

American Golf Corporation, d/b/a Mountain Shadows Golf Resort and Laborers' Local Union No. 139, Laborers' International Union of North America, AFL-CIO and Eli Jensen. Cases 20-CA-26942, 20-CA-27175, 20-CA-27207, and 20-CA-27472

November 20, 2002

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS LIEBMAN, COWEN, AND BARTLETT

On April 13, 2001, Administrative Law Judge William L. Schmidt issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief, the General Counsel and Charging Party Jensen filed briefs answering the exceptions, and the Respondent filed a brief in reply to the answering briefs.

The National Labor Relations 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 only to the extent consistent with this Decision and Order.

On April 17, 2000, the Board remanded this proceeding in relevant part for further consideration. 330 NLRB 1238. In the attached supplemental decision, the judge affirmed his earlier finding that alleged discriminatee Eli Jensen was unlawfully discharged because of his protected union activity. The judge rejected the Respondent's defense that, independent of any protected conduct that Jensen engaged in, he would have been discharged for disloyal conduct not protected by the Act. He concluded that in fact Jensen would not have been terminated in the absence of his protected activity.

We disagree, finding that Jensen would have been discharged for cause within the meaning of Section 10(c) of the Act because of his disloyalty. Accordingly, we will dismiss the outstanding complaint allegations involving him.¹

In his first decision,² the judge concluded, among other things, that Jensen, a maintenance worker and well-known union supporter, was unlawfully discharged for

¹ The Respondent excepted to the judge's failure to consider the brief it assertedly filed with him following the Board's remand for further consideration. In his supplemental decision, the judge stated that no such brief was filed. The Respondent contends that it was properly filed, and it provided some documentation in support. The Respondent also has attached its remand brief to its brief on exceptions to the judge's supplemental decision. We will assume, without finding, that the brief was properly filed with the judge. Given the particular issues in this case, we are in a position to evaluate the brief as effectively as the judge might have. Accordingly, we find that the Respondent has suffered no prejudice in this matter.

² The facts are fully detailed in the judge's first decision and the Board's first Decision and Order.

contacting a competitor of the Respondent by telephone, and for circulating a flyer the following day that disparaged the Respondent's operation of a municipal golf course and openly solicited for the Respondent's competitors to take over the Respondent's contract with the city. The Respondent claimed that both the telephone call and the flyer were disloyal and grounds for discharge under *NLRB v. Electrical Workers Local 1229 (Jefferson Standard)*, 346 U.S. 464 (1953). The judge found both to be protected activity, and the discharge to be an 8(a)(3) violation. On review, the Board agreed that the telephone call was protected activity, but found that the flyer was not protected under *Jefferson Standard*. The Board remanded for the judge to determine under *Wright Line*³ whether the disloyal flyer alone would have caused Jensen to be discharged.

On remand, the judge reaffirmed that Jensen was unlawfully discharged. He found that the protected telephone call and the unprotected flyer were inextricably linked, with the call being the primary basis for the discharge. The judge concluded that Jensen would not have been discharged for the flyer alone because he had made similarly disparaging remarks in the past in other flyers and in a self-evaluation form—all of which, unlike the flyer at issue here, made reference to union activity.

Jensen made copies of the flyer available to the public at a Rohnert Park city council meeting on March 5, 1996. The flyer stated in full:

ROHNERT PARK RESIDENTS,

DOES AMERICAN GOLF RETAIN A GREATER PERCENTAGE OF PROFITS FROM THE CLUBHOUSE FACILITIES (AS COMPARED TO GREEN FEES)? THERE'S NO MONEY BUDGETED FOR NEEDED COURSE UPGRADES, BUT A CAPITAL COST, NON-BUDGETED ITEM LIKE THE RESTAURANT ADDITION CAN BE FUNDED. (WE CAN HAVE A COUPLE OF DRINKS WHILE WE WATCH THE COURSE DRY OUT.) SINCE I'M FAMILIAR WITH NEITHER THEIR BUSINESS MODEL (VAGUE) NOR REVENUE DERIVATION, I CAN ONLY GUESS AS TO THE INTENT OF EXPENDITURES.

THAT NON REVENUE-GENERATING ITEMS LIKE INSTALLING A DRAINAGE SYSTEM WHERE NONE EXISTS OR INSTALLING A SECOND SPRINKLER SYSTEM AROUND THE SANDTRAPS (BOTH CAPITAL COSTS), DON'T GET DONE BECAUSE THEY WEREN'T BUDGETED, IS TYPICAL OF "OPERATING STATEMENT" THINKING. IF SUCH COURSE UPGRADING DOES NOT

³ 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

HAVE AN EASY, IMMEDIATELY CALCULABLE PAYBACK, IT IS NOT DONE. THE MONEY GOES INTO AREAS WHERE AMERICAN GOLF REALIZES A GREATER PROFIT. (I.E. BANQUET / TOURNAMENT FACILITIES.)

WHILE MOUNTAIN SHADOWS IS A COMMUNITY FACILITY, IT IS ALSO A BUSINESS. IN ORDER FOR A BUSINESS LIKE THIS TO THRIVE, THEY MUST EMPLOY "BALANCE SHEET" THINKING (BUT LET'S INCLUDE THE GOLF COURSE). THE CLUBHOUSE WAS A SIGNIFICANT INVESTMENT. AMERICAN GOLF WILL FOCUS ON THIS AREA FOR NOW SINCE IT'S NOT GETTING THE DESIRED RETURNS FROM THE GOLF COURSE (RESIDENT RATES?) "GETTING BY", "IT'S AN ONGOING PROCESS" OR "NEXT YEAR WE'LL BUDGET FOR IT", ARE NOT ACCEPTABLE RESPONSES! THE CONDITION OF THE COURSES DOES NOT PUT MOUNTAIN SHADOWS FIRST ON ANYONE'S LIST, EVEN SUBSIDIZED RESIDENTS. IF THE FACILITY WAS UP TO PAR, IT WOULDN'T HAVE TO BE "SOLD" TO ANYONE. WHILE IT WOULD BE GREAT TO HAVE A TOUR CALIBRE COURSE, GREENS FEES WOULDN'T BE THIS SIDE OF A HUNDRED DOLLARS. OBVIOUSLY, BENCHMARKS HAVE TO BE ESTABLISHED OBJECTIVELY. IT WOULD SEEM HOWEVER, THAT AMERICAN GOLF WOULD RATHER HAVE A MEDIOCRE BUSINESS PROPOSITION THAN A GOOD PRODUCT. THAT IS A BUSINESS DECISION, AND NOT NECESSARILY GOOD FOR THE COMMUNITY.

DOLLAR FOR DOLLAR, MOUNTAIN SHADOWS HAS THE POTENTIAL TO BE THE BEST BUY IN THE AREA. FOR TOO MANY YEARS, PROPER MAINTENANCE HAS BEEN IGNORED. IF AMERICAN GOLF ISN'T PREPARED TO LOOK AFTER THE FACILITY, PERHAPS IT'S TIME THE CITY FOUND A NEW PARTNER? MAYBE COURSECO IN PETALUMA OR THE ARNOLD PALMER MANAGEMENT COMPANY IN ORLANDO?

POOR MANAGEMENT * POOR BUSINESS & MARKETING PRACTICES * POOR MAINTENANCE

* IS ROHNERT PARK GETTING THE BEST DEAL? *

As discussed, the Board earlier found that the General Counsel had established a sufficient showing that Jensen's Union activity was a motivating factor in the Respondent's decision to discharge him. But the Board also found that "Jensen's distribution of the March 5 flyer is the type of conduct that the Court found to be beyond the protection of the Act in *Jefferson Standard*," 330 NLRB at 1241. In *Jefferson Standard*, the Supreme Court decided that certain employees' conduct in circulating handbills substantially disparaging the quality of the employer's product was "an elemental cause for discharge"

under Section 10(c) because of its disloyalty. 346 U.S. at 472. Accordingly, the Court upheld the Board's conclusion that the employees' discharge did not violate the Act.

The Board's earlier decision in this case, therefore, establishes that Jensen's unprotected distribution of the flyer could be a cause for lawful discharge within the meaning of Section 10(c). On remand, it was thus the Respondent's burden to demonstrate that Jensen would have been discharged even in the absence of his protected conduct." *Wright Line*, supra at 1089.

The Board has consistently found that disloyal employee conduct justifies discharge and/or denial of reinstatement and backpay in appropriate circumstances. In *Firehouse Restaurant*, 220 NLRB 818 (1975), the Board affirmed the administrative law judge's finding that one employee was lawfully discharged and two others, who had otherwise been discharged unlawfully, were properly denied reinstatement and backpay. The three had engaged in disloyal criticism of the quality of the food served in the employer's restaurant. Id. at 824-825. In *American Arbitration Assn.*, 233 NLRB 71 (1977), an employee was discharged for sending a letter to the employer's clients that disparaged the employer's operation of its business. The Board agreed with the administrative law judge that the employee's conduct was disloyal, that it constituted "an attack upon the Respondent which was sufficient to deprive [the employee] of the protection of Section 7 of the Act," and that it provided the employer with a reason for discharge that was "warranted and lawful." Id. at 75. In *Sahara Datsun*, 278 NLRB 1044 (1986), enf. 811 F.2d 1317 (9th Cir. 1987), the Board denied reinstatement and full backpay to a discriminatee who had denigrated the employer's reputation in remarks to a business associate of the employer after the discriminatee had been unlawfully discharged. The Board noted that the former employee's action "surely would have provided the Respondent with ample 'cause' for discharge if he had been employed" at the time of the misconduct. Id. at 1046. See also *Studio S.J.T.*, 277 NLRB 1189, 1201 (1985) (finding that a discriminatee's post-unlawful discharge telephone call to a customer attacking the employer's owners' personal reputations was "an act of sufficient disloyalty and vindictiveness as to deprive her of the right" to reinstatement and full backpay).

In the March 5 flyer, Jensen publicly impugned the Respondent's business practices and priorities, and he solicited city residents to replace the Respondent with either of two named competitors. We agree with the Respondent that a reasonable employer, confronted with such disloyalty, might have terminated the employee

responsible for it. More to the point, we find that the Respondent met its burden of showing that it would have discharged Jensen for the March 5 flyer standing alone.

The Respondent provided evidence, through the testimony of Loretta Raftery, its vice president for human resources, that Respondent in fact would have discharged Jensen for the March 5 flyer alone. The judge declined to accept Raftery's testimony. Thus, the judge concluded that the Respondent failed to establish that it would have discharged Jensen for the March 5 flyer alone. For reasons that follow, we disagree.

Initially, we note that the judge did not rely on demeanor reasons in refusing to accept Raftery's testimony. Rather, as explained below, the judge relied upon a flawed analysis of the case. Therefore, in these circumstances, the Board may proceed to an independent evaluation of the matter. See, e.g., *J.N., Ceazan Co.*, 246 NLRB 637, 638 fn. 6 (1979), and cases cited there.

As noted, in support of its rebuttal case, the Respondent offered the testimony of Raftery. She testified that the Respondent had no specific rule or written policy concerning disloyalty. She described a "common sense" policy that the Respondent followed, in which the level of discipline depends on the severity of the conduct deemed disloyal. In her view, Jensen would have been discharged because of the flyer, given the severity of the disparagement of the Respondent's business. She indicated that there had been other incidents of employee disloyalty, but nothing comparable to Jensen's conduct concerning the flyer.

However, the judge found Raftery's testimony "less than convincing." In this regard, the judge relied on the fact that the Respondent took no disciplinary action in connection with earlier conduct in October by Jensen. That earlier conduct was a self-evaluation by Jensen. In the self-evaluation, Jensen described his goals as follows:

To void American Golf's contract with Rohnert Park. To replace Santok [Respondent's maintenance supervisor]. To unionize the cart barn and restaurant employees. To make Mountain Shadows the excellent facility that it could be. To unionize six other American Golf operations. To get a new pair of "Nikes" & "JUST DO IT!"

We do not agree that the October conduct was comparable to the March 5 flyer. First, Jensen's earlier self-evaluation was a private, not a public, document. In addition, it did not criticize the Respondent in the same harsh tones used in the March 5 flyer. Further, the self-evaluation included clear references to union activity. Therefore, the Respondent would have been at significant risk if it had taken action in response to the docu-

ment. By contrast, given the public and harsh nature of Jensen's March 5 flyer, and its total lack of reference to any protected activity, the Respondent could reasonably conclude that discipline was necessary and warranted.

The judge also emphasized that Jensen's March 5 flyer was not "a bolt out of the blue" because Jensen had previously attended city council meetings to complain about working conditions and the progress of collective bargaining at Mountain Shadows, and had also previously distributed flyers appealing for public support for the golf course's maintenance workers in their labor dispute with the Respondent. The judge reasoned that because the March 5 flyer represented "a continuation of a lengthy stream of public criticism of the golf course operations," the Respondent would not have discharged Jensen for the March 5 flyer alone. We disagree with this reasoning. Jensen's earlier public criticisms invariably included references to union activity and thus may have been protected. The Respondent would reasonably not have taken action against Jensen for that reason. But, as the Board found in its previous decision in this case, the March 5 flyer was not protected. It was thus significantly different from Jensen's previous public pronouncements. Raftery herself testified that the flyer was different from Jensen's earlier activity because it did not relate to a labor situation or to union activity. Indeed, in finding the March 5 flyer unprotected in its earlier decision, the Board expressly contrasted that flyer, which made no mention of union activity, with Jensen's previous flyers, which did. 330 NLRB at 1241. Thus, to the extent the judge relied on the fact that the Respondent did not discipline Jensen for his previous flyers in determining that it would not have fired Jensen solely for the March 5 flyer, the judge has simply ignored the Board's earlier decision in this case.

The judge ignored the Board's earlier decision in another respect as well. He concluded that Jensen's March 4 phone call and the March 5 letter could not be separated. In the judge's view, they are "incapable of any logical separation into component parts." This view is flatly inconsistent with the Board's decision. The Board concluded that the two acts were analytically distinct. The March 4 phone call simply "left a message inviting [a competitor] to the March 5 city council meeting." The March 5 flyer disparaged the Respondent and actively sought to displace the Respondent as the operator of the golf course. The March 4 phone call was protected; the March 5 flyer was not protected. The Board remanded the case to the judge to determine whether the Respondent would have discharged Jensen based solely on the March 5 flyer. To the extent that the judge found that the March 4 phone call and the March 5 flyer were inextric-

cably intertwined and that thus the Respondent did not meet its rebuttal burden, the judge's decision is fatally flawed and must be rejected.

In light of all of the above, the Respondent's earlier inaction against Jensen provides no basis whatever for the judge's rejecting, or discrediting, Raftery's testimony. Thus, we are left with Raftery's uncontradicted and inherently plausible testimony in support of the Respondent's rebuttal case.

Finally, we recognize that the Respondent has not shown a practice of disciplining the kind of conduct involved herein. However, that is because the Respondent had not previously been confronted with the level of disloyal conduct involved herein. Thus, the Respondent could not, in this proceeding, cite any history of dealing with such an act. Rather, the Respondent offered the testimony of its manager Raftery. Unlike the judge, we find no basis for rejecting Raftery's testimony. It reasonably supports the Respondent's rebuttal case. Accordingly, we conclude, contrary to the judge, that the Respondent would have discharged Jensen, regardless of his protected activity, because of his distribution of the March 5 flyer.

Therefore, because we conclude that the Respondent satisfied its *Wright Line* burden, we will dismiss the relevant complaint allegations.

ORDER

The complaint allegations addressing the unlawful discharge of Eli Jensen are dismissed.

Margaret M. Dietz and Jill Coffman, Esqs., for the General Counsel.

Daniel F. Fears and William A. Calhoun II, Esqs. (Payne & Fears), of Irvine, California, for the Respondent.

Eli Jensen, Pro Se, of Santa Rosa, California.

Paul D. Supton and Theodore Franklin, Esqs. (Van Bourg, Weinberg, Roger & Rosenfeld), of Oakland, California, for Charging Party Local 139.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

WILLIAM L. SCHMIDT, Administrative Law Judge. On July 2, 1998, I issued my decision and recommended order in this matter wherein I concluded that Respondent violated Section 8(a)(1) and (3) of the Act by suspending Eli Jensen on March 12, 1996, and discharging him some 3 weeks later on April 5.¹ I reached this conclusion after finding that the two activities Respondent used to justify his discharge, i.e., his March 4, telephone call to Courseco, Respondent's competitor, and his

¹ The complaint in this case alleges that Jensen's discharge as well as his earlier suspension violated the Act. Unless the context otherwise demands specificity, my references hereafter to his discharge also encompasses his suspension, or the entirety of the disciplinary action taken against him in March and April 1996.

preparation and public distribution of a flyer the following day, each constituted activity protected by Section 7 of the Act. Because of my conclusion that both activities were protected by the Act, I did not address Respondent's alternate contention that it would have terminated Jensen for either of these two activities.

On April 17, 2000, the Board issued its Decision and Order remanding wherein it agreed that Jensen's telephone call to Courseco constituted protected concerted activity but concluded that Jensen's preparation and distribution of the March 5 flyer lacked protection under the Act. *Mountain Shadows Golf Resort*, 330 NLRB 1239 (2000). In reaching this conclusion, the Board first explained that in its decided cases since the Supreme Court's *Jefferson Standard* decision,² it has "held that employee communications to third parties in an effort to obtain their support are protected where the communication indicated that it is related to an ongoing dispute . . . and the communication is not so disloyal, reckless or maliciously untrue as to lose the Act's protection." 330 NLRB 1239.

Applying this two-pronged test to Jensen's March 4 telephone call, the Board concluded that Jensen met the "first prong" by telling the "person who answered the phone" (the administrative assistant to Courseco's president, Tom Isaak) that the Mountain Shadows employees were having "union problems" and that they were having trouble negotiating with the Respondent. As to the "second prong" of the Board's *Jefferson Standard* test, the Board concluded that nothing occurred during the March 4 telephone call that was "so flagrantly disloyal, reckless or maliciously untrue as to cause [Jensen] to forfeit the Section 7 protection." In fact, as the Board noted, Jensen did nothing other than leave a verbal invitation for Isaak to attend the city council meeting scheduled for the following day. The Board further noted the lack of evidence that Jensen solicited Isaak to try "to take over management of the golf course or otherwise attempt to interfere with American's business relationship with the city." That is unquestionably true because Jensen never, *at anytime*, spoke to Isaak personally; even though he sought a telephone audience with Isaak on this particular occasion, he got no further than Isaak's administrative assistant.

However the Board reached a different result when it applied the same analytical scheme to Jensen's March 5 flyer.³ It concluded that the flyer failed to meet either of the requisite tests necessary for protection under Section 7. First, the Board found that "Jensen's handbill made no mention of the labor dispute, the Union, management's treatment of the employees, or any issue having anything discernibly to do with employees' terms and conditions of employees [sic]" and that it "contained nothing . . . directly or indirectly linked [to] the issues raised to

² *NLRB v. Electrical Workers Local 1229 (Jefferson Standard)*, 346 U.S. 464 (1953).

³ Although labeled throughout as the "March 5 flyer," this document more precisely contains text of a speech Jensen planned to deliver at the March 5 Rohnert Park city council meeting. He prepared extra copies in anticipation of distributing them so that those in the audience could follow along. As found earlier, Jensen decided to forego delivering his speech when he observed no golf course officials present for that city council meeting.

any labor dispute.” As the Board viewed the substance of the flyer, “the matters addressed . . . related solely to the impact of the company’s capital investment and other business practices on the quality of the service provided to customers.” And even though the Board found that the flyer did “make a reference to proper maintenance having been ignored—an issue with an actual nexus to the employment concerns of the maintenance workers—the reference occurred in the context of a suggestion that the city consider turning over management of the facility to one of Respondent’s competitors, not as a way to change labor practice at the golf course but to make the course a better ‘buy’ for area residents.” As, in the Board’s view, the March 5 flyer “omitted all reference to the labor controversy and attacked policies of the Respondent with no discernible relation to it” the Board concluded that Jensen’s public distribution of the March 5 flyer by leaving 24 copies on a table outside the Rohnert Park city council chamber as he departed that meeting was not protected under the Act.

Noting that my decision did not address Respondent’s alternative assertion that Jensen would have been discharged for distributing the March 5 flyer even if he had not made the March 4 phone call, the Board remanded the allegations pertaining to Jensen’s discharge to me for that determination. In so doing, the Board found that the General Counsel had met his initial burden of showing that protected activity was a motivating factor in Jensen’s discharge in light of its finding concerning protected shrouding for his March 4 telephone call to Courseco. Accordingly, the remand directs me to determine whether Respondent had met its *Wright Line*⁴ burden of showing that it would have discharged Jensen in the absence of the March 4 telephone call to Courseco.

On remand, I provided all parties with an opportunity to supplement their original posthearing briefs by a date certain. The General Counsel and Jensen availed themselves of this opportunity; Respondent and Laborers Local 139 did not.⁵ After carefully reconsidering the record in light of the argument originally made on the remanded subject as supplemented following the remand, I have concluded that Respondent did not meet its *Wright Line* burden. Hence, I remain of the view that Jensen’s suspension and discharge violated Section 8(a)(1) and (3) as alleged based on the following

SUPPLEMENTAL FINDINGS OF FACT

A. Argument

Respondent asserted in its posthearing brief to me that it terminated Jensen for his “disloyal acts” (R. Br. to ALJ, p. 14, L. 4), namely, “his admitted solicitation of a competitor and his disloyal dissemination of the March 5th Memorandum.” (R. Br.

⁴ 251 NLRB 1083 (1980), enf’d. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), as modified in *Director, Office of Workers Compensation Programs, Department of Labor v. Greenwich Collieries*, 512 U.S. 267 (1994).

⁵ Both Jensen and Laborers’ Local 139 filed unfair labor practice charges concerning his discharge. Jensen’s charge is Case 20-CA-27472; the Laborers’ charges in Cases 20-CA-27175 and 20-CA27207 pertain to Jensen’s suspension and discharge.

to ALJ, p. 18, LL. 21–22.) Even though Respondent contended that its officials knew nothing of any protected aspect to Jensen’s March 4 call to the Courseco office until his testimony at the hearing and hence no unlawful motive can be inferred for discharging Jensen for this reason, the Board has now held otherwise.⁶

As the Board noted, Respondent also made the contention that it would have discharged Jensen for the unprotected and disparaging “March 5th memorandum regardless of the Isaak call.” In this regard, Respondent’s argument in its posthearing brief to me asserted:

The March 5th Memorandum alone, even in the absence of the Isaak call, would have resulted in Jensen’s termination. As discussed above, the March 5th Memo was clearly unprotected activity which would have resulted in the discharge of any employee, union or non-union.” [R. Br. to ALJ, p. 29, L. 25, p. 30, L. 1.]

Respondent cites the testimony of its vice president for human relations, Loretta Raftery, detailed and addressed below, to support this argument. Hence, Respondent argued, “even if the Board concludes the Isaak call was somehow protected, no violation of the Act can be found because [Respondent] has carried its burden under the *Wright Line* test.” [R. Br. to ALJ, p. 30, LL. 3–5.]

Counsel for the General Counsel argues that Jensen’s discharge violated the Act despite the Board’s conclusion that he authored and distributed the unprotected March 5 flyer. She contends that Respondent would not have discharged Jensen merely for distributing the “comparatively innocuous” March 5 flyer. Instead, she believes that his extensive protected union organizing activities during the winter and spring of 1996, including the March 4 Courseco phone call seeking to invite its owner, Tom Isaak, to the city council meeting the following day when he planned to again discuss the labor dispute. Counsel for the General Counsel argues that the March 5 flyer, viewed in the context of the activities that had already occurred in connection with this labor dispute, “did not contain any ideas or criticisms of American Golf that Jensen had not previously raised or made during earlier [protected] activity.” Mainly for this reason, counsel for the General Counsel asserts that Respondent’s claim that the March 5 flyer represented a “very different kind of activity” lacks credibility. The General Counsel argues that no evidence shows that Respondent’s managers “considered the two incidents separately and concluded that the March 5 memorandum alone would have warranted discharge.” In fact, the General Counsel argues, “it was the protected phone call in which Respondent believed Jensen was soliciting Tom Isaak to try to take over the management of the golf course that

⁶ At the very least, Respondent’s officials knew before discharging Jensen that claims, both orally and in writing, had been made by Union Attorney Supton, who represented Jensen, that the distribution of the March 5 flyer and the Courseco phone call constituted protected activity. No evidence shows that any company official ever asked Supton to explain the basis for that general claim. Instead, they persisted in their insistence to speak directly with Jensen, which Supton refused to permit.

caused Respondent to terminate Jensen, and not the March 5 statement.”

In his prelude to his supplemental brief, Jensen quotes to following passage from the *Allied Aviation* case⁷

the Board has found employee communications to third parties seeking assistance in an ongoing labor dispute to be protected where the communications emphasized and focused upon the issues cognate to the ongoing labor dispute.

and goes on to make the following contention concerning Board’s conclusion about his March 5 flyer:

Unlike the message in the flyers disseminated in *Jefferson Standard*, which had no discernable relation to the controversy, the March 5 draft was specifically related to the Union’s protest of unilateral changes made by the new superintendent, Mike Higuera, who contrary to past practice was sending Department 40 workers home on a whim and was manipulating hours so that no one received overtime. Respondent was very sure to frame this as a business decision not as a change to any labor practice. Unfair Labor Practices were filed.

Jensen’s brief contains other similar argument about the March 5 flyer. I decline his apparent suggestion to revisit that question; this case was not remanded to me for that purpose.⁸

B. Further Findings and Conclusions on Remand

As noted, the Board has already concluded that the General Counsel established a prime facie showing that Respondent terminated Jensen in part for his protected activities. It now seeks a determination as to whether Respondent met its burden of establishing that Jensen would have been discharged even in the absence of the protected March 4 call to Courseco. Under *Wright Line*, supra, if the General Counsel establishes a prima facie case, the burden of persuasion shifts to Respondent to establish that the same adverse action would have been taken even in the absence of the employee’s protected activity. *Best Plumbing Supply*, 310 NLRB 143 (1993). To meet this burden “an employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct.” *Roure Bertrand Dupont, Inc.*, 271 NLRB 443 (1984).

At the outset, the evidence almost uniformly establishes that Respondent made exaggerated assumptions about the Courseco phone call during its investigation leading to Jensen’s discharge. Hence, Respondent harbored (or professed to harbor) the erroneous belief that Jensen had solicited Courseco to actively pursue the Mountain Shadows management contract. To be sure, Jensen may have sought to instill that dreadful notion in the minds of American Golf managers by seeking Isaak’s appearance at a March 5 city council meeting while he once

again complained about course upkeep and suggested that the city seek a new “partner” but all indications suggest that Isaak wanted none of that. It was, after all, Isaak who alerted Respondent to the phone call in the first place. Yet, Respondent’s officials chose to assume the worst. The evidence detailed below demonstrates the use of this choice to discredit Jensen, who by then had become the most visible union activist on Respondent’s staff, not merely as a negative employee but as a grossly disloyal worker plotting to destroy the Company’s partnership with the city of Rohnert Park, the resort’s owner.

Thus, Superintendent Mike Higuera letter dated March 14 seeking a second meeting with Jensen the following day. In that letter, Higuera laid out the Respondent’s concern with Jensen’s activities on March 4 and 5. It alluded to Jensen’s first (March 12) meeting with Director of Maintenance Mike McCraw and Higuera, and then it states:

At the meeting, we asked you about recent information we had received that indicated that you (1) *had contacted Tom Isaak, the owner of Courseco, a competitor company, to solicit his company’s interest in the management of the Mountain Shadows Golf Course*, and (2) had been involved in drafting and/or circulating a memorandum that is extremely critical of American Golf’s management of Mountain Shadows and of its business practices. The only conceivable objective of such conduct would be to interfere with American Golf’s relationship with its landlord, the City of Rohnert Park, and perhaps to sever American Golf’s relationship with Rohnert Park. If successful, such efforts would result in serious damage to American Golf business and revenue, and potentially, American Golf employees would lose employment opportunities. [Emphasis added.]

In addition, Jensen’s termination letter, signed by maintenance director McCraw but admittedly prepared by Raftery, states:

Over the last few weeks we have met with you, your union representative, and most recently, with your attorney regarding (1) *your contacting of Tom Isaak, the owner of Courseco, a competitor company, to solicit his company’s interest in the management of the Mountain Shadows Golf Resort*, and (2) your drafting and/or circulating to the public a memorandum that disparages American Golf Corporation and its management team and the quality of the golfing conditions at Mountain Shadows. It was our desire to give you every benefit of the doubt with respect to these matters and to hear your side of the story. Unfortunately, despite the several meetings mentioned above, you have refused to respond to our questions regarding your involvement in the above-mentioned activities.

At our April 1, 1996 meeting at your attorneys’ (sic) office, your attorney, Mr. Supton, confirmed that you were involved in the above-mentioned matters, but he refused to allow us to speak with you about these matters. Thus, it appears very clear that you were involved in these extremely disloyal acts, that you do not deny involvement in this misconduct, and that you will not even speak with us about this matter.

Based upon the above, we must regrettably inform you that your employment is being terminated. We can see no

⁷ *Allied Aviation Service Co.*, 248 NLRB 229 (1980).

⁸ Jensen’s supplemental brief also contains references to statements contained in affidavits and attachments not contained in the official record of this matter. Although no party sought to strike these materials, I nevertheless have disregarded all such attachments and references in the preparation of this supplemental decision.

legitimate reason for your attempts to destroy the Company's relationship with the residents of Rohnert Park and to solicit a competitor company to attempt to take over the golf course. If your actions were successful, it would most likely result in the loss of jobs and a diminution of business for the Company. Given the nature of your inappropriate actions and your failure to discuss them with us, we do not believe that it serves anyone's interest to continue the employment relationship. [Emphasis added.]

The testimony of company officials also demonstrates the integration of the Courseco call into the basis for the discharge. Thus, Raftery, the company official responsible for overseeing Jensen's discharge, explained:

I'm not sure if it hit me the moment I read the [March 5 flyer], but probably within that first day after I had both pieces of information, I remembered the self evaluation⁹ which I had seen at the time it was generated and sort of filed away in my mind because it did, at the time, appear to be something that I couldn't imagine an employee would really be serious about doing.

And there were other things in that self-evaluation that were Mr. Jensen's personal expression of his feelings about the company and about unions. I remember it when I looked at the memo and remembered the Isaak situation, and I thought, oh my gosh, this guy really means to do this, really means to hurt our business by voiding our contract with the city. It appeared to me the pieces of the puzzle had come together on that.

Consistent with the theme present in the foregoing portion of Raftery's testimony, Respondent claimed at the hearing that Jensen provoked his own discharge by three—rather than two—acts that together amounted to grossly disloyal conduct. Thus, its counsel moved to dismiss the General Counsel's case and argued as follows:

There's a lot of ways you can apply pressure, some legal, some illegal. If he burned down the roof, that would apply pressure, but it's not legal. Going out and disparaging the name and engaging in disloyal acts that are separate from his union activities, that's not lawful. It's not protected. So, American Golf was well within its rights when it discharged an employee who had engaged in these grossly disloyal acts, *calling up the competitor, inviting them in, going to the resi-*

⁹ The reference made to the self-evaluation form refers to the "Co-Worker Self Evaluation" Jensen completed and submitted to the Company in October 1995. In the section of that form asking the employee to state "goals and objectives for the next six months" Jensen remarked:

To void American Golf's contract with Rohnert Park. To replace Santok. To unionize the cart barn & restaurant employees. To make Mountain Shadows the excellent facility that it could be. To unionize six other American Golf operations. To get a new pair of "Nikes" & "JUST DO IT!" [GC Exh. 25.]

Santok refers to Maintenance Superintendent Singh who had recently issued two unlawful warnings to Jensen immediately after his reinstatement as ordered by Judge Pollack in the earlier case. Elsewhere in the form Jensen, referring to his reinstatement, stated that he "was thrilled" to have his job back. No company official spoke to Jensen concerning the content of this form.

dents and telling them what a rotten golf course it is; and when you combine that with his stated motive of voiding the relationship, American Golf was well within its rights. That was not protected and it was not anti-union animus. [Emphasis added.]

Likewise, Dan Ross, the Mountain Shadows general manager who followed the progress of the events leading to Jensen's discharge from inside the Company but disclaimed any involvement with the decision making in Jensen's discharge, also saw the relationship of the Courseco call to Jensen's discharge. He testified:

Q. Excuse me if I asked this before. Why weren't you involved in the termination of Mr. Jensen?

A. At that point, Mike McCraw was handling the issue.

Q. What issue is that?

A. Performance issues, etc., with Mr. Jensen.

Q. Okay. It's your understanding that he was fired for performance related reasons?

A. My understanding that it was disloyalty to American Golf, contacting Mr. Isaak, a competitor, and soliciting for a new partner for the City of Rohnert Park.

And later he explained:

Q. BY MR. FEARS: Can you explain to us whether or not there was any relationship between the Isaak contact and the March 5 memorandum to the residents in your mind?

A. Well, they tie in.

Q. How.

A. Isaak is the president of Courseco.

Q. Was there any tie at all, in your mind, to the previously stated objective Mr. Jensen had made in his self-evaluation form?

A. Yes.

The foregoing evidence and argument substantially detracts from any conclusion that Jensen would have been discharged for distributing the March 5 flyer "even in the absence" of the Courseco call. Instead, the letters to Jensen state in rather plain terms that the decision to discharge him resulted from the threat his actions, if successful, posed to the jobs of employees and the Company's business, neither likely to result solely from "badmouthing" by a low-level employee. Instead, the language of both letters and Raftery's explanation strongly indicate that the solicitation of a competitor played a central role in the discharge rationale. In my view, this evidence (the letters and Raftery's testimony) shows that Respondent's rationale for Jensen's discharge amounts to a linear, unitary explanation incapable of any logical separation into component parts without altering the actual basis for his termination and inventing a new and artificial justification unsupported by the record. In sum, Respondent chose to claim here that Jensen's activities, taken as a whole, amounted to something far beyond negative employee comments; they charged that Jensen's activities amounted to grossly disloyal conduct.

Additionally, Respondent failed to present a persuasive case to support its alternative contention that Jensen would have

been terminated for the March 5 flyer even in the absence of the Courseco call. As seen below, the basis for that assertion is weak while the evidence is strong that the tone and object of the Jensen's March 5 flyer bore considerable resemblance to a substantial body of preceding protected concerted activity.

In support of its contention that Jensen would have been discharged for distributing the March 5 flyer even in the absence of the Courseco phone call Respondent's brief relies entirely on the following testimony from Raftery:

Q. If Mr. Jensen had been the most pro-company, anti-union, if he had been leading the forces for no union, but had sent out a memorandum to residents like the March 5th memo, indicating that it's a poorly maintained and poorly managed golf course and the city council ought to look at new partners, would you have taken the same action?

MR. FRANKLIN: Objection.

JUDGE SCHMIDT: Overruled. You may answer.

THE WITNESS: I believe, under circumstances like this with these acts that are alleged, I definitely would have taken the same action if I had no explanation for why, perhaps more quickly because I would have assumed a motive there that was a bad one. Perhaps financial gain or something else.

I find this assertion less than convincing especially where, as here, the Company did nothing in the face of Jensen's direct threat on his self-evaluation to void Respondent's contract with the city. Instead, I find that Respondent's perception that Jensen had sought the proactive involvement of Isaak (a perception that is not wholly accurate) constituted the last straw that resulted in his discharge.

Even though the Board concluded that the March 5 flyer disparaged the Company's product or service, Respondent failed to make any credible case that the March 5 flyer, in and of itself, represented some kind of bolt out of the blue. To the extent that Raftery sought to claim otherwise, I do not credit such a claim. Put in the context of all of the activities, Jensen's distribution of the March 5 flyer represents a continuation of a lengthy stream of public criticism of the golf course operations by the Union, Jensen and other employees concertedly.

Thus, between the time of its certification in September 1995 and Jensen's discharge in early April 1996, Union Representative David George and some of the unit employees, including Jensen, attended an estimated eight to ten city council meetings in Rohnert Park and two or three meetings of the council's golf course committee to complain about working conditions and the progress of collective bargaining at Mountain Shadows. In early January 1996 when Higuera became the maintenance superintendent, the Union claimed that scheduling changes occurred that reduced employee hours and pay. Thus, George recalled what he first heard from unit members about Higuera:

Q. After Higuera started as the superintendent, what was the first report you received about him from your members?

A. That he was going to change the work week.

Q. What effect would that have on their incomes?

A. It would reduce the overtime, which would reduce their pay.

Q. Okay. Was overtime an issue in bargaining?

A. Yes.

This led to a reduction of their wages and bitter complaints by the maintenance employees who felt that the Company had cut their work hours in the face of needed golf course maintenance tasks. George explained the nature and the scope of his activities at the city council meetings:

Q. Okay. And what were the conditions that you reported to them during the period of time we've just referenced?

A. That some people are being illegally terminated and reinstated; others have been terminated. A charge has been filed and they should—a complaint had been issued by the Board on that, adding duties to the work load of the workers, harassment of the workers by management, withholding of work.

Q. Withholding of work, what did you complain about there?

MR. FEARS: Objection. Relevance as to this whole line.

JUDGE SCHMIDT: Overruled.

THE WITNESS: That there was work to be done out at the course.

Q. BY MS. DIETZ: What work did you tell the city council had to be done out at the course?

A. There was a lot of drainage work that was not done during the winter which caused ponds or lakes to form out on the course where drainage work was being avoided. That was typically work that was done by the unit during that period of time.

Q. Did you ever take photographs out at the golf course for the purpose of going to city hall with them?

A. Yes.

Q. Okay. Can you recall a particular date when you took photographs or a month, at least?

A. Yes. It was the beginning of March.

Q. What did you take pictures of at that time?

A. I took pictures of the course conditions where they have the big lakes and such out there, where work was being withheld from the workers. They were sent home when there was work to be done out there.

Q. And did you take those to city hall?

A. Yes. I took them and also the couple the workers took. I presented them to the city council and explained the pictures.

Q. Okay. Was that a city council meeting or a golf course committee meeting; do you recall?

A. That was a city council meeting?

Q. Okay. In what month was that city council meeting?

A. I believe it was late March, maybe early April.¹⁰

¹⁰ George later testified that during a brief meeting with McGraw and Higuera at the golf course on March 22, McGraw chided him that

Whether true or not, employees could easily perceive any reduction in hours in the face of needed course maintenance amounted to little more than retribution for having chosen recently to be represented by a labor organization.

Jensen participated in the Union's corporate campaign in concert with George. His first public distribution, dated December 12, 1995, occurred in the middle of that month and illustrates his strategy to capitalize on the Company's past maintenance problems as its Achilles heel in the on-going labor dispute.

Thus, Jensen attached to his December handbill a scathing letter from Rohnert Park City Manager Joseph Netter to Kevin Roberts, an official of American Golf, dated June 14, 1994. Jensen's flyer appealed for support from Netter similar to that the city manager provided a Rohnert Park resident who headed an association of local golfers in the attached letter. Unquestionably, Jensen's December flyer reflects the existence of a labor dispute. In an obvious reference to the Mountain Shadows maintenance crew, Jensen openly asked why "a group of twelve (down from twenty)" could not get support similar to that reflected in the attached letter from Netter. He requested that Netter send a letter "on our behalf" to "settle this dispute."

Seizing on the threat contained in Netter's attached letter, Jensen suggested that the city should find "a new partner" if American Golf would not "negotiate with the employees at Mountain Shadows Golf Resort." He claimed there were other management companies "eager to manage" Mountain Shadows, complained that even the city "can't even have a look at the books," and questioned, "Who's [sic] property is this?"¹¹ The December 12 letter concludes with an appeal for citizens to support the Mountain Shadows' maintenance workers by calling Netter. (GC Exh. 11(a).) Plainly, this appeal for the city to find a "new partner" parrots the threat Netter made in the attached letter indicating that the city would be willing to change partners if American Golf officials continued to blame the Mountain Shadows deficiencies on the regulated resident greens fees.

the improved weather conditions would make his picture taking more difficult.

¹¹ At the hearing, Respondent's counsel argued Jensen's assertions about the city's inability to "look at the books" (appearing here and implied again in the March 5 flyer) somehow suggests that he is claiming that the Company is engaging in "financial improprieties." I find that claim without any support. Even though Jensen clearly questioned the Company's allocation of capital in the March 5 flyer, any claim that he also makes a charge of financial impropriety of any sort simply lacks evidentiary support. As I read the March 5 flyer, Jensen, in his elliptical prose sought to state his pique at the Company for allocating major sums of capital to build a new clubhouse facility because it provides large returns (and no work for unit employees) while at the same time declining to allocate capital for the correction of drainage problems on the fairways that would likely produce work for unit employees but little or no return on the dollars spent. Hence his scornful lament: "We can have a couple of drinks while we watch the course dry out." Concurrent with this distribution, George photographed pools of water standing in the fairways for presentation to the city council later that month in an effort to make a public issue out of the reduction in hours for the maintenance workers despite the extreme drainage problems at the course.

In the letter attached to Jensen's December 12 distribution, Netter excoriated Roberts for blaming the "management and operational deficiencies at Mountain Shadows" on the city's steadfast refusal to permit large greens fees increases for residents. Without mincing words, Netter offered to terminate the Mountain Shadows lease with American Golf to relieve it of the "hundreds of thousands of dollars in losses" Roberts seemingly blamed on the established resident rate. Netter also charged that in the past 18 months routine problems never seemed to be solved until he intervened so that he had "personally spent more time on golf-related matters and complaints . . . than [he had] for the full fifteen (15) years [he had] been with the City." In the end, Netter informed Roberts that the city was considering "an audit of the lease terms to make sure all obligations and commitments have been completed" and that a public works/parks inspector had been assigned "to review monthly the maintenance of the courses" and that the city would provide American Golf with a copy of the inspector's report on "items that are deficient or are in need of repair." (GC Exh. 11(b).) General Counsel's Exhibits 28 and 29, lengthy lists of maintenance items, appear to be an outgrowth of the inspection scheme Netter implemented in his June 1994 letter to Roberts.

Jensen and a group of maintenance employees attended the city council's golf course committee meeting on January 16, 1996, to complain about Respondent's conduct at the bargaining table and elsewhere. Jensen prepared a speech for delivery at that meeting and distributed extra "read-along" copies to the public in attendance at the meeting. In those written remarks, Jensen charged that if American Golf's books were available the city would realize that "they spend less money on our two courses than they do on other similar courses" and that "they put the minimum back into [the Mountain Shadows] facility, milking it for all it can, realizing profits on the backs of underpaid employees and sub-standard maintenance." Jensen grouped the problems faced by the Mountain Shadows management into two broad categories, course maintenance and personnel. He asserted that course maintenance, i.e., "digging out sand traps and filling them with real sand . . . levelling the trees . . . drying out the swamps that pass for fairways . . . or finally correcting the irrigation system . . . or buying new mowers that won't damage the turf" represented only part of the problem. A "quality company," Jensen asserted, needed to do those things and more. American Golf, he said, also needed to "treat its employees with dignity and to give us a decent living" as the city did with its other employees. His prepared remarks concluded:

Has American Golf been less than a good partner?

Have our profits been at the expense of not only the condition of the course, but at the expense of the employee who expend so much effort?

If the courses are operating at only 55% capacity, maybe a more grounded business approach is necessary?

Poor management, poor business and marketing practices, poor maintenance.

Are we getting the best deal?

Finally: Thinking about the employee; are these the “grape pickers” of the nineties? Other facilities are experiencing the same “problem.”

Please. Look past their sales pitch and listen to those who work with them.

The following week Raftery and Ross appeared at a city council meeting to deliver a rebuttal to the Union’s presentation the previous week. All of this vitriol resulted in a written admonition from the Rohnert Park mayor to the effect that the Company should follow all Federal and State laws, including the labor laws. The tone and substance of the mayor’s letter plainly fell far short of the kind of action Jensen sought a month earlier when seeking intervention by the city manager.

In the second week of February, Jensen and two other maintenance employees requested and were granted an audience with City Manager Netter and a subordinate where they complained about being sent home early that day when rain apparently threatened. There is no indication that this meeting produced results.

On March 3 Jensen distributed his “Monkey” flyer to area residents appealing for citizen support at the city council meeting on March 5. This flyer, implicitly critical of the city council, charges the Company with refusing to bargain in good faith and with violating city policy by not dealing fairly with employees.¹² Plainly this flyer suggests Jensen’s frustration at the failure of the city officials to become more involved in the dispute as sought in his original December distribution. To the extent that Jensen’s propaganda represented the feelings of union officials and a consensus on the union side, the Monkey flyer suggests a disappointment with the success of the Union’s corporate campaign to that point.

¹² A graphic of four monkeys appears on the heading of this flyer. One appears with his hands over his eyes, another appears with her hands over her ears, the third appears with his hands over his mouth, and the fourth is shrugging.

In my judgment, the Courseco call the following day represents a significant escalation of the corporate campaign seeking to pressure Respondent’s officials into agreement with union demands. Undoubtedly the invitation to a competitor to personally bear witness to an unseemly spectacle at city hall about Respondent’s maintenance practices and employee discord went beyond the pale of what Respondent’s officials would tolerate. The language in Jensen’s discharge letter stating that the Company could see “*no legitimate reason for your attempts to destroy the Company’s relationship with the residents of Rohnert Park and to solicit a competitor company to attempt to take over the golf course*” confirms the inseparability of the Courseco call in the Jensen discharge rationale. By contrast, Jensen, the Union and other employees had littered the landscape with disparaging comments about the Company, all of which appear to have been treated as a part of the labor dispute game up to that time.

For reasons discussed above, I find that Respondent failed to carry the burden of establishing that it would have terminated Jensen in the absence of the Courseco call. On the contrary, I have concluded that the Courseco call represents the centerpiece for Respondent’s discharge rationale. Respondent’s claim that it would have discharged Jensen for distributing the March 5 flyer even in the absence of the Courseco call amounts to, in my judgment, little more than a hastily devised argumentative strategy constructed after specific evidence—Jensen’s convincing testimony—emerged that demonstrated, contrary to all earlier claims by company officials, the protected character of the Courseco call, i.e., an up front disclosure about the ongoing labor dispute at Mountain Shadows. In view of this conclusion, I reaffirm my original conclusion that Jensen’s 1996 suspension and discharge violated Section 8(a)(1) and (3) of the Act.

[Supplemental Order omitted from publication.]