

**Hadco Aluminum & Metal Corporation and Local 707,
International Brotherhood of Teamsters, AFL–
CIO.** Case 29–CA–22072

June 28, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS
HURTGEN AND BRAME

On December 11, 1998, Administrative Law Judge Raymond P. Green issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.¹

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, and conclusions and to adopt the recommended Order as modified.²

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Hadco Aluminum & Metal Corporation, Jamaica, 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(b).

"Make Ronald Wright whole for any loss of earnings and other benefits suffered as a result of the discrimination against him from May 15, 1998, until the date, to be determined in compliance proceedings, of his threat to Maighbaren Persaud, less any 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)."

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

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

¹ No exceptions were filed to the violations found by the judge.

² We agree with the judge's recommendation that backpay for discriminatee Wright should be tolled as of the date of his threat to employee Persaud. We decline to adopt, however, his admittedly arbitrary conclusion that this threat was made on July 6, 1998. Accordingly, we shall modify par. 2(b) of his recommended Order to leave to compliance proceedings determination of the date on which this threat was made. Chairman Truesdale would adopt the judge regarding this issue. Because no party has excepted to the July 6, 1998 date, Chairman Truesdale finds that referring the matter to compliance proceedings would unnecessarily prolong the litigation.

We also shall provide a new notice to employees in conformance with the requirements of *Indian Hills Care Center*, 321 NLRB 144 (1996), and to conform the notice to the Order.

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 or otherwise discriminate against any of you because you support or engage in activities on behalf of Local 707, International Brotherhood of Teamsters, AFL–CIO, or any other union or because you engage in concerted activity for mutual aid and protection.

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

WE WILL make Ronald Wright whole for any loss of earnings and other benefits resulting from his discharge until the date, to be determined in compliance proceedings, of his threat to Maighbaren Persaud, 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 discharges of Steven Jordan and Ronald Wright, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

HADCO ALUMINUM & METAL
CORPORATION

Scott Feldman Esq., for the General Counsel.

Joseph S. Rosenthal Esq., for the Respondent.

Frank Brownell, for the Charging Party.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. This case was tried in Brooklyn, New York, on October 7 and 8, 1998. The charge in this case was filed on June 5, 1998, and the complaint was issued on September 14, 1998. In substance, the complaint alleged that on May 15, 1998, the Respondent discharged Ronald Wright and Steven Jordan.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

FINDINGS OF FACT

I. JURISDICTION

The parties agree and I find that the Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The Company is engaged in the wholesale distribution of aluminum products and it operates out of a warehouse in Jamaica, New York. The Company's president is Hyman Gormezano. John Meany is its director of sales, Otis Smith is the warehouse manager, and Desmond Gittens is the assistant warehouse manager. All of these people are conceded to be supervisors as defined in the Act and all are paid on a salary basis.

Apart from a few truckdrivers and office clerical employees, most of the Company's work force, including the alleged discriminatees, Ronald Wright and Steven Jordan, work in the warehouse. At the opening of the hearing, the General Counsel amended the complaint to allege that Bob Shaw was a supervisor. However, the evidence showed that Shaw, a long-term hourly paid employee, was essentially another warehouse employee whose duties included taking "orders" that were written out in the office, to the respective parts of the warehouse and that he also recorded material as it was received into the warehouse. There was no evidence that he had any of the indicia or authority set out in Section 2(11) of the Act. Although Shaw distributes "orders" from the office to people in the warehouse, this is simply a routine function that in no way can be equated to ordering employees around or assigning them their work. Based on the record as a whole, I conclude that Shaw was not a supervisor within the meaning of the Act.

Ronald Wright began working at the Company in September 1995. In 1996 he was arrested for illegal possession of a firearm and Gormezano referred him to an attorney who apparently succeeded in having the charge dismissed. In 1997 and 1998, Wright admittedly was involved in a number of incidents which indicate that he exhibited the traits of a bully in dealing with some of the coworkers. In one instance, involving a man named Sam Morrison, Wright got him in a headlock and dragged him across the floor until other employees intervened. In the case of an employee named Maighbahren Persaud (Buddy) there is evidence that Wright on at least one occasion, slapped him on the head when Buddy didn't want to do what Wright suggested. (Buddy is a much smaller man than Wright.)

Steven Jordan was hired in August 1997 and although he had some absences, he had no untoward incidents during his employment. He never received any warnings, either written or oral, either about his work or his attendance record.¹ Indeed, on May 8, 1998, Jordan asked Gormezano for a raise and was granted a 50-cent-per-hour increase effective the following week.

Wright and Jordan testified that on May 7, 1998, they had a conversation with a Teamsters truckdriver during which they complained about some of their working conditions. The driver suggested that they contact his union and he took Wright's phone number. That evening, Frank Burnell, a business agent of Local

707 IBT, had a phone conversation with Wright and suggested that Wright talk to the other employees and set up a meeting.

According to Wright and Jordan, on or about May 8 or 9, they told the other warehouse workers, including Shaw, about the contact with the Union in the breakroom. (As I found that Shaw was not a supervisor, his knowledge of union activities cannot be imputed to the Employer.)

According to Wright, on May 9, 1998, he approached Assistant Warehouse Manager Gittens and asked him what he thought about trying to get a union and if he (Gittens) would be interested. In this regard, Wright states that no other persons were present during this conversation and Gittens denies that it ever happened at all. The Respondent posits that it is inherently improbable that Wright would have announced his intentions to the assistant manager. But given the evidence regarding the informality in the shop and the evidence of Wright's aggressive character, it is not improbable that Wright's account of this conversation is true.

The Company claims that on May 14, 1998, Wright assaulted Maighbahren Persaud (Buddy). But although Persaud testified that on one occasion, he was, in fact, hit by Wright, he placed this incident about a month earlier, as did Shaw and Otis Smith. As the credited testimony shows that this event happened much earlier, it could not have been, as the Employer asserts, the reason why Gormezano decided to discharge Wright.

On May 15, 1998, Gormezano told Wright that he was being discharged, but refused to tell him why.

On that same day, Jordan testified that he called in and told Smith that he would be out that day. According to Gormezano, at some point during the morning, he went into the warehouse and discovered that Jordan was not there. Gormezano testified that he got very angry because he understood that Jordan had not called in. He states that after he pulled Jordan's attendance records he decided to discharge him when he discovered that Jordan had about 10 absence days during 1998, of which 7 were in the prior 6 weeks.

The evidence shows that in the past, employees have been discharged for excessive absenteeism. However, the evidence also shows that under the Company's policy rules, a discharge for absenteeism should ordinarily be preceded by a warning. In this case, Jordan did not receive any warnings and the evidence proffered by the Respondent does not show to what extent previously discharged workers had received prior warnings.

In any event, on May 15, 1998, the Company sent a telegram to Jordan informing him that he was discharged because of excessive absenteeism.

Jordan testified that on May 15, 1998, he went to the Company to pick up his check and spoke to Warehouse Manager Otis Smith. He states that he told Smith that he had been fired and said that the reason he was given was because of absenteeism. Jordan states that Smith responded that there had to be more to it than that; there had to be a "rat" in the Company and he would find out who.

According to Jordan, about a week later, he visited the warehouse to pick up stuff from his locker and spoke again to Smith. He states that Smith told him that he had spoken to Gormezano about Jordan and Wright and had tried to get them their jobs back. Jordan credibly testified that Smith said it was "no-go"; and added that if anyone, even himself, had spoken about a union, it was bad business and they would be terminated. Smith told Jordan that there was nothing he could do about it.

Otis Smith testified that he was not aware, before Wright and Jordan were discharged, that there was any union activity. He testified that he learned about Jordan and Wright and the Union

¹ R. Exh. 10 is the Company's personal policy manual. Although this document lists a group of offenses that can be the cause of immediate termination, absenteeism is not one of them. On the contrary, the manual states that excessive absenteeism or lateness may "subject an employee to an oral or written reprimand and discharge after warning."

from the boss *after* they were terminated. He did not however, deny Jordan's testimony regarding his conversations with Jordan, either on May 15 or the week thereafter.

Maighbren Persaud testified that some time after Wright had been discharged, Wright called him at work and said, "you're going to be dead." He also testified on August 21, 1998, Wright and four or five men came into the warehouse and came after him. Although nothing happened, Persaud testified that he was frightened on both occasions and filed a complaint with the police department regarding the second event on August 21.

Wright denied both of the incidents related by Persaud, but did testify that on one occasion after his discharge, he was in the shop and Persaud told him that he did not have anything to do with Wright not getting unemployment benefits.

III. DISCUSSION

In my opinion, the General Counsel, pursuant to *Wright Line*, 251 NLRB 1083 (1980), enf.d. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), has made out a prima facie case that Wright and Jordan were discharged of their union activities. I note that their discharges occurred close in time to their union activity and in the case of Jordan immediately after he had been given a raise. (I suspect that at the time that Gormezano agreed to give Jordan a raise, he was not yet apprised of the union activity.)

The Employer asserts that the General Counsel's case must fail because there was no proof that the Respondent was aware of any union activity prior to the discharges of Wright and Jordan. In *Darbar Indian Restaurant*, 288 NLRB 545 (1988), the Board stated:

[T]he Respondent contends . . . that the General Counsel failed to establish that it had knowledge of Saha's union activities. Although there is no direct evidence of the Respondent's knowledge, we believe that the circumstances here support an inference of knowledge based . . . on the Respondent's general knowledge of union activity among the small group of seven dining room employees, the timing of the discharge, the contemporaneous 8(a)(1) conduct, the shifting and pretextual reasons asserted for the discharge and the absence of any incident involving Saha or any conduct by him to explain his discharge on June 8.²

In the present case, the General Counsel has offered credible evidence to establish that the Company was aware of union activity by Wright and Jordan. In the first place, Wright credibly testified that he told Assistant Warehouse Manager Gittens about the Union on or about May 9, 1998. For another thing, Jordan's uncontradicted testimony was that about a week after his discharge, Warehouse Manager Smith told him that he had talked to Gormezano about putting Wright and Jordan back to work but that it was "no-go," and that if anyone talked about a union, this was bad business and would result in termination.

The Respondent asserted that it discharged Wright because of an incident involving Persaud, which it claims happened on May 14, 1998. But, although I accept the fact that Wright hit Persaud, the credited testimony of Persaud and others shows that the incident took place about a month earlier.

Similarly, although the Respondent asserts that the sole reason it discharged Jordan was because of his absenteeism, the evidence shows that he was never previously warned about his absences

and that on May 15, he had notified Smith that he was going to be out that day and had received approval.

All of these circumstances lead me to conclude that the General Counsel has met his burden of showing that the Company was aware of Wright's and Jordan's union activity. I also conclude that he has further met his burden for establishing an 8(a)(3) violation as set out in *Wright Line*, supra. As I do not believe that the Respondent has met its burden of showing that it would have discharged these employees for legitimate reasons apart from their union or protected activity, I conclude that the Respondent has violated Section 8(a)(1) & (3) of the Act.

CONCLUSION OF LAW

By discharging Ronald Wright and Steven Jordan because of their union activity, the Respondent has violated Section 8(a)(1) and (3) of the Act.

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 argues that even if the Board concludes that a violation exists with respect to Wright, the Board should also conclude that there should be no reinstatement or backpay on account of his behavior.

In dealing with this contention, I think that the only relevant evidence would concern conduct that Wright engaged in *after* his discharge as it is my opinion that his pre-discharge conduct played no role in the discharge decision. Thus, it is not necessary to consider the line of precedent dealing with after acquired knowledge of predischarge conduct.³

There is a line of cases dealing with postdischarge conduct as affecting reinstatement and backpay rights of discriminatees. In *C-Town*, 281 NLRB 458 (1986), the American law judge concluded that postdischarge ethnic slurs were sufficient to disqualify an employee for reinstatement. The Board disagreed and stated:

[N]ot every impropriety deprives the offending employee of the protection of the Act. The Board looks at the nature of the misconduct and denies reinstatement in those flagrant cases "in which the misconduct is violent or of such character as to render the employees unfit for further service."

On the other hand, some postdischarge conduct, including verbal threats, may be sufficiently egregious to bar reinstatement and toll backpay as of the date of the conduct. For example, a threat to kill someone, will be enough. *Alto-Shaam, Inc.*, 307 NLRB 1466, 1467 (1992). See also *Precision Window Mfg. v. NLRB*, 963 F.2d 1105, 1110 (8th Cir. 1992). (Discriminatee forfeited right to reinstatement by threatening to kill his supervisor and by lying under oath at the administrative hearing.)

In *Lear-Siegler Management Service*, 306 NLRB 393, 394 (1992), the discriminatee threatened another employee who was a potential witness in the case that if that employee changed his testimony, (expected to be favorable to the discriminatee), he would report that the witness had violated the terms of his probation. The Board held that reinstatement should be denied and backpay tolled as of the date of the threat. The Board stated:

² See also *Montgomery Ward & Co.*, 316 NLRB 1248, 1253 (1995).

³ See for example *Marshall Durbin Poultry Co.*, 310 NLRB 68, 70 (1993) and *John Cuneo, Inc.*, 298 NLRB 856 (1990).

[W]e agree . . . that threats to induce a witness to testify in a certain way in a Board proceeding constitute serious conduct. The integrity of the Board's judicial process depends on witnesses telling the truth, as they see it, without fear of reprisal or promise of reward. That integrity was compromised when Sumlin was threatened with reprisal if he changed his anticipated testimony. It makes no difference that Wood may have believed that he was seeking to ensure true testimony as he saw it. The essential point is that persons should not threaten potential witnesses, even if it be in the name of ensuring supposedly truthful testimony.

In the instant case, unlike the judge, we find that Wood should receive backpay, but that it should be tolled as of the date of his threat to Sumlin. In so finding, we note that this remedy strikes a balance between the competing and equally important interests of protecting the Board's judicial processes and remedying unfair labor practices.

Although such interference with the Board's processes warrants the tolling of backpay rights it does not alone warrant the denial of reinstatement. Here, however, Wood not only attempted to manipulate Sumlin's testimony, he also accompanied that interference with a blatant threat of specific consequences to Sumlin's well-being, i.e., the threat to lodge an accusation with authorities that could threaten Sumlin's continuing probation. This threat from an employee like Wood, who had a reputation in the workplace as a violent and disruptive person, was of a nature likely to produce in coworker Sumlin a continuing fear that any workplace disputes with Wood might result in a revival and possible implementation of the threat. In the unique circumstances of this case, we agree with the Respondent's contentions concerning Wood's fitness for return to the workplace and find that the potential for serious disruption warrants denying him reinstatement.

Although Wright denied that he made the threat to Persaud, I found that Persaud was a credible witness and I believe him. Given Wright's earlier admitted conduct toward Persaud and the statement over the phone that Persaud was going to be dead, I think it is reasonable to conclude that Persaud had every reason to believe that this was, if not a genuine threat to kill him, a real threat of bodily harm. Moreover, as this threat was made shortly after Wright's discharge, it seems apparent that Persaud reasonably construed this threat as a means to discourage him from giving any statements or evidence to the State's unemployment agency. This is consistent with Wright's testimony that sometime after his discharge, Persaud told him that he wanted Wright to know that he was not the cause of Wright being denied unemployment benefits.

To me this is a close call. But as I credit Persaud's testimony that Wright threatened him with bodily harm and as I believe that this threat was made with the intention of influencing Persaud to withhold evidence from a State agency, I am inclined to believe that Wright's conduct crossed the line. Accordingly, I shall recommend that reinstatement not be ordered for Wright and that backpay be tolled as of the time of the threat. Persaud could not say exactly when the threat was made, although it had to have occurred sometime after May 15 and before August 21, 1998. Unless, either side can establish to the contrary in a backpay proceeding, I will split the difference and arbitrarily conclude, for purposes of backpay, that the threat was made on July 6. Any backpay owed to Wright shall be computed from the date of his discharge to July 6, 1998, less any 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).

The Respondent having discriminatorily discharged Steven Jordan, 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 his reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, supra, plus interest as computed in *New Horizons for the Retarded*, supra.

ORDER

The Respondent, Hadco Aluminum & Metal Corporation, Jamaica, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees because of their support or activities on behalf of Local 707, International Brotherhood of Teamsters, AFL-CIO, or any other labor organization or because of any concerted activity protected by Section 7 of the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the rights guaranteed to them under Section 7 of the National Labor Relations 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 Steven Jordan, 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 discrimination against him in the manner set forth in the remedy section of the decision.

(b) Make Ronald Wright whole for any loss of earnings and other benefits suffered as a result of the discrimination against him from May 15 to July 6, 1998, 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 discharges of Ronald Wright and Steven Jordan and within 3 days thereafter notify them in writing that this has been done and that the discharges will not be used against them 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 Jamaica, New York, copies of the attached notice marked "Appendix."⁴ 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

⁴ 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."

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 May 15, 1997.

(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.