

Bower and Associates, Inc. and Mike Cunningham.
Case 9-CA-32530

May 7, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS COHEN
AND FOX

On January 24, 1996, Administrative Law Judge Benjamin Schlesinger issued the attached decision. The Respondent filed 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 conclusions² and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Bower and Associates, Inc., Jeffersonville, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² In adopting the judge's finding that the Respondent's discharge of Mike Cunningham violated Sec. 8(a)(3) and (1) of the Act, we note that the record supports his finding of disparate treatment vis-a-vis apprentice Travis Hughes. The Respondent contends that both Cunningham and Hughes were discharged for absenteeism and lateness and contends that a "termination letter" sent to the Union concerning Hughes establishes that it took similar action in both cases. The record establishes, however, that "termination letters" were used by the Union to monitor the progress of its apprentices and, unlike the "no further referral" letter sent to the Union regarding Cunningham, did not preclude future employment with the Respondent. The record further discloses that Hughes actually returned to work for the Respondent subsequent to the issuance of this letter. Thus, we find the Respondent's contention without merit.

Patricia Rossner Fry, Esq., for the General Counsel.
C. Laurence Woods III, Esq., and *Carole C. Desposito, Esq.*
(*Westfall, Talbott & Woods*), of Louisville, Kentucky, for the Respondent.

Mike Cunningham, of Louisville, Kentucky, for the Charging Party.

DECISION

FINDINGS OF FACT AND CONCLUSIONS OF LAW

BENJAMIN SCHLESINGER, Administrative Law Judge. The complaint alleges that Respondent Bower and Associates, Inc. laid off Charging Party Mike Cunningham on December 30, 1994, to retaliate for his union activities in violation of Section 8(a)(3) and (1) of the National Labor Relations Act. Respondent denies that it violated the Act in any manner.¹

Jurisdiction is conceded. Respondent, a corporation, has been engaged in commercial construction—machinery moving and rigging services—at Jeffersonville, Indiana. During the 12 months ending February 23, 1995, it purchased and received at its Jeffersonville facility goods valued in excess of \$50,000 directly from points outside Indiana. Respondent admits, and I conclude, that it is an employer within the meaning of Section 2(2), (6), and (7) of the Act and that Kentucky State District Council of Carpenters, Local 1031, an affiliate of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO (the Union), is a labor organization within the meaning of Section 2(5) of the Act.

The basis of the complaint is Respondent's illegal motivation for Cunningham's layoff, and the witnesses had dramatically different recollections from one another. Larry Bower, Respondent's president and co-owner, testified that he was not familiar with Cunningham's work performance but relied on what he was told by Richard Egnew, general foreman. Although Bower wrote on two occasions that two reasons that he did not want to employ Cunningham again were that Cunningham was "disruptive" and "had a bad attitude," Egnew denied telling Bower that Cunningham was disruptive. Thus, either Bower or Egnew is not telling the truth. Bower also said that Cunningham was late every day, but no one testified that he was; and even Bower admitted that that was hyperbole. Then, Bower and Egnew relied on one incident of Cunningham's lateness of 4 hours, which Cunningham explained was an absence that had been approved by William Schuler, Respondent's foreman, an admitted supervisor, agent, and representative of Respondent. Schuler did not testify, and I must credit Cunningham's uncontradicted assertion, which was somewhat corroborated by Union Steward Don Gilpin, who was called as a witness by Respondent and was the only witness who was not particularly interested in the outcome of this proceeding.

Equally telling, to counteract all of Respondent's conflicting testimony, was the un rebutted testimony of Cunningham that the real reason that he was laid off was expressed by Schuler—that Egnew was irate that Cunningham had been complaining constantly to the Union about Respondent's violation of its contractual commitments. No one denied this telling statement against Respondent's interest. Schuler's unexplained absence persuades me not only that he had nothing favorable to say in support of Respondent's case but also that whatever he would have said would have bolstered a finding of an illegal motive. Accordingly, I find facts and motive that are contrary to those testified to by Respondent's witnesses. To the extent that there is testimony that conflicts

¹ The relevant docket entries are as follows: Cunningham filed the unfair labor practice charge on January 20, 1995; the complaint issued on February 23, 1995; and the hearing was held in Louisville, Kentucky, on August 22, 1995.

with my findings, I credit the witnesses whose testimony I rely on. In making these credibility findings, I have fully reviewed the entire record and carefully observed the demeanor of all the witnesses. I have also taken into consideration the apparent interests of the witnesses; the inherent probabilities in light of other events; corroboration or the lack of it; the consistencies or inconsistencies within the testimony of each witness and between the testimony of each and that of other witnesses with similar apparent interests. Testimony in contradiction to that on which my factual findings are based has been carefully considered but discredited. When necessary, however, I have set forth the precise reasons for my credibility resolutions. See generally *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962).

Cunningham, a millwright, had worked for Respondent in the past, but his most recent employment started on November 18, 1994,² at a job Respondent was performing at a Ford truck plant. Respondent then asked him to work at another job and then the General Electric building 5 (GE) in the Louisville, Kentucky area, which he started on Monday, November 28. Respondent was performing work at the GE facility before and during "shutdown," that period of time when GE's employees are on vacation and necessary repairs and maintenance are performed, at minimum disturbance to the functioning of the plant. Cunningham's first complaint occurred about 3 days later, when he asked Gilpin, who was appointed by the Union's business representative and was the principal union representative on the job, which employee was the millwrights' foreman. (The collective-bargaining agreement provided that, when there are up to nine journeymen millwrights on the job, Respondent shall pay one millwright the foreman's rate of pay.) Gilpin told him that it was an iron worker, and Cunningham, who had been a union executive board member and a delegate to the Union's district council, pointed out that the collective-bargaining agreement required that the millwrights have their own foreman. Gilpin promised to consult with Randall Perry, the union business representative, to find out whether Cunningham was correct. The next day, Perry told Cunningham that Respondent had agreed to pay Schuler foreman's pay.

Cunningham also complained to Gilpin that he needed safety equipment (a burning jacket and a welding hood), because his shirt had been burned; and he also asked Gilpin to obtain safety equipment for another employee whose shirt had burned. Again, on December 28 or 29, he complained to Schuler, and then to Gilpin, that sheet metal workers were performing the work that should have been performed by millwrights. Gilpin said that he would talk to Perry and ask him to come to the facility. Perry arrived at about 2 p.m. on December 29, and Cunningham related his complaint. Perry said that he would take care of it. About 15 minutes later, Cunningham left the place he was working to get some water. He met two millwrights who told him that they were being laid off that day. Cunningham told them that their layoffs would not comply with Respondent's agreement to employ three millwrights for every one iron worker. At that time, the employees in each craft were about equal. He advised them to file a grievance with Gilpin. They said that they welcomed being laid off, because they had to travel a

great distance to get to the job and were not making enough money to compensate them for their travel.

The following morning, Friday, Schuler told him: "Boy, Richard Egnew's really mad at you, really hot at you." Cunningham asked him what the problem was, and Schuler said that someone called Egnew the previous night to complain that Cunningham was calling the business agent every 5 minutes; but Schuler said that he had taken care of it, that he had told Egnew that Cunningham did not do that and that Cunningham had been working with him in the scissors lift. At 2 p.m., Schuler advised Cunningham that he was laid off. On his way out, Cunningham saw Egnew and told him that it was not true that he had called Perry every 5 minutes and asked why Egnew did not ask him. Egnew said that he had received a phone call telling him that Cunningham had. Cunningham asked him why he was laid off, and Egnew replied, "[A]bsenteeism." Cunningham said that he had always received permission from Egnew and Schuler before he had to be absent, so that there would be no problems. Egnew replied only that he was laid off. On January 9, 1995, Bower wrote to Perry, requesting that Cunningham not be referred to any of Respondent's projects, because he was "[L]ate every day and had a bad attitude."

Respondent contends that it laid off Cunningham on December 30, for lack of work, and in effect discharged him 10 days later for cause by asking the Union not to refer him again. Respondent never mentioned "lack of work" as its reason for any of its actions, however, until after Cunningham filed his unfair labor practice charge. Instead, on December 30, Egnew told Cunningham "absenteeism" and told Gilpin: "For absentees, being late and absentees." Lack of work was not Respondent's original reason, as demonstrated not only by Respondent's words but also by its actions. Immediately after laying off Cunningham, Egnew received a call, he testified, from a GE engineer that there were some additional areas that could be worked the following Monday. As a result, Egnew testified that he called in employees from another of Respondent's jobs to do that work on Monday. Thus, on the following Monday, after the Friday that Bower said he had engaged in a reduction in force, Respondent employed one more employee at the job than on the preceding Friday. Accordingly, Respondent's position at the hearing was a sham.

Under *Wright Line*, 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Corp.*, 462 U.S. 393 (1983), the General Counsel must prove that Cunningham's union activities motivated Respondent to act as it did. The General Counsel did so. Egnew knew that Cunningham had been complaining to the Union and was irate. Cunningham's layoff followed immediately on Egnew's knowledge of those activities. Respondent concocted reasons for laying off Cunningham, gave false reasons at the hearing, and kept shifting its reasons. That is ample to create a prima facie case.

Once having met the burden of proving a prima facie case, Respondent must demonstrate under *Wright Line* that it would have taken the same action that it did, even in the absence of Cunningham's union activities. I conclude that Respondent did not do so. Its strongest case comes from various warnings given by Egnew. At three safety meetings in December, at least one of which Cunningham attended, Egnew mentioned tardiness and absenteeism. Gilpin corrobo-

²All dates hereinafter refer to 1994, unless otherwise stated.

rated Egnew's testimony, that in three safety meetings in December, Egnew said, "[T]hat he had a time limit to get this job in, and he wasn't gonna tolerate with people being late or absentee, because he had a certain date he had to finish." He added that, if people were tardy and absent, "he was just gonna replace them."³ In addition, layoffs are the norm after a shutdown, and Egnew tried to prepare the employees for that eventuality. At the safety meeting on December 28, Egnew announced that the shutdown was coming to an end and he was going to be cutting back. He warned that, if anybody missed work or was late, that would put his or her name to the top of the layoff list.

Respondent's attempt to blame Cunningham for absenteeism has no merit. First, when Bower wrote to the Union asking that Cunningham not be referred again, he mentioned only that Cunningham had been late every day and had a bad attitude. When Bower wrote to the Board during the precomplaint investigation, he said that Cunningham was absent once. The absence that Respondent refers to⁴ was one for 4 hours, which Bower also counted as a lateness when relating Cunningham's history of tardiness, because Cunningham was not away from work the entire day. Cunningham explained that he had an appointment with his doctor for a mild case of carpal tunnel syndrome and that his absence had been excused by both Schuler and Egnew. In fact, Cunningham had offered to bring in proof that he was absent for these reasons, but Egnew and Schuler said that that was not necessary. Once again, the failure of Respondent to call Schuler to testify impels me to believe Cunningham, particularly because Egnew falsely denied making any statement about learning of Cunningham's complaints to the Union.

A closer case exists for Respondent's layoff of Cunningham because he was late; and here I find, particularly in light of Gilpin's testimony, which I credit, that Cunningham was not candid and understated his tardiness. Respondent's records show that Cunningham was late on December 9, 14, and 29. That record was maintained by Egnew's daughter; and, even though she did not testify, I credit that record over Cunningham's recollection of only one instance of lateness, in light of Gilpin's corroboration. I credit Cunningham's un rebutted testimony, however, that he was late on December 29 only 5 or 6 minutes, because he had to go to the restroom.⁵ The real question is whether the last absence caused Egnew to lay him off, and I conclude that it did not for one reason. The same day that Respondent laid off Cunningham, it laid off Travis Hughes, who was absent that day without permission or excuse. Hughes' record of absenteeism and tar-

³ Gilpin, prompted by Egnew, also told the employees how important it was to finish the job and that Egnew "was gonna start cutting back if they continued to be late or—or miss. He wasn't gonna tolerate with absentee[ism]."

⁴ Cunningham was absent from work on 2 days, but one, when he had to comply with a subpoena.

⁵ If Cunningham were as late as the time record reflects, and lateness was Respondent's legitimate reason, it would be likely that Egnew would have laid him off that day, December 29, when it laid off two other employees.

diness was far worse than Cunningham's, and all that Respondent did was to lay him off. But Respondent, in effect, discharged Cunningham by requesting the Union never to refer him to Respondent's job again, despite that fact that Hughes' violations were more serious. Accordingly, I find that Respondent treated Cunningham disparately, that his lateness the day before he was discharged was merely a pretext, and that the true reason for the discharge was his union activities. Accordingly, I conclude that Respondent violated Section 8(a)(3) and (1) of the Act.

Finally, Respondent raised the defense of Cunningham's bad attitude, that is, that Cunningham was often away from his work area and that Egnew had to caution Cunningham to get back to work on three or four occasions. Conspicuously absent from Gilpin's testimony, and of course from the failure of Schuler to be called, was any corroboration of this claim. Surely, Gilpin and Schuler, working with Cunningham (Egnew was often not even at the jobsite), could have confirmed that Cunningham wandered about and did not diligently perform his job. But they did not support Egnew's testimony. And, even disregarding Cunningham's testimony that only absenteeism was mentioned, leaving the job was not the reason that Egnew gave to Gilpin. Thus, the "disruption" that Bower complained about in his letter to the Union asking that Cunningham not be referred to Respondent's jobs anymore had nothing to do with what Respondent now posits. What distinguishes Hughes and Cunningham was Cunningham's attitude, his disruptive behavior, not that he interfered with the conduct of the job but that, by making his complaints to the Union, he disrupted the way that Egnew wanted to conduct this job, without the constant interference of the Union, and that constituted the basis of his termination.⁶ That distinguishes Respondent's treatment of Hughes, laid off the same day as Cunningham, who was merely laid off and not terminated by reason of advice to the Union not to refer him again.

The unfair labor practices found here, occurring in connection with Respondent's business, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Specifically, I shall order Respondent to reinstate Cunningham to his former position or, if that position no longer exists, to a substantially equivalent position of employment, without prejudice to his seniority or other rights and privileges, and make him whole for

⁶ Bower would not have felt strongly critical about Cunningham's gripe that another company was doing millwrights' work. If he were successful, Bower would have received more work because the work would not have been subcontracted to another firm.

any loss of wages and benefits he may have suffered by reason of Respondent's discharge of him. Backpay shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).⁷

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁸

ORDER

The Respondent, Bower and Associates Inc., Jeffersonville, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging its employees because of their union activities.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them in Section 7 of the National Labor Relations Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

⁷In recommending this remedy, I note that Respondent wrote to the Union on February 17, 1995, reciting that Cunningham was eligible for rehire. That is not a valid offer of reinstatement to Cunningham. Furthermore, Respondent employs some regular employees, including the ones who replaced Cunningham when Respondent laid him off, and Respondent originally hired Cunningham to work at other locations before shifting him to the GE job. So, Cunningham might have been retained in Respondent's employ in preference to other employees. These issues will be determined in compliance proceedings.

⁸If 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.

(a) Offer Mike Cunningham immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this decision.

(b) Remove from its files any references to the unlawful layoff and discharge of Mike Cunningham and notify him in writing that this has been done and that the layoff and discharge will not be used against him in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility in Jeffersonville, Indiana, copies of the attached notice marked "Appendix."⁹ Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 9 in writing within 20 days from the date of this Order what steps Respondent has taken to comply.

⁹If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."