

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

HORIZON CONTRACT GLAZING, INC.,

and

Case 20-CA-32880

DISTRICT COUNCIL OF PAINTERS NO. 16,
GLAZIERS, ARCHITECTURAL METAL AND
GLASSWORKERS LOCAL UNION NO. 767,
INTERNATIONAL UNION OF PAINTERS AND
ALLIED TRADES, AFL-CIO,

Micah Berul, Esq. and Cecily A. Vix, Esq.
of San Francisco, California, for the General Counsel.

Joseph Santos, Organizer
District Council No. 16, Northern California
of Livermore, California, for the Charging Party Union.

*Thomas A. Lenz, Esq. (Atkinson, Andelson, Loya,
Ruud & Romo)* of Cerritos, California, for the Respondent.

DECISION

Statement of the Case

JAY R. POLLACK, Administrative Law Judge. I heard this case in trial at Sacramento, California, on July 18, 2006. On February 6, 2006, District Council of Painters No. 16, Glaziers Architectural Metal and Glassworkers Local Union No. 767, International Union of Painters and Allied Trades, AFL-CIO (the Union) filed the original charge alleging that Horizon Contract Glazing, Inc. (herein called Respondent) committed certain violations of Section 8(a)(3) and (1) of the National Labor Relations Act, as amended (29 U.S.C. Section 151 et seq., herein called the Act). On April 28, 2006, the Regional Director for Region 20 of the National Labor Relations Board issued a complaint and notice of hearing against Respondent, alleging that Respondent violated Section 8(a)(3) and (1) of the Act by failing to recall from layoff employee Joe Upchurch because he engaged in union activities or other protected concerted activities. On June 29 the Regional Director issued an amended complaint. Respondent filed timely answers to the complaints, denying all wrongdoing.

The parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. Upon the entire record, from my

observation of the demeanor of the witnesses,¹ and having considered the briefs submitted by the parties, I make the following.

Findings of Fact

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I. Jurisdiction

Respondent is a California corporation with a place of business in West Sacramento, California, engaged in the construction industry as a glass and glazing contractor. During the calendar year ending December 31, 2005, Respondent purchased goods valued in excess of \$50,000 directly from suppliers located outside the State of California. 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.

Respondent admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair labor Practices

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A. Background

Respondent performs glass sub-contracting work in the Sacramento area, with projects in other areas of Northern California. Respondent was signatory to union contracts for ten years until 2000. Respondent enjoyed an amicable relationship with the Union until there was a disagreement with the management of the Union. In sum, Respondent contended that Sacramento was a different market than the San Francisco Bay Area while the Union's management, under the leadership of Gene Massey, business manager, sought the same benefits and wages for the Sacramento Area. Since 2000, the Union has picketed Respondent on a regular basis.

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Pat Shurnas is president and owner of Respondent. Shurnas is proud of his past affiliation with the Union and has no animus against union membership. Shurnas' dispute is with Gene Massey, the Union's business manager and secretary-treasurer, and Doug Christopher, the Union's director of services. The Union has sought to obtain a collective bargaining agreement from Respondent but Shurnas has refused to sign an agreement while Massey is in charge of the Union. Shurnas' daughter, Michelle Klein, Respondent secretary-treasurer, is also proud of her past affiliation with the Union. Klein formerly served on the Joint Apprenticeship Committee, a joint employer-union apprentice training committee, and would like to serve on that committee again. Klein, similar to Shurnas, is unhappy with the way Massey runs the Union.

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On October 14 the Union, pursuant to a newspaper advertisement, sent a number of organizers and business agents to apply for work with Respondent. These employees wore union hats and shirts and did not hide their union affiliations. These employees were overt

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¹ The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Manufacturing Company*, 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction to the findings herein, their testimony has been discredited, either as having been in conflict with credited documentary or testimonial evidence, or because it was in and of itself incredible and unworthy of belief.

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union “salts”. “Salting” is the name given to the practice of unions sending union members to nonunion employers seeking employment and once employed the “salt” tries to organize the employer. None of these overt salts were hired nor were their references checked.

5 On October 18 Joseph Upchurch, a union organizer and business representative, applied for work with Respondent. Upchurch is a certified journeyman glazier.² While Upchurch applied to work as a glazier he was also a covert union “salt.” Believing that union affiliation would eliminate the possibility of employment, Upchurch did not list employment with union contractors nor his current employment with the Union on his job application. Rather, Upchurch
10 listed a false employment history in Louisiana, believing that Hurricane Katrina would make checking employment references in that area difficult or impossible.³ On October 18 Upchurch was interviewed by Chris Toepfer Respondent’s glazing superintendent. Toepfer asked why Upchurch listed only one former employer and Upchurch answered that he had worked for that employer for the 10-year history requested by the employment application. Upchurch was hired
15 that date and began work the following day.

 During October, Upchurch worked eight full days for Respondent. During that time Toepfer praised his work. On October 31 Upchurch was laid off for lack of work. Upchurch was laid off because he was the least senior employee and there is no contention that there were
20 any issues with his work. Further, there is no contention that this lay off was related to his union activities or union membership.

 Also on October 31, Shurnas directed Klein to call the employer in Louisiana listed on Upchurch’s job application. Shurnas does not normally check references but testified that
25 because he had lived in Louisiana and because Upchurch had worked for one employer for ten years this interested him. When Klein called the employer in Louisiana, she was told that they had no record of Upchurch. Respondent took no action at that time. Shurnas testified “I kept it to myself. . . it’s not a paramount thing.” In fact, the next day, Shurnas instructed Toepfer to recall Upchurch.
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 On November 1 Upchurch and Joseph Santos, another union organizer, went to one of Respondent’s jobsites to organize. At this time, Upchurch identified himself as a union organizer and handed out his union business card. That same morning, one of Respondent’s employees called Toepfer and told him that Upchurch was organizing for the Union and had
35 handed him union materials. Toepfer then informed Shurnas of Upchurch’s activities. At this time, after learning that Upchurch was a union organizer, Shurnas decided that Upchurch was not a victim of Hurricane Katrina.

 However, on the afternoon of November 1, Toepfer called Upchurch to offer him work on a jobsite in Santa Rosa, California. Upchurch reminded Toepfer that he had a previously scheduled, pre-paid vacation to Las Vegas. Toepfer and Upchurch agreed that Upchurch would report to work on November 8 at the Santa Rosa jobsite. Upchurch went to Las Vegas on his vacation.
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 On November 3 Toepfer left a voice mail for Upchurch instructing him not to report to the Santa Rosa jobsite. Upchurch arrived home from his vacation late on the evening of November 7 and reported to work on the morning of November 8. He had neglected to check
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² Respondent concedes that Upchurch is a qualified glazier.

50 ³ Upchurch testified that he listed employment in the Hurricane Katrina area to make checking his references difficult and not to appeal for sympathy.

his voice messages. When Upchurch arrived at the jobsite he was told that there was no work for him. Later that morning, Upchurch spoke with Klein and was told that he was not supposed to be on the job. After some discussion about how much Upchurch was due, Klein agreed to pay Upchurch for his time that day.⁴ When he returned home, Upchurch heard the voice message previously left for him by Toepfer.

On November 17 Upchurch returned to Respondent's shop seeking further employment. Toepfer told Upchurch that there was no work available for him. Upchurch has not been recalled by Respondent although Respondent has since hired two employees to do glazing work for which Upchurch was qualified.⁵

Shurnas testified that he would not rehire Upchurch because of the falsification of his job application and because of Upchurch's behavior regarding the misunderstanding regarding Upchurch's reporting to work on November 8. Shurnas further testified that instead of receiving an apology from Upchurch for not listening to his answering machine, Respondent was required to pay Upchurch more than Upchurch needed or wanted. Shurnas testified that he would not rehire Upchurch "unless forced to do so."

B. The Failure to Rehire Upchurch

In cases involving dual motivation, the Board employs the test set forth in *Wright Line, A Division of Wright Line, Inc.*, 251 NLRB 1083, 1089 (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, 399-403 (1983). Initially, the General Counsel must establish by a preponderance of the credible evidence that antiunion sentiment was a "motivating factor" for the discipline or discharge. This means that General Counsel must prove that the employee was engaged in protected activity, that the employer knew the employee was engaged in protected activity, and that the protected activity was a motivating reason for the employer's action. *Wright Line, supra*, 251 NLRB at 1090. Unlawful motivation may be found based upon direct evidence of employer animus toward the protected activity. *Robert Orr/Sysco Food Services*, 343 NLRB No. 123, slip op. at 2 (2004). Alternatively, proof of discriminatory motivation may be based on circumstantial evidence, as described in *Robert Orr/Sysco Food Services*, id:

To support an inference of unlawful motivation, the Board looks to such factors as inconsistencies between the proffered reasons for the discipline and other actions of the employer, disparate treatment of certain employees compared to other employees with similar work records or offenses, deviations from past practice, and proximity in time of the discipline to the union activity. *Embassy Vacation Resorts*, 340 NLRB No. 94, slip op. at 3 (2003).

⁴ Klein testified that Upchurch gave her a lecture on the NLRB. She testified that she was confused about his intentions. Thereafter, Klein initially issued a check to the wrong person. Klein left Upchurch a message and then later corrected the situation. Klein stated that she was concerned that Upchurch would go to the NLRB, "about a problem that wasn't even our fault."

⁵ Respondent stipulated that it hired employees to positions for which Joseph Upchurch was qualified after November 8, 2005. An issue arose over the meaning of that stipulation and, therefore, Respondent stipulated that "two people were hired to glazing work." Respondent further stipulated that "falsification" was the main impediment to employment with Respondent. In its brief Respondent argues that Respondent has not hired any glaziers since November 2005. In view of its stipulations, I gave no credence to that statement in Respondent's brief.

When the General Counsel has satisfied the initial burden, the burden of persuasion shifts to Respondent to show by a preponderance of the credible evidence that it would have taken the same action even in the absence of the employee's protected activity. If Respondent advances reasons which are found to be false, an inference that the true motive is an unlawful one may be warranted. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966); *Limestone Apparel Corp.*, 255 NLRB 722 (1981), *enfd.* 705 F.2d 799 (6th Cir. 1982). However, Respondent's defense does not fail simply because not all the evidence supports its defense or because some evidence tends to refute it. *Merrilat Industries*, 307 NLRB 1301, 1303 (1992). Ultimately, the General Counsel retains the burden of proving discrimination. *Wright Line*, *supra*, 251 NLRB at 1088, n. 11.

In order to establish a discriminatory refusal to recall violation, the General Counsel must establish the following elements: (1) Respondent was hiring or had concrete plans to hire or recall at the time of the alleged unlawful conduct; (2) that it excluded the discriminatee from the hiring or recall process; (3) that the discriminatee had experience and training relevant to the generally known requirements of the positions; and (4) that anti-union animus contributed to the decision not to consider for recall and to recall the discriminatee. See *Landmark Installations, Inc.*, 339 NLRB 422 (2003); see also *Wayne Erecting, Inc.*, 333 NLRB 1212 (2001) citing *FES, (A Division of Thermo Power)* 331 NLRB 9 (2000).

In the instant case, there is no issue that Respondent hired employees for glazing work, that Upchurch was qualified for and that Respondent had excluded Upchurch from recall. The issue is whether Respondent's actions were motivated by its animus against the Union's leadership or because of Upchurch's falsification of his job application.

In the instant case, Respondent had no animus against union members or union membership. Respondent, however, admitted animus against Gene Massey and his leadership of the Union. The overt union salts who applied for work shortly before Upchurch applied were not hired. Therefore, Upchurch, a union employee who worked under Massey, was sent as a covert salt. Believing that if he gave accurate employment history he would never be hired, Upchurch falsified his application and was hired.

In *Winn-Dixie Stores, Inc.*, 236 NLRB 1547 (1978), the Board addressed this point and found a violation where a discharge was allegedly for failing to reveal in a job application previous employment as a union business representative. The Board held that the employee's failure to make such disclosure [employment by a union] is not analogous to false statements on other subjects such as education or criminal convictions. It therefore concluded that the evidence of that respondent's policy and practice of terminating other employees for falsifying their employment applications, even if proven, did not justify a finding that the respondent had discharged the employee for not disclosing his union employment. In *Winn-Dixie Stores*, at 1547-1548, the Board held:

For, being aware of Respondent's hostility toward unions, [the discriminatee] knew that he must either falsify the information as to his employment background or face the probability that Respondent would (unlawfully) refuse to hire him. Certainly the purposes of the Act would not be effectuated by finding lawful a discharge for failure to disclose information which, were it the basis for a refusal to hire, would render such an initial refusal to employ a clear violation of the statute. Thus, we cannot find that the purposes of the Act would be served by finding that, after hiring him, Respondent could lawfully discharge [the discriminatee] for failing to disclose his union employment, but if Respondent had refused to hire him in the first place for that reason it would have

violated the Act. Accordingly, even if [the discriminatee] were discharged for the reason asserted by Respondent, we would find it thereby acted unlawfully.

After Shurnas learned that Upchurch falsified his job application he took no action. Shurnas testified that it was not a paramount thing. In fact he had Toepfer recall Upchurch the very next day. Shurnas attempted to recall Upchurch even with knowledge that Upchurch was organizing the employees on behalf of the Union.

So what changed? On November 8 Upchurch gave Klein an NLRB lecture and demanded that he be paid properly. Klein and Shurnas were displeased by this action. I find by this conduct Upchurch reinforced the fact that he was an employee of the Union (and Massey) and not just a union member. Thereafter, Upchurch was told that there was no work for him and Shurnas decided not to recall Upchurch unless forced to do so. Based upon a preponderance of the evidence, I find that General Counsel has sustained the initial burden of showing that Upchurch's employment as a union agent was a motivating factor for the failure to recall or rehire him.

Thus, the burden shifts to Respondent to establish that the same action would have taken place in the absence of the employees' union activities. Where, as here, General Counsel makes out a strong prima facie case under *Wright Line*, the burden on Respondent is substantial to overcome a finding of discrimination. *Eddyleon Chocolate Co.*, 301 NLRB 887, 890 (1991). An employer cannot carry its *Wright Line* burden simply by showing that it had a legitimate reason for the action, but must "persuade" that the action would have taken place even absent the protected conduct. *Centre Property Management*, 277 NLRB 1376 (1985); *Roure Bertrand Dupont, Inc.*, 271 NLRB 443 (1984).

Respondent has not shown a policy of discharging employees for falsification of their job applications. If termination had been warranted for falsification, Shurnas would have taken action when he learned of the falsification. Rather, he stated the matter was not paramount and he had Upchurch recalled the following day. Shurnas expressed displeasure that Upchurch allegedly posed as a victim of Hurricane Katrina. Again, Shurnas decided on November 1 that Upchurch was not a victim of Hurricane Katrina but still offered him work in Santa Rosa. Thus, as stated above, the triggering event appears to be Upchurch's "NLRB lecture" and demands for payment for reporting to work on November 8.

Thus, I find that Respondent did not persuade that Upchurch would not have been recalled absent his position as a union employee.

Conclusions of Law

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

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By failing and refusing to recall or rehire Joseph Upchurch, Respondent violated Section 8(a)(1) and (3) of the Act.

Remedy

Having found that 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 recall or rehire Joseph Upchurch, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer 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).

Respondent must also be required to expunge any and all references to its unlawful refusal to recall or rehire Upchurch from its files and notify Upchurch in writing that this has been done and that the discrimination will not be the basis for any adverse action against him in the future. *Sterling Sugars, Inc.*, 261 NLRB 472 (1982).

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

ORDER

The Respondent, Horizon Contract Glazing, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

- a. Failing and refusing to recall or rehire employee Joseph Upchurch or any other employee because he supported the Union or engaged in other concerted activities.
- b. In any like or related manner 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 Joseph Upchurch full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.
- b. Make Joseph Upchurch whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the Remedy section of the decision.

⁶ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

c. Within 14 days from the date of this Order, remove from its files any reference to the unlawful failure to recall or rehire Joseph Upchurch, and within 3 days thereafter notify him in writing that this has been done and that the discharge will not be used against him in any way.

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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 such records if stored in electronic form, necessary to analyze the amount of back pay due under the terms of this Order.

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e. Within 14 days after service by the Region, post at its facility in West Sacramento, California copies of the attached notice marked “Appendix.”⁷ Copies of the notice, on forms provided by the Regional Director for Region 20, 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 proceedings, 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 November 2005.

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f. 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.

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Dated: October 4, 2006.

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Jay R. Pollack
Administrative Law Judge

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⁷ If this Order is enforced by a Judgment of the 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.”

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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 Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities

WE WILL NOT fail and refuse to recall or rehire Joseph Upchurch or any other employee in order to discourage union membership or activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights.

WE WILL within 14 days from the date of the Board’s Order, offer Joseph Upchurch full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Joseph Upchurch whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board’s Order, remove from our files any reference to the unlawful refusal to recall or rehire Joseph Upchurch and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the refusal to recall or rehire him will not be used against him in any way.

Horizon Contract Glazing, Inc.

(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

901 Market Street, Suite 400
San Francisco, California 94103-1735
Hours: 8:30 a.m. to 5 p.m.
415-356-5130.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 415-356-5139.