

Schwerman Trucking Co. and William A. Anders.
Case 9–CA–35925

July 13, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS HURTGEN
AND BRAME

On April 12, 1999, Administrative Law Judge Jerry M. Hermele 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 and has decided to affirm the judge's rulings,¹ findings,² and conclusions 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, Schwerman Trucking Co., Kosmosdale, Kentucky, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Theresa L. Donnelly, Esq., for the the General Counsel.
James U. Smith III, Esq. (Smith and Smith), of Louisville, Kentucky, for the Respondent.

¹ 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.

² We disagree with the judge's finding that the General Counsel failed to show that protected conduct was a motivating factor in the Respondent's decision to discharge, Charging Party William Anders. See *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Here, the General Counsel showed, and the judge found, that (1) Anders engaged in protected activity by soliciting union authorization cards from his coworkers during the week immediately prior to his discharge; (2) the Respondent knew of Anders' protected activity as a result of Anders' disclosure of that activity to Human Resource Director Terry LaCasse 2 to 3 days before his termination; and (3) Scott Pearce, area manager, possessed union animus.

In addition, contrary to the judge, we find that the record supports the conclusion that LaCasse and Pearce jointly made the decision to discharge Anders. Further, in discharging Anders, the Respondent failed to follow its own established disciplinary procedure, which the Board has found to support an inference of discriminatory motivation. See, e.g., *Ingles Markets, Inc.* 322 NLRB 122, 125 (1996); *Florida Tile Co.*, 300 NLRB 739, 741 (1990), enfd. 946 F.2d 1547 (11th Cir. 1991). We nevertheless agree with the judge, for the reasons stated in the decision, that the Respondent has satisfied its burden under *Wright Line* of showing that Anders' summary dismissal resulted from a recent escalation of tensions in his longstanding personal dispute with Terminal Manager Bud Fleming and that the Respondent would have taken the same action even if Anders had not engaged in protected activity.

DECISION

I. STATEMENT OF THE CASE

JERRY M. HERMELE, Administrative Law Judge. In a June 17, 1998 complaint, the General Counsel alleges that the Respondent, Schwerman Trucking Co. (Schwerman), committed several violations of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) during a union organizing campaign at one of its terminals at Kosmosdale, Kentucky. Specifically, it is alleged that two of the Respondent's supervisors interrogated and/or threatened an employee regarding union organizing activity. Also, it is alleged that another employee—William Anders—was discharged because of his union activity. The Respondent denied these allegations in a June 25, 1998 answer.

This case was tried on December 8, 1998, in Louisville, Kentucky, during which the General Counsel called two witnesses and the Respondent called four witnesses. Both parties then filed briefs on February 2, 1999.

II. FINDINGS OF FACT

Schwerman's Milwaukee-based trucking operation consists of 600 employees located in 35 terminals across the eastern United States. The employees at half of those terminals are represented by various locals of the Teamsters Union. One of the nonunion terminals is located in Kosmosdale, Kentucky, about 25 miles south of Louisville. The 22 drivers and mechanics there transport dry bulk cement and liquid chemicals from the Kosmos Cement Company to locations within 150 miles of Louisville (Tr. 27, 130–32). The Respondent sells and ships over \$50,000 of goods annually from Kosmosdale to points outside Kentucky (G.C. Exh. I(e)).

Bud Fleming is the Kosmosdale terminal manager, Kevin Emerson is the terminal dispatcher, Scott Pearce is Schwerman's midwest area manager, and Terry LaCasse is Schwerman's personnel manager in Milwaukee (Tr. 129, 190–91, 220, 252). Teamsters Local 89 has attempted to organize the Kosmosdale terminal approximately once a year for the past several years, most recently in the spring of 1998 (Tr. 22). The most senior driver at Kosmosdale was William Anders, who was strongly antiunion (Tr. 22–23, 58). Anders had been a driver there since 1994 and his performance was deemed outstanding. Thus, Anders also held the position of safety engineer since 1995 for which he received an extra \$50 per week. As such, he trained other drivers (Tr. 17, 20–21, 141–43; G.C. Exh. 6; R. Exhs. 4,6).

The working relationship between Anders and Terminal Manager Fleming began to deteriorate in June 1997 when Anders had difficulty in getting personal time off to attend a house closing (Tr. 228–229). Anders characterized his relationship with Fleming thereafter as cordial, but acknowledged that at times they had heated exchanges (Tr. 89, 96, 295). According to Fleming, however, the two men could not really talk to each other after June 1997 (Tr. 236). Anders called LaCasse in October 1997 to complain about his difficulty in getting time off in June 1997. Anders added that he was antiunion. Thereafter, LaCasse sought to accommodate Anders with a move to another Schwerman terminal. But Anders stayed at Kosmosdale (Tr. 148–150, 177–179).

During a routine audit of drivers' logs, dispatcher Emerson discovered a log falsification by Anders in February 1998 (Tr. 253–254). So, on March 20, 1998, upon receiving Emerson's

report, Fleming issued a written warning to Anders “for failure to log driving a Schwerman unit from Speed, Indiana, to the Kosmosdale, Kentucky terminal on February 3, 1998.” (G.C. Exh. 5; Tr. 223–224). And, on March 31, 1998, Anders was removed from the safety engineer job (R. Exh. 3). On April 13, Fleming spoke with LaCasse about his continued problems with Anders. Indeed, according to Fleming, he had talked to LaCasse and Pearce several times about this matter since June 1997 (Tr. 233). But Fleming never disciplined Anders, despite his authority to do so (Tr. 237, 246). According to Fleming, although he viewed Anders’ conduct as serious, he believed they could “work it out” (Tr. 248–249).

Also on April 13, as he had in past years, Anders told Fleming that a union campaign had resurfaced at the terminal and Anders told Fleming that he was still antiunion. Anders then identified the union supporters when Fleming asked him to name names. Fleming added that “there’s no way Jack’s [Schwerman] going to have a union.” (Tr. 49–51, 81–84, 108–109, 230–231.) Later, Fleming asked driver Rudy Williams if he knew anything about the Union and to keep him informed who was prounion. Williams denied knowing anything, but he told Fleming he would keep him informed (Tr. 113–114). Williams was not openly prounion and he knew that Anders was antiunion. The next day, April 14, Williams testified that Emerson asked him if Anders had asked him to sign a union card. Williams said no. Then, according to Williams, Emerson said, “whoever gets on the bandwagon with Bill will go down with him.” (Tr. 114–115, 120, 124.) Emerson denied ever talking with Williams about the Union or making this comment (Tr. 266–267).

Anders learned of his loss of the safety engineer job after April 13 when he noticed a lesser amount in his paycheck. When the loss of the job was confirmed by Fleming, Anders became irate and said, “[Y]ou’re taking some more goddamn money from me” (Tr. 30, 225). On April 22, Anders called LaCasse to complain. Anders also told LaCasse about the Teamsters’ current drive and revealed that he was now prounion because of what Fleming had done to him. LaCasse denied that Anders said anything about the Union during this conversation. LaCasse was able to get \$215 in backpay for Anders’ past performance of the safety engineer job (Tr. 30–32, 154–160). But Anders did not get the job back. And on either April 21 or 22, Anders went to Local 89 to get union authorization cards. Anders was able to get 13 or 14 of the cards signed by the facility’s drivers by April 24, including Williams, who told Anders about Emerson’s two remarks (Tr. 24, 26, 32–33, 35, 116–117). Anders then spoke with Emerson who denied saying anything to Williams (Tr. 33–34, 267–268).

According to Emerson, working conditions had deteriorated because of Anders. So, on April 22 Emerson called LaCasse and told him that “conditions were getting unbearable in the terminal” because of Anders. Emerson added that Anders was exhibiting aggressive behavior toward Fleming and had harassed another employee, Norman Smith (Tr. 166–167, 255–161). Anders testified that he did not threaten Smith (Tr. 293). Thereupon, LaCasse decided to fire Anders. According to LaCasse, he knew nothing about Anders’ switch to prounion. Indeed, when LaCasse called Pearce, to instruct the latter to go to Kosmosdale to fire Anders in person, LaCasse testified that he did not believe Pearce’s statement that Anders might be involved in the union activity there. Rather, LaCasse believed that “someone was trying to set [Anders] up” (Tr. 169–170).

LaCasse decided on this course of action because of “the possibility of violence” and Fleming’s loss of authority. In short, upon this latest collision between Anders and Fleming, it was the subordinate Anders who had to go (Tr. 179, 186–187).

On April 23, Anders substituted as a dispatcher at Kosmosdale (Tr. 93). According to Anders, Emerson asked him to screen out applicants for a driver’s position if they were prounion. Anders then told Emerson he was prounion (Tr. 86–87). Emerson denied asking Anders to screen driver applicants (Tr. 269–270).

On Friday, April 24, Pearce went from Indianapolis to Kosmosdale to implement LaCasse’s decision in person. According to Anders, Pearce said, “I am tired of having to drive down here from Indianapolis every time there’s union problems. You seem to be the one stirring it up.” But Pearce also said he was firing him because of Anders’ problems with Fleming. Thereafter, Anders went to his car to retrieve the signed union cards, showed them to Pearce, and said that was the real reason for the termination, whereupon Pearce said, “[T]hat’s not necessarily entirely true.” Anders then said that he hated both the Union and Fleming, and that he was not going to turn in the cards to the Union. Rather, he obtained the signatures to prove that Fleming was the problem at Kosmosdale. As his meeting with Anders ended, Pearce said that he would call Anders on Monday, April 27 (Tr. 37–41, 208–213).

On April 27, Anders turned in the signed cards to Local 89. And on April 28, Emerson confirmed to Anders that he was fired (Tr. 42–43). On May 4, Local 89 filed an election petition (G.C. Exh. 2). And on June 24, the Kosmosdale employees voted 12 to 10 against the Union (G.C. Exh. 3).

III. ANALYSIS

The General Counsel’s first allegations concern the interrogations of, and threat against, employee Rudy Williams. Anders, who had yet to learn of the loss of his safety engineer job, informed Fleming of the nascent union activity on April 13 and he identified the union supporters. That same day, according to Williams, Fleming interrogated him about the Union and asked him to keep management informed. Significantly, Fleming did not deny Williams’ testimony. And the presiding judge found Williams to be a credible witness. Thus, it is concluded that Fleming’s interrogation violated Section 8(a)(1) of the Act.

Williams further testified that dispatcher Emerson interrogated him the next day, April 14, about whether Anders had asked him to sign a union card. Williams added that Emerson threatened him by saying, “[W]hoever gets on the bandwagon with Bill will go down with him.” Williams told Anders about both remarks. But Emerson denied both of Williams’ allegations. The presiding judge is unable to conclude that Emerson uttered either of these statements. Williams and Emerson were equally credible witnesses, and just because Fleming did an interrogation on April 13 does not mean that it is likely that Emerson followed suit on April 14. Also, because Anders was still antiunion as of April 14, Emerson had no reason to ask Williams if Anders was soliciting signatures for the Union then. Likewise, Emerson had no reason to threaten Williams with the aforementioned “bandwagon” remark at this time. Therefore, the General Counsel has failed to prove, by a preponderance of the evidence, a violation of the Act regarding Emerson.

Turning to Anders’ April 24, 1998 termination, the General Counsel alleges that Anders’ April 21 prounion conversion, and disclosure thereof to Terry LaCasse, was the reason for La-

Casse's decision to fire Anders. But the Respondent counters that Anders sowed the seeds of his termination because of his insubordination toward his superior, Terminal Manager Bud Fleming. In evaluating these competing theories, the General Counsel must establish, by a preponderance of the evidence, that Anders' protected activity was a motivating factor in the Respondent's decision to terminate him. If so established, the burden then shifts to the Respondent to show, also by a preponderance of the evidence, that its actions were based on a lawful reason and would have occurred absent the protected activity. *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *Transportation Management Corp.*, 462 U.S. 393 (1983).

The presiding judge concludes that there is absolutely no evidence of union animus by LaCasse, who made the decision to fire Anders. Also, LaCasse credibly denied that Anders' switch on the Union had anything to do with the decision to fire him. Although there is evidence of union animus by Fleming, as discussed supra, and Pearce, who did not deny making a remark about Anders stirring up "union problems," Pearce merely performed the ministerial in-person task of telling Anders he was fired on April 24. Further, it is significant that half of the Respondent's 35 terminals are unionized; a fact of life accepted by LaCasse in his role as the Company's personnel manager. See *Columbian Distribution Services*, 320 NLRB 1068, 1070 (1996). Therefore, it is concluded that the General Counsel has not met his *Wright Line* burden.

But even assuming that companywide union animus was a motivating factor in the decision to fire Anders, it is clear that there was bad blood between Anders and Fleming. Their working relationship soured in June 1997 and simmered thereafter. Indeed, Fleming testified that they had trouble talking to each other after June 1997 and Anders admitted to heated exchanges. Further, Anders took the extraordinary step of complaining to LaCasse in Milwaukee. And still further, contrary to the General Counsel's unfounded doubts, the evidence does indeed show that LaCasse unsuccessfully tried to accommodate Anders with a transfer out of Kosmosdale. The evidence also clearly shows that the Anders-Fleming relationship took a nosedive after April 13, 1998, when Anders first learned of the loss of his safety engineer position, and the two men came close to physical contact. Indeed, Anders called LaCasse again on April 22 to complain about Fleming. And the evidence also shows that Dispatcher Emerson called LaCasse on April 22 to complain about the deteriorating work environment, blaming Anders.

In short, there existed a justifiable reason for LaCasse to fire Anders at exactly the time he did so. But there are three troubling matters that also must be addressed. First, the presiding judge concludes that LaCasse did learn of Anders' switch from antiunion to prounion before he decided to fire Anders. Although LaCasse mistakenly denied that Anders revealed this fact in the April 22 telephone conversation, is highly logical that Anders told LaCasse of his switch because his dispute with Fleming was the reason for the switch, and Anders' call to LaCasse was prompted by the boiling over of the dispute. Further, Emerson told LaCasse the same thing about Anders the same day. Nevertheless, upon the totality of the circumstances of this case, the timing of Anders' revelation to LaCasse and LaCasse's decision to terminate Anders was, in the presiding judge's view, purely coincidental. Second, the General Counsel points out that LaCasse suspiciously departed from

Schwerman's established progressive discipline policy in deciding to fire Anders. But LaCasse was already well—familiar with the Anders-Fleming problem, thus explaining the absence of a lesser sanction against Anders, or need to investigate the matter further. Third, although LaCasse did not independently verify Emerson's allegation that Anders was harassing a second person at Kosmosdale, Norman Smith, LaCasse convincingly testified that the degradation of the Anders-Fleming dispute was sufficient to warrant Anders' immediate termination.

CONCLUSIONS OF LAW

1. The Respondent, Schwerman Trucking Co., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The International Brotherhood of Teamsters, Local No. 89, is a labor organization within the meaning of Section 2(5) of the Act.

3. Pursuant to paragraphs 5(a) and 7 of the General Counsel's complaint, the Respondent violated Section 8(a)(1) of the Act on April 13, 1998, by interrogating an employee about his union activity and the union activity of other employees.

4. The General Counsel has failed to prove his allegations at paragraphs 5(b) and 6 of the complaint.

5. The unfair labor practice of the Respondent, described in paragraph 3, above, affects commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹

ORDER

The Respondent, Schwerman Trucking Co., Kosmosdale, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees about their union activity.

(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 after service by the Region, post at its Kosmosdale, Kentucky office copies of the attached notice marked "Appendix."² Copies of the notice, on forms provided by the Regional Director for Region 9, 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

¹ 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.

² 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."

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 April 13, 1998.

(b) 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.

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.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate any employees about their union activities, membership, or sympathies.

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.

SCHWERMAN TRUCKING CO.