

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

TOLL MANUFACTURING COMPANY

and

Case 9-CA-37449-R

LESLIE R. PARDUE, an Individual

Engrid Emerson Vaughan, Esq.,
for the General Counsel.
Michael Glassman, Esq., of Cincinnati, Ohio,
for the Respondent.
Dianne Pardue, for the Charging Party.

SUPPLEMENTAL DECISION

JOHN T. CLARK, Administrative Law Judge. I initially heard this case in Dayton, Ohio, on December 12, 2000. On July 5, 2001, my recommended decision issued finding that Toll Manufacturing Company (Respondent) violated Section 8(a)(3) and (1) of the National Labor Relations Act by discharging employee Leslie R. Pardue on February 23, 2000, because of his union or other concerted activities. The Board, in the absence of exceptions being filed by any party, adopted the recommended Decision and Order in an unpublished Order dated October 26, 2001.

On July 10, 2002, counsel for the General Counsel, pursuant to Section 102.28(d)(1) of the Board's Rules and Regulations, filed a motion requesting that the record be reopened and the case remanded to me for further hearing. The basis for the motion was newly discovered evidence that cast doubt on the testimony of Charging Party Leslie R. Pardue, and inferentially, on the testimony of his corroborating witness Dianne Langford Pardue, regarding a material fact. The material fact concerned the Pardues' credited testimony, over the Respondent's denial, that Leslie Pardue telephoned the Respondent from their home in Dayton, Ohio, between 7 and 9 a.m. on February 21 and 23, 2000, to report off from work. The Board granted the motion and issued, by direction, an unpublished Supplemental Order dated September 3, 2002.

The Board's Supplemental Order vacates its October 26, 2001 Order, remands the case to me for the purpose of reopening the hearing, taking additional testimony concerning the calls on February 21 and 23, 2000, and issuing a decision with findings, conclusions, and recommendations. Pursuant to the Board's Order and my Order, the Regional Director for Region 9 on October 1, 2002, issued an intent to issue notice of supplemental hearing, and on October 17, 2002, issued the Order scheduling the hearing. Accordingly, the supplemental hearing in this matter was held on November 19, 2002, in Dayton, Ohio.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by counsel for the General Counsel¹ and the Respondent, I make the following²

5 Findings of Fact

1. Background

10 The findings of fact are more fully set forth in the attached initial decision, to which no exceptions were filed. The complaint alleges that the Respondent discharged Leslie Pardue on February 23, 2000, because of his union or other concerted activities. The Respondent argues that Pardue was discharged for two incidents where he failed to properly clock in after lunch and for failing, on February 21 and 23, 2000, to notify the Respondent that he would not be at work within 2 hours of the start of his shift.

15 I found that neither timeclock incident should have resulted in discipline, that the Respondent never investigated either incident, did not inform Pardue about the discipline until it was used as a basis for his discharge, and that the discipline was excessive, even when compared with the Respondent's written policy of progressive discipline. Regarding the
20 contention that Leslie Pardue failed to show up or report off work within the allotted time I credited his, and Dianne Pardue's testimony, that he had notified the Respondent by telephone sometime after 7 a.m., on both days, that he would not be at work. The Respondent denied receiving either call.

25 Neither the above findings, nor any portion of the decision, was contested by any party. The Board adopted the recommended Decision and Order on October 26, 2001, and the Respondent complied with the nonmonetary provisions of the Order. As part of a compliance investigation to determine the amount of backpay owed to Pardue, Pardue provided an affidavit,
30 dated October 25, 2001, stating that he was unable to work anywhere, from February 23, 2000, until mid-September 2000 (GC Exh. X, Deponent's Exh. 4 at 1-2). On November 8, 2001, Pardue submitted another affidavit, and pay stubs, indicating that he had worked for Crown Temporary Services during February 2000. Eventually the Region obtained timecards showing that Pardue clocked in at 7:32 a.m. and 7:36 a.m. on February 21 and 23 respectively, at Zoom
35 Products, an employer located in the Cincinnati, Ohio area. In a March 6, 2002 deposition, Pardue estimated that his residence was "about 60 some miles" from where he worked at Zoom Products. He further estimated that it took him from 45 minutes to an hour to drive that distance (GC Exh. X at 22-23). Faced with the newly discovered timecards, and the obvious
40 discrepancies, the General Counsel moved to reopen the record and remand the case.

40

45 ¹ Counsel for the General Counsel's unopposed motion to correct the transcript, dated Dec. 23, 2002, is granted except that "Diane" is changed to "Dianne," based on Ms Pardue's spelling in her brief.

50 ² Ms Pardue filed a document entitled "brief," on behalf of the Charging Party. The document was untimely filed and I served it on the parties. The document argues facts not in evidence, and generally is of no probative value. It was obvious at the hearing that Ms Pardue is not legally trained and is unfamiliar with labor law. The document is included solely to complete the record.

2. Supplemental Hearing

At the original hearing Pardue testified that he had Dianne Pardue call the Respondent “a little after 7 a.m.” on February 21 from their residence in Dayton, Ohio (Tr. 85,127). He
5 estimated that he and Dianne Pardue spoke with Plant Manager Chad Donley for a total of
“approximately ten minutes, maybe” (Tr.128). Regarding the call-in on February 23, his
testimony was more specific. Pardue stated that he knew that Dianne called Donley at 7:20
a.m. because he “looked at the clock,” and that the call lasted approximately 10 minutes.
(Tr.78, 128).

10 In his March 6, 2002 deposition, Pardue initially denied being at Zoom Products on
February 21 and 23, however, after being confronted with his timecards he admitted that he
could not have called the Respondent (GC Exh. X at 22–23, 59). Pardue also estimated that it
took him at least 45 minutes to drive from his residence to Zoom Products (GC Exh. X at 22).
15 Pardue does not deny the authenticity or accuracy of the timecards.

At the supplemental hearing Pardue contended that the conversation between himself,
Dianne Pardue, and Donley lasted no longer than 2 minutes. He estimated that he only drove
30 miles to work at Zoom and that it took only 27 to 30 minutes. Pardue further stated that the
20 route he drove was entirely on 2 lane roads, consisted of at least 7 turns and “a couple” of stop
signs, and was driven at speeds in excess of 60 miles per hour. (Supp. Tr. 69, 86–89).

Assuming, for the sake of argument, that his statements do not defy the laws of physics,
Pardue’s current version of the events on February 21 might be mathematically possible.
25 Regarding the morning of February 23, 2000, however, not only must it be believed that his
travel time took not 45 minutes to an hour, but 27 to 30 minutes, that the entire conversation
lasted not 10 minutes, but only 2 minutes, and last, but not least, that the conversation occurred
not at 7:20 a.m., but at 7 a.m. This last fact is the most disconcerting. In his sworn testimony at
30 the initial hearing he not only testified to the specific time that the call was made, 7:20 a.m., but
that the reason he knew the exact time was because he had “looked at the clock.” The only
generalized explanation Pardue offered regarding his contradictory statements is that he was
taking medication at the time of the initial hearing, as he was at the time of the supplemental
hearing. Pardue offered no corroborating evidence to demonstrate that any medicine he was
35 taking was capable of causing this great a memory lost or state of confusion. Based on my
observations of him during both hearings, he did not appear to be under the influence of any
substance, prescribed, or otherwise.

At the supplemental hearing Dianne Pardue, once again, attempted to corroborate her
husband’s testimony. Thus, she testified that the calls were made around 7 a.m., and that
40 Pardue drove himself to Zoom Products in only 27 or 30 minutes. At the initial hearing Dianne
Pardue testified that the telephone call on February 21 was made approximately around 7 a.m.
and the call on February 23 was “approximately between 7:15 and 7:20.” She also recalled the
time of the calls because she looked at the clock each time she called. (Tr. 177, 180). When
asked to explain these, and other contradictory statements in her testimony, she stated that
45 emotional stress caused her to be psychologically sick.

Based on the foregoing obvious and unexplained contradictions I do not credit the
testimony of Leslie Pardue or Dianne Pardue regarding the alleged telephone calls to the
Respondent on February 21 and 23, 2000. I find that their testimony at the original hearing
50 concerning the telephone calls is false, and that their testimony at the supplemental hearing is
an attempt to perpetuate the falsehood. Additionally, I find that neither Pardue has offered any
credible, mitigating circumstances which would tend to excuse or justify the false statements,

given under oath, at both hearings. Accordingly, I find that Leslie Pardue did not notify the Respondent that he would not be at work on February 21 or 23, 2000, within 2 hours of the start of his shift.

5

3. Analysis

Although Pardue's lack of truthfulness is a factor which must be weighed, the ultimate question where discrimination is alleged, and that was I addressed in the initial hearing, is the actual motivation of the Respondent. See, *Schaeff Inc.*, 321 NLRB 202, 210 (1996), enfd. 113 F.3d 264 (D.C. Cir. 1997), and cases cited therein. Thus, even if a discriminatee is lacking in credibility, a preponderance of the credible testimony and other evidence could lead to a conclusion that there has been unlawful motivation—that the respondent took disciplinary action against that employee which would not have been taken had the employee not been active on behalf of, or at least sympathetic toward, a union. See, *Wright Line*, 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).

Under the *Wright Line* methodology the General Counsel has the initial burden to persuade that antiunion sentiment was a substantial or motivating factor in the challenged decision. The fact that the General Counsel has met the burden by a preponderance of the evidence was established in the initial decision and adopted by the Board. Once the unlawful motivation is established, the burden of persuasion shifts to the Respondent to prove its affirmative defense that the alleged discriminatory conduct would have occurred even in absence of the protected activity. The test applies regardless of whether the case involves pretextual reasons or dual motivation. *Frank Black Mechanical Services*, 271 NLRB 1302 fn. 2 (1984). "A finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel." *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982).

30

The prior decision found that both reprimands for the alleged timeclock violations were prepared based solely on Donley's review of the employee timesheets. There was no attempt to notify Pardue of the reprimands before they were used as a basis for his discharge. Donley never attempted to question Pardue about the incidents or to conduct any independent investigation. Donley's conduct is an objective indication of unlawful motivation. See *Handicabs, Inc.*, 318 NLRB 890, 897 (1995), enfd. 95 F.3d 681, 685 (8th Cir. 1996). An additional objective indication of unlawful motivation is that the issuance of the warnings was inconsistent with the Respondent's progressive discipline system. *Tubular Corp.*, 337 NLRB No. 13 (2001). Thus, as found in the initial decision, it was evident from the outset that the Respondent "was looking for a way to be rid of the leading union adherent," and the Respondent was ordered to remove the unlawful disciplinary actions, dated February 2 and February 3, from its files. It follows that the subsequent discharge, which was based in part on those warnings, also violates the Act.

45

I disagree with counsel for the General Counsel's current position that "the Employer's method for handling prior no-call/no-show violations does not reveal such disparate treatment in the new context of Pardue's failure to call in" (GC Supp. Br. 11, fn. 8). Pardue's lack of credibility does not negate the Respondent's disparate treatment of him. As counsel for the General Counsel correctly argued in the initial hearing "assuming arguendo that Pardue did not call in on the days in question, the record establishes Donley's disparate treatment of Pardue in discharging him for a violation of a policy which Respondent's records show normally was applied to employees who just simply did not show up for work and were not heard from

50

thereafter”(GC Br. 8). The Board has repeatedly stated that evidence of “blatant disparity is sufficient to support a prima facie case of discrimination.” *Sears, Roebuck & Co.*, 337 NLRB No. 65, slip op. at 1 (2002) and cases cited therein.

5 “The Board has long held that “[a]n employer cannot simply present a legitimate reason for its actions 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.” *Key Food* 336 NLRB No. 6, slip op. at 2 (Citations omitted.) (2001). The “mere existence of valid grounds for a discharge is no defense to a charge that the discharge was unlawful, unless the discharge was predicated solely on those grounds, and not by a desire to discourage union activity.” (Citation omitted.) *NLRB v. Symons Mfg. Co.*, 328 F.2d 835, 837 (7th Cir. 1964). Accord: *Singer Co. v. NLRB*, 429 F.2d 172, 179 (8th Cir. 1980).

4. Conclusion

15 Based on the foregoing I reaffirm the initial Decision and Order issued on July 5, 2001, (JD-91-01) (attached), finding that the Respondent violated Section 8(a)(3) and (1) of the Act by unlawfully discharging Leslie Pardue.

Remedy

20 The Respondent has complied with all aspects of the remedial order except the backpay award. The Board has broad remedial discretion in fashioning an appropriate remedy. The Supreme Court concluded that, despite an employee’s false testimony, the Board’s decision not to make a categorical exception to the usual remedy of reinstatement with backpay was within the Board’s broad discretion. *ABF Freight System, Inc. v. NLRB*, 510 U.S. 317, 325 (1994). The Board will withhold the usual remedy of reinstatement with backpay from a discriminatee who makes false statements at a hearing when the discriminatee’s conduct “amount[s] to a malicious abuse of the Board’s processes under circumstances which require forfeiture of remedy to effectuate the purposes of the Act.” *Service Garage*, 256 NLRB 931 (1981). When possible the Board seeks to find a balance “between the equally important policies of discouraging unfair labor practices by remedying them” and protecting the Board’s processes. *Victor’s Café 52, Inc.*, 338 NLRB No. 90, slip op. at 4 (2002).

35 Certainly the false testimony of Leslie and Dianne Pardue, is a “flagrant affront” to the Board’s processes, that should not be condoned nor rewarded. *ABF*, above at 323. Their false testimony is not, however, material to the outcome of the case and probably does not fall within most statutory definitions of “perjury.” *Service Garage*, above at 935 fn. 4. I have also considered the fact that to deny Pardue backpay would, in essence, be rewarding the Respondent-wrongdoer. See generally *Airport Park Hotel*, 306 NLRB 857, 858 (1992), and cases cited therein (applying the principle, in the context of a backpay proceeding, that uncertainties are resolved against the Respondent-wrongdoer). Under the circumstances of this case I find that it will not effectuate the purposes of the Act to require forfeiture of the traditional remedy of backpay as set forth in the “Remedy” section of the initial decision.

45

50

ORDER

5 Based on the foregoing I reaffirm the initial Decision and Order that issued on July 5,
2001, (JD-91-01), attached, and adopted by the Board on October 26, 2001.

Dated, Washington, D.C. April 23, 2003.

10

15

John T. Clark
Administrative Law Judge

20

25

30

35

40

45

50

JD-48-03
Dayton, OH