

Smith Auto Service, Incorporated and William H. White. Case 5-CA-1047

September 30, 1980

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS
JENKINS AND PENELLO

On July 14, 1980, Administrative Law Judge Bruce C. Nasdor issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, the General Counsel filed cross-exceptions and a supporting brief, and Respondent filed an answering brief.¹

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,² and conclusions of the Administrative Law Judge and to adopt his recommended Order.³

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Smith Auto Service, Incorporated, Baltimore and Towson, Maryland, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

¹ The General Counsel's motion to withdraw fn. 10 of his brief is hereby granted.

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

³ Member Jenkins would compute interest in accordance with his partial dissent in *Olympic Medical Corporation*, 250 NLRB No. 11 (1980).

DECISION

STATEMENT OF THE CASE:

BRUCE C. NASDOR, Administrative Law Judge: This case was heard in Baltimore, Maryland, on November 20 and 21, 1979, and January 10, and February 8, 1980.

The charge and amended charge in this proceeding were filed by William H. White, the Charging Party, on January 18 and February 2, 1979.¹ The complaint alleges several instances of 8(a)(1) conduct, and the discriminato-

¹ All dates in 1979, unless otherwise specified.

ry discharge of William H. White. Respondent denies it committed the alleged violations of the Act.

Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent is engaged in the business of auto glass and upholstery service at its Baltimore, and Towson, Maryland, locations. During the preceding 12 months, a representative period, Respondent purchased and received, in interstate commerce, goods and supplies valued in excess of \$50,000 from points located outside the State of Maryland. It is admitted, and I find, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is admitted, and I find, that District No. 12, International Association of Machinists and Aerospace Workers, AFL-CIO, herein called the Union, is, and has been, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

Respondent installs automobile glass and upholstery at its two locations in Baltimore and Towson, Maryland. According to the record testimony, some of the employees were not satisfied with working conditions in the shop and they met at the home of William H. (Herb) White to discuss the feasibility of joining a union. Sometime during the month of August 1978 the employees met again at White's home with Ballinger, a union representative. White, who was the individual responsible for contacting the Union, arranged two subsequent meetings at his home at which the employees signed union authorization cards. The last meeting prior to the election was held at the union hall.

On August 14, a petition was filed in Case 5-RC-10566, by District No. 12, International Association of Machinists and Aerospace Workers, AFL-CIO (hereinafter referred to as the Union).

On September 11, a conference was held where the parties executed a Stipulation for Certification upon Consent Election. White and Preston Wenzing appeared on behalf of the Union.

The election was held on October 27, where nine votes were cast against the Union and eight votes were cast in favor of the Union. There was one challenged ballot which was not determinative. White appeared as the union observer.

No objectives were filed to the election results.

A. Independent 8(a)(1) Allegations

A few days after the Union filed the petition, Leonard Smith, Respondent's president, made a speech to the employees regarding the Union's organizational efforts. A few days later, Joseph E. Harvey Thornton, White's

stepson, went to Smith and asked him for a raise. Smith allegedly told Thornton he could not give him a raise because some "pricks" were trying to bring a union in and a raise would seem like a bribe. Thornton testified that Smith told him if he, Thornton, should hear anything or know anything about the Union, he should tell Smith and Smith would take care of him. Thornton feigned ignorance with respect to the organizational campaign.

Thornton testified that some time after September 11, the date the stipulation for certification was executed, he was approached by Smith while he was parking a car in the lot, and asked if he knew anything about the Union, to which he responded negatively. Smith allegedly told Thornton that if he did find out anything to let him know and he would take care of him. Thornton again requested a raise but got no answer from Smith.

According to Thornton's testimony 2 weeks later, while making a delivery to the shop which is located in Towson, Smith allegedly approached Thornton and asked him who Herb White thought he was, that this Smith Auto Service was not Bethlehem Steel. Smith also stated that the Union was not going to get in, what was Herb trying to do. Thornton responded, "I have my own opinion of the whole thing. What Herb does is Herb, and what I do is myself."

Steven Riddle testified that sometime in August, while he was in the shop working, Smith came up to him and told him that he would like to see him in the backroom for a couple of minutes. Riddle and Smith discussed problems in the shop and what was wrong with the employees. According to Riddle's testimony, sometime during the conversation, Smith stated that if the Union did not get in, he was going to give everybody a raise, better Blue Cross/Blue Shield and a timeclock. Furthermore, Smith allegedly stated, that if Herb had any problems he should have come to Smith and talked about them instead of going to the Union. Smith told Riddle he should stay away from Herb because he had been mixed up with the Union.

Riddle testified that he had a second conversation with Smith in the backroom sometime in October. According to Riddle this conversation was basically the same as the August conversation. Riddle elaborated, that Smith stated to stick by him, vote no for the Union, and stay away from Herb. Smith allegedly stated that Herb was a bad influence because he was trying to get the Union in.

George Anders, a reluctant witness, appeared after being brought before a Federal District Court Judge in a subpoena enforcement proceeding.

Anders testified that he was hired in November 1978. He testified further that at a prehire interview, Smith told him what his pay would be and what his position with Respondent would be. Smith allegedly asked him if he liked the Union and did he have anything against the Union. Anders responded that he did not care for the Union. He testified that Smith told him that a union had tried to get into the Company, failed, and it cost him money to keep it out. He told Anders that Herb White "tried to start it [the Union]." He also referred to White as a troublemaker. Anders testified that Smith told him

he was going to clean house at Caroline Street,² and "he was going to change the whole shop around." The record is not clear as to whether this statement was made at the prehire interview or at some later time. Anders testified that while he was working for Respondent he said, "fuck you" to Smith but he did not say it to his face. Much of his testimony was devoted to the circumstances surrounding the taking of his affidavit. He testified that when he met with the Board agent one night he was drunk, he never read the affidavit, and he did not swear to its contents.

His testimony reveals certain omissions and inconsistencies with the affidavit, although the testimony I have set forth is consistent with his affidavit.

Milton Chambers testified that Smith, during the latter part of August, called Chambers into his office and told him he did not want him speaking to that "fathead." The evidence reveals that Chambers was in the shop talking to White, who was installing a windshield, and Smith apparently saw the two men talking through the glass partition separating Smith's office from the shop.

Chambers testified that sometime in June, while on his lunch hour, Smith gave him instructions which he resented and he walked away from Smith. Smith, according to the testimony, followed him from the lot to the shop and told Chambers not to walk away from him. Chambers testified that he got mad, turned around, poked his finger at Smith and said, "you better stop fucking with me."

Allen Dawson was called as a witness on behalf of Respondent. Dawson has been employed by Respondent for 32 years. Because of the rapidity of his speech the court reporter was unable to take much of his testimony. Dawson completely lost control of himself, stood in the witness stand, and in a frenzy hurled obscenities and invectives at counsel for the General Counsel and White, who was sitting in the back of the hearing room. Counsel for the General Counsel was unable to cross-examine Dawson. Apparently he was called as a witness to rebut Thornton's testimony that he, Thornton, overheard Dawson, who was also known as Geech, say to Smith, "you are a motherfucker." What testimony is in the record reflects that Dawson denied calling Smith the name referred to stating that he only uses that particular word when he is in a fight.

B. The 8(a)(3) Allegation

William H. (Herb) White worked for Respondent approximately 7 or 8 years and had no disciplinary problems.

White testified that as a result of the discontent with working conditions in the shop he had his wife contact a union representative, Bradley, who came to his house and met with him and four other employees. Three or four other meetings were subsequently held at White's house. White also appeared at the conference where the Stipulation for Certification Upon Consent Election was executed.

White testified that he handed out campaign literature to the employees. In evidence, as General Counsel's Ex-

² The Baltimore, Maryland, location

hibit 2, is a pamphlet captioned "Your Boss and the Union as Seen Through the Eyes of a Baby." White testified that he intended to give a copy of this document to Smith, but Smith was on the telephone so he laid it on the secretary's desk, which is in front of Smith's desk. Smith came out of his office with the document in hand and, according to White, yelled and screamed at him. According to White, Smith was outraged at being given the pamphlet but White did not respond to Smith's outrage.

White testified that his son had been after Smith for a raise for a long period of time and Smith kept stalling him. Furthermore, another man was hired who had no tools and no knowledge of the business yet he was paid 35-cent-an-hour more than White's son. On January 12, White's son again approached Smith for a raise, was apparently turned down, and informed his father of such. White readily admits he got perturbed and he went up to Smith and told him that he thought he was a son-of-a-bitch, then realized what he had said, and immediately apologized. Smith told White to pack his tools because he was fired.

White testified that he has heard other employees curse at Smith, particularly Dawson and Milton Chambers. White testified specifically that in the latter part of 1978 or early 1979 around lunchtime he heard Milton Chambers tell Smith to "go fuck himself."

Leonard Smith testified that he was amazed that an employee had called him a son-of-a-bitch because no employee had ever cursed him before and the insult was something he could not forgive. Smith testified that when White called him a son-of-a-bitch there were employees in the area and "their eyes opened up." He contends if he had not fired White he would have lost the respect of his employees. Smith did not recall whether or not there were customers in the area at that time.

Respondent introduced into evidence a document reflecting the names of 10 employees who were terminated in 1978 and 1979, and including the dates of their termination. White's testimony reveals that they were terminated for a variety of reasons, everything from lateness and absenteeism to drug abuse.

Respondent in its brief emphasizes that employee Danny P. McGee was fired for cursing at the Company's service manager. Smith's testimony reveals something more than that. According to Smith, "McGee was a bad character." Everything from damaging our vehicles deliberately accidents—I mean, I have customers coming in to a small garage, naturally, my people are waiting for their cars and he would espouse all kinds of four letter words, and I always went out to the garage and told him that, I don't want to hear anything like this in front of customers." Smith testified further that McGee cursed his service manager and the service manager fired him. According to Smith his service manager told him "either he (McGee) goes or I go."

On direct examination Smith's responses were unequivocal "yes" or "no" answers. He testified he spoke with his employees about the Union on only one occasion, that occasion being when Smith read a speech within a few days or a week after the Union filed its petition for certification. So, according to Smith, at no

other time during the 3-month period of organizational activity preceding the election, or at any time after the election, did he talk to employees about the Union.

Other witnesses were called to testify, John Button and Carl Bryant. Essentially, their testimony reflects that they heard cursing every day and it was commonplace to call Smith all sorts of dirty names either to his back or under their breath. Button testified that he heard White call Smith a son-of-a-bitch but he did not hear an apology. Button testified that he hears cursing every day. He also testified that there was a radio which is constantly playing in the shop.

James Norton, the Board agent who investigated this case, was called to testify.³ Norton testified that he has worked for the National Labor Relations Board as a field examiner for 4 years. Norton testified generally how he takes affidavits and his *modus operandi* with respect to swearing in a witness and such. His memo to the file was introduced into evidence reflecting that he had an appointment with Anders at 9:30 a.m. on January 26, 1979. Norton testified he met with Anders as scheduled and took the affidavit in Anders' kitchen. Counsel for the General Counsel pursued a line of testimony with Norton to qualify him as an expert as to whether or not Anders was drunk. He testified that in 1971 he worked at a detoxification center for alcoholics for the period of 6 to 7 months. Norton characterized himself as a medical assistant who worked as an orderly and had daily contact with individuals in all stages of intoxication. Norton testified that he himself drinks a bottle of beer a day. He testified further that he had no reason to assume that Anders had an alcoholic beverage, nor did he see any bottles containing alcohol in the vicinity of where he took the affidavit. According to Norton, Anders appeared to be a lucid, coherent person attuned to the time, place, and date. Norton administered the oath to Anders, Anders signed the affidavit, and initialled the corrections. Also, at the bottom right hand corner of each page, Anders initialled to reflect that he had read that particular page. On cross-examination Norton testified that he specifically followed the above outlined procedure with Anders and that he had a good recollection of it. His only qualification was that he did not recall whether he administered the oath prior to, or subsequent to, taking the affidavit. However, he testified that 95 percent of the time he administers the oath prior to taking the affidavit.

C. Conclusions and Analysis

With respect to the 8(a)(1) allegations attributed to Smith, they are solely a matter of credibility. I resolved those credibility issues completely in favor of the witnesses called by counsel for the General Counsel. Smith's substantive testimony and demeanor on the witness stand convinced me that he is a witness unworthy of belief. Counsel for Respondent, who did an admirable job, considering what he had to work with, was frustrated by his client's regard for the truth, and understandably so. At certain junctures during the hearing he was compelled to admonish Smith as follows:

³ Counsel for Respondent strenuously objected.

Mr. Smith, do not fence with this man [counsel for the General Counsel]. Answer his questions. This is not a contest between you and him. When he asks you a question, answer it, please.

Don't try to outsmart him [counsel for the General Counsel]. He's only asking you to see how good your memory is about the thing.

Leonard. [Smith] this no game. Do not fence with me. Do not fence with him [Counsel for the General Counsel]. Tell it like it is.

I find and conclude that Respondent interfered with, restrained, and coerced employees in the exercise of the rights guaranteed to them in Section 7 of the Act by engaging in the following:

1. Encouraging employees to engage in surveillance of their coworkers' union activities and to report back to Respondent.
2. Interrogating employees about their union activities and the Union activities of their coworkers.
3. Respondent's president telling employees he would "take care" of them if they reciprocated by engaging in surveillance of coworkers union activities.
4. Promising employee benefits including raises, a better medical plan, and the installation of the timeclock if the employees reject the Union as their collective-bargaining representative.
5. Telling employees to "stay clear" of the Charging Party because of his membership in and activities on behalf of the Union.
6. Interrogating a perspective employee as to how he felt about unions.
7. Telling a perspective employee not to associate with White or his stepson Joseph Thornton because they were "troublemakers" and White was an "instigator."
8. Telling a perspective employee that he would "clean house" at the Baltimore, Maryland, shop.

D. The 8(a)(3) Allegation

There was no real dispute between Smith and White with respect to the incident and the apology that followed. The threshold issue is uncomplicated, was the basis for the discharge pretextual? In my opinion it was.

The record is clear that Smith knew of White's union activities and considered him its primary supporter, which he was. When considering the 8(a)(1) violations, and Smith's expressed animus towards White and the Union, one can reach no other conclusion. Not only did White hold union meetings at his house where authorization cards were signed, appear on behalf of the Union at the representation conference, but he placed union literature on the desk in Smith's office. Smith's ego was hurt and he reacted accordingly by screaming at White.

Counsel for Respondent argues that the most significant factor in this case was the timing of the discharge. The timing contention is a twofold argument by Respondent. First, White's termination immediately followed the incident, unlike in other cases, where an employer Respondent waits many weeks prior to discharging the employee. Second, Respondent argues that the termination occurred nearly 3 months after the election, and there was no evidence that the Union activities con-

tinued, so there is no basis for inferring any connection between the union campaign, White's activities, and the discharge. The only problem is that, although the union activity may have ceased after the election, Smith's union animus and in particular his animus toward White did not abate.

I am convinced that Smith was lying in wait for White and that cursing to and about Smith, by other employees, was a common everyday occurrence. One only had to behold Dawson's frenzy on the witness stand to realize that he must have used curse words to Smith that have not even been thought up yet. Smith testified that Dawson had screamed at him in the past, but had never called him anything abusive or used curse words towards him. I am constrained to agree with counsel for the General Counsel that this is laughable and incredible.

With respect to the testimony of the Board Agent James Norton, I conclude that he was meticulous in taking the affidavit, he administered the oath, and I accept his layman's observations that Anders was not drunk.

Addressing myself to the testimony of Anders in my opinion, based on his demeanor and the substantive testimony, I believe he was credible in his testimony on the witness stand. To be more specific, I believe that Smith interrogated him as to his union sentiments and that Smith told Anders that White had tried to start the Union. Furthermore, I believe that Smith told Anders that White was a troublemaker and that Smith was going to "clean the house." On the witness stand, I think Anders was telling the truth with respect to these comments attributed to Smith, although I think he had memory lapses with respect to not being administered the oath and being drunk. He testified that he was drinking pretty heavily the night Norton came to his house. The weight of credible evidence reflects that Norton took the affidavit in the morning. I reject any omissions in his testimony *vis-a-vis* the affidavit as being substantive evidence.⁴ The affidavit itself is not critical to my conclusions in this case, because there is substantial direct evidence upon which I have based my conclusion that White's discharge was motivated by his union activities, thereby constituting a violation of Section 8(a)(1) and (3) of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 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 encouraging employees to engage in surveillance of the union activities of their coworkers, and to report back to Respondent, Respondent has committed unfair labor practices in violation of Section 8(a)(1) of the Act.
4. By interrogating employees about their union activities and union activities of their coworkers, Respondent has committed unfair labor practices in violation of Section 8(a)(1) of the Act.

⁴ In my opinion *Alvin J. Bart and Co., Inc.*, 236 NLRB 242 (1978), is inapposite to the instant proceeding.

5. When Respondent's president told employees he would "take care of them" if they engaged in surveillance of the union activities of their coworkers, Respondent engaged in unfair labor practices in violation of Section 8(a)(1) of the Act.

6. By telling employees to "stay clear" of Herb White because he was an active union adherent, Respondent engaged in a violation of Section 8(a)(1) of the Act.

7. By interrogating a perspective employee as to his union sentiments, Respondent engaged in the violation of Section 8(a)(1) of the Act.

8. By promising employees raises, a better medical plan, and a timeclock if they reject the Union, Respondent engaged in unfair labor practices in violation of Section 8(a)(1) of the Act.

9. By telling a perspective employee not to associate with Herb White or his stepson, Joseph Thornton, because they were "troublemakers" and that White was an "instigator," Respondent engaged in violations of Section 8(a)(1) of the Act.

10. By telling a perspective employee that Smith, the president of Respondent, would "clean house," Respondent engaged in a violation of Section 8(a)(1) of the Act.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent discriminatorily discharged William H. (Herb) White, I recommend that Respondent offer him immediate and full reinstatement to his former or a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed. In addition, I recommend that Respondent make White whole for any loss he may have suffered by reason of the discrimination against him, by payment to him of a sum of money equal to that which he would normally have earned from the date of his discharge, less net earnings during said period. Backpay shall be computed according to *F. W. Woolworth Company*, 90 NLRB 289 (1950), and with interest computed in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977). (See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).)

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I issue the following recommended:

ORDER⁵

The Respondent, Smith Auto Service, Incorporated, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Encouraging employees to engage in surveillance of their coworkers' union activities and report back to Respondent.

(b) Interrogating employees about their union activities and the union activities of their coworkers.

(c) Telling employees that they would be taken care of if they reciprocated by engaging in surveillance of their coworkers' union activities.

(d) Promising employees benefits including raises, a better medical plan, and the installation of a timeclock if the employees reject the Union as their collective-bargaining representative.

(e) Telling employees to "stay clear" of the Charging Party, Herb White, because of his membership in and activities on behalf of the Union.

(f) Interrogating employees as to how they felt about unions.

(g) Telling perspective employees not to associate with William H. (Herb) White or his stepson, Thornton.

(h) Telling perspective employees that he, Respondent's president, would "clean house" at the Baltimore, Maryland, shop.

(i) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

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

(a) Offer William H. (Herb) White immediate and full reinstatement to his former position or, if such position no longer exists, to a position which is substantially equivalent thereto, without prejudice to any seniority or other rights and privileges previously enjoyed, and make him whole for any loss of pay he may have suffered by reason of the discrimination against him with interest as provided in the section above entitled "The Remedy."

(b) Post at both premises at Baltimore and Towson, Maryland, copies of the attached notice marked "Appendix."⁶ Copies of said notice, on forms provided by the Regional Director for Region 5, after being duly signed by an authorized representative of Respondent, be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Respondent shall take reasonable steps to insure that said notices are not altered, defaced, or covered by any other material.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Notify the Regional Director for Region 5, in writing, within 20 days from the date of this Order, what steps the Respondent has been taken to comply herewith.

⁵ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

⁶ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

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

WE WILL NOT encourage employees to engage in surveillance of their coworkers' union activities and to report this back to us.

WE WILL NOT question employees about their union activities and the union activities of their coworkers.

WE WILL NOT tell employees that we will "take care" of them if they engage in surveillance of their coworkers' union activities.

WE WILL NOT promise employees better benefits including raises, a better medical plan, and the installation of a timeclock if the employees reject the union.

WE WILL NOT tell employees to "stay clear" of William Herb White because of his membership in and activities on behalf of the Union.

WE WILL NOT question employees as to how they feel about unions.

WE WILL NOT tell employees not to associate with William Herb White or his stepson, Joseph E. Harvey Thornton, because they are "troublemakers" and White is an "instigator."

WE WILL NOT tell employees that we intend to "clean house" at our Baltimore, Maryland, shop.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them in Section 7 of the National Labor Relations Act.

WE WILL offer to William H. (Herb) White immediate and full reinstatement to his former position or to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed, and compensate him for any loss of pay suffered by reason of his termination, with interest.

SMITH AUTO SERVICE, INCORPORATED