

Pepsi-Cola General Bottlers, Inc. and Steven C. Saunders. Case 9–CA–38197

June 25, 2002

DECISION AND ORDER

BY MEMBERS LIEBMAN, COWEN, AND BARTLETT

On October 29, 2001, Administrative Law Judge Bruce D. Rosenstein issued the attached decision. The Charging Party filed exceptions and a supporting brief, and the Respondent filed a limited cross-exception and a brief in support of the judge's decision and its limited cross-exception. The Charging Party filed a reply 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.

ORDER

The recommended Order of the administrative law judge is adopted, and the complaint is dismissed.

Naima R. Clarke, Esq., for the General Counsel.
Edward S. Dorsey, Esq., of Cincinnati, Ohio, for the Respondent-Employer.

DECISION

STATEMENT OF THE CASE

BRUCE D. ROSENSTEIN, Administrative Law Judge. This case was tried before me on August 29, 2001, in Cincinnati, Ohio, pursuant to a complaint and notice of hearing (the complaint) issued by the Regional Director for Region 9 of the National Labor Relations Board (the Board) on May 23, 2001. The complaint, based upon an original charge filed by Steven C.

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. In adopting the judge's credibility determinations, we do not rely on his specific finding that Charging Party Saunders' testimony was inconsistent regarding the extent of his knowledge of an incident in February 1993 involving former employees Assum and Radcliff. This does not affect our affirmance of the judge's overall discrediting of Saunders' testimony.

We adopt the judge's dismissal of the complaint on the basis that it is time-barred. Thus, we find it unnecessary to pass on the judge's alternative findings regarding the substantive allegations of the complaint. We also find it unnecessary to consider whether the judge erred by denying admission of the corroborative evidence of Human Resource Manager Handley's contemporaneous notes of a conversation he had with alleged discriminatee Saunders, because the denial was at most a harmless error.

Saunders (the Charging Party or Saunders) on January 11, 2001, alleges that Pepsi-Cola General Bottlers, Inc. (the Respondent or Pepsi) has engaged in certain violations of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). The Respondent filed a timely answer to the complaint denying that it had committed any violations of the Act.

Issues

The complaint alleges that Respondent, since about July 15, 2000,¹ has refused to hire, or consider for hire, the Charging Party. The Respondent, as part of its affirmative defense, argues that it made the decision not to hire Saunders and communicated that decision to him on June 22, more than 6 months before the charge was filed.

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

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a corporation engaged in the manufacture, sale, and distribution of soft drinks. It has an office and place of business located in Cincinnati, Ohio, where it annually purchases and receives goods valued in excess of \$50,000 directly from points outside the State of Ohio. 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. It also admits that Teamsters Local 1199, an affiliate of the International Brotherhood of Teamsters, AFL–CIO (the Union), is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Respondent is a business in the highly competitive beverage industry. As part of its sales, distribution, and manufacturing operations, the Respondent employs, among others, certain employees who are covered by collective-bargaining agreements with the Union. The bargaining unit positions include such titles as merchandiser, full service driver, forklift operator, and machine operator. At all material times, Daniel Handley was the human resource manager and Kathleen A. McCabe, esquire, held the position of employee relations manager at Respondent.

Saunders held the position of full-time paid union president between January 1, 1988, and December 31, 1999, when he was removed from his position having been voted out of office. Once Saunders was removed from the presidency, he ceased to remain a member of the Union in good standing because he did not hold a bargaining unit job. Saunders, prior to becoming union president, worked as a production employee at Respondent's biggest competitor Coca-Cola Bottling Company for approximately 12 years. During his tenure of employment at Coca-Cola, Saunders operated production machinery including

¹ All dates are in 2000, unless otherwise indicated.

depaletizers, palletizers, and forklifts. He also served in the quality control department as a sanitation technician and syrup mixer.

Saunders, while holding the position of union president, regularly engaged in contract negotiations and grievance administration with representatives of Respondent including Handley.

B. Timeliness of the Charge

The Respondent asserts in its answer and presented evidence during the hearing, that the subject complaint must be dismissed as the charge was not timely filed. In this regard, Respondent argues that it made its decision not to hire Saunders and communicated that decision to him on June 22, more than 6 months before the charge was filed on January 11, 2001.

Saunders testified that he sought full-time employment with Pepsi in June 2000, and telephoned Handley to inquire if he could submit an application. During this telephone conversation, Saunders asked Handley whether obtaining employment would be a problem because of his union background. Handley said, he would look into it and get back to him. After about a week, Saunders called Handley and left a voice-mail message again inquiring about the possibility of acquiring a position with Pepsi. Since Saunders did not hear back from Handley, he decided to personally visit the facility. Saunders prepared a resume over the July 4 holiday and visited the facility on July 7. He went directly to the front desk and spoke with the receptionist, who informed him that Handley was in his office. Saunders knocked on Handley's office door and asked if he could speak with him. Handley informed Saunders that he was busy but if he would wait in the cafeteria Handley would meet with him once his business was completed. Thereafter, Handley went to the cafeteria to meet Saunders, and they returned to his office. Saunders gave Handley a copy of his resume and informed him that he wanted to apply for either a merchandiser or full service driver position. Handley informed Saunders that he would look into it and get back to him.

Since Saunders did not hear from Handley, he telephoned him on or about July 13 or 14, and inquired whether Handley had considered his job application. Handley replied that he knew Saunders from prior dealings and because of his personality he chose not to hire him. Saunders replied that he was surprised, since he was fully qualified to hold any available opening at Respondent. Saunders telephoned Handley on or about July 18 or 19, and asked whether he had reconsidered. Handley informed Saunders that the Respondent would not hire him. Saunders continued to make inquiries about the possibility of a position at Respondent and left voice-mail messages for Handley in July and October 2000, that he needed a job. According to Saunders, he left a copy of his updated resume and commercial drivers' license for Handley on December 29, but Handley testified that he never received it. Saunders testified that at no time prior to July 14, did Handley ever inform him that he would not be hired at the Respondent.

Handley's version of the events is considerably different. He testified that Saunders appeared outside his office door on June 15, without being announced by the receptionist or having a scheduled appointment. Saunders presented a resume to Hand-

ley and informed him that he was interested in obtaining employment at Pepsi, expressing interest in the positions of full service driver or merchandiser. Handley did not make any commitments to Saunders at that time. Handley testified that 2 or 3 business days after June 15, he made a notation on the upper right-hand corner of the resume that stated, "rec'd 6/15 or 6/16/00" (R. Exh. 3).

On June 22, Saunders telephoned Handley to inquire whether he would be hired. Handley made notes of the telephone conversation.² Handley testified that he told Saunders there were no openings and he did not feel that employment at the Respondent would work out. Saunders asked, "if it was because of his union activity." Handley replied, "[N]o." Saunders inquired why he was not being hired and Handley said, "[Y]ou are viewed as argumentative and we do not feel you'd fit in." Handley also testified that Saunders left a voice mail message on July 13 that he was still looking for a job, and that his notes confirm such a conversation. Additionally, on July 31, Handley testified that in a telephone call Saunders informed him he heard the pay rate for merchandisers had been increased because the Respondent could not find or keep individuals in that position. Handley testified that his notes confirm the telephone call and he informed Saunders that nothing was available at that time.

Central to a decision on the timeliness issue, is the credibility of the testimony of Saunders and Handley. During the course of the hearing, former bargaining unit employee Paul Assum testified about an incident that took place in or around February 1993. The Respondent suspected that employee Jim Radcliff was taking products off his delivery truck or was stealing cases of soft drinks. Accordingly, Radcliff was removed from his delivery route and Assum was substituted as the driver. Shortly after his removal from the route, Radcliff stopped Assum while he was making deliveries and informed him that he needed to remove some extra cases of soda from under the front seat of the truck. Assum helped Radcliff remove the cases from the truck and placed them in Radcliff's personal vehicle. Assum then finished his route and returned to the facility. He informed the union steward what had occurred and it was decided that Assum should talk to Saunders. In February 1993, during a telephone conversation, Saunders told Assum to be quiet about the matter and if he "ratted" on a union brother, he could be fined. Assum testified that during this telephone conversation he was told by Saunders to talk with the union attorney before talking with management. On cross-examination, Saunders admitted that Assum apprised him about Radcliff taking products off the truck. When called on rebuttal by the General Counsel, and in response to my questions, Saunders denied that the union steward telephoned him so he could talk to Assum and further denied that either the union steward or Assum informed him about Radcliff's taking product off the Pepsi truck. He also testified that it was not until the October 1993 Radcliff discharge arbitration that he first learned that Assum had any knowledge concerning Radcliff's alleged conduct. I have sin-

² I rejected, as a proffered exhibit, the written notes because Handley testified about their content. Additionally, I determined the notes were cumulative (R. Exh. 6).

cere doubts about Saunders denial that the union steward did not apprise him about his conversation with Assum or that Assum did not inform Saunders until the arbitration that Radcliff had stolen product from the Respondent. Additionally, Saunders admission and then denial that Assum informed him that Radcliff removed product from the truck is suspect and the subject of inconsistencies. Handley credibly testified that Saunders was a strong union leader and regularly injected himself into issues even when stewards were present. Likewise, I can't imagine that the union steward would not immediately inform Saunders about potentially damaging evidence concerning Radcliff, who had recently been suspended for theft, had filed a grievance, and was pending discharge. Thus, based on this incident, I find that Saunder's overall credibility is cast in doubt.

To buttress Handley's credibility, the Respondent presented the testimony of McCabe to support Handley's assertions that Saunders was informed on June 22, that he would not be hired. McCabe testified that in the regular course of business in late 2000, Handley forwarded Saunders resume to her attention. When McCabe received the resume, she personally observed the notation on the upper right-hand corner that said, "rec'd 6/15 or 6/16/00." On February 1, 2001, McCabe authored the Respondent's position statement that was prepared and filed with the Board in response to the subject unfair labor practice charge (GC Exh. 3). McCabe testified that based on her conversations with Handley, she discussed in the position statement the initial meeting that occurred between Handley and Saunders on June 15, and the subsequent telephone call that took place on June 22, wherein Saunders was informed he would not be hired.³ Further, I conclude that McCabe was aware that Handley made notes of his conversation with Saunders on June 22.

Based on the foregoing, and my personal observation of the witnesses' demeanor, I am persuaded that Handley and McCabe's testimony concerning the events in question are more accurate and precise. Thus, I find Handley told Saunders on June 22, that he would not be hired at the Respondent. Therefore, since Saunders was informed of the decision not to hire him on June 22, a period of time more than 6 months before the charge was filed on January 11, 2001, I find that the charge was not timely filed.⁴ Under these circumstances, I recommend that the subject complaint be dismissed.

³ Attached to the position statement is Saunder's resume. McCabe credibly testified that when the position statement was prepared, she redacted the notation in the upper right hand corner, to conform with the fact that upon receipt of Saunders resume on June 15, Handley did not make any notations on the document. Rather, it was not until 2 or 3 business days later that Handley made the notations on the resume. McCabe asserts, however, that she personally observed the handwritten notations on the resume when it was forwarded to her by Handley in late 2000, prior to the filing of the subject charge.

⁴ I reject the General Counsel's argument that the Respondent's July 31 refusal to hire Saunders was an independent violation of the Act and falls within the plain language of the complaint. In this regard, I find that the reasons Respondent did not hire Saunders on July 31 remained unchanged from June 22, and the complaint did not allege an independent refusal to consider or hire Saunders on July 31.

C. The 8(a)(1) and (3) Allegations

For the following reasons, even if the charge is timely, I would find that Respondent refused to consider or hire Saunders for legitimate reasons unrelated to his union activities.

In *FES*, 331 NLRB 9 (2000), the Board stated the elements that the General Counsel must establish to meet its burden of proof in a discriminatory refusal-to-hire case as follows:

- (1) that the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants.

I find that the General Counsel has met its burden of proof regarding the first two elements of the test set forth above. In this regard, Saunders possessed 12 years of related training and experience during the course of his employment at Coca-Cola that qualified him for Respondent's vacant full service driver and merchandiser positions. Moreover, the parties stipulated that at the time Saunders was applying for positions at Pepsi, the Respondent was hiring (GC Exh. 4), and he possessed the necessary experience and training relevant to the announced requirements for the vacant positions. With respect to element (3), I am not convinced, as argued by the General Counsel, that antiunion animus contributed to the decision not to consider or hire Saunders for the following reasons.

First, Handley cited Saunders complete disregard of protocol when he came to Respondent's premises to meet with bargaining unit employees. In this regard, Saunders repeatedly refused to first notify a member of management or human resources when he wanted to come on the premises. Rather, he would proceed to enter the facility unannounced and Handley was informed after the fact that Saunders was at the facility. Despite repeated requests for Saunders to follow the pre-announcement procedure, he consistently refused to do so.

Second, in February 1999, Respondent scheduled a update/status meeting with 70 bargaining unit employees to discuss ongoing contract negotiations with the Union. Saunders came to the meeting, despite not being invited, and interjected himself by interrupting the speaker. When the facilitator opened the floor for questions, Saunders stated to the employees that we have work to do and headed for the steps with one or more union stewards. While the majority of the employees remained in the meeting and a give-and-take discussion took place, Handley believed that this was rude and disruptive. Although it did not occur, Saunders actions could have cut short the opportunity to communicate with the bargaining unit employees on a critical subject that was of mutual interest to all concerned.

Third, Handley was very concerned with the statements and actions of Saunders surrounding the arbitration of discharged employee Radcliff, a portion of which was discussed above. In this regard, Handley had been provided two independent statements from respondent managers who had spoken with Assum

in October 1993, that confirmed the threat that Saunders made to Assum (R. Exhs. 7 and 8). Handley had also met with Assum prior to the scheduled arbitration. During that conversation, Assum informed Handley that Saunders had threatened him with a fine if he told the truth about Radcliff removing product from the delivery truck. After Assum testified at the arbitration proceeding, and repeated the threat under oath, Handley had grave doubts about the honesty and trustworthiness of Saunders. Since it appeared that Saunders had engaged in witness intimidation, Handley had no intention of hiring him.

Fourth, Handley testified that Saunders often was late for prescheduled negotiation and grievance meetings. He estimated that Saunders would be late from 5 minutes to 1-1/2 hours at least 30 percent of the time. Handley believed that a trait of not being punctual was one he did not want in a newly hired employee.

For all of the above reasons, I credit Handley's rationale for not wanting to hire Saunders. In this regard, I find that the reasons relied upon were legitimate and were not related to Saunders' union activities.

As further evidence to establish that Handley did not take union activities into consideration when he determined not to hire Saunders, I find that Respondent supported other bargaining unit employees who held union positions. In this regard, Handley credibly testified that he was involved in the recommendations to promote four bargaining unit employees to supervisory positions during his tenure as human resource manager. These employees held union steward positions or were members of the union bargaining committee that participated in contract negotiations with Handley. In another instance, Handley prepared a memorandum for bargaining unit employee Bill Wells, setting forth the benefits that he would retain if he decided to run for union office (R. Exh. 9).

In agreement with Respondent, I find that union animus was not a factor in its decision not to consider or hire Saunders.⁵

⁵ Under *FES*, once the General Counsel has established a prima facie case, the burden shifts to the respondent to show that it would not have

Under these circumstances, I find that the Respondent did not violate Section 8(a)(1) and (3) of the Act. Therefore, I recommend that the complaint be dismissed.

CONCLUSIONS OF LAW

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

2. The subject unfair labor practice charge was not timely filed.

3. The Respondent did not engage in violations of Section 8(a)(1) and (3) of the Act by its refusal to consider or hire Steven C. Saunders.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁶

ORDER

The complaint is dismissed.

hired the alleged discriminatees even in the absence of their union activities or affiliation. *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). While I found that the General Counsel has not established a prima facie case, if others disagree, I would still find that the Respondent met its *Wright Line* burden of showing that it would not have hired Saunders even in the absence of his union activity.

⁶ 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.