

Medeco Security Locks, Inc. and International Union of Electronic, Salaried, Machine, and Furniture Workers, AFL-CIO. Case 11-CA-16215

November 29, 1996

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS BROWNING, FOX, AND HIGGINS

On September 29, 1995, the Board issued its decision in this case.¹ On October 19, 1995, the Respondent filed its petition for review with the United States Court of Appeals for the Fourth Circuit. On December 15, 1995, the Board petitioned the court for remand of the case to the Board for reconsideration, and on December 19, 1995, the court remanded the case for this purpose. On April 15, 1996, the Board issued an Order remanding the case to Administrative Law Judge Howard I. Grossman so that he could make specific findings of fact and credibility concerning the testimony of employees William Folden and Mike Furrow that Manager Stephen Bullock had told them that the Respondent considered both the "GD&T" and the "QS-1" test scores in deciding to transfer Folden to the second shift. On May 9, 1996, Judge Grossman issued his supplemental decision. On August 21, 1996, the Board issued a Supplemental Order remanding the case to the judge for the same purpose as described in the Board's first remand Order. On September 12, 1996, Judge Grossman issued his second supplemental 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, and conclusions and to adopt the recommended Order. In so doing, we rely on the judge's findings that both William Folden and Mike Furrow were truthful witnesses, and the judge's crediting of their testimony that Manager Stephen Bullock had told them that the Respondent considered both the "GD&T" and the "QS-1" test scores in deciding to transfer Folden to the second shift. We also rely on the judge's finding that Bullock did not have a truthful demeanor, and the judge's discrediting of Bullock's denial that he told Folden and Furrow that both test scores would determine who went to the second shift. The judge was confronted with conflicting testimony—Furrow and Folden's assertions and Bullock's denial. In these circumstances, the judge's credibility determination in favor of Furrow and Folden is entitled to deference because credi-

bility is a function not only of what a witness says but of how a witness says it. See *NLRB v. So-White Freight Lines*, 969 F.2d 401, 407 (7th Cir. 1992); *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951).²

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Medeco Security Locks, Inc., Salem, Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

² Although we adopt the judge's finding, based on demeanor, that Furrow truthfully testified that Bullock "showed" him a copy of the "QS-1" score, we find it unnecessary to rely on this fact. The critical finding, made by the judge and affirmed by us in this decision, is that Bullock told Folden and Furrow that both test scores would determine who went to the second shift. We note that, in the first remand Order, the Board did not "accept" that Bullock gave Furrow a copy of the test score.

Michael W. Jeannette, Esq., for the General Counsel.
Clinton S. Morse and Todd A. Leeson, Esqs. (Woods, Rogers & Hazelgrove), of Roanoke, Virginia, for the Respondent.
Mr. Charles J. Van Dellen, Treasury Secretary District 1, of Ben Mountain, Virginia, for the Charging Party.

SUPPLEMENTAL DECISION

I. THE BOARD'S REMAND ORDER

My initial decision in the above-captioned matter issued on July 31, 1995. On April 15, 1996, the Board issued its "ORDER REMANDING TO ADMINISTRATIVE LAW JUDGE." The Order reads in part:

The Respondent asserted that it had transferred Folden because he had failed the Respondent's "GD&T" test. Both Folden and employee Mike Furrow testified that Manager Stephen Bullock had told them that the Respondent had considered both the "GD&T" test and the Respondent's "QS-1" test in deciding to transfer Folden. The judge credited Furrow's testimony, relying on his ability to recall four of his own scores on the "QS-1" test and one of Folden's scores on the "QS-1" test. The judge viewed Furrow's recollection of "QS-1" scores as corroboration of his testimony that Bullock had showed him the scores and had alluded to Folden's "QS-1" test in justifying Folden's transfer. The judge then cited Furrow's testimony in corroboration of Folden's testimony that Bullock had told him that scores on both the "QS-1" and "GD&T" test would be used in deciding which employee to transfer to the second shift.

Further review of the record shows, however, that Furrow was not relying on his recollection when he recited the five "QS-1" test scores. Rather, Furrow was reciting the scores from the Respondent's exhibit which he was holding at the time.

In light of the above, we shall remand this proceeding to the judge to prepare a supplemental decision con-

¹ 319 NLRB 224.

taining specific findings of fact and credibility resolutions concerning: (1) Folden's testimony that Bullock told him that "GD&T and QS-1 test scores would determine who went to the second shift"; and (2) Furrow's testimony that Bullock gave him the "impression that both these sections [GD&T and QS-1] were considered for the qualifications," that he "learned during meetings with Steve [Bullock] that the QS-1 and GD&T together would be a deciding factor," and that Bullock "used all the test scores as a deciding factor." If appropriate, this supplemental decision shall contain revised conclusions of law and recommendations concerning Folden's transfer and discharge.

II. THE RECORD EVIDENCE

A. Testimony of William Folden

1. Direct examination

On April 20, 1994, according to Folden, he had a conversation with Supervisor Steven Bullock.¹ It was on that date that he signed a "Confidentiality" statement presented to him by Bullock.² Folden was asked whether his possible transfer to the second shift was discussed. He answered that the GD&T and QS-1 tests would determine the question. The record shows the following questions and answers:

Q: Now, . . . you mentioned transferring to second shift GD&T and QS-1 scores.

A: Yes, sir.

Q: What's your basis for saying that?

A: That's what he told me that he would base his decision on.

Q: When did he tell you this?

A: During this meeting and one other time.

Q: When was that, sir?

A: After I had retaken the test.

Q: Where was this meeting at?

A: In his office.

Q: Anyone else present?

A: No, sir.

Q: What specifically did he say to you?

A: That GD&T and QS-1 would determine who went to the second shift position.

The "Confidentiality" statement refers only to the GD&T test. Folden testified that he read the Confidentiality statement at the time of the April 20 meeting and had questions about it. However, he decided to defer these questions and utilize the Company's "Open Door" policy.

2. Cross-examination

Counsel engaged in a colloquy with Folden on the QS-1 test. Folden stated that he had passed, but did not know his exact score. Questions and answers follow:

Q: All it (the Company) considered was whether you passed or failed the QS-1, right?

¹The spelling of Bullock's first name is changed in accordance with the transcript.

²The "Confidentiality" statement is set out in administrative law judge's decision p. 4.

A: Yes, we didn't understand the scoring of it.

Q: Right, and there wasn't any scoring of it was there, to your knowledge?

A: Yes, sir, there was.

Q: Well, you never asked for or got a score did you?

A: Yes, sir, I had.

Q: Well, what was it? Tell us.

A: It was several categories and I briefly seen some of the scores but I don't recall exactly what they were.

Q: Right, and the reason was that on one cared what you had made on the QS-1 as long as you passed. Isn't that right?

A: No, sir, not to my knowledge.

Q: As far as you know, there were not comparisons made on test scores in the AS-1?

A: Within our department, it was.

Q: But as far as you know, there is no way to compare QS-1 test results between employees, is there?

A: Yes, sir, I seen a computer readout of individuals.

Supplementing his testimony on direct examination, Folden said that he did not ask any questions during this interview, that he should just "listen and not be heard yet."

B. Testimony of Mike Furrow

1. Direct examination

The transcript reads in relevant part:

Q: And you said you had a conversation with Mr. Bullock about Mr. Folden. Where was that meeting at?

A: In his office.

Q: Was any else present?

A: No, sir.

Q: Who spoke, and what was said?

A: I went to Mr. Bullock and said that since Billy (Folden) passed this test³ and it was me that made the lower score that I should be the one moved to second (shift) and he said no, because I (Bullock) had handled it this way, I would have to give you (Furrow) a second chance on taking the test, and then he (Bullock) went through the QS-1 scores that he had, and I was unaware of my scores, and he showed me the sheet with the Departmental's QS-1 scores on there.

Q: What, if anything, else did he say to you sir?

A: He said I (Bullock) could get real shitty about this, since Mr. Folden did not take the comparative section of the QS-1 testing, which was not required.

2. Cross-examination

Counsel elicited from the witness the fact that he and Bullock discussed the GD&T tests. Following are relevant portions of the transcript:

Q: And that's all that was discussed at that meeting, right?

A: No, sir. We talked about the QS-1 test scores also.

Q: Well, how did that come up?

³Furrow refers to Folden's second test.

A: Because that's what Mr. Bullock would be a hope since I didn't - instead of giving me another chance taking the (GD&T) test or that option, he used all the test scores as a deciding factor.

Q: Well, let me ask you this: Do you know what you made on the QS-1?

A: No, sir.

Q: But you do know what you made on the GD&T, don't you?

A: Yes, I had the test.

Q: He (Bullock) told you, didn't he, that he did not use the QS-1's?

A: No, sir he showed me the sheet of paper with our QS-1 scores on it.

Q: He did? Did he show you that you were higher or lower than Mr. Folden?

A: I didn't pay no attention to that?

Q: Did he (Bullock) say anything about whether you were higher or lower than Mr. Folden?

A: I assumed I was higher because he (Folden) was moved to second (shift).

Q: I'm going to ask you a question. Did he say anything to you about whether you were higher or lower than Mr. Folden?

A: Not that I recall.

Q: But you say he got the QS-1's and went over them with you?

A: Yes, sir. And I found out recently that Hal Williams give him the spreadsheet with those test scores on there.

Counsel then marked a document and asked the witness whether it was the one that Bullock had shown him. Furrow answered that it was the one Bullock had shown to him. Respondent then moved to introduce the document as Respondent's Exhibit 1, and it was received without objection.⁴

The transcript continues:

Q: Mr. Furrow, can you look at this and tell me whether your test scores on the QS-1 are higher or lower than Mr. Folden's?

A: They're higher.

Q: They are?

A: Yes, sir.

Q: The [sic] me how you can see that, please?

A: The numbers are right there.

⁴R. Exh. 1 consists of three documents or copies thereof. The documents are 9-1/4 inches wide, and 2-1/2 inches high. There are separate columns across the width of the documents listing the names of employees, and designations of various types of tests: "SPC Diag. # 1"; "SPC # 2"; "SPC # 3"; "SPC # 4"; "SPC Comp."; "Gage Diag."; and "Gage." The names of 10 individuals are listed in the employee column on each of the 3 documents. Folden's and Furrow's names are included. Opposite Folden's names, on the first document various dates are listed for the four SPC tests, while none are listed for Furrow. In the "Gage Diag" test, Folden's scores are listed as "68/89/81/68." Furrow's scores for the same test are listed as: "96/81/71/94."

The second document does not indicate any test scores for Folden or Furrow, with the designation "ex" (exempt) in several columns. The third document indicates several SPC tests taken in 1993, without any scores.

Q: Well, tell me what you're looking at to reach that conclusion?

A: I'm looking at 68 on Mr. Folden to 96, 89, 81, 81, 71, 68, 94.

Q: So you were right, on the gauge (test) right?

A: Yes, sir.

C. Testimony of Steven Bullock

1. Direct examination

Bullock testified that he met with Folden and discussed his score on the GD&T test. The transcript reads:

Q: At any time during the meeting you had with him on April 20th, did you at all reference that you would consider his QS-1 results in determining his qualifications?

A: No, I did not.

Q: At any time during that meeting did you tell Mr. Furrow that you were going to determine qualifications for shift transfer based upon both OS-1 and GD&T test results?

A: No, I did not.

2. Cross-examination

Q: Now, the QS-1 is given to all employees?

A: Whoever volunteers takes it, yes.

Q: And that includes the QC (Quality Control) employees?⁵

A: QC employees were required to take QS-1.

Counsel showed the witness Respondent's Exhibit 1. Bullock described the meaning of the information on the exhibit. The transcript reads:

Q: So those are the scores for the gauge diagnostic exam.

A: Yes.

Q: And if you look at the right hand side we have numbers and names and if (you) took that employee and went across under (column) K, we would find the scores they made on the gauge diagnostic. Right?

A: Right.

Q: So then if you wanted to compare the gauge diagnostic exam of Mr. Folden with, for example, Mr. Butler, you could do so under column K on page 1?

A: If it shows a test score.

. . . .

Q: (by ALJ): One of the General Counsel's witnesses testified that you either gave or showed him Respondent's 1, about which you've just been testifying. Do you recall doing that?

A: No, sir.

Q: At no time did you show the QS-1 scores to any of the people in this preceding, when being questioned?

A: Not that I can recall.

Q: Are you positive?

A: Yes, sir.

⁵Folden and Furrow were quality control employees.

D. Factual and Legal Conclusions

The first issue is whether Bullock showed Furrow Respondent's Exhibit 1, which he denies and Furrow affirms. As I stated in my initial decision:

Furrow correctly identified the first number which appears on the Company's report of Folden's test scores on the gauge diagnostic test. Although Furrow gave seven numbers as his own scores on this test, he included the four actual scores recorded on the exhibit. It is highly improbable that Furrow's recitation at the hearing of Folden's first test score and four of his own could have been the result of guesswork. Although he included three extraneous scores, one was a repetition, and the other two may have been mistakes in reading or transcription.

There is thus no way that Furrow could have known these scores unless somebody showed them to him. I conclude that Bullock did show them to Furrow—in-
deed, this is one of Respondent's exhibits identified by Furrow.⁶

There is no escape from the fact that Furrow could not have known Folden's test scores without being shown the exhibit. The Board's remand Order states that Furrow was "reciting the scores from the Respondent's exhibit which he was holding at the time."⁷ It may thus be accepted as a fact that Bullock showed Furrow a copy of Respondent's Exhibit 1.

The next issue is Bullock's reason in showing the exhibit to Furrow. The only explanation consistent with Respondent's position is that Bullock showed Furrow a document listing QS-1 scores, but did not discuss QS-1 scores with him. This is highly improbable if not absurd. Bullock would have had no reason for showing the scores to Furrow unless he wished to discuss them.

This reasoning is supported by Furrow's detailed testimony, explaining that Bullock said he would rather rely on both tests rather than give Furrow a second GD&T test. It is also supported by the detailed language Furrow attributed to Bullock—the latter could be "real shitty" about using the QS-1 scores.

Further, as stated in my initial decision, Furrow was a current employee at the time of his testimony, and it is unlikely that he would have testified against his own interest.

It may be noted that taking the QS-1 test was mandatory for QC employed like Folden and Furrow, but only voluntary for other employees. This distinction shows the greater importance which Respondent attached to QC employees taking the QS-1 test.

For these reasons, I reaffirm my finding that Bullock did talk to Furrow about the QS-1 tests as they applied to the transfer issue, and that he made the statements attributed to him by Furrow.

Furrow's testimony thus provides strong corroboration of Folden's testimony that Bullock said essentially the same thing to Folden. The fact that Folden did not question the absence of any reference to the QS-1 test in the "Confidentiality" statement is insufficient to overcome the probative weight of Furrow's corroboration supported by documentary

evidence. As Folden testified, he simply decided to remain silent during the interview, and take up the matter in the Company's open-door policy. For these reasons, I reaffirm my prior finding that Bullock made the statements attributed to him by Folden.

I do not rely upon Furrow's alleged recall of test scores, as stated in the remand Order. Rather, as stated in my prior decision. I rely on the fact that Furrow could recite the scores only after being shown Respondent's Exhibit 1. It is this action which decides the matter.

For the foregoing reasons, I reaffirm my findings of fact, conclusions of law, and recommended Order in my initial decision.

Michael W. Jeannette, Esq., for the General Counsel.
Clinton S. Morse and Todd A. Leeson, Esqs. (Woods, Rogers & Hazelgrove), of Roanoke, Virginia, for the Respondent.
Mr. Charles J. Van Dellen, Treasury Secretary District 1, Ben Mountain, Virginia, for the Charging Party.

SECOND SUPPLEMENTAL DECISION

My two prior decisions in the above-captioned proceeding issued on July 31, 1995, and May 9, 1996, respectively. On August 21, 1996, the Board issued its second supplemental remand Order directing me to make credibility findings with respect to "(1) Folden's testimony that Bullock told him that 'GD&T and QS-1 test scores would determine who went to the second shift; (2) Furrow's testimony that Bullock gave him the 'impression that these sections (GD&T and QS-1) together would be a deciding factor, and (3) Bullock's testimony that he told neither Folden nor Furrow that both the 'GD&T' and 'QS-1' scores would be considered in determining who went to the second shift."

My original decision stated that my findings of fact were based upon "the entire record, including my observation of the demeanor of the witnesses."¹ I reaffirm that principal herein. Folden's appearance was that of a truthful witness. The substance of his testimony on cross-examination supports his testimony on direct examination that Bullock told him that both the GD&T and QS-1 tests would be used in determining who would work the second shift.

Furrow also was a truthful witness in appearance. He was a current employee, and unlikely to testify falsely against his employer, under accepted Board analyses. That Bullock gave him copy of the QS-1 scores is obvious, as accepted by the Board in its first remand Order.

Bullock, on the other hand, was not a disinterested witness. His manner was abrupt and lacked the detail and conviction in Folden's and Furrow's testimony. Further, Bullock denied giving a copy of the QS-1 test scores to anybody involved in this proceeding; testimony which is false, since he gave a copy to Furrow.

Based on the truthful demeanor of Folden and Furrow, the absence thereof from Bullock's assertions, his false statement that he did not give a copy of the QS-1 scores to anybody involved in this proceeding, his interest in testifying favorably for Respondent, and the other factors listed in my prior decisions, I find that Bullock told Folden and Furrow that

⁶ Administrative law judge's decision p. 6, l. 37-43; p. 7, l. 1-3.

⁷ Remand Order, p. 2.

¹ Administrative law judge's decision p. 2, ll. 1-3.

both the GD&T and QS-1 test scores would be used in determining who would be transferred to the second shift.

For the foregoing reasons, I reaffirm my prior findings, conclusions, and recommended Order.