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Whiteford Ford Trucks, Inc. and Forrest Hutchinson, Gary Miller, and Anthony Hudson. Cases 25–CA–27093–1, 25–CA–27131–1, and 25–CA–27148–1

May 6, 2004

DECISION AND ORDER

BY MEMBERS LIEBMAN, SCHAUMBER, AND MEISBURG

On September 24, 2001, Administrative Law Judge Marion C. Ladwig issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions² and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² The Respondent, in its exceptions, contends that applicant Anthony Hudson was not a qualified truck mechanic and therefore did not meet the "experience or training" requirement of the test set forth in *FES*, 331 NLRB 9 (2000), enfd. 301 F.3d 83 (3d Cir. 2002). The record reflects that Hudson had worked as a mechanic for at least 22 years. As the judge noted, Hudson's April 14 application showed that he was currently working on tractor and trailer repairs at Employer Truckers. Moreover, Hudson's previous employment at TMI and Wabash Ford demonstrates his experience in truck maintenance. Finally, Hudson qualified for at least a C mechanic classification. We find the Respondent's exception to be without merit.

The judge found that the Company demonstrated "union animus" towards the applicants for engaging in "union and other protected concerted activity." Member Schaumber questions whether the Board should continue using such terms as "union animus" or "anti-union animus" and adopt in lieu thereof a term such as "Section 7 animus" as the former terms are confusing. The words "anti-union animus" literally mean opposition to antiunion activities. Also, the terms "anti-union animus" and "union animus" can be, and sometimes are, construed to mean opposition to unionization. Opposition to unionization, however, is an employer's choice; it is not unlawful. What is unlawful is an employer's active animus toward the Sec. 7 activities of its employees, whether prounion or antiunion. Member Schaumber adopts the judge because the General Counsel showed that the Respondent's conduct reflected animus towards the applicants' Sec. 7 activity.

orders that the Respondent, Whiteford Ford Trucks, Inc., Greenwood, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. May 6, 2004

Wilma B. Liebman, Member

Peter C. Schaumber, Member

Ronald Meisburg, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Walter Steele, Esq., for the General Counsel.

Roger W. Benko, Esq. (Barnes & Thornburg), of South Bend, Indiana, for the Respondent.

DECISION

STATEMENT OF THE CASE

MARION C. LADWIG, Administrative Law Judge. These cases were tried in Indianapolis, Indiana, on March 20–22, 2001. The charges were filed May 16 and June 6 and 20, 2000,¹ and the consolidated complaint was issued August 30.

In 1999 the Respondent Company, Whiteford Ford Trucks, Inc., was underbid by Truck Maintenance, Inc. (TMI), a nonunion employer, to perform truck and trailer maintenance for a union company, USF Holland Motor Freight (Holland) (Tr. 280, 403). Holland was constructing a new garage on a lot adjacent to its Greenwood, Indiana terminal, outside Indianapolis. TMI began performing the work on November 15, 1999, and moved into the new garage on December 20, 1999. (Tr. 34, 110, 279; R. Exh. 1 p. 1.)

TMI hired the three charging parties, each of whom had worked for Wabash Ford, which previously had performed Holland's truck and trailer maintenance. They were lead mechanic, Forrest Hutchinson, and mechanics Gary Miller and Anthony Hudson. They worked on the third (night) shift. Except for Hudson, there was limited opportunity for the third-shift mechanics to earn a weekly productivity bonus, because trucks did not come into the next-door Holland lot at night. Hudson was hired January 16 as a tractor and trailer repairman. During the short time he was there, he was doing mostly brake jobs on trailers and was receiving a bonus for averaging about 5-1/2 hours to complete an 8-hour brake job. (Tr. 18, 22, 28–29, 126–131, 184, 231, 237, 468; GC Exh. 2.)

Both second- and third-shift mechanics were complaining about the unfairness of the bonus, which favored the first-shift mechanics. Hutchinson and Miller, on the third shift, were outspoken against the bonus. Hutchinson talked to TMI's operations manager, Robert Shuler, about bonus concerns of both

¹ All dates are in 2000 unless otherwise indicated.

the second and third shifts and also urged Shuler to grant Miller's longstanding request, since he was hired in November, to work on the first shift. He likewise urged Shuler to raise Hudson's wage rate from \$15 to the agreed rate of \$15.50 when he was hired. (Tr. 24–25, 28–29, 37, 126–132, 165, 173–174, 193–195, 232, 234, 237, 467.)

On Thursday, February 3, Hutchinson went to Shuler's office and told Shuler "the guys are upset with the bonus and I was wondering if we could just get rid of the bonus and give . . . everybody 50 cents or a dollar." As Hutchinson credibly testified, Shuler responded that "if I get rid of the bonus, ain't nobody going to get any more fucking money." (Tr. 133–134.)

That Thursday evening, when Hutchinson went in to pick up his paycheck, he reported to some second- and third-shift employees "exactly" what Shuler told him in the bonus-money meeting and said, "I think I might go talk to the Union about it." Hutchinson followed through on contacting the Union, then began organizing, and the union activity became a "hot topic" in the shop. (Tr. 137–141, 197–198, 485–486.)

Hutchinson began passing out union authorization cards on the third shift in the early morning of Wednesday, February 9. (Tr. 140–141.) Then, before leaving work that morning, he asked Shuler for his overdue \$150 signing bonus for getting mechanic Miller and another permanent mechanic hired. (Tr. 119, 122; GC Exh. 4.) First-Shift Lead Mechanic Marty Gregory "bolted out" and said, in front of Shuler, "ain't nobody going to get no bonus money until this union shit is blown over." Shuler "just chuckled." Hutchinson responded, "I don't think it is fair that [Shuler is holding] my bonus money over my head over union activities." (Tr. 145–147, 176–177.) I discredit Shuler's denial that he had "any knowledge of union activity" on February 9. (Tr. 45.)

Wednesday evening, February 9, when Hutchinson reported to work, TMI President Rick Memmer told him not to clock in, that he wanted to talk to him in Shuler's office. (Tr. 32, 111, 148.) There, as Hutchinson credibly testified (Tr. 147–148), Memmer (who was not a witness)

told me that he was letting me go and I said, what are you letting me go for? And he said because you are not getting along with supervision and Bob [Shuler].

And I said, you are letting me go over this union stuff. And he said, I don't know nothing about no union shit.

The following Tuesday, February 15, TMI refused the demand of Teamsters Local 135 (the Union) for recognition, or it would picket. Holland immediately canceled TMI's contract and TMI closed the facility that same afternoon, terminating all the employees. (Tr. 30–31, 39–40, 200–201.)

Shuler was evasive when asked on cross-examination if this "was the first time that you had any idea that there was any sort of union activity?" He answered, "That's the first time I was contacted by the Union." (Tr. 455.) He finally claimed that yes, the first time he "knew anything about any union activity at [TMI] was on February 15 when the Union demanded recognition." He then admitted, however, that although "I had never seen" two business agents at the facility, he understood that "both business agents contacted [mechanic] Denzil Tuttle," a former union member. He claimed, "It didn't matter to us one

way or the other" whether they were union. (Tr. 456.) By his demeanor on the stand, he appeared to be less than candid. I discredit the denials.

A day or two after the February 15 terminations, as Hudson credibly testified, Gregory called him and said "it was that motherfucking Forrest's [Hutchinson's] fault." Inquiring if Hudson supported the union organizing, Gregory asked Hudson if he had signed a union card. Hudson falsely told him, no, feeling "it wasn't anyone's business." (Tr. 251.)

On February 22 or 23, after efforts failed to have TMI reopen the shop under a temporary agreement with the Union until a vote could be held (Tr. 251–252), a Holland representative called Kenneth Moore, the Company's service director who oversees the service managers at its several locations. He asked Moore if the Company was interested in replacing TMI at Holland's garage. Moore replied, "Absolutely," and on February 25 submitted a bid. (Tr. 403–406.) Holland obviously was wanting to restore peace with the Union—after years of contracting with nonunion vendors for fleet maintenance in that area. (Tr. 279–280.) Most of the Company's maintenance shops were union. (Tr. 401–403.)

Before Holland awarded a contract to the Company on April 3 or 4 to reopen the garage, Moore began meeting with the Union and arranging for a union shop. (Tr. 405, 407–408, 436–437.) Moore admitted asking business agent, Michael Hubrecht, to recommend employees. Moore first denied recalling the names of employees that Hubrecht "rattled off" (Tr. 411), but later admitted that Hubrecht gave him the name of Hutchinson. (Tr. 433.)

Moore testified that on April 5, "I went to Bob Shuler," who recommended Marty Gregory, TMI's first-shift lead mechanic, to be the service manager over the shop. On this recommendation, Moore hired Gregory on April 10. (Tr. 146, 202, 251, 408–409, 437.)

Moore personally began calling and inviting former TMI mechanics to come in and fill out an application if interested in coming back to work. Although he admitted (Tr. 414) that "Basically, yes," he was "interested in hiring all of the former [TMI] employees," Moore failed to call Forrest Hutchinson and Gary Miller. He did call Anthony Hudson, who had told Gregory he had not signed a union card at TMI. (Tr. 158–159, 254–255, 410, 430.)

On April 12, Moore hired five of the former TMI mechanics, to report to work when the shop reopened on April 17. (Tr. 417, 426.) He testified that he did not know if any of them had supported the Union. (Tr. 421.)

When Hudson went to the shop to apply on April 14, he arrived in the company of Gary Miller. Like Hutchinson, Miller had been outspoken against TMI's productivity bonus and had not been called. Gregory, not Moore, interviewed them. As Hudson credibly testified, Gregory told him he could start at \$15.72. But instead of telling Hudson to report to work on April 17, Gregory said to "get back with him and he would tell me when I could take my physical and when I could start." Hudson twice called back. The Company denied him employment, Gregory each time stating "there wasn't nothing happening right now." (Tr. 205, 258–259.)

Gregory then interviewed Miller and told him outright that “they are really not hiring right now.” (Tr. 206.) Later, on April 17, the Company refused to hire Hutchinson, as discussed below.

The primary issues are whether the Company unlawfully discriminated against lead mechanic, Forrest Hutchinson, and mechanics, Gary Miller and Anthony Hudson, for engaging in union and other protected concerted activity, violating Section 8(a)(3) and (1) of the Act.

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 Company, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Company, a corporation, maintains and repairs fleet vehicles at Holland’s garage in Greenwood, Indiana, where it annually receives goods valued over \$50,000 directly from outside the state. The Company 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 and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Refusal to Hire Forrest Hutchinson*

1. Referrals and interview

When USF Holland Motor Freight gave the Company a contract to perform its truck maintenance work at its new garage, Holland supervisor, Oren Demaree, referred Forrest Hutchinson as he had done before to previous maintenance contractors.

Demaree became acquainted with Hutchinson in the spring of 1993, when Hutchinson was employed by Truckers 24 Hour Road Service (Truckers). Hutchinson performed maintenance and repair work on Holland’s road and city tractors at Holland’s Greenwood lot, under Demaree’s supervision. (Tr. 112–114, 281–282.)

In 1995, when Hutchinson told Demaree he wanted to get schooling on electronic engines, Demaree told him to go over to Wabash Ford, which then had Holland’s main contract for maintenance work. Demaree said to tell them that Demaree sent him and they would hire him. Hutchinson obtained the job, took the training, and continued working on Holland trucks for about 4 years, the last 2 years as a working foreman. (Tr. 114–117, 187–190; GC Exh. 6 p. 2.)

In June 1999, Holland was “pulling their trucks out of Wabash Ford” and was planning to open its own garage next to its Greenwood terminal. Hutchinson returned to Truckers, to continue working on Holland trucks in the meantime. (Tr. 187–188.)

In November 1999, when Holland contracted with TMI to perform its truck and trailer maintenance work at its new garage, Demaree referred Hutchinson to Rick Memmer, the president of TMI. Memmer interviewed Hutchinson at Demaree’s desk at Holland and employed him to work at Holland’s garage as a lead mechanic. (Tr. 57, 110–112, 117–119, 212.)

In April 2000—nearly 2 months after Holland canceled TMI’s contract—Holland awarded the Company a contract to perform truck maintenance at its new garage. The Company had agreed with the Union that it would become a union shop. (Tr. 405, 407–408, 436–437.)

Hutchinson was a highly qualified journeyman with 14 years experience. (Tr. 183, 473.) He instructed other mechanics in doing work they could not do. (Tr. 184.) He had worked on Holland’s trucks about 7 years (since 1993), part of the time as a working foreman. He had special schooling on electronic engines, qualifying him to make repairs on various models of Holland’s electronic truck engines. (Tr. 187–189.) The Union had recommended him and had told him that he would be one of the first hired back into the shop and that the Company was “supposed to be getting a hold” of him. (Tr. 158.) Yet Moore called and hired less qualified former TMI mechanics, but had not called or offered to hire him.

On April 12, Moore hired five of the former TMI mechanics, who began work when the shop reopened April 17 (Tr. 320, 398)—2 months after TMI terminated its approximately 24 employees. (Tr. 34, 42.) Only two of them were journeymen: Joseph McCoskey (GC Exh. 13) and Anthony Shirley (GC Exh. 12). Terry Thompson (GC Exh. 11; R. Exh. 4 p. 34) was an A technician. Kevin Davis (GC Exh. 14) and Lawrence Simpson (GC Exh. 10) were B technicians.

Thus, having hired only two journeymen before April 17, but refusing to hire journeyman Hutchinson on that date, as discussed below, Moore did not have a journeyman on each of the three shifts to serve as lead mechanic (technician), or to perform internal engine work. It is undisputed that an A technician “can do anything to a vehicle except internal engine work,” a B technician must have more knowledge than the “basic hand tools” and 2 or 3 years experience, and a C technician must be able to do “minor repairs.” (Tr. 495–496.) As found, Hutchinson served as lead mechanic on the third shift at TMI and was not only qualified to do internal engine work, but had special training in repairing Holland’s electronic engines.

In the next 2 weeks, from April 23 to May 1, the Company was able to hire seven additional mechanics (GC Exhs. 9, 17–21, 25–26, 28), none of whom was a journeyman. Three were A technicians, one was a B technician, and three were C technicians. One of the C technicians (GC Exh. 26) hired on May 1, however, was terminated the next day. On April 22, the Company began running an ad, for 5 days, in the Indianapolis Star Newspaper for “Truck Technicians,” but received only one applicant in response. (Tr. 321–322; GC Exh. 8.) Moore was obviously aware of a shortage of qualified mechanics.

Moore admitted, “My ultimate goal was [to perform] all services, tractor and trailer” for Holland. At the time of trial in March 2001, however, Holland still had not awarded the trailer work to the Company, which had only 12 mechanics, as compared to TMI’s approximately 24 employees for performing Holland’s truck and trailer maintenance. (Tr. 413–414.)

Meanwhile, not hearing from the Company, Hutchinson telephoned Demaree to see if anybody was in the shop yet to take applications. Demaree reported that Moore had said he was supposed to contact Hutchinson, but did not have Hutchinson’s phone number. Demaree advised Hutchinson to put in an

application, because the shop was starting to fill up. (Tr. 158–159.)

On April 17, Hutchinson submitted his application. (GC Exh. 6.) Moore interviewed him in the presence of Gregory. (Tr. 437, 472.) As Hutchinson credibly testified, Moore then took him aside and asked if he knew Marty Gregory, stating that Gregory was the service manager and was going to do the hiring and firing. When Hutchinson said he knew Gregory, Moore said, “I feel sorry for you,” that he had heard that Hutchinson “had a problem with the old service manager [Shuler]” at TMI. (Tr. 159–160.) As discussed later, this indicated that Moore had previously received this information from Shuler.

Then, as Hutchinson also credibly testified, Moore said that first, “I have the right where *I don’t have to hire you* [emphasis added] and secondly, if I don’t like the color of your hat, I’ll fire you for that.” Even though Moore had not hired a journeyman to serve as the third lead mechanic, he did not offer to hire Hutchinson. The next week, after no one from the Company contacted him about his application, Hutchinson called the Company, and later called back, but he could not get anybody to talk to him. (Tr. 160–161.)

2. The Company’s defenses

a. No knowledge of Hutchinson’s union activity

Moore, the Company’s service director, gave much conflicting testimony, when testifying first as an adverse witness and later as a defense witness.

Moore was attempting to support the Company’s defense, that it did not refuse to hire Hutchinson because of his alleged union and other protected concerted activity at his former employer, TMI—where Hutchinson had been outspoken in urging TMI Operations Manager, Robert Shuler, to improve working conditions and then began organizing the Union.

The Company first contends in its brief (at 4), as a complete defense, that “Hutchinson’s union activities at [TMI] were irrelevant to [the Company’s] decision not to hire him.”

To support this contention at the trial, Moore testified about his first knowledge of Hutchinson’s union activity at TMI. When he was testifying as a defense witness, the company counsel questioned him about Hutchinson’s Board charge (GC Exh. 1a), which Hutchinson signed May 12, and filed May 16, and in which Hutchinson alleged that the Company unlawfully refused since April 17 to hire him because of his union activity at TMI (Tr. 429):

Q. [BY MR. BENKO:] And . . . what date is on that charge?

A. May 12th of 2000.

Q. And is that *the first time that you had knowledge* that Mr. Hutchinson was active in getting a union at [TMI]?

A. Yes.

Q. And you had interviewed Mr. Hutchinson on April 17th, am I correct?

A. Correct.

Q. And so it was *almost a month* later before you became aware that he was the union supporter at [TMI]?

A. Yes. [Emphasis added.]

To the contrary, Moore had earlier admitted being put on written notice of Hutchinson’s union activity at TMI.

Thus, when Moore was testifying as an adverse witness, counsel for the General Counsel asked him about a similar union-activity allegation that Hutchinson made in his April 17 application. On page 2 of the application (GC Exh. 6), under “Record of Previous Employment,” Hutchinson clearly wrote as his “Reason for Leaving” TMI: “Illegally fired for organizing Union.”

At that time, Moore made the following admission (Tr. 306):

Q. [BY MR. STEELE] . . . [Y]ou testified, Mr. Moore, that you looked over Mr. Hutchinson’s application and looked at all of his places that he had previously worked?

A. Yes.

Q. Did you notice what he put down as to why he left his last employer, [TMI]?

A. *I am sure I did.*

Q. Did you ask him anything about that?

A. No, normally I don’t. [Emphasis added.]

Thus, Moore gave conflicting testimony, both admitting and denying knowledge before May that Hutchinson engaged in union activity at TMI. I discredit the denial as an afterthought.

b. No knowledge that Hutchinson worked for TMI

Later in the trial, Moore denied even knowing before April 17 that Hutchinson had worked for TMI, testifying (Tr. 433):

Q. BY MR. BENKO: So, until Mr. Hutchinson made application on April 17th to work at [the Company], you did not know he was a former employee of [TMI]?

A. No, Sir.

To the contrary, as found, Hutchinson credibly testified that when Moore was interviewing him for employment on April 17, Moore said he had heard that Hutchinson “had a problem with [TMI’s] service manager [Shuler].” By Hutchinson’s demeanor on the stand, he impressed me most favorably as a truthful witness.

Moore testified how he claimed it happened that he did not learn that Hutchinson had been a TMI employee, even though Moore had received names of TMI’s former employees from Shuler.

Testifying as an adverse witness, Moore volunteered: “I did not look at [Hutchinson’s] personnel file.” He claimed, “I asked [Shuler] for anybody that was *currently* [emphasis added] employed there” (just as if the terminated employees were still employed), that “Shuler just simply gave me names and phone numbers,” and that “I simply wrote them down on a pad of paper.” (Tr. 311; GC Exh. 32.)

Earlier, as the first witness at the trial, Shuler testified that he went through the February 15 payroll timecards and gave Moore the names of approximately 24 employees. (Tr. 41–42.) Assuming this testimony was true (although Shuler gave other discredited testimony), it would explain how he could have failed to give Moore the name of Hutchinson, who was discharged February 9, the week before the February 15 termination of the remaining employees. (Tr. 108.)

But clearly this is not what happened. The two yellow-pad pages in evidence (GC Exh. 32) show otherwise.

First, contrary to Moore's claim that Shuler simply gave him names and phone numbers, the two pages in evidence reveal that Moore and Shuler had a wider discussion about the former TMI employees. The two-page list reveals that they discussed both duties and qualifications of employees, as well as the shifts on which most of the employees worked. As examples, it described certain mechanics as entry level, good, efficient, or very efficient, as well as the types of work they performed.

Second, Moore's list shows that Moore was not copying down the names and telephone numbers of former TMI employees as Shuler testified he was reading them from the February 15 timecards. One of the timecards on that date was that of Charging Party Gary Miller, who was terminated along with the other employees on the afternoon of February 15. Although Shuler positively testified that he gave Moore all of the approximately 24 names on the timecards (Tr. 42), Moore's list omits Gary Miller who, like Hutchinson, had been outspoken against TMI's weekly productivity bonus.

The Company ignores, and offers no explanation for, the omission of Miller's name.

I find that Moore omitted the name of Miller, as well as the name of Hutchinson, from his list of former TMI employees, because of what Moore learned from Shuler in their discussion of the TMI employees.

In reaching this conclusion, I particularly rely on the following:

(1) The fact that Moore's list reveals that Shuler and Moore engaged in a discussion of the former TMI employees.

(2) The unexplained omission of Miller's name from the list, indicating that Moore had no intention of calling Miller about employment with the Company.

(3) When testifying as an adverse witness, Moore gave emphatic denials, insisting that he did not talk to or consult with Gregory about Hutchinson before deciding not to hire him, as discussed below.

(4) Hutchinson's credited testimony that in his April 17 interview, Moore admitted to him that Moore had heard that he "had a problem" with Shuler, indicating that Moore had previously received this information from Shuler.

I therefore discredit Moore's claim that before Hutchinson applied on April 17, he did not know that Hutchinson was a former TMI employee.

c. Moore's "uncomfortable" feeling toward Hutchinson

Testifying as an adverse witness about his interview with Hutchinson on April 17, and ignoring his knowledge of Hutchinson's union organizing at TMI at the time of the interview (from Hutchinson's application), Moore claimed (Tr. 305-306):

A. Basically . . . I wasn't comfortable with the applicant.

Q. What made you uncomfortable with Mr. Hutchinson?

A. Sir, I barely remember the interview, but . . . it is a feel, I have been doing this for a number of years and

when I am interviewing someone, when you talk to them you get an impression, a feel for that person. It is a gut reaction of whether you should or should not hire the person. I didn't feel that he was going to be a good part of our program.

Q. How did you reach that conclusion, or why did you reach the conclusion that he wouldn't be a good feel, what was said or done by Mr. Hutchinson in that interview that would lead you to that conclusion?

A. I have no idea.

Later, when called as a defense witness, Moore testified (Tr. 447):

Q. [BY MR. BENKO]: Okay. But the problem that you had with Mr. Hutchinson was what?

A. It was basically *attitude and indirect responses* to my questions. I didn't feel comfortable with him.

Q. Okay. Okay. And so that was *the reason* that you didn't hire him.

A. Absolutely. Absolutely, Sir.

Q. You just didn't feel comfortable with him.

A. That's correct. [Emphasis added.]

Moore had testified earlier (Tr. 302, 319):

THE WITNESS: I remember one [part of the interview] that stuck out real strong in my head . . . he said he worked for Holland on their trucks . . . and what finally came out was that he had worked for Wabash on Holland trucks. But I was under the impression at first that he had worked actually for Holland, on their trucks for Holland themselves.

. . . .

Q. [BY MR. STEELE]: And you can't recall anything else that went on in Mr. Hutchinson's interview that led you to believe that his attitude was bad and he was a bad fit for [the Company]?

A. No, Sir.

Hutchinson's application (GC Exh. 6 p. 2), however, clearly states that Truckers and Wabash (not Holland), were his employers when he worked on Holland trucks. I discredit as an afterthought, Moore's claim that Hutchinson's "attitude and indirect responses" were the reason for his deciding not to hire Hutchinson.

d. Contradictory testimony

As discussed, Moore claimed that he refused to hire Hutchinson because of an uncomfortable feeling about him.

Evidently realizing that such a defense would not be convincing, Moore gave contradictory testimony about why he decided not to hire Hutchinson. In doing so, he gave much conflicting testimony about whether he discussed Hutchinson with Gregory before making that decision.

Testifying as an adverse witness, Moore gave emphatic denials, insisting that he did not talk to or consult with Gregory about Hutchinson before, but only after, he interviewed and decided not to hire Hutchinson. (Tr. 311, 319.) Later, however, when called as a defense witness, Moore claimed that he discussed Hutchinson with Gregory before deciding not to hire

him, by claiming that Gregory's "evaluation" of Hutchinson's performance at TMI "influenced" his "decision not to hire" Hutchinson. (Tr. 452.)

Of course, if Gregory's evaluation of Hutchinson influenced Moore's decision not to hire Hutchinson, Moore would have previously discussed Hutchinson with Gregory.

On cross-examination, Moore made claims (Tr. 448-449) about being also influenced by Gregory's reporting of Hutchinson's "past conflicts" with Gregory:

(1) Yes, the past conflicts between Gregory and Hutchinson influenced him not to hire Hutchinson.

(2) "No, I would not" have had to know about the conflicts at the time of his decision not to hire Hutchinson.

(3) "I do not know" when he became "aware of any conflicts between Mr. Hutchinson and Mr. Gregory."

(4) "Correct," the conflicts influenced his decision not to hire Hutchinson.

(5) "No, I don't" know "the nature of these conflicts."

To the contrary, Gregory positively testified (Tr. 466-467): "I never had a problem with Hutchinson."

Moore's claims—that he was influenced in his decision not to hire Hutchinson, both by Gregory's evaluation of Hutchinson's performance at TMI and Gregory's past conflicts with Hutchinson—are clearly contradictory to

(a) Moore's testimony as a defense witness that "Absolutely. Absolutely," that "the reason" he did not hire Hutchinson was "basically attitude and indirect responses to [his] questions" and he "didn't feel comfortable" with Hutchinson.

(b) Moore's testimony on cross-examination (Tr. 452) that yes, his refusal to hire Hutchinson was "based on what happened [in Hutchinson's] personal interview."

(c) Moore's emphatic denials that he consulted with Gregory about Hutchinson before he decided not to hire him. (Tr. 311, 319.)

By his demeanor on the stand, Moore appeared willing to fabricate any testimony that might support the Company's defenses.

I note that although Moore testified twice, first as an adverse witness and later as a defense witness, he never mentioned receiving any report from Gregory about Hutchinson purportedly having a confrontation with Shuler over an incident in which Hutchinson failed to get proper authorization from Holland before making an engine repair.

Late in the trial, however, Gregory testified (Tr. 479):

Q. [BY MR. BENKO]: . . . What confrontation did you observe Mr. Hutchinson have with Shuler while he worked at [TMI]?

A. It was a argument over a job that Mr. Hutchinson performed that was not an authorized repair.

In rebuttal, Hutchinson credibly explained (Tr. 503) that on his night shift, Holland authorized him to remove the accessory drive on a truck to learn the cause of an oil leak. The next morning, after Hutchinson had removed the accessory drive, Holland informed Shuler that it did not want to spend the

money to make the repair, because it did not want to put more money into the old trucks it planned to sell. That evening, Shuler told Hutchinson not to tear apart the old engines anymore.

Although Gregory's belated testimony about the purported confrontation was offered to bolster the Company's defense, I find that it had nothing to do with Moore's refusal to hire Hutchinson.

3. Contentions of the parties

The General Counsel contends in his brief (at 19) that the reasons given by the Company for its refusal to hire Hutchinson were a pretext for discrimination.

As indicated, the Company contends in its brief (at 4) that "Hutchinson's union activities at [TMI] were irrelevant to [the Company's] decision not to hire him."

In support of this contention, the Company cites service director Moore's discredited testimony (Tr. 429) that it was "almost a month" after he interviewed Hutchinson on April 17 that he first became aware, from an allegation in Hutchinson's Board charge in May, that Hutchinson supported the Union at TMI. To the contrary, as discussed, Moore had earlier admitted (Tr. 306), "I am sure I did notice" the reason Hutchinson stated on his April 17 application for leaving TMI: "Illegally fired for organizing Union." I discredit Moore's later denial of this admission. (Tr. 455.)

In its brief (at 4), the Company cites Moore's testimony that he did not hire Hutchinson because he "simply was not comfortable hiring Mr. Hutchinson"—ignoring Moore's knowledge at the time of the interview that Hutchinson had engaged in union and other protected concerted activity at TMI.

Also in its brief (at 4), the Company asserts various defenses based on what Gregory purportedly told Moore about Hutchinson's conduct at TMI. In view of Moore's admission, when testifying as an adverse witness, emphatically denying that he consulted with Gregory about Hutchinson before deciding not to hire him, I reject these defenses as obvious afterthoughts.

4. Concluding findings regarding refusal to hire Hutchinson

After weighing all the evidence, and particularly Service Director Moore's conflicting and contradictory testimony, I find that Moore had already decided not to hire Forrest Hutchinson before interviewing him on April 17.

I find, contrary to Moore's testimony, that he was informed by TMI Operations Manager Shuler, that Hutchinson and Miller who worked with Hutchinson, were outspoken in their opposition to TMI's productivity bonus and that Hutchinson then engaged in the union organizing, which resulted in the termination of Shuler and the TMI employees.

Although Moore admitted that he was basically interested in hiring all of the TMI employees and began calling and inviting them to come in and submit applications, he failed to telephone Hutchinson and Miller. Then when Holland Supervisor Oren Demaree, referred Hutchinson to the Company and Hutchinson submitted his application on April 17, Moore interviewed but would not hire him, despite the shortage of qualified mechanics and the Company's need for a lead mechanic with Hutchinson's qualifications.

I find that Moore's principal stated reason for not hiring Hutchinson—because “he simply was not comfortable hiring Mr. Hutchinson”—was based on his knowledge that Hutchinson had engaged in union and other protected concerted activity at TMI.

I also find that the Company's reference in its brief (at 4) to “Hutchinson's problems with authority” (referring to Gregory's belated claim of a purported confrontation with Shuler), in fact alludes instead to Hutchinson's efforts to improve working conditions and to his union organizing—causing Moore to “feel” that Hutchinson was not “going to be a good part of our program.”

I therefore reject the Company's defenses for not hiring charging party Forrest Hutchinson.

B. Refusal to Hire Gary Miller

As found, charging party Miller worked on the third shift at TMI with lead mechanic Hutchinson. Like Hutchinson, Miller was outspoken in the employees' complaints against the weekly productivity bonus, which favored the first shift.

Also as found, service director Moore—without explanation—omitted Miller's name, along with Hutchinson's name, from the list of former TMI employees, the list that Moore used to call the terminated employees about employment with the Company. Moore failed to telephone either Miller or Hutchinson, even though Moore admitted (Tr. 414) that he basically was “interested in hiring all” of the TMI employees.

I therefore find that Moore had already decided not to hire Miller, as well as Hutchinson, if they applied.

When Miller did apply on April 14, 2 days after Moore hired five of the former TMI mechanics on April 12 and told them to report to work on April 17, Service Manager Gregory (not Moore) interviewed him. As Miller credibly testified, Gregory refused to hire him, claiming that “they are really not hiring right now because they . . . are in negotiations with the Union on a contract.” (Tr. 205–206; GC Exh. 31.)

To the contrary, the Company was hiring additional employees. The Company not only hired five mechanics on April 12, but on that same date it offered to hire another mechanic, who rejected the offer. (Tr. 423; R. Exh. 5.) It continued to take applications and hired four mechanics from April 23 to April 26 (GC Exhs. 17, 19, 20, 28), and three others on May 1 (GC Exhs. 9, 18, 26), long before the union contract (R. Exh. 4) was signed October 22, retroactive to May 15.

Lead mechanic Hutchinson, who daily observed Miller's work on the third shift, credibly testified that Miller was a good mechanic. (Tr. 507–508.) Miller credibly testified that he had 25 years of experience as a mechanic and that while working 2 years for Wabash on Holland trucks, “I probably had worked on just about every truck they had.” (Tr. 208, 211; GC Exh. 31.)

Yet, Gregory testified that through his personal observation, “Mr. Miller's efficiency as far as what I was aware was not up to the standards that I wanted to run in my shop.” (Tr. 470.) Gregory, however, worked on a different shift, as the first-shift lead mechanic. Miller credibly testified (Tr. 517), that the only time he ever worked on the first shift was for 6-1/4 hours on

February 15 (the last day of their employment there before being terminated that afternoon). I discredit Gregory's claim.

I note that although the Company quotes in its brief (at 5) the above testimony by Gregory, at one point in its brief (at 7), the Company admits that it “does not dispute that Messrs. Hutchinson and Miller were qualified truck mechanics.”

I discredit Moore's claim (Tr. 301) that Gregory made the decision not to hire Miller. I find instead that Moore himself made the decision, based on his belief, from Miller's outspoken opposition to the productivity bonus, that Miller supported Hutchinson's union-organizing efforts.

C. Refusal to Hire Anthony Hudson

As found, Moore included the name of Charging Party Hudson (but not the names of Hutchinson and Miller), on the list that Moore obtained from TMI Operations Manager Shuler and used to call the former TMI employees for employment with the Company. Undoubtedly Shuler had learned from Gregory that Hudson had denied signing a union card.

Moore placed a call to Hudson and left a message for Hudson to call him back. When Hudson returned the call, as he credibly testified, he spoke to Gregory who “told me that he would set up a time for me to come in . . . to put in my application and he was *looking forward to us working together again* [emphasis added].” (Tr. 254–255.)

When Hudson went to the shop to apply on April 14, however, he arrived in the company of Miller, whom Moore had not called. As found, Gregory interviewed Hudson first and told him he could start at \$15.72. But, instead of telling him to report to work on April 17 with the five former TMI employees that Moore hired on April 12, Gregory told him to call back for his physical. Hudson called back twice, but the Company denied him employment, Gregory each time stating that “there wasn't nothing happening right now.”

As also found, Gregory next interviewed Charging Party Miller and told him outright that “they are really not hiring right now.” To the contrary, the Company continued to hire employees, but not the third Charging Party, Hutchinson.

Hudson had been hired by TMI on January 16 as a tractor and trailer repairman. But during the short time he was there, before the February 15 terminations, he was doing mostly brake work on trailers and was receiving a bonus for averaging about 5-1/2 hours to complete an 8-hour brake job. Undoubtedly Hudson's demonstrated efficiency was a factor in Gregory's first telling Hudson “he was looking forward to us working together again.”

The Company contends in its brief (at 5) that it did not hire Hudson because, as Gregory testified (Tr. 471), “we were opening up and just working on tractors and trucks and [Hudson] was more of [a] trailer mechanic and I did not need a trailer mechanic at that time.” I reject this contention because, when Gregory told Hudson “he was looking forward to us working together again,” Gregory was undoubtedly aware that the Company's maintenance contract with Holland did not cover Holland's trailer work.

I also reject the Company's contention (at 11) that “Mr. Hudson was not a qualified truck mechanic,” without any supporting evidence. His April 14 application (R. Exh. 2 p. 2)

shows that he was currently working on tractor and trailer repairs at Truckers, as he had worked previously at Wabash and another employer.

Hudson credibly testified that he had worked as a mechanic "at least 22 or 23" years. At Wabash, where he worked before going to TMI, he worked mostly on Holland trucks, making repairs on both their light and heavy-duty trucks. At a previous employer, he worked as the shop foreman over 25 to 30 employees in the absence of the truck shop foreman. (Tr. 260-263, 275-276.)

I discredit Moore's claim (Tr. 301) that Gregory made the decision not to hire Hudson. I find instead that Moore made the decision, because Hudson had arrived with Miller, causing Moore to believe that Hudson had in fact supported Hutchinson and Miller in the union-organizing effort at TMI.

I therefore find that Moore refused to hire Hudson on April 14 because of Moore's belief that Hudson supported Hutchinson's and Miller's union organizing effort at TMI.

CONCLUDING FINDINGS

I find that the General Counsel has met his burden of proof (1) that the Company was hiring when the three charging parties made their applications for the position of mechanic, (2) that the three applicants were qualified to meet the Company's requirements for the mechanic position, and (3) that the Company's union animus toward their engaging in union and other protected concerted activity at their former employer contributed to the decision not to hire the applicants. *FES*, 331 NLRB 9, 12 (2000).

Having rejected the Company's defenses for refusing to hire them, I find that the Company has failed to meet its burden of showing that it would not have hired each of the applicants in the absence of their union or other protected concerted activity.

I therefore find that the Company discriminatorily refused to hire each of the applicants, Anthony Hudson, Forrest Hutchinson, and Gary Miller, in violation of Section 8(a)(3) and (1) of the Act.

CONCLUSION OF LAW

By discriminatorily refusing to hire Anthony Hudson and Gary Miller on April 14, and Forrest Hutchinson on April 17, 2000, the Company has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Company, the Respondent, has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily refused to hire employees, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from dates of the refusals to hire to the dates of proper offers of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²

ORDER

The Respondent, Whiteford Ford Trucks Inc., Greenwood, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to hire applicants because of their union or other protected concerted activity.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Anthony Hudson, Forrest Hutchinson, and Gary Miller reinstatement to the position for which they applied or, if that position no longer exists, to a substantially equivalent position, without prejudice to their seniority or any other rights or privileges.

(b) Make Anthony Hudson, Forrest Hutchinson, and Gary Miller whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, 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 refusal to hire Anthony Hudson, Forrest Hutchinson, and Gary Miller and, within 3 days thereafter notify them in writing that this has been done and that the refusal to hire them will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records, and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

Within 14 days after service by the Region, post at its facility in Greenwood, Indiana, copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 25, 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 proceed-

² If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

ings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 14, 2000.

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.

Dated, September 24, 2001

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

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

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 refuse to hire applicants because of their union or other protected concerted activity.

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 Anthony Hudson, Forrest Hutchinson, and Gary Miller reinstatement to the position for which they applied or, if that position no longer exists, to a substantially equivalent position, without prejudice to their seniority or any other rights or privileges.

WE WILL make Anthony Hudson, Forrest Hutchinson, and Gary Miller whole for any loss of earnings and other benefits suffered as a result of our unlawful discrimination against them.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to our unlawful refusal to hire Anthony Hudson, Forrest Hutchinson, and Gary Miller, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the refusal to hire them will not be used against them in any way.

WHITEFORD FORD TRUCKS, INC.