

Less Express Courier Systems and District 6, International Union of Industrial Service, Transport and Health Employees. Case 2-CA-31600

November 17, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX
AND HURTGEN

On August 18, 1999, Administrative Law Judge Margaret M. Kern issued the attached decision. The Respondent filed exceptions 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 brief and has decided to affirm the judge's rulings, findings,¹ and conclusions² 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, Less Express Courier Systems, New York, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Lauri Kaplan, Esq., for the General Counsel.

Douglas E. Rowe, Esq., for the Respondent.

DECISION

STATEMENT OF THE CASE

MARGARET M. KERN, Administrative Law Judge. This case was tried before me in New York, New York, on June 3, 1999. The complaint, which was issued on December 28, 1998, and amended on March 10, 1999, was based on an unfair labor practice charge filed on July 10, 1998,¹ by District 6, International Union of Industrial Service, Transport, and Health Employees (the Union) against Less Express Courier Systems (the Respondent).

It is alleged that in the first week of February, the Respondent interrogated an employee concerning other employees' union activities and that on February 6, the Respondent discharged employee Kevin Walker because of his union activi-

¹ 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.

² In concluding that the discharge of Walker was unlawful, the judge noted that Respondent's supervisor (Hawley) told Walker that Murphy had said that "they didn't need him [Walker] any more because he was down with the Union." The judge relied on the fact that Hawley was a supervisor. Member Hurtgen agrees with the judge, but he also notes that Murphy was a close personal friend of Respondent's president, Branch, albeit not an agent of Respondent.

¹ All dates are in 1998 unless otherwise indicated.

ties. The Respondent denies the act of interrogation and asserts that Walker voluntarily abandoned his employment. For the reasons set forth herein, I find that the Respondent did interrogate an employee in violation of Section 8(a)(1) of the Act and discharged Walker in violation of Section 8(a)(3) and (1) of the Act.

FINDINGS OF FACT

I. JURISDICTION

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.

II. LABOR ORGANIZATION STATUS

The Respondent admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Respondent is engaged in the business of providing messenger and delivery services to businesses in New York City. The Respondent employs at any given time from 20 to 40 messengers and these employees are not represented by any labor organization. Elizabeth Branch is the Respondent's sole owner and president and Jacob Hawley is a dispatcher. Respondent admits that Branch and Hawley are agents and supervisors within the meaning of the Act. The Respondent denies, however, that John Murphy was, at any material time, a supervisor or agent. Murphy, who did not testify, is the ex-boyfriend of Branch. Branch testified that Murphy was never employed by the Respondent, did not perform any services for the Respondent and had no responsibility in operating the Respondent's business. Branch and Murphy shared other business interests, however, and Murphy occupied office space on the same floor as the sort room where the messengers employed by the Respondent work. Hawley testified that to his knowledge Murphy did not work for the Respondent and did not perform any duties for the Respondent.

In February, the Respondent utilized a payroll service called Accounting Statistics (ACS). Each week, Branch totaled the number of hours worked by employees the previous week. Branch reported the hours to ACS on Tuesdays, Wednesdays, or Thursdays and ACS delivered the payroll checks the day after the hours were called in. The checks were dated for the following Monday when they were distributed to employees. Thus, a paycheck dated and distributed on February 9 was for the week ending January 30. Frequently there were mistakes in the ACS checks and handwritten checks were often issued by the Respondent as payroll checks in addition to the ACS checks. Branch testified that when an employee is fired, it is her practice to pay the employee that same day whatever he is owed. The terminated employee is given his ACS check if one has been prepared and/or a handwritten check in order to fully compensate him before he leaves the premises.

B. Walker's Union Activities and Termination of Employment

Walker was first employed as a messenger for the Respondent in February 1997. Sometime in the last week in January,

Walker met two union representatives, Kevin S. Walker² and Nephty Cruz, outside the offices of the Respondent. Kevin S. told Walker that if Walker distributed authorization cards, and if a majority of the employees signed those cards, he would have a meeting with them to discuss working conditions. After speaking with Kevin S., Walker went back inside the building to Respondent's offices, picked up his work, exited the building and accompanied Kevin S. to the union office. Kevin S. gave Walker blank authorization cards and Walker returned to his messenger duties.

Walker testified that in the week following his receipt of the authorization cards from Kevin S., he distributed the cards on 4 or 5 occasions to approximately 20 employees. Approximately 10 employees signed cards and returned them to Walker. On February 4, Walker gave a card to employee Nelson Jenkins inside the Respondent's offices. Walker testified that Hawley and Murphy were among those present at the time he gave Jenkins the card. Jenkins signed the card and returned it to Walker the same day.

Walker testified that on Friday, February 6, he returned to the office having completed his rounds at around 4 p.m. He dropped off his work and was about to change his clothes when Hawley approached him and handed him an ACS check dated February 9 in the amount of \$236.76 and a handwritten check dated February 6 in the amount of \$258.50. Walker asked what the checks were for and Hawley responded that Murphy said they didn't need him any more because they heard that he was "down with the union." Walker said o.k. and he left. He testified on both direct and cross-examination that to the best of his recollection, no one else was present when this conversation took place between him and Hawley. According to Walker, he never returned to Respondent's offices after February 6. From the date that Walker met Kevin S. and received the authorization cards to the time he was discharged was a period of approximately 1 week.

Jenkins worked as a messenger from November 1997 to March 1998. Jenkins testified that he was sitting at a desk when Walker and Hawley had a conversation at around 4 p.m. He did not hear the conversation but did observe Hawley open a desk drawer, remove two checks and hand them to Walker. As he and Walker walked to the bus to go home, Walker told Jenkins he had been fired and that he thought it was because of the Union.

The Respondent's payroll records reflect that in 1998, six ACS paychecks were prepared for Walker. These checks were dated January 5, 12, 19, 26, and February 2 and 9 and were for the following net amounts, respectively: \$142.81 (28 hours), \$157 (26 hours), \$224.73 (38 hours), \$271.38 (40 regular hours, 6 overtime hours), \$291.39 (40 regular hours, 10 overtime hours), and \$236.76 (40 regular hours, \$1.25 overtime hours).

C. Interrogation of Meyers

Eugene Meyers was employed as a messenger from 1994 to 1998. Meyers testified that in "early 1998" he had a conversation with Branch about the Union in the dispatcher's area. Two employees by the names of Melissa and Steve were present, neither of whom testified. According to Meyers, Branch asked

him if he knew anything about anybody joining a union and he said no. She told Meyers that if heard anything to get back to her. Meyers agreed that he would get back to her but he never did. Branch denied that she ever spoke to Meyers about the Union.

D. Respondent's Defense

Hawley testified that the afternoon of Friday, February 6, was the last time that Walker worked. Hawley claimed that Walker had not made his deliveries that day because he said it was too much work. "[H]e started complaining about the work and making a whole lot of noise, and just being totally disruptive. And up until that—prior to that he had—just his performance was deteriorating anyway, and I just had enough." Hawley took the undelivered packages from Walker and told him to clock out, go home, and to call him on Monday. Hawley denied that he terminated Walker or that he made any mention of John Murphy during the conversation. He also denied giving any checks to Walker that Friday or on any other date. According to Hawley, Walker did not call him on Monday and Hawley never saw him again. He was asked at what point in time did he conclude that Walker had quit, and Hawley testified, "I guess after a week I hadn't seen him."

Branch testified that between the hours of 12:15 and 2:15 p.m. on Walker's last day of work, she received a number of phone calls from customers complaining that they had not received their deliveries. She determined that it was Walker who was at fault. She went downstairs and informed Hawley of the situation. Branch telephoned her customers to find out which packages had priority: "I generally leave the office anywhere between 1:30 and 2:30 to go home for the day, and I had to stay on this particular day. It was very, very bad weather and I had so many complaints coming in." Branch testified that she told Hawley to send Walker home. She denied that Hawley terminated Walker or that she had instructed him to terminate him. Branch insisted she did not know the date that Walker last worked except that it was a Friday. When Walker failed to report to work the following Monday, Branch realized he had quit.

Both Hawley and Branch denied giving Walker his last two checks, the February 6 handwritten check and the February 9 ACS check. According to Branch, Walker must have returned to the office the Monday or Tuesday following his last day of work to pick up his checks. She did not see him on that date, but she assumed he was present because checks are always given personally to employees. On cross-examination, Branch was certain that Walker could not have been given the ACS check on Friday because the check was locked in the company safe and only she had access to the safe. However, in an affidavit given during the course of the investigation, Branch stated that Walker came to the office on February 6 to pick up his check.

As to the handwritten check dated February 6, Branch acknowledged that the signature on the check was hers but claimed that she did not know who filled out the rest of the check, explaining that "many people could have written it out." She testified that it is her practice to sign blank checks and to leave them available in case someone in the office needs to make out a check. She listed Marcos Escobar, Teddy Hendricks, and Jacob Hawley as those individuals who had the authority to complete a previously signed blank check. She could not, however, identify the handwriting on the February 6

² Kevin S. Walker, the union representative, is no relation to Kevin A. Walker, the alleged discriminates. To avoid confusion, I will refer to the union representative as Kevin S.

check other than her own signature. Branch acknowledged that the February 6 handwritten check reflected wages paid to Walker for work performed, but she insisted she did not know the week in which the work was performed.

Q. Isn't it true that the check, the handwritten check you have in front of you is payment for the workweek ending February 6th?

A. No.

Q. No. But you're sure it's not for the workweek ending February 6th, but you have no idea what it is for?

A. Correct.

When asked to examine the February 6 handwritten check, Hawley testified that he recognized the signature as Branch's handwriting and that the rest of the handwriting on the check "could be" Branch's. It was definitely not his handwriting and the handwriting did not appear to him to belong to anyone else. Hawley denied that he or anyone else other than Branch had the authority to write company checks.

Both Branch and Hawley denied possessing any knowledge of Walker's activities on behalf of the Union.

IV. ANALYSIS

In all cases alleging a violation of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation, the General Counsel is required, in the first instance, to make a prima facie showing sufficient to support the inference that protected conduct was a motivating factor in the employer's decision. Once this is established, the employer has the burden to demonstrate that the same action would have taken place even in the absence of the protected conduct. *Wright Line*, 251 NLRB 1083 (1980), enf'd. 622 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).

The General Counsel has presented a strong prima facie case. Walker credibly testified that in the first week in February he distributed the Union's authorization cards in and around the Respondent's offices. On February 4 he gave an authorization card to Jenkins in Hawley's presence. Two days later, Walker testified he was told by Hawley that he was fired because he was "down with the union." The General Counsel's initial burden under *Wright Line* has been satisfied.

The Respondent's defense that Walker voluntarily quit his job is riddled with inconsistencies and improbabilities. In the first instance, Branch testified that she had received numerous customer complaints that Friday afternoon, that she identified Walker as the employee who had failed to make his deliveries, that she apprised Hawley of this fact and that she told Hawley to send Walker home. Hawley, on the other hand, made no mention of having had any such conversation with Branch and testified that he sent Walker home on his own initiative because Walker was being disruptive and because his performance had been deteriorating anyway. Hawley did not explain why he considered Walker's work to have been substandard prior to that Friday, and there is no evidence that Walker was ever reprimanded or disciplined for poor work performance prior to his termination. Hawley's invocation of deteriorating work performance by Walker as the reason for sending him home is wholly unsubstantiated on this record and clearly a pretext.

The second glaring inconsistency in Respondent's defense concerns the February 6 check. Branch admitted that this handwritten check constituted a wage payment to Walker, de-

nied that the check was for the workweek ending February 6. Branch further admitted that the signature on the check was hers but denied filling out the rest of the check. She identified three individuals, including Hawley, who had authority to fill out company checks. Branch's testimony was directly contradicted by Hawley who testified that no one other than Branch had the authority to fill out company checks, that the handwriting on the check was not his, and that the handwriting looked like Branch's handwriting. Branch's testimony is also inconsistent with the payroll records which show that no ACS check was prepared for Walker after the week ending January 30. In view of Hawley's clear recollection that Walker worked the full week ending Friday, February 6, and the fact that the amount of the handwritten check is consistent with having worked a 40-hour workweek, the handwritten check is incontrovertible evidence of payment for the work performed in the week ending February 6.

The final deficiency in Respondent's defense is that Branch and Hawley could not account for Walker's receipt of the two paychecks. Both denied giving Walker either check and neither offered any explanation for how the checks came to be in Walker's possession. The solution to the mystery of the paychecks lies in the credible testimony of Walker who testified that he was handed his last two paychecks by Hawley and told he was fired. Not only is this the only version of events that makes any sense, it is corroborated by Jenkins' testimony that he saw Hawley hand the checks to Walker.³ It is also consistent with Branch's testimony that when an employee is fired, he is normally given all of his compensation before leaving the premises. Branch's insistence that Walker could not have received the February 9 check on February 6 because it was locked in the company safe to which she had sole access is undermined by her admission that she worked later than usual on February 6 was obviously physically present in the Respondent's offices, with access to the safe, at the same time that Walker testified he was given the February 9 check by Hawley.

Walker was fired 1 week after he began distributing authorization cards and 2 days after he handed an authorization card to Jenkins in Hawley's presence. Such timing between the exercise of protected conduct in relation to a discharge is strong evidence of an unlawful motive for the termination. *Grand Central Partnership*, 327 NLRB 966 (1999); *Trader Horn of New Jersey, Inc.*, 316 NLRB 194, 198 (1995). Indeed, timing alone can be sufficient to establish that antiunion animus was a motivating factor in a disciplinary decision. *Sawyer of Napa, Inc.*, 300 NLRB 131, 150 (1990). In addition to the proximity of the discharge in relation to Walker's union activity, Walker's credible testimony establishes that his union activities were the express reason for his discharge. Hawley told Walker, in no uncertain terms, that he was being fired because of his affiliation with the Union. It is irrelevant that Hawley invoked Mur-

³ Walker testified that to his knowledge, no one else was present when Hawley handed him the two paychecks. However, Jenkins testified that he was sitting at a desk a short distance away and was in a position to observe Hawley when he handed Walker the checks. This apparent inconsistency may be explained by Walker's perception that since Jenkins was not a party to the conversation with Hawley that Jenkins was "not present." In any event, I do not discredit the testimony of these witnesses, which was otherwise credible, because of this inconsistency.

phy's name in discharging Walker.⁴ Hawley is an admitted supervisor within the meaning of the Act and possessed the authority to fire employees. Hawley exercised that authority and did so for a purely discriminatory reason.

As to the allegation that Branch interrogated Meyers regarding other employees' union activities, I credit Meyers over Branch. Meyers was a 4-year employee at the time of the interrogation and was apparently trusted by Branch to report to her on other employees' union activity. The Respondent's counsel did not cross-examine Meyers and there is no evidence from which to infer that Meyers was biased against his former employer or that he possessed a motive to fabricate. Nor is there any evidence from which to infer that Meyers was disposed to give testimony favorable to Walker. I credit the testimony of Meyers and find that Branch interrogated Meyers as to employees' union activities in violation of Section 8(a)(1). I further find that this incident of interrogation evidences Respondent's animus concerning its employees' union activities *Pan American Electric*, 321 NLRB 473, 475 (1996). Meyers' testimony that this interrogation took place "in early 1998" is insufficient, however, to establish that it occurred prior to Walker's discharge on February 6. It is equally consistent with the evidence in this case that Branch, anxious to determine the extent of the union support amongst her employees, asked Meyers to report to her after Walker's discharge as before. It is unnecessary to resolve this ambiguity as there is more than sufficient evidence to establish Walker's discharge as violative of the Act without specific reliance on this incidence of interrogation.

CONCLUSIONS OF LAW

1. The Respondent is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent, by Elizabeth Branch, violated Section 8(a)(1) of the Act in or about early 1998 by interrogating an employee about other employees union activities.

4. The Respondent violated Section 8(a)(3) and (1) of the Act on February 6, 1998, by discharging Kevin Walker.

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 Kevin Walker, must offer to him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of discharge to the 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

⁴ The evidence fails to establish Murphy's status as a statutory supervisor and agent as alleged in the complaint and I so find.

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

ORDER

The Respondent, Less Express Courier Systems, New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees about their or other employees union activities.

(b) Discharging or otherwise discriminating against employees because they support or engage in union activities.

(c) In any like or related manner interfering with, restraining, or coercing its 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 to Kevin Walker 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 Kevin Walker 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 his files any reference to his unlawful discharge and 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.

(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 New York, New York offices copies of the attached notice marked "Appendix."⁶ Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 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 February 6, 1998.

(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.

Board and all objections to them shall be deemed waived for all purpose.

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."

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 interrogate employees about their or other employees activities on behalf of District 6, International Union of Industrial Service, Transport, and Health Employees, or any other union.

WE WILL NOT discharge or otherwise discriminate against employees because they support engage in activities on behalf of District 6, International Union of Industrial Service, Transport, and Health Employees, or any other union.

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

WE WILL, within 14 days from the date of the Board's Order, offer to Kevin Walker 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 Kevin Walker whole for any loss of earnings and other benefits resulting 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 Kevin Walker 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.

LESS EXPRESS COURIER SYSTEMS