

**Superior Welding, Inc. and Indiana State Pipe Trades Association and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 157, AFL-CIO. Case 14-CA-24709**

June 30, 1998

**DECISION AND ORDER**

BY MEMBERS LIEBMAN, HURTGEN, AND BRAME

On March 27, 1998, Administrative Law Judge Arthur J. Amchan issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering 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 briefs<sup>1</sup> 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>The Respondent contends that the General Counsel's exceptions should be rejected under Sec. 102.46 of the Board's Rules and Regulations because they do not set forth specifically those questions of fact or law to which he excepts. Although the General Counsel's exceptions do not conform in all particulars with Sec. 102.46, they are not so deficient as to warrant rejection. Moreover, the Respondent has neither claimed nor shown prejudice as a result of any deficiency.

<sup>2</sup>The General Counsel 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), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

*Kathleen C. Richmond, Esq.*, for the General Counsel.  
*Ronald R. Allen, Esq. (Fine & Hatfield)*, Evansville, Indiana, for the Respondent.

**DECISION**

**STATEMENT OF THE CASE**

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Robinson, Illinois, on January 6, 1998. The charge was filed August 11, 1997,<sup>1</sup> and the complaint was issued September 30.

On the entire record, 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

<sup>1</sup>All dates are in 1997 unless otherwise indicated.

**FINDINGS OF FACT**

**I. JURISDICTION**

Respondent, a corporation, engages in the business of welding, repair, and maintenance of machinery and equipment from its facility in Robinson, Illinois, where it annually performs services valued in excess of \$50,000 for various enterprises within the State of Illinois, each of which meets a direct standard for assertion of jurisdiction by the NLRB. The Company also purchases and receives at its Robinson, Illinois facility goods and materials valued in excess of \$50,000 directly from points outside of the State of Illinois. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union, Plumbers and Pipefitters Local 157, is a labor organization within the meaning of Section 2(5) of the Act.

**II. ALLEGED UNFAIR LABOR PRACTICES**

The General Counsel alleges that Respondent violated Section 8(a)(1) and (3) in discharging John Griffin on May 16, 1997. He also alleges that Respondent violated Section 8(a)(1) in July, by threatening employees that its facility would close if employees were represented by a union. Finally, he asserts that Respondent violated Section 8(a)(1) in authorizing a poll conducted on October 1, to determine its employees' union sympathies.

*A. The Discharge of John Griffin*

Michael Pleasant, a union field representative, approached Respondent's president, Howard Bilyew, in August 1996, about entering into a relationship with it. Bilyew declined the offer. Pleasant then informed Bilyew that the Union would attempt to organize its employees. At the beginning of May 1997, John Griffin, an unemployed union apprentice, reported to the hiring hall. Because the hall had no work for him, Pleasant suggested that Griffin apply for work at Superior Welding.

On May 1 or 2, Griffin went to Superior's office in Robinson, Illinois, and obtained a job application. He was interviewed by Howard Bilyew. Griffin did not disclose or give Bilyew any indication of his affiliation with the Union. Bilyew hired him and said his employment would be short-term. He suggested that there was a possibility of long-term employment.

Griffin started work on either Friday, May 2, or Monday, May 5. Respondent assigned Griffin to work in its shop for the first few days and then he periodically worked outside of the shop. Some of his assignments involved hauling metal scrap to other locations.

On the morning of Friday, May 16, Bilyew assigned Griffin to haul scrap to a salvage yard in Vincennes, Indiana. After he returned from his second trip, Bilyew told him that "some work fell through" and that he would have to terminate Griffin's employment. No other employees were laid off. Todd Cooper, a welder who was hired before Griffin but started work after him, remained in Respondent's employ.

John Griffin did not engage in any union activity while he was employed by Respondent in May. Griffin alleges that he revealed his union affiliation to two employees. He testified that on the day before he was laid off, two of Respondent's

employees, Roger Benson and Roger Brush, indicated to him that they recognized him from another worksite. Griffin had worked for a union contractor at this other worksite. According to Griffin, both Benson and Brush asked him if he was still in the Union. Griffin states that he confirmed that he was still a union member.

Griffin's testimony does not indicate any antiunion animus on the part of either Benson or Brush, who were rank-and-file employees. Indeed, he testified that Brush said he thought a union was a good idea for Superior Welding, although Brush didn't think Bilyew would like one. Michael Pleasant also testified that in several conversations with Brush prior to September 1997, Brush appeared to be interested in the Union. Therefore, even if I accept Griffin's testimony at face value, it fails to provide a basis on which I am able to infer that Bilyew knew of his membership in the Union through Brush or Benson.

Howard Bilyew is the only person alleged to be a Superior Welding supervisor and agent by the General Counsel.<sup>2</sup> The only direct evidence that he knew of Griffin's membership in the Union is the testimony of Shane Alumbaugh, an apprentice who quit Respondent's employ to join the Union in September 1997. Alumbaugh testified that the day Griffin was laid off, an employee named Kevin Beckett told Alumbaugh that Howard Bilyew laid Griffin off because he was a union organizer.

According to Alumbaugh, Roger Brush told him that Brush informed Bilyew that Griffin was a union organizer and that Bilyew had laid Griffin off for that reason. I decline to credit Alumbaugh's testimony. He is not a disinterested witness and his testimony is inconsistent with that of Pleasant and Griffin that Brush was favorably disposed to the Union in May. Brush, therefore, had no motivation to tell Bilyew that Griffin was a union member. Moreover, Griffin had not engaged in any organizing while he had worked for Respondent. Brush was called as a witness by Respondent but neither party interrogated him about whether he informed Bilyew about Griffin's union membership. Beckett and Benson were not called as a witnesses.

In order to prove that Respondent violated Section 8(a)(1) and (3) in terminating Griffin, the General Counsel must show that union activity has been a motivating factor in the Respondent's decision. Then the burden of persuasion shifts to Respondent to prove its affirmative defense that it would have taken the same action even if Griffin had not engaged in union or other protected activity. *Wright Line*, 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981).

To establish discriminatory motivation, the General Counsel generally must show union or other protected activity, employer knowledge of that activity, animus or hostility towards that activity, and a causally related adverse personnel action. Inferences of knowledge,<sup>3</sup> animus<sup>4</sup> and discriminatory

motivation<sup>5</sup> may be drawn from circumstantial evidence rather than from direct evidence.

In the instant case the General Counsel has failed to prove a prima facie case, primarily because he has failed to establish employer knowledge. The General Counsel argues that knowledge can be inferred from the small size of Respondent's facility (8-10 employees), the close contacts between Bilyew and his employees, the timing of Griffin's discharge, Bilyew's knowledge that the Union wanted to organize his company, and employees' knowledge of Griffin's union status. In rejecting this argument, I would note that reliance on Respondent's size, the "small plant doctrine" is not warranted since Griffin engaged in neither union activity nor publicized his union membership, *Mantac Corp.*, 231 NLRB 858 fn. 2 (1977).

The General Counsel is correct that the Respondent's explanation for Griffin's layoff is not particularly convincing. Respondent relies on three bids it submitted between April 24 and May 1, for which contracts had not been awarded as late as January 1998. As the General Counsel points out, the record is devoid of evidence that Respondent had any reason to expect these contracts to be awarded in mid-May. Nevertheless, I conclude that Respondent's reasons are not so obviously pretextual that they justify an inference that Bilyew knew Griffin was a union member and laid him off for that reason.

#### B. *The Alleged Threat to Close the Workplace if Respondent's Employees Joined a Union*

Shane Alumbaugh testified that Bilyew told his employees that he would go broke if they unionized and that he would have to close his doors if they did so. Both Bilyew and Brush deny that Bilyew made these statements. I decline to credit Alumbaugh and thus conclude that the General Counsel has not met his burden of proof with regard to this allegation.

#### C. *The Allegation That Respondent Directed or Authorized Roger Brush to Poll its Employees Regarding Their Union Sympathies*

The Union's charge regarding the termination of John Griffin and Respondent's alleged threats to employees was served on Superior Welding on August 13. On September 10, Griffin was recalled to work by Respondent, following the resignation of Shane Alumbaugh. On October 1, Roger Brush conducted a poll of Respondent's employees regarding their interest in the Union. Griffin went on strike immediately after the poll was conducted and has not returned to work at Superior Welding. The General Counsel alleges that Respondent authorized or directed this poll. Respondent contends Brush acted on his own.

Despite the rather suspicious circumstances surrounding the poll, I conclude that there is insufficient evidence to infer that Bilyew authorized it. Griffin testified that he was in the breakroom waiting for his work assignment on October 1. He alleges that Bilyew entered the room, said something to Brush, and left. He does not contend that he heard what Bilyew said. After Bilyew left, Brush conducted the poll in

<sup>2</sup> At p. 12 of its brief the General Counsel alleges that Brush was acting as an agent of Respondent in conducting a poll in October 1997. However, he never alleged Brush was an agent of Respondent prior to filing the brief. I find this issue was not tried by consent. Moreover, the record does not establish that Brush was an agent of Respondent.

<sup>3</sup> *Flowers Baking Co.*, 240 NLRB 870, 871 (1979).

<sup>4</sup> *Washington Nursing Home*, 321 NLRB 366, 375 (1996).

<sup>5</sup> *W. F. Bolin Co. v. NLRB*, 70 F.3d 863 (6th Cir. 1995).

which the assembled employees indicated their lack of interest in the Union on a piece of paper.

Brush testified that Bilyew had nothing to do with the poll. He asserts that Bilyew told him he had to go to a meeting and left before Griffin arrived. After Griffin arrived, Brush says he asked all the employees to indicate their feelings about the Union on a piece of paper. Bilyew also denies having anything to do with the poll. He says he went to a meeting at the Hershey Chocolate plant in Robinson before the poll was taken and that he merely told Brush where he was going before he left. There is insufficient evidence for me to find that Bilyew discussed the poll with Brush before he left. Moreover, until the filing of his brief, the General Counsel never alleged that Brush was an agent of Respondent.

#### CONCLUSION OF LAW

I conclude that the General Counsel has failed to establish any of the violations alleged in the complaint as amended.

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

#### ORDER

The complaint is dismissed.

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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.