

Columbian Distribution Services, Inc. and General Teamsters Union Local No. 406, International Brotherhood of Teamsters, AFL-CIO. Case 7-CA-36062

March 27, 1996

DECISION AND ORDER

BY MEMBERS BROWNING, COHEN, AND FOX

On January 25, 1996, Administrative Law Judge Michael O. Miller issued the attached decision. The Respondent filed limited exceptions and a supporting brief.

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

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order.

ORDER

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

¹ The Respondent excepts, arguing that the judge inadvertently erred when stating in sec. C, par. 4, of his decision that "I find the testimony of Wickard and Haisma to be less convincing than that of Wickard and Clary." (Emphasis added.) The totality of the judge's decision and the record make clear that it was General Counsel witnesses Holzgen and Haisma that the judge found less convincing. We modify his decision accordingly.

Thomas Doerr, Esq., for the General Counsel.
Jack C. Clary, Esq. and *Jack R. Clary, Esq.* (*Clary, Nantz, Wood, Hoffius & Cooper*), for the Respondent.
Ronald E. Holzgen, Business Representative, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL O. MILLER, Administrative Law Judge. This case was tried in Grand Rapids, Michigan, on November 7, 1995, based on a charge filed by General Teamsters Union Local No. 406, International Brotherhood of Teamsters, AFL-CIO (the Union or the Charging Party) on June 14, 1994,¹ and an amended complaint which was reissued on June 14, 1995.² The amended reissued complaint alleges that

¹ All dates are in 1994 unless otherwise indicated.

² The original complaint was withdrawn and the proceedings were deferred to the parties' contractual grievance arbitration procedures on September 9, 1994, pursuant to the Board's policies as explicated in *Collyer Insulated Wire*, 192 NLRB 837 (1971), and *United Technologies Corp.*, 268 NLRB 557 (1984). That deferral was revoked upon the Regional Director's conclusion that Respondent had "engaged in conduct inconsistent with its earlier expression of willingness to arbitrate the underlying dispute and has thus prevented or impeded the prompt resolution of the underlying dispute" through the contractual procedures. On brief herein, Respondent has opted not to

Columbian Distribution Services, Inc. (Respondent, the Employer, or CDS) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) by threatening its employees with changes in wages, hours, and other terms and conditions of employment and by reducing an employee's hours. Respondent's timely filed answer denies the commission of any unfair labor practices.

On the entire record,³ including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION STATUS

Preliminary Conclusions of Law

The Respondent, a corporation, with its principal office and place of business in Grand Rapids, Michigan, is engaged in the transportation and warehousing of commodities. Annually, it directly transports goods and materials valued in excess of \$50,000 from its Grand Rapids, Michigan facilities to points located outside the State of Michigan. The complaint alleges, Respondent admits, and I find and conclude that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The complaint alleges, Respondent admits, and I further find and conclude that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Union has long represented Respondent's warehouse employees and drivers. Since about 1986, it has also represented Respondent's office clerical employees in a separate unit. Certification in that latter unit followed a short recognition strike and an election.

At the times involved herein, from about January to June 1994, Richard Wickard was Respondent's vice president and general manager; he became its president in December. Respondent's counsel and bargaining representative was Jack R. Clary. During the same period, Ronald Holzgen was the Union's business representative; Larry Haisma was the steward in the warehouse and drivers unit; and Haisma subsequently became a paid union representative.

Abdulio Negron and Donald Nelson were Respondent's janitors. Until March 1994, they were not represented by any labor organization. Negron was the more senior of the two. Nelson had been hired in December 1992. As he was retired from other employment, he received no fringe benefits but was hired at a greater rate of pay. Until June, Negron and Nelson worked on the first shift, 6 a.m. to 2 p.m., Mondays through Fridays. Nelson did not always work 40 hours each week. He had commitments to social organizations which met during the workday and Respondent accommodated him by allowing him the necessary time off.

contest this conclusion, stating, "At this late date, the Employer does not intend to proceed (again) through the grievance arbitration procedures, and therefore will not address the deferral issue."

³ Respondent's unopposed motion to correct the record is granted.

At issue is whether Respondent's change and reduction of Nelson's hours, proposed by the Employer and ostensibly agreed to by the Union on May 24, and its alleged statement that it was doing so because of the union activity, violated Section 8(a)(3) and (1).

B. Union Activity Recognition and Agreement

In January or February, Negron and Nelson expressed an interest in union representation. Haisma related this information to Holzgen, received authorization cards for the employees, secured their signatures, and returned those cards to Holzgen. Holzgen made a demand for recognition and filed an RC petition.

In early March, Clary proposed to the Union's secretary treasurer, Carl Schobey, that if the Union would agree to include the janitors in the clerical unit, the Employer would recognize the Union as their representative. Schobey agreed. On March 17, Holzgen and Wickard met and formally executed a recognition agreement which placed the janitors in the unit with office and clerical employees. It further provided that the Employer and the Union would meet to bargain an addendum for the wages and other terms and conditions of employment of the janitors.

There were two bargaining sessions. At the first, the Union presented its proposals. One sought full fringe benefit coverage under the clerical contract for the janitors. At the second, held on May 24, the Company's proposals were put forward. Each item was discussed and, with some modifications, that proposal formed the basis for the agreement reached that day.

Respondent's proposal excluded all those in the janitorial classification from most of the fringe benefits of the clerical agreement. That proposal, with one change granting them unpaid holidays and personal days, was quickly agreed to. It included a separate proposal to continue Negron's health insurance. Respondent also specifically proposed, in paragraph 5, to exclude Nelson from all fringe benefits for the remainder of that contract's term, while continuing his present rate of pay. In making that proposal, it referred to Nelson as a "part-time employee."

Paragraph 6 stated as follows: 6. "Note that Mr. Nelson will soon be scheduled to work from 3 p.m. to 8 p.m. four days per week."

According to what I find to be the more credible evidence as offered by Clary (see *infra*), Holzgen stated, "You can't change hours because of union activity." Clary denied any discriminatory motivation. Rather, he stated, they had decided to broaden the janitorial coverage because of sanitation problems.⁴ Holzgen agreed that the clerical agreement gave Respondent the authority to change hours and work schedules without notice to the Union.⁵ He asked and was assured

⁴Holzgen acknowledged that were discussions of sanitation problems, "probably" at the point in the negotiations when the parties were discussing the par. 6. Haisma had no recollection of that discussion but may not have been at the bargaining table at all times.

⁵ Sec. 4.1, Management Rights, reserved to management the exclusive right, *inter alia*, to determine schedules of work. The contract also provided for part-time employees and disclaimed any guarantee of hours.

that there had been no reduction in the amount of work available.⁶

The parties caucused to prepare their best and final offers. During the caucus, Holzgen presented the Employer's proposal to Nelson and Negron. Nelson initially objected to the language cutting his hours. Apparently upon an assurance from Holzgen that it would not happen, he assented to the contract, as did Negron.

After the caucus, the parties agreed to the terms of an addendum for the janitors, including the language of paragraph 6, quoted above. In that agreement, the Employer's proposed wage scale was increased, at least for Negron, and Respondent's proposal to continue health benefits for Negron was amended to give him the option of a cash payment in lieu of insurance. Respondent also agreed that Nelson would be eligible for holiday and vacation pay so long as he regularly worked more than 24 hours per week (which, under the Employer's proposal, he would not be scheduled to do).

C. Alleged Expressions of Animus

Allegedly, according to Holzgen, when they had met about March 17, Wickard complained about Nelson's having gone to the Union for representation. Holzgen recalls Wickard as stating:

Don Nelson pisses me off . . . Nelson is a retiree from another employer . . . He's a close personal friend of a supervisor . . . and said "I don't need any benefits, I don't need anything like that, I just need to supplement my retirement income." We gave him a job because he's a friend of . . . the supervisor. Now he comes to you and wants to join the Union and wants to negotiate for benefits.

Similarly, Haisma claimed that sometime in March or April, he spoke with Wickard about the janitors' union activity. Purportedly, Wickard told him that he was "just a little bit upset with" and "disappointed in" Nelson because Nelson had been hired as a favor to one of the supervisors. Neither Holzgen nor Haisma claim that there were any references to Nelson's hours, or threats of retribution, in these conversations.

In the May 24 negotiations, when Holzgen questioned why Respondent had proposed to cut and change Nelson's hours (discussed above), Wickard allegedly stated (according to Holzgen), "This whole union thing has forced us to re-evaluate our janitors."⁷

⁶Neither Clary nor Wickard alluded to nor contradicted Holzgen's testimony as to this. I find it credible. In fact, there was no reduction in the janitorial work motivating this action. Holzgen further claimed that he suggested that, as there was no reduction in the amount of work, there was no reason for any reduction in Nelson's hours. He further claimed to believe that management had agreed with that assumption. These latter claims are belied by the statements in the affidavits of both Holzgen and Haisma to the effect that the change in Nelson's hours "was left that this was a business decision." One can only speculate on the assumptions Holzgen made which apparently lead him, in seeking the employees' ratification of the agreement, to assure Nelson that his hours would not likely be reduced.

⁷Haisma did not immediately recall it in the same terms. Initially, he recalled Wickard stating, "[B]ecause of restructuring the janitory system . . . that [Nelson's] hours would have to be changed." It

Continued

Wickard convincingly denied making any of these statements. In that meeting, both he and Clary stated, only Clary spoke for the Employer; Wickard did not speak beyond greeting the participants. I find the testimony of Wickard and Haisma to be less convincing than that of Wickard and Clary. Their testimony was somewhat vague and imprecise; Holzgen recalled few details of what was said on May 24 other than Wickard's alleged threat and acknowledged that he did not "have that good [of a] recollection of the meeting." Significantly, there were no references to the pre-May 24 statements of alleged animosity in either Holzgen's or Haisma's affidavits, given on June 24, much closer in time to the events than this hearing. I note that no animosity was ever expressed to Nelson, that Wickard was experienced in labor relations, somewhat less likely to openly express union animus than a manager who was not, and that, after recognition and the change in Nelson's hours, Respondent continued to accommodate Nelson with time off for his social activities and continued to offer him extra hours. Similarly reflecting a lack of animosity are the facts that Respondent has a long-standing relationship with the Union and recognized the Union as the janitor's representative quickly and with no pressure being applied.⁸

D. The Change

Sometime after May 24, Nelson's hours were changed in line with the language of paragraph 6. He worked four afternoons a week, beginning at 2 p.m., and he averaged about 20 hours per week. However, in the first week after the change, he worked full time, filling in for Negron who was on vacation. On a number of Fridays, Nelson was offered overtime to be worked at the end of his shift. He declined those offers.

Prior to the change, Nelson and Negron bore the principal responsibility for cleaning the warehouse. Nelson also painted, made safety inspections of the lights, alarms, fire extinguishers and doors, checked the rodent traps and, when necessary, went out to purchase cleaning materials and supplies. Nelson acknowledged that, from time to time, others also did some of this work. After June 1, he no longer did the safety inspections, painting, or purchasing. On one occasion, he learned that some painting had been done in his absence on a weekend. Other employees, including some nonunit casual workers, continued to do janitorial work from time to time.

According to Wickard, whose testimony I credit, Nelson had never been the only one to paint or clean. Other employees mopped and picked up; they also painted. After June, some painting may have been done by employees called in to work at their warehouse jobs on a Saturday, as a way of filling out the hours which they were guaranteed when called in for weekend overtime.

was only after he was asked whether Wickard had said anything about the hours being changed "in connection with the janitors going to the union" that Haisma recalled Wickard as stating, "[T] because of Mr. Nelson joining the union, they would have to restructure their janitorial." The statement as Haisma initially recalled it, although he attributed it to Wickard rather than Clary, tends to corroborate Clary's testimony and contradict that of Holzgen.

⁸I find no basis for concluding that Respondent feared another work stoppage such as had occurred in 1986 in connection with the demand for recognition on behalf of the office and clerical employees.

Nelson voluntarily left Respondent's employ in September. There is no contention that he was constructively discharged.

E. The Employer's Rationale

Beginning in the summer of 1993, Respondent began to expand on its storage of raw food products, including raisins and nuts, used for the production of cereals by a national manufacturer with plants in the area and by its suppliers. In January, it encountered a problem when a customer found rodent droppings in a shipment of raw materials and rodent droppings were observed in the warehouse. The immediate response was to ask everyone to pick up trash around the warehouse. The problem continued into March when an inspection, although generally satisfactory, found further evidence of rodents.

Wickard concluded that Respondent needed to expand the coverage of its janitorial staff. Respondent's was a three-shift operation and, with janitors working only on the first shift, the dirt created by the other two shifts accumulated until the start of the next day's first shift. Twelve hours of janitorial service, covering half of the full workday, he concluded, would be "a good start." Wickard had decided on this change by May, he claimed, but withheld implementation pending the negotiations for the janitor's addendum.

At first blush, it would appear contradictory for Respondent to seek to expand its sanitation coverage by reducing the hours worked by the janitors from about 16 per day to about 12. Wickard explained, however, that the work was more efficiently performed after the end of the first shift because there were fewer people present to impede cleanup efforts. Additionally, he noted, when Nelson and Negron worked the same hours, they sometimes worked together, performing functions which one man could do alone. He also noted that, where necessary, one of them could be asked to work additional hours. The 12-hour arrangement, he said, was a starting place for restructuring the work of the janitors.

While I am left with some questions as to the validity of this rationale, I do not find it so unreasonable as to warrant a substitution of this administrative law judge's business judgment for that of the Employer.⁹ I must note that there is no evidence that Respondent hired or assigned anyone else to regularly perform janitorial work while Nelson continued in his employment or that Nelson's replacement, if any, worked any different or greater hours than Nelson had. It would thus appear that the altered hours satisfied Respondent's business objectives.

F. Analysis

The General Counsel's complaint alleges that Wickard violated Section 8(a)(1) by stating, in the presence of Haisma who was then still an employee, that Respondent was reducing and changing Nelson's hours because of the union activity. As I have found insufficient credible evidence to support this allegation, I shall recommend that it be dismissed.

*Wright Line*¹⁰ provides the analytical mode to determine Respondent's motivation with respect to the 8(a)(3) allegation. Pursuant to that test, General Counsel must establish a

⁹*FPC Advertising*, 231 NLRB 1135, 1136 (1977).

¹⁰251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981); *NLRB v. Transportation Management Corp.*, 462 U.S. 393 399 (1983).

requisite prima facie case by showing union or protected activity, knowledge, animus and adverse action.¹¹ Once the General Counsel has put forth a prima facie case, the burden shifts to the Respondent to demonstrate that the same action would have taken place even absent any protected conduct.¹²

The General Counsel has shown union activity, knowledge and adverse action. However, as I have discredited his witnesses with respect to the evidence of animus, I find that essential element to be lacking. Absent animus, the prima facie case falls and the General Counsel has failed to sustain his burden of proof on the 8(a)(3) allegation.¹³

Even if I were to find that the evidence presented by the General Counsel rises to the level which would warrant a shifting of the evidentiary burden, I would find that Respondent has successfully rebutted the prima facie case. In

addition to rebutting the evidence of animus, Respondent has presented a rationale for its actions, a business judgment which, as noted above, I am not at liberty to reject. I am compelled to find that Respondent would have changed and reduced Nelson's hours whether or not the janitors chose to be represented by the Union.

Accordingly, I shall recommend that the 8(a)(3) allegation be dismissed.

CONCLUSION OF LAW

Respondent has not violated the Act in any manner alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁴

ORDER

The complaint is dismissed.

¹¹ See *Farmer Bros. Co.*, 303 NLRB 638, 649 (1991).

¹² *Fluor Daniel, Inc.*, 304 NLRB 970 (1991).

¹³ As I find no discrimination, I need not reach the issue of whether, by agreeing to the addendum which specifically provided for the reduction and change in hours, the Union and/or Nelson waived their statutory rights. See *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983), and *NLRB v. Magnavox Co.*, 415 U.S. 322 (1974). See also *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953).

¹⁴ 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.