

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

SMURFIT-STONE CONTAINER CORPORATION

and

Case 8-CA-34009

JEFFERY A. ROSE, An Individual

Gregory M. Gleine, Esq., for the General Counsel.
Thomas M. Hanna, Esq., of St. Louis, Missouri
for the Respondent.

DECISION

Statement of the Case

C. RICHARD MISERENDINO, Administrative Law Judge. This case was tried in Canton, Ohio on September 25, 2003. On February 10, 2003, a charge was filed by Individual Charging Party Jeffery A. Rose (Rose) against Smurfit-Stone Container Corporation (Respondent). On May 30, 2003, the complaint was issued alleging that the Respondent violated Section 8(a)(3) and (1) of the Act by reassigning Rose to different duties within his department because he filed a grievance and because of comments he made during a grievance meeting.

The Respondent's timely answer denied the material allegations of the complaint. The parties have been afforded a full opportunity to appear, present evidence, examine and cross-examine witnesses, and argue orally in lieu of submitting posthearing briefs pursuant to the Board's Rules and Regulations Section 102.42.

On the entire record, including my observation of the demeanor of the witnesses, as well as my credibility determinations based on the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole, and after considering the oral argument of the General Counsel and the Respondent, I make the following

Findings of Fact

I. Jurisdiction

The Respondent, a corporation, is engaged in the manufacture of multi-wall industrial paper bags at its facility in New Philadelphia, Ohio. There, it annually sells and ships goods, and purchases and receives materials, in excess of \$50,000, to and from points outside the State of Ohio. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent further admits, and I find, that the Paper, Allied-Industrial, Chemical and Energy Workers International Union (PACE) AFL-CIO, CLC, Local 5-1974 (Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. Facts

5 1. Mounter/proofers

The Respondent employs three first shift mounter/proofers in its printing department, who are responsible for ensuring that bag orders are properly processed and printed. Two mounter/proofers work on the floor and one works in the branded bag room. (Tr. 31-32.)

10 A bag order originates with a customer service representative (CSR), who receives all the specific information for making the bag from the customer. (Tr. 62.) This includes the bag size, print type, layout, and requested artwork. The CRS places this information on a brand card for new orders or duplicates an existing order for reorders with no art changes. The brand card
15 or a copy of the old order is given to the branded bag room mounter/proofer. (Tr. 64-65.)

The branded bag room mounter/proofer reviews the brand card to familiarize himself with the information to be printed on the bag. If it is a new order or change order, the branded bag room mounter/proofer contacts an art house, which produces a faxable proof of a sample bag that comports with the customer's specifications. (Tr. 66.) The proof contains the graphics, lettering, and colors that will be printed onto the bag. The proof is sent to the customer service representative, who sends it to the customer for approval. (Tr. 63-66, 67.) After the customer approves the proof, it is returned to the branded bag room mounter/proofer, who sends it to an engraver, along with the brand card, to make a polymer plate for printing on the bag.¹

25 If it is a reordered bag, the process is simplified because the proof and actual branded bag already exist. The branded bag room mounter/ proofer will retrieve the actual bag from a file, check to make sure that it is stamped with the correct brand number, and send it to the engraving room along with a copy of the order, proof, and a quality check sheet. (Tr. 66, 208.)
30 The engraver then makes a polymer plate for printing on the bag.

In either situation, the polymer plate is given to the floor mounter/proofer, who places the plate on a printing press, which prints the bags.

35 2. Jeffery Rose

Individual Charging Party Jeffery Rose began working for the Respondent as a mounter/proofer in August 1985. (Tr. 88.) Over the years, he periodically worked in the branded bag room and on the floor. In December 2001, Rose was working in the branded bag room, when Sid Wise became the printing department manager. Although Wise was Rose's supervisor, he took a hands-off policy on overseeing the branded bag room. He and Rose had an informal understanding that Rose would run the branded bag room and Wise would run the printing department. (Tr. 59.) This arrangement worked until early 2002.

45 3. Misprinted bags

In February 2002, Purina Mill, Inc. reordered a bag produced two years earlier, but requested a change in the bag size. The proof for the original bag, 742A, was used, which did not contain some additional lettering and a color change. (Tr. 70.) The proof went to the

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¹ A polymer plate weighs approximately 1½ to 2 pounds.

engraver without a brand card or a copy of the order, so the error was not caught. A polymer plate was made using the incorrect proof and 2 rolls of bags were printed at \$900 per roll before the error was detected. (G.C. Exh. 5.)

5 There was controversy over who was responsible for the mistake. Individual Charging Party Rose was at the center of it. Rose asserted that he had received verbal approval from a CSR, named Erin Marshall, to send the old proof to the engraver. Rose testified that he received a call from the engraver wanting to know the status of the Purina bag order, so he called CSR
10 Erin Marshall, who told him that she did not send out a proof because the order only called for a size change. (Tr. 99.) Rose stated that he explained to Marshall that a new proof was necessary because the print had to be downsized to match the smaller bag. Rose also testified that when he told Marshall to get a proof and customer approval, she told him to “approve” it and send it to the engraver. (Tr. 99-100.) Rose stated that when he told Marshall that he needed a brand card indicating that she had the customer’s “approval,” Marshall told him that the order was “hot,”
15 which means that the customer needed the bags right away, and that he should send the proof to the printer, which he did, and that she would send him a brand card later, which never happened. (Tr. 104.) Marshall denied that she gave Rose verbal approval to process the order. The incident strained their working relationship.

20 A dispute also arose between Rose and Wise over who was responsible for proofreading the bag order at various steps. Wise asserted that Rose was responsible for checking the proof for accuracy before it was sent to the engraver. (Tr. 66, 70, 73.) Rose asserted that Wise was responsible for checking the proof before it was given to customer service to be sent to the customer for approval. (Tr. 100.) Ironically, both claimed responsibility
25 for proofreading the bag before it went to final print – which apparently was not done. (Tr. 56, 100.)

 Ultimately Wise credited Marshall’s account of what was discussed with Rose. He also maintained that Rose should have proofread the proof before sending it to the engraver, which
30 Rose admitted he did not do.² (Tr. 76.)

4. Disciplinary action and grievance

 On May 10, 2002, Printing Department Manager Wise gave Rose a “note to file” for
35 failing to follow plant rules. (Tr. 40, 93; G.C. Exh. 5.) On June 5, Rose disputed the disciplinary action by filing a grievance that was pursued to the third step of the contractual grievance procedure. (Tr. 41, 94; G.C. Exh. 6(a).)

40 In the meantime, Rose maintained a “strictly business” working relationship with CSR Marshall. He had less face-to-face contact with her and went to the customer service department only when necessary. (Tr. 183.) He communicated with her more frequently by phone, and left voice messages if she was away from her desk. (Tr. 187.) He would not forward any proofs to the engravers unless Marshall provided all the proper documentation.

45 At the same time, the number of bag orders that Rose completed in a day declined. Wise testified that after he gave Rose the note to file, Rose began leaving unfinished bag orders on his desk at the end of the shift with post-its notes stating, “You need to get a brand card,” “You need to get an order.” (Tr. 190.) Wise estimated that on any given day Rose would leave

50 ² Wise testified that he did not know that Rose had not been proofreading as required by his job description. (Tr. 189; G.C. Exh. 3.)

three to six unfinished bag orders on his desk. (Tr. 46-47.) Wise stated that he was required to finish the orders and had to communicate more with customer service in order to do so. (Tr. 190-191.) According to Wise, other printing department employees also complained to him that the bag orders were not being processed properly.³ (Tr. 41, 77, 84.)

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On September 30, 2002, the third step grievance meeting was attended by several high ranking Union and management representatives, including International Union Representative Joe Ramsey, Local Union President George Houston, Individual Charging Party Jeffery Rose, Plant Manager, Ron Pettinger, Production Manager Elmer Meese, and Printing Department Manager Sid Wise. Rose gave his side of the story. He explained how the Purina bag order was processed and that he obtained verbal approval from Marshall to use the old proof. Pettinger told Rose that Marshall disagreed with his version of the story. (Tr. 223.) Wise was less diplomatic. He implied that Rose was not telling the truth, which offended Rose. (Tr. 129-130, 142-143.) Rose replied that Marshall was not telling the truth. (Tr. 129-130.) According to Wise, Rose also stated that he would no longer communicate with CSR Marshall at which point Pettinger told Rose that communicating with Marshall was part of his job. (Tr. 188, 223-224.) Rose then clarified that "he had no problem discussing anything to do with business, but on personal matters, socially, [he] did not talk to Erin Marshall anymore."⁴ (Tr. 104.)

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The issue of proofreading was also discussed. According to Wise, Rose stated that he was not going to proofread any of the bags before they went to final printing.⁵ (Tr. 55.) Pettinger told Rose that it was his responsibility to proofread and he reiterated that point more than once to make sure that Rose, and his Union representatives, understood what his job duties entailed. (Tr. 224-226.) Rose did not dispute, object or disagree with Pettinger regarding his job responsibilities. (Tr. 225, 232.)

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5. The reassignment of Rose

On October 3, Engraver Darryl Beam complained to Wise about a stack of branded bags with post-it notes that were left by Rose. (Tr. 191, 211.) Wise estimated that there were 10-12 unfinished bag orders that he and Beam had to complete. Wise discussed the situation with Plant Manager Ron Pettinger. Pettinger testified that he concluded that Rose was defying his directives that he communicate with customer service and check over his work.⁶ (Tr. 226-227, 230.) Pettinger told Wise that it was too costly to allow Rose to decide for himself what he was going to do and who he was going to communicate with.⁷ (Tr. 227.) Wise decided to reassign Rose.

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³ Although Wise testified that he verbally counseled Rose once for not getting his job done by the end of the shift, he took no written disciplinary action against Rose. (Tr. 204-206.)

⁴ At trial, Wise conceded that after Pettinger told Rose that it was part of his job to communicate with Marshall, Rose clarified that he did not talk to her about personal matters. (Tr. 44.)

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⁵ Oddly, Wise admitted that it is the supervisor's responsibility to check the proofed bag for accuracy before it goes to the final printing press. (Tr. 56.)

⁶ There is no evidence that Rose refused to proofread after the September 30 meeting.

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⁷ Pettinger testified that Marshall had told him that Rose was not communicating with her, other than by voice messages, and by dropping notes in her mail box. (Tr. 229, 232.) At trial, Marshall contradicted Pettinger. She testified that she told Pettinger that Rose only spoke to her about business matters. (Tr. 186.) She further testified that Rose phoned her frequently and went to her department if needed. (Tr. 183.)

On October 4, 2002, Wise told Rose that he was being reassigned from the branded bag room to a floor moulder/proofer position. (Tr. 45, 95-96.) Wise further testified that he told Rose he was being reassigned because of his bad attitude and poor job performance. (Tr. 48, 195.) Rose told Wise that he would file another grievance. (Tr. 49.)

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On October 8, Rose, accompanied by Union President, George Houston, and Shop Steward, Gerald Dunn, met with Wise in the engraving room seeking an explanation for why Rose was reassigned. (Tr. 51.) There are different recollections of Wise's response.

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Wise testified that he told Houston and Dunn that Rose was reassigned because of his bad attitude and poor performance. (Tr. 107, 197.) Wise stated that they asked him "if the decision to remove Rose from the branded bag room was connected in any way to the grievance that was filed over his note to file that he received in May of 2002," and that he told them that "[t]he only connection with the grievance meeting and the decision to remove him was what he said during the grievance meeting and he also followed through with the threats that he made." (Tr. 52, 198.) Wise elaborated that Rose "made statements in the grievance meeting that he was not going to communicate with Erin Marshall and he also made a statement that it was not his job to proofread and he would not proofread ...[a]nd those statements, the following through of those statements was what made the decision, made my decision." (Tr. 52.)

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Rose testified that Wise stated that he reassigned Rose because of his bad attitude and the grievance he filed. (Tr. 107.) Wise denied that he ever stated that Rose was removed because he filed a grievance. (Tr. 199.) He stated that if Rose had done his job, he would not have been reassigned even though he filed a grievance. (Tr. 200.) For demeanor reasons, I credit Wise's testimony denying that he told Rose he was reassigned because he filed a grievance.

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Houston testified that Wise told him that Rose's "bad attitude got him removed from the room, and that things that had come out during the third step hearing also were part of the reason..." (Tr. 138.) Houston further testified that Wise stated, "If Jeff had not screwed the bag up to begin with, he wouldn't have had a grievance, and all of these negative things wouldn't have never come out, and he'd still be there." (Tr. 140.)

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Dunn testified that when he asked Wise "so if he didn't file the grievance, he'd still be in his position?" Wise replied, "Yes." (Tr. 108.) In his pretrial statement, Dunn stated that, "Houston asked Wise if Rose would have been removed from the job if he had not filed the grievance," to which Wise responded, "Obviously, the grievance was a problem." (Tr. 168-169.) Dunn also testified that Wise stated, "that the meeting did have a lot to do with Jeff's job." (Tr. 170) As a result, Dunn filed a grievance on behalf of Rose over the reassignment.

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Based on the evidence viewed as a whole, I find that the thrust of Wise's response to Houston, Dunn, and Rose was that he reassigned Rose because he displayed a bad attitude in the second and third step grievance meetings by stating that he would not proofread or communicate with Marshall and because Wise felt that he had followed through on those statements afterwards by not properly performing his job duties.

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B. Analysis and Findings

The evidence carefully scrutinized discloses that Wise decided to reassign Rose in part because of the comments that he made during the September 30 meeting (Tr. 202) and in part because of his job performance. A dual motive *Wright Line*⁸ analysis is therefore required. See, e.g., *Atlantic Steel Erectors, Inc.*, 339 NLRB No. 152, slip op., page 2 (August 2003) (single motive cases do not require a *Wright Line* analysis).

1. The General Counsel's evidence

The General Counsel argues that Rose was reassigned in violation of Section 8(a)(3) of the Act because he was a union shop steward at one point in time; because he filed a grievance concerning the note to file; and because of the comments he made during the September 30 grievance meeting.

The evidence shows that Rose has been a Union member since 1985. From approximately 1995 to 2000, he was a Union shop steward. (Tr. 93.) However, there is no evidence of past or present hostility by the Respondent toward the Union. Nor is there any evidence of discriminatory action directed at Rose while he was a shop steward. Rather, the evidence shows that Wise was not even employed by the Respondent when Rose was a shop steward. I find that the General Counsel has failed to show any correlation between Rose's reassignment and his past Union activity and/or his Union membership.

Nor does the evidence show that Rose was reassigned because he filed a grievance. First, the timing of the reassignment is too far removed to reasonably infer a cause-and-effect relationship. Rose filed a grievance concerning the note to file on June 5, 2002. Three months later, on September 30, a third step grievance meeting was held. Four days after that, Rose was reassigned. I find that a 3-month lapse in time is too attenuated to support an inference that the filing of the grievance triggered the reassignment. In addition, there is no evidence that the Respondent displayed any hostility toward Rose during the 3-month period. To the contrary, the evidence shows that despite the fact that Rose left unfinished bag orders on Wise's desk, he did not even discipline him. Thus, I find that the General Counsel has failed to show that Rose was reassigned on October 4, 2002, because he filed a grievance.

Regarding the comments Rose made during the September 30 grievance meeting, the evidence shows that Rose (1) described how he processed the order and his phone conversation with Erin Marshall, (2) explained that after the Purina bag incident he only spoke to her concerning business matters,⁹ and (3) he disputed that it was his responsibility to proofread at various stages of the process. There is no evidence that these statements were made in a loud or threatening manner or that they were accompanied by obscenities or that they were made during a heated argument. In addition, the undisputed evidence shows that after Pettinger made it very clear that it was Rose's responsibility to communicate with Marshall and that he was required to proofread for accuracy everything that came across his desk, Rose neither disputed, objected or disagreed with Pettinger's statements concerning his responsibility to perform those duties. (Tr. 225, 232.) Based on this evidence, I find that Rose was engaged in

⁸ 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

⁹ Human Resources Director James Dwyer recalled Rose stating that he was not going to act on verbal approvals from Marshall and that he was going to get everything in writing. (Tr. 234.)

protected concerted activity during the September 30 grievance meeting and that his comments did not fall outside the boundaries of protected activity. Because Wise admitted that Rose's comments made during the September 30 meeting were a factor in his decision to reassign him, I find that the General Counsel has satisfied his initial *Wright Line* evidentiary burden.

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2. The Respondent's evidence

Printing Department Manager Sidney Wise testified that he decided to reassign Rose because of the comments he made during second and third grievance meetings and because of his job performance afterwards. (Tr. 54-55.) He asserted that despite Rose's remarks during those meetings, he would not have been reassigned if he had performed his job.

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Concerning Rose's comments, Wise asserted that Rose refused to communicate with Marshall, and that he followed through on this statement. The assertion is not completely accurate. While Rose may have made such a statement during the second step grievance meeting, the evidence shows, and Wise conceded, that at the third step grievance meeting, Rose stated that he would not talk to Marshall regarding personal matters. (Tr. 44, 103-104.) More specifically he stated that he would speak to her only about business matters. The evidence shows that Rose was true to his word. After he received the note to file, he maintained a "strictly business" working relationship with CSR Marshall. He had less face-to-face contact with her and went to the customer service department only when necessary. (Tr. 183.) He communicated with her more frequently by phone, and left voice messages if she was away from her desk. (Tr. 187.) Moreover, Marshall testified that she had explained this to Pettinger when he asked if Rose was talking to her. (Tr. 186.) Thus, contrary to Wise's assertions, Rose did not refuse to communicate with Marshall.

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Although there is no evidence that Rose refused to proofread after he received the note to file, the evidence shows that he continued to assert that it was not his responsibility to proofread the proofs after they returned from the customer, until Pettinger told him on September 30 that he was responsible for proofreading everything that came across his desk. Indeed, Rose testified that he told Pettinger at the September 30 meeting, "if he wanted me to proof read the proofs before they went up to customer service, to let me know and I would be happy to do so." (Tr. 126.) His testimony implies that Rose was not proofreading everything that he should have been proofreading. I find that the evidence viewed as a whole supports a reasonable inference that Rose was not proofreading in accordance with his job description, after he received the note to file.¹⁰

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Wise also stated that Rose failed to complete several branded bag orders on any given day, including October 3, which was another reason why his job performance was lacking. Wise typically had to complete the orders himself and often had to contact customer service to obtain the information to do so. Rose did not deny that that he often left three to six unfinished bag orders on Wise's desk with post-it notes. Nor did he explain why. He testified that if the schedules were late, he would not be able to complete some orders, and pointed out that on those occasions he asked Wise if he should stay late, but Wise would not approve overtime for him to complete the job. (Tr. 127.) Rose did not explain, however, how often that occurred nor did he specifically give that as a reason for leaving work for Wise on a continuous basis.

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¹⁰ The evidence shows that Rose's responsibilities were to, "[p]roof read all proofs that are received and reflect the customers requirements and specifications" and "[c]heck negs. With brand bag, to assure that they match." (G.C. Exh. 3.)

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The undisputed evidence shows that on October 3, Engraver Darryl Beam brought approximately 12 unfinished branded bag orders to Wise, and that Wise and Beam had to complete the orders themselves in order to maintain production. This was one more example of an ongoing problem that appeared to be getting worse.

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The General Counsel points out that Wise never took any disciplinary action against Rose for failing to complete his work on time. It therefore argues that the September 30 meeting must have been the event that triggered the reassignment. I disagree. Rather, the evidence viewed as a whole shows that the September 30 meeting was a part of an ongoing chain of events that began soon after Rose received the note to file. As time went on the situation did not improve. Rose was not doing the job the way it was supposed to be done, and more importantly, he was not getting the job done. On October 3, Wise concluded that it was only getting worse. Looking back over the past three months, and reflecting on the statements that Rose had made during the grievance meetings, Wise realized that Rose was not going to change, so he reassigned him.

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I find that the Respondent has satisfied its *Wright Line* evidentiary burden. I find that the Respondent has persuasively shown that it would have reassigned Rose, even if he had not made certain statement during the September 30 grievance meeting. Accordingly, I shall recommend that the complaint be dismissed.

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Conclusions of Law

The Respondent has not violated the Act in any manner alleged in the complaint.

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On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹¹

ORDER

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The complaint is dismissed.

Dated, Washington, D.C. November 21, 2003

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C. Richard Miserendino
Administrative Law Judge

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¹¹ 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.

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