

Bedding Discount Centers, Inc, and Lon Jarrell Jr.
Case 29–CA–20194

July 31, 1998

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS LIEBMAN
AND HURTGEN

The issue presented in this case¹ is whether the administrative law judge correctly found that the Respondent violated Section 8(a)(3) of the Act. The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,² and conclusions and to adopt the recommended Order as modified.³

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Bedding Discount Centers, Inc., Bethpage, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(e).

“(e) Mail a copy of the attached notice marked ‘Appendix’ to all current employees and former employees employed by the Respondent at any time since July 23, 1996. Such notice shall be mailed to the last known address of each of the employees above. Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent’s authorized representative, shall be mailed within 14 days after service by the Region.”

2. Substitute the attached notice for that of the administrative law judge.

¹ On September 26, 1997, Administrative Law Judge Steven Davis issued the attached decision. The Respondent and the General Counsel filed exceptions and supporting briefs.

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

² 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), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

³ Because only one sales employee works at each of the Respondent’s stores, and the complaint for which the Respondent discharged discriminatee Lon Jarrell Jr., was mailed to all stores, we shall modify the Order to require that the Respondent mail a copy of the Board’s remedial notice to all employees working in its stores on and after the date of Jarrell’s discharge.

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting Retail Wholesale Employees Union, Local 305, AFL–CIO, of Westchester County and Vicinity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board’s Order, offer Lon Jarrell full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Lon Jarrell whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board’s Order, remove from our files any reference to the unlawful discharge of Lon Jarrell, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

BEDDING DISCOUNT CENTER, INC.

Sonja Fritts, Esq., for the General Counsel.

Dorothy Rosensweig, Esq. (Kaufman, Naness, Schneider & Rosensweig, P.C.), of Jericho, New York, for the Respondent.

DECISION

STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge. Based on a charge filed by Lon Jarrell Jr., an individual (Jarrell) on July 26, 1996, a complaint was issued against Bedding Discount Centers, Inc. (the Respondent) on November 22, 1996.

The complaint alleges essentially that the Respondent discharged Jarrell because of his union and concerted activities. The Respondent denied the material allegations of the complaint, and on February 24, 1997, a hearing was held before me in Brooklyn, New York.¹

Upon the evidence presented in this proceeding, and my observation of the demeanor of the witnesses and after consideration of the briefs filed by the General Counsel and the Respondent, I make the following

¹ All dates hereafter are in 1996 unless otherwise indicated.

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a New York corporation, having its principal office and place of business at 75 Central Avenue South, Bethpage, New York, has been engaged in the retail sale and distribution of mattresses. During the past year, the Respondent received gross annual revenues in excess of \$500,000 from its operations, and during the same period of time, it purchased and received at its Bethpage facility supplies and materials valued in excess of \$5000 directly from enterprises located outside New York State. The 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. The Respondent also admits, and I find that Retail Wholesale Employees Union, Local 305, AFL-CIO of Westchester County and Vicinity (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

The General Counsel's Case

The Respondent, popularly known as Sleepy's, operates about 100 retail stores in the New York metropolitan area. Its officials are Harry Acker, chief executive officer, Jack Acker, general manager, Howard Roeder, president, and Ira Fishman, vice president of sales.

Each store is manned by only one employee. That person is responsible for its sales, making reports to the company, and making deposits of funds received from customers.

The Respondent has an interstore, headquarters phone system which connects all the stores, and over which employees at each store can communicate with each other, and can leave voice mail messages for specific sales people, or can leave a message addressed to everyone. Similarly, management can leave messages which all employees are required to listen to.

Jarrell was employed by the Respondent as a salesman from August 1995 until his discharge on July 23, 1996.

On March 12, 1996,² a letter typed on the letterhead of the Union was distributed to the employees at various store locations. It was headed "an open letter to our co-workers," and was signed "employee organizing committee." The three-page letter criticized the Company and Harry Acker.³ It made certain claims including that the Respondent had raised the prices of its merchandise and reduced its employees' commissions, accused Harry Acker of not caring about the workers, and alleged that the employees were subject to threats and intimidation. The letter urged the employees to join the Union. The letter further quoted Acker as saying that "the company's commission structure was fair, and that he would never lie to the employees."

Specifically, the letter allegedly quoted Acker, and stated, in part, as follows:

In order to pay our expenses, and remain competitive, we had to increase our prices and stop paying all those ridiculous commissions we previously were paying! The new commission structure is fair to everyone. Remember this line? I'm

talking about making money, lots and lots of money. Don't you people understand? Doesn't anyone care? Why don't you believe me? I would never lie to you. We never lie! Ever!!!! Please, believe me! You're going to make lots and lots of money! Just wait, you'll see!!!

In summation, Harry's reached into our pockets at least five or six ways in the past year alone.

The letter further stated that employees said that in (a) April 1995 Acker "reduced commissions across the board seventeen to twenty five percent" and (b) February 1996, Acker said that employees must split commissions with telemarketing.

Jarrell, who was not a member of the Union's organizing committee, stated that after he read the letter, he discussed it with 10 of his fellow workers over the company phone system. They agreed that they needed union representation because of the Company's improper treatment of them.

Jarrell testified that on March 13, a management official left a voice mail message that he did not believe that it was in the employees' best interest to join the Union. That day, Jarrell received a letter from the Company with his paycheck, which apparently was sent to all the sales people. The letter stated that the Union "has been distributing a leaflet full of lies and intended to trick you into signing a Union card." It continued that Respondent has been a good employer which cares about its employees. It urged the employees to "say no to a union."

Jarrell discussed the employer's letter with his 10 colleagues, and they continued to believe that they needed union representation. Jarrell conceded that during all his conversations with those employees, no management representative was present in his store.

On March 15, Acker left a voice mail message for all employees in which he stated that although the Union accused him of lying, he never lied to his workers. Acker offered to pay \$100,000 to any employee who put up \$1000 and could prove that Acker lied to his employees.

That day, Jarrell discussed the offer with his fellow employees, and an attorney friend, Bill Kane, who urged him to accept the challenge. On March 17, Acker repeated his offer and said that any employee wishing to accept his challenge should have his attorney contact Acker's attorney. Jarrell advised Kane of this message, and Kane recommended Attorney Samuel Rieff to represent him. On March 24, Acker repeated his offer and called the Union's accusation that he stole from his employees a lie.

On March 29, Jarrell participated in a conference call with Acker, Jack Acker, and Christine Schaefer, Respondent's vice president of administration. Jarrell apparently claimed that Acker had lied, and he claimed the \$100,000. Acker asked for specifics as to the lies he allegedly made. Jarrell refused to tell Acker how he had lied, saying that he would have to ask his attorney if he could reveal that information. According to Jarrell, Acker said that if he did not tell him what the alleged lies were, he would be discharged. Jack Acker told Jarrell that it was not in Jarrell's "best interest" to call the chief executive officer a liar. Jarrell replied that he did not do so, the Union did, and he was only "substantiating" the alleged lies by accepting Acker's challenge. Jarrell did not mention the name of any other employee who was affected by Acker's conduct.

According to Jarrell, Rieff attempted to contact the Respondent by phone and letter, but his communications were not responded to. Rieff suggested that they begin legal action.

² Respondent's unopposed motion to correct the transcript to state at p. 149, L. 24, that "they were not forced to send this back" is granted.

³ All references hereafter to Acker are to Harry Acker, unless otherwise indicated.

Jarrell spoke to Rieff about the matter, and in May 1996, Rieff drafted a document entitled “verified complaint.”⁴ The document, which was not verified, was dated June 25, bore the name of Rieff, and set forth the venue as the Nassau County Supreme Court.

The complaint set forth two causes of action. The first, which was for breach of contract, essentially stated that: (a) Acker offered to pay any employee \$100,000 if the employee could “establish” that the company had lied to him in connection with the operation of Respondent’s business or that he stole money from employees; (b) Jarrell has proof of such lies and; (c) Jarrell attempted to prove that Respondent made seven lies, but Respondent refused to meet with him or his attorney.

For the first cause of action the complaint sought damages of \$700,000, that is \$100,000 for each of the seven alleged lies, and punitive damages of \$2,100,000, or a total of \$2,800,000.

The second cause of action stated, inter alia, that Respondent engaged in:

Numerous acts of unfair labor practices in violation of the New York State Human Rights Law, New York State Labor Law and New York State Penal Law [including]:

(a) On or about April 6, 1996, defendants advised employees that the company’s cost analysis approach reveals 10–11% in salary and commission payments when such statements were deliberately misleading

(b) Deducting fines from employees pay.

(c) Requiring employees to make deposits on their days off without compensation.

(d) Demeaning employees with challenges and calling them horses asses.

(e) Offering employee [sic] monetary challenges and contracts and reneging upon its terms.

(f) Failing to pay the plaintiff the monies owed to him for his acceptance of the defendant’s contractual offers.

The second cause of action seeks an unspecified amount of damages.

Jarrell stated that he included paragraphs (a) through (c) because he sought to bring to light that Acker was violating employee rights by lying to and stealing from the employees. Prior to directing his attorney to draft the complaint, he discussed with other employees the improper fining of employees, and that Acker’s statement that Respondent pays employees 10–11 percent was erroneous.

Jarrell stated that he solicited other employees to join him in filing the complaint, but they refused. He did not contact the Union regarding it. He testified that in mailing the complaint, he was not attempting to change pay scales for employees, and acted entirely on his own in an attempt to collect for himself \$100,000 for each alleged lie made by Acker. He testified that the complaint had nothing to do with any other employee, and it was for his sole benefit. Nevertheless, following the sending

of the complaint, employees told him that he did the right thing, and were happy that someone “stood up” to Acker.

On July 4, Jarrell was working in his store. At 5 p.m., he called Respondent’s official Fishman and told him that he wanted to close the store 2 hours early. According to Jarrell, Fishman asked him if there was any reason he was closing early, and asked if there was any problem. Jarrell replied that he had no business the entire day. Fishman allegedly said, “fine.” Company rules provide that closing early without permission is grounds for discipline.

Fishman testified, denying that he gave Jarrell permission to close the store early. He reported the matter to President Roeder.

Jarrell testified that on July 9, he felt physically threatened by a customer, so he “physically helped” him out the door.

On July 19, Roeder sent a letter to Jarrell, warning that his closing the store early, and his abuse of a customer were not acceptable. The letter advised that “any further violations of company policy or failing to conduct yourself as a professional may result in your termination from the company for cause.” Jarrell stated that he received that letter on July 19 or 20.

Jarrell testified that he made copies of the complaint and mailed them to 88 of the Company’s stores. He stated that he mailed them on a Saturday morning, either July 6 or 13. The date he did so is in dispute. The parties stipulated that 13 of the envelopes he mailed at the same time bore a postmark of July 20. In view of that, I find that he mailed them on Saturday, July 20. It is inconceivable that envelopes allegedly mailed on July 6 or 13 at the same time would all be postmarked July 20.

Jarrell stated that his reasons for causing the complaint to be written were that the Union said that Acker was lying, and Acker denied it, and he believed that since the Respondent was refusing his attempts to prove the alleged lies, he believed that the only way to obtain results and receive the money offered would be to sue the Company.

B. The Discharge

Howard Roeder became Respondent’s president in May 1996. At that time, he was advised by Christine Schaefer, Respondent’s official, of pending litigation, including that Jarrell was attempting to collect on a “bet” placed by Acker, and that the Respondent had been contacted by Attorney Rieff regarding that.

On July 23, Schaefer was sent copies of the complaint by employees who had received them, and she sent them to, corporate attorney, Howard Gross. She stated that at that time, there was no union activity occurring at any of the stores, but there had been such activity in March for a few weeks.

Gross advised Schaefer that he had investigated the complaint and found that it had no index number, had not been filed in court, and had no legal effect. Schaefer advised Roeder of this information. Roeder was with Acker at a meeting, and were preparing to leave the state on business that day. She also told Roeder that she received calls from many stores that the employees received a complaint by Jarrell against Acker, which related to the bet between Jarrell and Acker. Schaefer did not describe the complaint in more detail, and did not mention paragraphs (a) through (f).

Roeder decided to discharge Jarrell essentially because he viewed the “complaint” as an improper response and challenge to the July 19 disciplinary letter Roeder had sent him only a few days before. Roeder also viewed the complaint, which he

⁴ I cannot credit Jarrell’s testimony that he obtained an index number for the complaint, or that it was filed on June 25, 1996. It does not appear that any index number was obtained for that document, and there was no evidence that it was filed in court. Rieff denied filing it or obtaining an index number for it. Jarrell’s testimony that the index number, 35313-96 was obtained for this complaint is erroneous. That index number was obtained on December 30, 1996, for a summons against the company with Jarrell as the plaintiff. No complaint was attached to that summons.

learned was misrepresented as a valid legal document, as a “continuing effort” by Jarrell to obtain money from the Company, and “very disruptive” to its business, and designed to “agitate” the employees.

Roeder decided to discharge Jarrell before receiving or reading the complaint since he left the state on the day he was advised that the complaint had been received.

Roeder stated that at the time he decided to discharge Jarrell, he had no knowledge that he had been engaged in union activity, or that any union activity was taking place at any of Respondent’s stores.

Following Jarrell’s discharge, Respondent’s official Fishman testified at an unemployment insurance hearing that the reason for the termination was that Jarrell distributed copies of a complaint to other employees, and that Respondent did not believe that the complaint had been filed.

III. ANALYSIS AND DISCUSSION

The General Counsel argues that Jarrell was unlawfully discharged because of his union and concerted activities. The Respondent asserts that his discharge was proper.

A. Jarrell’s Union Activities

Although the only evidence of a union organizing campaign was testimony that such an effort occurred from about mid-March and continued for about 1 month, I find that Jarrell engaged in union activities.

Jarrell’s activity in sending the complaint to employees derived from the Union’s campaign, and by doing so he aligned himself with the Union’s cause. The Respondent could not have failed to have made the connection between the Union’s effort to organize its employees and Jarrell’s sending the complaint.

The complaint was sent as a direct response to the Union’s March letter which accused Acker of lying to employees, and Acker’s immediate challenge to the employees to prove that he had done so. The Union’s letter specifically mentioned the issue of commissions, and Jarrell’s complaint set forth that matter as a term of employment which Acker had allegedly lied to employees about.

The fact that the Union’s campaign may have been defunct when, 4 months later, the complaint was sent, has no bearing upon Jarrell’s union activities. Regardless of when the campaign ended, Respondent’s challenge, in response to the Union’s letter, remained open, and Jarrell sought to take advantage of it by sending his complaint.

Thus, Jarrell’s action in sending the complaint was directly related to the Union’s campaign. The Union accused Acker of lying concerning compensation of the employees and other matters, Acker invited the employees to prove that he lied, and Jarrell accepted the invitation. This was all part of the Union’s campaign to convince employees to support it. Jarrell became a part of that campaign.

B. Jarrell’s Concerted Activities

By engaging in union activities, I find that Jarrell has engaged in concerted activities. However, I need not reach the separate question, raised by the complaint issued by the Regional Director, of whether Jarrell engaged in concerted activities as a separate violation of Section 8(a)(1).

There was evidence that Jarrell spoke to his coworkers about the need for union representation, and their complaints about the employment matters set forth in the complaint, prior to his mailing it. I should note, however, that Jarrell’s credibility is

questionable. He repeatedly testified that an index number was obtained for the complaint, which was filed. However, there was no evidence that either was the case. In addition, his testimony that he mailed the complaint on July 6 or 13 was put in serious doubt by a stipulation of the parties and documentary evidence that the envelopes were postmarked July 20. Even if I accept his testimony that he spoke with other employees, there is no evidence that any representative of the Respondent was aware of such activities at the time of his discharge.

Nevertheless, Jarrell conceded that he sent the complaint solely in behalf of himself and no one else, and did not seek to change any working conditions thereby. His sole motive was to collect the \$100,000 offered by Acker if it was proven that he had lied to the employees. The fact that certain employees may have agreed with his sending the complaint, after the fact, is irrelevant.

On the other hand, it may be argued that by sending the complaint to other employees, Jarrell sought to make “common cause” with them concerning the issues raised by the complaint—namely Acker’s alleged lies about their terms of employment—and thereby engaged in concerted activities.

I need not reach this issue, however, inasmuch as I have found that Jarrell engaged in union activities by sending the complaint to employees.

Inasmuch as the Respondent concedes that it discharged Jarrell for sending the complaint to employees, I find that the General Counsel has shown that Jarrell’s union activities were a motivating factor in his discharge. *Wright Line*, 251 NLRB 1083 (1980). The burden then shifts to the Respondent to prove that it would have discharged Jarrell even in the absence of his union activities. *Wright Line*, supra.

C. Respondent’s Defenses

The Respondent’s president Roeder discharged Jarrell because he believed that Jarrell’s distribution of the complaint was in direct, improper response to his being issued a disciplinary warning for two acts of misconduct which occurred earlier that month.

However, Jarrell would not have been discharged, and had not been discharged, for those prior incidents. He was only warned about them. Accordingly, the discharge was effected only because of the complaint that Jarrell sent. Jarrell’s response to the warning, although regarded by Respondent as an act of defiance and a “challenge,” nevertheless constituted union activities, for which he could not be discharged.

Although Roeder may not have been specifically aware of the full content of the complaint since he did not read it at the time he made the decision to discharge Jarrell, nevertheless other Respondent officials, Schaefer and Gross, had read it, and it was Gross who recommended the discharge. Roeder himself was aware of the general nature of the complaint, having been told by Schaefer that it related to the bet between Jarrell and Acker, as to which Roeder had been informed upon his assuming the presidency.

The complaint may have been misrepresented as a valid legal document. It appeared to be a complaint that was filed in the Nassau Supreme Court. However, it did not bear an index number and was not verified, although it bore the caption of “verified complaint.” Nevertheless, whether the complaint was, in fact, a document which had actually been filed in court or not, it was indeed a letter related to the challenge posed by The

Respondent and accepted by Jarrell—all of which had a connection to the Union's letter.

Inasmuch as the admitted reason for Jarrell's discharge was his distribution of the complaint, which I have found constituted union activities, I accordingly find and conclude that the Respondent has not proven that it would have discharged him even in the absence of his union activities. *Wright Line*, supra.

CONCLUSIONS OF LAW

1. The Respondent, Bedding Discount Center, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, Retail Wholesale Employees Union, Local 305, AFL-CIO of Westchester County and Vicinity, is a labor organization within the meaning of Section 2(5) of the Act.

3. By discharging Lon Jarrell, Respondent violated Section 8(a)(3) and (1) of the Act.

4. The unfair labor practices found above constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged Lon Jarrell, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁵

ORDER

The Respondent, Bedding Discount Center, Inc., Hackensack, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for supporting Retail Wholesale Employees Union, Local 305, AFL-CIO of Westchester County and Vicinity, or any other union.

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

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

(a) Within 14 days from the date of this Order, offer Lon Jarrell full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Lon Jarrell whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge and notify Lon Jarrell in writing that this has been done and that the discharge will not be used against him in any way.

(d) Preserve and, within 14 days of a 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.

(e) Within 14 days after service by the Region, post at its facility in Hackensack, New Jersey, copies of the attached notice marked "Appendix."⁶ Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the 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 the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 26, 1996.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

⁵ 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.

⁶ If 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."