Forsyth Electrical Company, Inc. *and* Local Union 342, International Brotherhood of Electrical Workers, AFL–CIO. Cases 11–CA–16631 and 11–CA–16805

March 28, 2007

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND KIRSANOW

On September 29, 2000, the National Labor Relations Board issued a Decision and Order in this case, affirming the finding of an administrative law judge that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to grant preferential reinstatement rights to three economic strikers after their unconditional offers to return to work.[1] The Board petitioned the United States Court of Appeals for the Fourth Circuit to enforce the Board's Order. By unpublished opinion dated June 30, 2003, the court denied the Board's petition, vacated its Order, and remanded the case for further explanation of the basis of its decision.[2] On December 9, 2003, the Board advised the parties of its decision to accept the court's remand and invited the parties to file statements of position addressing issues raised by the court. Thereafter, the General Counsel filed a statement of position on remand.

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

We have reviewed the entire record in light of the court's remand, which we accept as the law of the case. For the reasons that follow, we reverse the Board's prior holding that the Respondent violated Section 8(a)(3) by denying reinstatement rights to former economic strikers David Jones, John Kimball, and Douglas Hill. We find merit in the Respondent's argument that it lawfully refused to reinstate these individuals because, together with their discharged coworker Douglas Summers, they engaged in an unprotected work slowdown before going on strike. We shall therefore dismiss the complaint.[3]

I.

IBEW Local 342 (the Union) initiated a salting campaign against Respondent Forsyth Electrical in 1995.[4] Due to prior weather delays, the Respondent was working simultaneously on six jobsites in June and July. This was an unusually high number of concurrent jobs and required the Respondent to expand its usual work force of electrician mechanics and helpers in order to handle this workload and to meet imminent contractual deadlines for some jobs. In response to the Respondent's newspaper job ads, Union Agent Gary Maurice directed out-of-work union members to apply as covert salts, i.e., without disclosing their union affiliation.[5] The Respondent hired Douglas Summers and Douglas Hill in early June. On Summers' recommendation, David Jones was hired on July 3. Hill was fired after refusing to work on July 4, but the Respondent rehired him on July 15. In the interim, the Respondent hired John Kimball on July 10. All of these individuals had several years of experience and were hired as mechanics.[6]

Summers, Jones, and Kimball worked at the Respondent's Hamrick's store jobsite, where the Respondent faced an intractable July 31 completion deadline. Much of the work at this and other ongoing jobsites involved the installation of overhead light fixtures. Several witnesses testified about productivity expectations for such work. Union Agent Maurice indicated that work variables made it difficult to provide specific numbers but, "in the best case scenario," an electrician (journeyman/mechanic) should be able to install and wire a fixture in 5 minutes. He cited a Wal-Mart job where two people working together could complete 80-90 installations in a 10–12 hour workday under ideal conditions. Helper Larry Workman testified that he could install 30–50 lights in an 8-hour day, spending 15 minutes "tops" on each fixture. Respondent's owner, Fred Benson, credibly testified that a team of five (Benson, Field Coordinator Ralph Holler, Office Manager Dave Hill, and two helpers) installed 300 light fixtures on one Saturday in July at Hamrick's.

The Respondent hired Summers as a lead mechanic on the Hamrick's job. Benson credibly testified that when Summers began work in June, this job was not behind

[1] 332 NLRB 801 (*Forsyth I*). All other unfair labor practice allegations in the complaint were dismissed. Chairman Battista and Members Schaumber and Kirsanow did not participate in the Board's 2000 decision.

[2] *NLRB v. Forsyth Electrical Co.*, 69 Fed. Appx. 164.

[3] Inasmuch as we have found the Respondent lawfully denied reinstatement because Jones, Kimball, and Hill engaged in an unprotected prestrike work slowdown, we find no need to address other issues presented by the court's remand.

[4] Unless otherwise stated, all subsequent dates are in 1995.

[5] At various times since 1991, Maurice had unsuccessful discussions with the Respondent's owner, Fred Benson, about becoming a unionized employer.

[6] The Respondent also hired covert salts Ray Singleton and Bobby Lee Barnett. In *Forsyth I*, the Board affirmed the judge's dismissal of allegations that the Respondent unlawfully failed to accord them striker reinstatement rights. The judge rejected the General Counsel's claim that Singleton and Barnett were strikers, finding instead that each employee quit.

schedule. However, according to Benson, Summers was "very unproductive." On about July 7, Benson voiced concern to Field Coordinator Holler that "[t]hings [were] just not happening on that job. We're getting fifteen (15) or twenty (20) light fixtures a day wired when there should be at least seventy (70) or eighty (80) a day per person. Outlets were not getting installed, wire was not being pulled, fixtures were not being terminated, contacts were not being mounted, floor work was not being done, conduits were put in the wrong space." Summers himself testified that "[w]e wouldn't maybe got about 10 or 15 lights [installed] in a day because I wouldn't put myself in no strain."

Benson considered replacing Summers when he hired Kimball. Instead, Summers took leave from work from July 14 to 24. He told Benson that he needed time off for a family emergency. In actuality, Maurice arranged for Summers to take a fully-paid training session as a union organizer during that time. When Summers returned to work, he was told that he was no longer needed because work at the Hamrick's jobsite was substantially completed.

Jones testified that "between doing other things" he wired 9–10 lights a day at Hamrick's. Helper Workman estimated that Jones spent a couple of hours every day talking about the Union during working time. Workman testified that he wired two lights to every one that Jones wired and that he also had to tighten the ground screws on some of Jones' fixtures. Mechanic Alan Mather corroborated Workman's testimony that Jones tried to talk to Workman about the Union during working time. Mather said Jones wore a beeper and frequently made phone calls after being beeped. Mather said he complained to Benson and Field Coordinator Holler about Jones' work habits, observing that "[it] didn't really seem—appear like he was even working for us, you know, the way he acted and what not." Benson testified that Jones was "unproductive" and "lazy," and that he "spent very, very little time getting the work done and getting it done correctly." Benson also testified about discovering, after Jones went on strike, that Jones had failed to groundwire a number of light fixtures he installed, creating a potentially serious safety hazard. Jones denied that the fixtures he installed were not grounded but stated, in any event, that assuring proper ground connections was not his responsibility.

Benson credibly testified that he checked Kimball's job references and heard he was a "great mechanic," but he proved to be unproductive on the job. According to Benson, Kimball "just really did not want to work. Didn't want to work a full day. I had gotten, you know, a few light fixtures, six (6) or seven (7) light fixtures per day, just a total lack of concern for the completion of the job." Kimball took 3 of his 7 days on the job to install 12–14 light fixtures in a dressing room, a task Benson estimated should have taken 2-1/2 to 3 hours.

Unlike the aforementioned covert salts, Hill worked at the Respondent's Victoria's Secret jobsite. Lead mechanic Ralph Holler (son of Field Coordinator Holler) worked with Hill there for 2-1/2–3 weeks in June. Holler testified that "[t]here was no speed in [Hill's] work period. Very slow with everything he did. Even his movement in walking around." Hill also frequently missed work—was tardy or left early. As previously stated, Benson fired Hill when he refused to work on July 4. Hill acknowledged that at this time he had a "pretty bad" attitude, with family and drinking problems. Hill returned to work at the Victoria's Secret jobsite after Benson rehired him on July 15. He worked with helper Johnny Overstreet until, as encouraged by Hill, Overstreet quit on July 17 to join the Union's apprenticeship program. Hill testified that when he phoned Benson to tell him about Overstreet's departure, Benson wondered what was happening and referred to being "targeted" by the Union. Hill said Benson was not aware of Hill's union affiliation.

On July 18, Kimball refused Field Coordinator Holler's request to work voluntary overtime. On the next day, Kimball told Holler that he was going out on an unfair labor practice strike and to contact Maurice if Holler had any questions. Separately, Jones said the same thing to Benson. Accompanied at times by Maurice, Kimball and Jones picketed the Hamrick's site and one or two other jobsites that day for a period variously estimated by witnesses as one-half to 4 hours.

On July 21, Maurice submitted a job application for himself that he had obtained in the previous week. Field Coordinator Holler accepted the application but said there were no jobs available. Maurice testified that he spoke successively to Holler and Benson. During these conversations, he offered to help the Respondent by providing union members for work. Benson indicated that he was not interested.

Although Hill complained to Benson about needing help, he worked alone most days at the site until July 25. He then told Benson that he was going on strike and to speak with Maurice about "any particulars." After Hill went on strike, Benson discovered numerous fixtures installed one-fourth to one-half inch off-center at Victoria's Secret. The fixtures had to be repositioned, requiring that drywall be recut, in order for display mirrors and wall coverings to fit as planned.

The Respondent did not hire anyone from July 20 until early August. Instead, Benson and other management

officials worked nights and weekends to complete work at Hamrick's and other jobsites. (The general contractor at one jobsite hired another electrical subcontractor to finish work there.) There were no exceptions to the judge's findings that hiring was suspended because (1) as Benson credibly testified, he was too busy working on meeting job deadlines to review applications and conduct interviews, and (2) the recent productivity problems of individuals with good references and adequate experience showed that the Respondent's "traditional means of verifying that a worker would be productive, by checking references, had broken down." 332 NLRB at 820.

Jones offered to return to work on August 17. Office Manager Dave Hill told Jones there was no work available and "they didn't see nothing coming up." Jones spoke with Dave Hill again 2 or 3 days later. Dave Hill again said nothing was available. Striker Douglas Hill phoned Benson and offered to return to work on August 25. According to Hill, Benson "said that they only had one job going on at that time and he was thinking about laying off some men and he just didn't need anyone at that particular time." On November 10, Maurice sent Benson a letter announcing the end of the strike, conveying an offer by Kimball to return to work, and reiterating offers to return from the other former strikers. The Respondent did not reply to this letter.

It is undisputed that the Respondent did not replace the three strikers. Respondent finished work at four of the six jobsites by early August, thus, reducing its electrician staff needs to pre-June levels. Most employees hired by the Respondent from August 1995 through March 1996 worked in helper positions that were not substantially equivalent in pay and skill level to the former strikers' mechanic jobs. However, after Jones and Hill offered to return to work, the Respondent rehired Jimmie Brewer on September 8 at mechanic-level wages. Brewer was rehired after being terminated for poor work performance. Benson testified that Brewer was originally hired as a mechanic, but he later decided Brewer was not capable as a mechanic. He was assigned helper work but his wages were not reduced.

II.

The administrative law judge addressed allegations that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging Summers and by failing to accord reinstatement rights to former economic strikers Jones, Kimball, and Hill. At several points in the judge's decision, he discussed his conclusion that there was an unprotected prestrike slowdown coordinated by Union Agent Maurice to pressure the Respondent into hiring referred union members in order to meet pending job deadlines: *Forsyth I*, 332 NLRB at 813–814, 817, 825–826. The judge determined that Benson must have become aware that the slowdown was part of the Union's salting strategy when Kimball went on strike on July 19. Id. at 825.

The judge found that the Respondent effectively discharged Summers when it declined to assign him any further work on July 24. However, he concluded that the discharge was lawfully based on Summers' participation in the unprotected work slowdown. According to the judge, "Summers' intent to slow down the work, readily inferred from the circumstances, distinguishes him from Jimmy Brewer, whom Benson described as a bad employee but rehired anyway. The record does not indicate that Brewer deliberately tried to produce little. His spirit was willing even if his performance was weak." Id. at 826.

Although the judge's slowdown analysis indicated participation by Jones, Kimball, and Hill in this unprotected activity, he did not discuss the Respondent's contention that this deliberate conduct justified its refusal to accord them reinstatement rights when they offered to return to work after striking. Instead, the judge focused on the alternative defense that their poor work performance prior to the strike, *even if not part of a deliberate slowdown*, justified denying reinstatement. In this context, the judge took a different view of the significance of Brewer's rehiring than for Summers' discharge. He found that the Respondent's willingness to rehire Brewer in spite of past work deficiencies undercut the assertion that the former strikers' past lack of productivity justified denying them reinstatement. Id. at 824.

The Board affirmed the judge's conclusion that the Respondent's refusal to reinstate the three former strikers violated Section 8(a)(3). It summarily affirmed the judge's rejection of the Respondent's argument that the Respondent was justified in denying reinstatement because they were unproductive. Id. at 801. Turning to the Respondent's reiteration in exceptions of the contention that the strikers' participation in an unprotected prestrike slowdown justified denying them reinstatement, the Board found insufficient evidence in support of the judge's finding that there was a generalized work slowdown or, even if there was, that Jones, Kimball, and Hill participated in it. The Board also suggested that this defense was a post hoc pretext, stating that "the Respondent never mentioned the slowdown at the time it allegedly occurred, at the time the Respondent refused reinstatement, or at the time of the hearing." Id. at 802.

On review, the Fourth Circuit held, inter alia, that the Board had provided an inadequate explanation for rejecting the judge's findings relating to the slowdown. Noting that the judge had engaged in an extensive review of

the record and a thorough analysis of this issue, the court directed the Board on remand to provide more than "conclusory assertions that the ALJ's findings were without adequate support." 69 Fed. Appx. at 168.[7]

III.

It is well established that an employer violates Section 8(a)(3) and (1) of the Act by failing to reinstate a former economic striker after an unconditional offer to return to work unless the employer can show a "legitimate and substantial business justification" for its action. *NLRB v. Fleetwood Trailer Co.,* 389 U.S. 375, 379 (1967). It is likewise well established that employees who engage in deliberate work slowdowns are not protected by the Act and their discipline for such activity does not violate the Act. E.g., *DaimlerChrysler Corp.*, 344 NLRB No. 154, slip op. at 2 (2005). The Fourth Circuit's remand action clearly implies its view that the Respondent had a legitimate and substantial reason justifying its denial of reinstatement rights *if* it proved the strikers engaged in an unprotected prestrike deliberate slowdown and it denied reinstatement rights for this reason. We agree.[8] Furthermore, unlike the Board in *Forsyth I*, we agree with the judge that there is sufficient proof of a general slowdown by covert union salts, including Hill, Kimball, and Jones. We also find that the Respondent lawfully relied on this unprotected activity when denying them reinstatement.

As for the slowdown, the judge found that there was an unprotected slowdown prior to the strike, and that it was coordinated by Union Agent Maurice to pressure the Respondent into hiring union members. Indeed, the judge found that Summers' participation in that slowdown was the reason for his lawful discharge.

The judge also specifically relied on credited evidence tying Summers, Hill, and Kimball to the slowdown: Summers' testimony that he "wouldn't put [him]self in no strain," Benson's testimony that Summers was very unproductive, Holler's testimony about Hill's lack of speed on the job, and Benson's testimony that in spite of excellent references Kimball was very unproductive. We do not believe that this poor performance was simply the result of lack of skill or industry. Rather, we conclude that it was the result of a union-coordinated effort. In finding union coordination of the slowdown, the judge relied on evidence that all covert salt employees frequently communicated with Union Agent Maurice, Maurice further impeded progress on the Hamrick's job by arranging for Kimball to take a week off in July, and each worker directed the Respondent to contact Maurice for details when declaring a strike.

Although not specifically mentioned by the judge, the corroborative testimony about a comparable lack of effort by Jones on the Hamrick's job supports finding that he too participated in a deliberate work slowdown. Concededly, Benson and other witnesses for the Respondent may at times have overstated the number of daily ceiling-light installations a mechanic/journeyman should be expected to perform. However, the number of installations performed by Hill, Kimball, and Jones fell far short of even Maurice's cautious estimates for experienced journeymen. Except for Hill, who credibly testified that he had a bad attitude and a drinking problem at the time, there is *no* apparent explanation for the slow pace of work other than that it was intentional; and, as to Hill, notwithstanding other possible explanations, the evidence still preponderates in favor of the intentional slowdown explanation. Coupled with frequent complaints from the covert salts about a need for more workers and pressure from Maurice to hire union referrals, there is a reasonable linkage between the slow pace of the work and the hiring objective ascribed to the Union by the judge. In sum, we find that there is sufficient evidence showing that Hill, Kimball, and Jones participated in an unprotected work slowdown to achieve the Union's objective before they ceased work completely to strike.[9]

We next turn to the question of whether the Respondent proved that the unprotected conduct was the reason it denied reinstatement. We recognize that the only reason the Respondent articulated in response to any of the offers to return to work was that it no longer had any job openings for mechanics due to the reduction in number of ongoing projects.[10] However, the failure to articulate

[7] We note that the General Counsel did not except to the judge's slowdown finding. However, the Board implicitly construed the Respondent's exceptions as requiring review of the factual support for this finding, and it reversed the judge on this point. While the court found the Board's analysis inadequate, it did not challenge the Board's scope of review.

[8] We also note that the General Counsel's statement of position on remand from the court does not address the slowdown issue.

The Respondent's unprotected work slowdown defense stands in contrast to its defense that prestrike poor performance, even if not deliberate, also justified denying Jones, Kimball, and Hill their reinstatement rights. The judge correctly rejected this defense. In general, prestrike work deficiencies are not a legitimate and substantial business reason for refusing to reinstate former economic strikers. See *TIC-The Industrial Co.*, 320 NLRB 1122, 1124 (1996), and cases cited there.

[9] The Respondent alleges that Jones' failure to groundwire fixtures and Hill's off-center installation of fixtures were deliberate acts of sabotage in support of the work slowdown. The judge did not rely on this conduct in making his slowdown finding, and we find no need to pass on the sabotage allegation in affirming this finding.

[10] One of the issues presented for our consideration by the court's remand is whether the Respondent proved it lawfully denied reinstatement for strikers because it no longer had job openings for them. As previously stated, we find no need to pass on this issue in light of our finding that the Respondent lawfully refused to accord reinstatement

a particular reason for a decision does not itself establish that it is not reason for the decision. As to the reason for the decision herein, it is clear from Benson's credible testimony that he would not have reinstated any of the former strikers in any event because of their prestrike activity, just as he would not offer Summers continued work at another jobsite after July 24. Thus, even though Benson and the Respondent's other officials did not make the explicit accusation that the poor performances were part of a deliberate work slowdown, they correctly perceived the connection between this performance problem and the Union's overt efforts to get its members into the Respondent's work force.

Further, credited testimony shows that the Respondent's officials and employees expressed concern among themselves prior to the strike that Summers, Jones, Kimball, and Hill all performed far below expectations created by their job experience and references. This disparity between expectation and actual performance was one reason Benson suspended hiring on about July 20. Hill testified that Benson expressed an awareness of being targeted by the Union when informed that Overstreet had quit on July 17. It is reasonable to infer that the strike declarations by Kimball and Jones on July 19, followed by Maurice's July 21 job application and effort to obtain employment for union members, made clear to Benson that the prestrike lack of productivity was a deliberate part of the Union's campaign.

In sum, we find that the Respondent has shown that the slowdown was the basis for its failure to reinstate Jones, Kimball, and Hill after they offered to return to work.[11] Their participation in an unprotected slowdown was a legitimate and substantial reason justifying the Respondent's action.[12] Consequently, we shall dismiss the complaint's sole remaining allegation that the refusal to reinstate Jones, Kimball, and Hill violated Section 8(a)(3) and (1).

ORDER

The complaint is dismissed.

Dated, Washington, D.C. March 28, 2007

Robert J. Battista, Chairman

Peter C. Schaumber, Member

Peter N. Kirsanow Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

rights because the strikers had engaged in a deliberate prestrike work slowdown.

[11] The Respondent articulated this in its response to the charge. The response to the charge states, in relevant part, "Questions about whether the people named in your letter were legitimately on strike *and questions about whether the serious misconduct they engaged in before the so called strike disqualified [them] from any future employment* are serious and involve both legal and factual issues." Further, the Board incorrectly stated in *Forsyth I* that the Respondent did not mention the slowdown at the time of the hearing. Respondent's counsel did attempt to elicit testimony about a slowdown during his cross-examination of Maurice. As summarized above, Respondent's witnesses also provided extensive testimony about an unexpected lack of productivity by covert salts that supports finding a deliberate, union-coordinated slowdown.

[12] As with Summer's discharge, the Respondent's rehiring of Brewer does not undermine the Respondent's reliance on the prestrike lack of productivity when viewed as a deliberate slowdown. Brewer was a poor performer, but not intentionally so like Jones, Kimball, and Hill.