

Blue Star Services, Inc. and Amalgamated Transit Union Division 757, AFL-CIO, CLC. Case 36-CA-8132

May 28, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND HURTGEN

On December 8, 1998, Administrative Law Judge Frederick C. Herzog issued the attached bench decision. The Respondent filed exceptions and a supporting brief, and the General Counsel 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, findings,¹ and conclusions and to adopt the recommended Order.

The judge found that the Respondent violated Section 8(a)(1) and (3) of the Act by discharging employee Ken Nowack because of his union and other protected concerted activities. The relevant facts are established by credited uncontradicted testimony. On November 6, 1997, Nowack began working for the Respondent. Nowack discussed wages, breaks, working conditions, and organizing a union with employee Gustav Knecht on November 9, 1997, and with employee Harold Garoute on November 16, 1997. On November 18, 1997, Supervisor Garnet Brown informed Company President Mike Bilic that Nowack had initiated and participated in these discussions. On the same day, Bilic terminated Nowack. The Respondent has admitted that these Nowack discussions with other employees precipitated his discharge.

We adopt the judge's finding that the General Counsel has established a *prima facie* showing that union and other protected concerted activities were a motivating factor in the Respondent's decision to discharge Nowack and that the Respondent has failed to show that it would have taken the same action in the absence of these activities.

¹ The Respondent, a Washington corporation, is engaged in the business of airport transportation, charter bus services, and airfreight delivery, with an office and place of business in Ridgefield, Washington, and a branch office in Portland, Oregon. During the calendar year 1997, the Respondent had gross revenues in excess of \$500,000 and performed services valued in excess of \$50,000. The Respondent is an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act.

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.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Blue Star Services, Inc., Ridgefield, Washington, its officers, agents, successors, and assigns, shall take the action set forth in the judge's recommended Order.

Linda J. Scheldrup, Esq., for the General Counsel.
Tom Bilic, Esq., of Ridgefield, Washington, for the Respondent.

BENCH DECISION AND CERTIFICATION

FREDERICK C. HERZOG, Administrative Law Judge. This matter was heard before me in Portland, Oregon, on October 8 and 9, 1998. At the close of the hearing, I issued a Bench Decision, pursuant to Section 102.35(a)(10) of the Board's Rules and Regulations, in which I found that the Respondent has engaged in certain unfair labor practices.

The portion of the trial transcript which contains my Bench Decision (including the Conclusions of Law, Order, and Notice to Employees [Appendix B]) is attached hereto as "Appendix A."

In accordance with Section 102.45 of the Board's Rules and Regulations, I certify the accuracy of the pertinent portion of the trial transcript (as corrected in Appendix A), and that the transcript's pages, from page 242, line 12, through page 247, line 7, constitute my Decision here.

Dated at San Francisco, California, December 8, 1998.

APPENDIX A

BENCH DECISION

Judge Herzog: All right. I do think this is a case that is appropriate for a bench decision and I am prepared to issue that at this time. We are on the record, I take it. I'm going to comment and, by the way, as I enter my decision this is not subject to interruption. It's not something for commentary. It is my decision. It may not be the correct decision, but it's a decision that can be appealed if I am wrong. This is a case involving the issue of whether or not Mr. Ken Nowack engaged in either union activities, or protected, concerted activities, and whether or not he was discharged as a result thereof. Under well established Board authorities, including *Washington Aluminum*, either of those activities will suffice to accord Mr. Nowack the protections of Section 7 of the National Labor Relations Act. I am satisfied based upon the testimony of Mr. Ken Nowack and of Mr. Gustav Knecht, both of whom were credible witnesses in my opinion, that the requisite *prima facie* case of having engaged in protected concerted activities under the *Washington Aluminum* rationale, or having engaged in union activities, in the sense of being preparatory to seeking the protection of a union, has been made out. And, in fact, that is a very strong showing. The fact is that, indeed their testimonies in this are un rebutted. The fact of that *prima facie* violation, that Mr. Nowack was discharged for engaging in union activities is, in fact, confessed by the testimony of Mr. Mike Bilic, in which he stated during his first conversation with Mr. Nowack that his concern was about him disturbing, bothering and agitating other employees. There can be no clearer case shown for the violation than that testimony of Mr. Bilic. And, by the way, in this regard I do not mean to be understood as being insulting or of

being disrespectful of Mr. Bilic. As a matter of fact my impression of Mr. Bilic, and I want to make make a record of this, is that he seems to be a very honorable and conscientious man. And I wish to state my respect for you, sir. I feel saddened in this case because I frankly feel, perhaps incorrectly, that Mr. Bilic doesn't understand the law that I am bound by in this case. But that's parenthetical. Having said what I've said about the *prima facie* case and the strength of it that has been established by the General Counsel, the main question in this case then turns to whether or not, under the theory of the *Wright Line* decision, Mr. Bilic has succeeded in demonstrating that Mr. Nowack would have been discharged, or suffered the same fate that he did, regardless of whether or not he engaged in these union or protected concerted activities in the first place. And toward that end Mr. Bilic has presented credible evidence, which I've said I accept here, of Mr. Nowack having been once warned for speeding, for example, by his (Bilic's) mother. And, of having been seen by his (Bilic's) father, I believe, in another instance of a violation of company, well, not a violation of company policy, that's too strong a word, but of engaging in some sort of an argument or confrontation with the night dispatcher. And of having been seen at least two days prior thereto—of this conversation with—by Mr. Mike Bilic, himself, engaged in the violation of the dress code in the sense of wearing white tennis shoes and of wearing his T-shirt outside of his pants or a T-shirt outside of his pants. Both of which would be, I'd accept for the purposes of this discussion and of this decision, violations of Respondent's dress code. Now, whether or not that actually occurred, I don't know. But for the purposes of this decision right now I'm going to assume that it did occur as Mr. Bilic said. Despite the fact that I'm not making that finding. Because as I said, I find Mr. Nowack a credible witness. But, for example on the dress code violation, Mister Bilic has testified that that occurred. He's also testified that it, in a prior instance of another employee engaging in similar conduct, resulted in that prior employee being discharged on the spot, or immediately. In this case, however, the exact opposite is established because, by Mr. Bilic's own words, nothing happened to Mr. Nowack. Instead Mr. Bilic let it go and it didn't form any basis for the decision to discharge until after these instances of the protected concerted activities had come up. And, indeed, none of these things ever, aside from the T-shirt and the dress code violation, came up until they were made part of an inquiry by Mr. Bilic. And that inquiry didn't occur until it immediately followed on the heels of the dispute about the protected, concerted activities. In short, under those circumstances, the law is clear that where an employer brings up violations of policy, but doesn't bring them up until there has been a record made of engagement in protected concerted activities, there is a deep shadow and deep suspicion that is cast over all such evidence. And that's the way the trier of fact is compelled to view that evidence. In other words you, if these things had been tolerated as they were, Mr. Bilic, by your own testimony, you did nothing to him. You say you even didn't say anything to him as far as I heard, about his violation of dress code, which in another instance resulted in immediate termination. But two days go by and nothing is said to him until after the dispute came up about his engaging in "agitation." And of his being a "troublemaker." Of his having a "bad attitude." All of which are viewed by the Board with great suspicion. They're sort of code words for union activities. They've been known by that over the years. And there's case

authority again on that. But, where those matters don't come up until there has been first the engagement in union activities, and there's been similar sorts of activities suffered by the employer previously, with no adverse consequences being visited upon the employee until after it's shown that their union activities intervened, then I am afraid I must tell you that I view that evidence as being insufficient to overcome the strong *prima facie* case that's been established by the General Counsel. I do not wish to be misunderstood here. I do not wish to say that an employer is bound to simply accept examples of employee disrespect. He's not. An employer is not bound to look aside from examples of employees ignoring it's work rules. An employer is not. An employer is free to run his business the way he wishes to run it. But he has to run it consistently. He can't start acting and reacting to union, or protected, concerted activities and then react differently than he has in the past. He's got to behave consistently, or otherwise his evidence about his motive is going to be held to be insufficient to overcome that *prima facie* case. In this case I find that to be the situation and I will, upon the presentation of the transcript to me, approximately, well, the contract calls for it to come to me ten days from now, I will enter an appropriate order. As a result of the above findings, I issue the following

CONCLUSIONS OF LAW

Respondent, Blue Star Services, Inc., is a employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

1. On or about November 18, 1997, Respondent violated Section 8(a)(3) and (1) of the Act by discharging its employee, Kenneth R. Nowack, because he engaged in union, and protected, concerted activity.

2. Upon these findings of fact, and the entire record, and pursuant to Section 10(c) of the Act I hereby issue the following recommended.

ORDER²

A. Respondent, Blue Star Services, Inc., its officers, agents, and assigns, shall cease and desist from

1. Discharging employees because they engage in union, and/or protected concerted activities, including discussing their wages, hours and working conditions with fellow employees.

2. In any like or related manner, interfering with, restraining or coercing employees in the exercise of their rights guaranteed in Section 7.

B. Respondent shall take the following affirmative action necessary to effectuate the policies of the act.

1. Within 14 days from the date of this Order, offer Kenneth R. Nowack immediate and 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, and make him whole for any loss of earnings and other benefits suffered as a result of the unlawful discrimination against him.

² 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. Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify Kenneth R. Nowack in writing that this has been done and that none of these records will ever be used against him in any way.

3. 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.

4. Within 14 days from service by the Region, post at its facility in Ridgefield, Washington, copies of the attached notice marked "Appendix B."³ Copies of the notice, on forms provided by the Regional Director for Region 36, 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 November 18, 1997.

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

³ 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."

APPENDIX B

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 discharge employees because they have engaged in activities protected by the Act, including discussing wages, hours, and working conditions with fellow employees.

WE WILL offer Kenneth R. Nowack immediate and 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 by him.

WE WILL notify him in writing that we have removed from our files any references to his discharge, and that none of these records will ever be used against him in any way.

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

All our employees are free to engage in protected concerted activities, or union activities, and to join or support labor organizations.

BLUE STAR SERVICES, INC.