar both denied that they were smoking. Young testified that when Hammond came into the men’s room, there were in addition to himself and Molnar, two other employees, whom Young did not identify, smoking in the toilet stalls with the doors shut. Hammond came in and said only “You guys know better” and walked out. Young and Molnar returned to their work. Later, Hammond returned and, after terminating Molnar, came to Young at his work station and told him that he was being fired for smoking in the men’s room. Young told Hammond that he was making a mistake, however, Hammond directed him to leave the premises, which he did.

Young also testified that during his employment with the Company, even after the smoking prohibitions became effective on January 1, 1992, he had seen other employees smoking in restrooms; at times in the presence of supervisors. Young also testified that during the week before his discharge, on one occasion, he and a supervisor were smoking together in the men’s room.

<sup>4</sup>Hammond was employed until the end of August when he left for a better job.

Young further testified to a conversation with Hammond about a week after Hammond became third-shift supervisor wherein Hammond told him that during an organizational effort at his prior place of employment, he told management that if they got rid of their expensive lawyers, they could get rid of the union. Hammond, whose testimony I credit in this regard, testified that he only told Young that in 1 year, it had cost the Company \$300,000 for lawyers to fight the union and that later expenses were only about \$30,000 without lawyers, with company management doing the work.

Concerning the incident, Molnar testified that he was talking to Young when Hammond stepped into the men's room and gave them a "funny" look. There was a man standing behind the restroom door that Hammond could not see and two more people occupied toilet stalls. Molnar testified that he could not recall Hammond saying anything and that Hammond left and later came back while he was working and told him that he was being fired for smoking in the men's room. Molnar denied smoking in the men's room, whereupon, according to Molnar, Hammond told him that this was not about him (Molnar) but that they wanted to fire someone else and that all he had to do was come in Monday and speak to Connie Hinkle, director of human resources, and he would be returned to work. Hammond, whose testimony I find more credible, testified that he did not, at the time he terminated Molnar, have any conversation with him about getting his job back.

Molnar testified that on the following Monday, he came to the plant to speak to Hinkle but spoke instead to Billie, a human resources employee, who spoke to Hinkle and relayed to him a message from Hinkle that he had in fact been terminated and the action was final.

Hinkle, however, testified that she actually met with Molnar at the human resources department on Monday and that he only asked to have his job back. Hinkle denied his request, restating that he had been caught smoking in the men's room. As Molnar was leaving, he remarked that he never thought a cigarette would get him fired. Hinkle testified that Molnar never mentioned any conversation with Hammond about getting his job back. Having reviewed the record, I am satisfied that Molnar spoke with Hinkle, that Molnar did not mention any conversation with Hammond about getting his job back; and that Molnar made the parting comment attributed to him.

#### IV. DISCUSSION AND ANALYSIS

##### A. *The 8(a)(1) Allegations*

The General Counsel contends that Respondent violated Section 8(a)(1) of the Act by promising higher wages and bonuses to employees. A review of the record discloses that the nature of Respondent's business had been changing from national defense production to a more commercial orientation. During the early months of 1993, Respondent determined that in order to compete in a nondefense market, it would be necessary to revise its manner of training and compensating employees. Over a period of some weeks, it formulated new procedures, and in a set of speeches to employees on April 9, 16, and 23, 1993, Respondent undertook to explain the general concepts involved in training to become manufacturing certified, and at each meeting alluded to the

prospect of increased compensation for those employees who qualified.

The record supports the conclusion that Respondent was unaware of any organizing activity until April 22, when the Union distributed pamphlets to Respondent's employees. In his speech on April 23, Heitz was more specific concerning the modifications that needed to be undertaken to implement the manufacturing certification program and the manner of increasing the compensation of those employees who qualified, including bonuses, but the prospect of greater compensation had already been raised in Heitz's two previous speeches. This speech on April 23 was simply a further and ongoing explanation of a previously arrived at business decision and was not a response to Union's distribution of pamphlets on April 22.

While it is true that Respondent alluded to the Union's organizational effort in his prepared speech on April 23, he was simply expressing in a lawful manner his opposition to the Union's organizational effort. Indeed, the General Counsel does not allege that any statements being made by Heitz about the Union during his speech violated the Act. Any lawful references to his opposition to organization, even though appearing in remarks devoted primarily to modifications in the employee compensation system, do not make unlawful remarks which were otherwise lawful.

In these circumstances, I conclude that Heitz's speech on April 23, 1993, did not violate Section 8(a)(1) of the Act.

##### B. *Discharges of Young and Molnar*

The General Counsel contends that Young and Molnar were discriminatorily discharged in order to rid the Respondent of Young, an active union adherent. The record makes it clear that Young was a prominent union supporter and that Respondent had been so advised by the Union in a letter dated April 26, 1993. Molnar's union sentiments were unknown, particularly since Molnar himself testified that he never disclosed them. He was, according to the General Counsel, the innocent victim of Respondent's unlawful termination of Young.

As set out above, Respondent was serious about its ban on smoking. Rules had been established prohibiting smoking in all except certain areas of the plant. Both Young and Molnar testified that they were aware of the no-smoking rule and that it applied to the restrooms. They were also aware that they could be discharged for violating the rule. It is also clear, in my view of the record, that both were violating the rule by smoking in the men's room and that they were caught in the act of smoking by Hammond.

While the General Counsel and Union did not concede these findings, they argue that even assuming they had been smoking, that smoking at the plant was pervasive, and that enforcement of the no-smoking rule was selective and was used as a pretext to disguise the discriminatory discharges of Young and Molnar.

The record does disclose that smoking by employees did take place, sometimes with the knowledge of supervisors and that on one occasion, a supervisor smoked with Young. However, the record is not sufficient, in my opinion, to show that Young or Molnar were afforded disparate treatment constituting discrimination under Section 8(a)(3) of the Act.

First, Hammond was a new supervisor, and the record does not show that he had previously condoned smoking by employees.<sup>5</sup>

Also, while it appears that the smoking ban may not have been enforced at all times, that was clearly the policy of management, and particularly higher management, and the policy had already been enforced with discharge for those who were either caught in the act of smoking or had admitted that they had been smoking. The record discloses no instances in which a lesser discipline than discharge was imposed for smoking violations. As noted above, discharge had been administered in prior cases where, as here, the proof was clear. The record does not support the condonation by management of smoking even though some supervisors may not have vigorously enforced the ban.

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<sup>5</sup>Having credited Hammond concerning his conversation with Young about the expense of an antiunion campaign at a prior job, I further conclude that this credited version does not establish that Hammond harbored union animus.

Even more significant is the fact that when Hammond called Bolin for guidance on the discipline, he directed Hammond to discharge both employees before he was even aware of their identities. This, without more, negates any inference that Young and Molnar had been discriminatorily singled out for discipline because of Young's union activity.

In summary, I conclude that while Respondent no doubt welcomed the removal of a prominent union adherent from its employ, the discharges were nonetheless lawfully administered pursuant to its no-smoking policy.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>6</sup>

#### ORDER

The complaint is dismissed in its entirety.

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<sup>6</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.