

Quality Broadcasting Corp. of San Juan d/b/a WQBS-AM Radio Station "La Gran Cadena" and Union De Periodistas, Artes Graficas y Ramas Anexas afiliada a The Newspaper Guild, AFL-CIO. Case 24-CA-3916

February 24, 1981

SUPPLEMENTAL DECISION AND ORDER

On March 21, 1979, the National Labor Relations Board issued a Decision and Order¹ in this proceeding, finding that Respondent violated Section 8(a)(1) of the National Labor Relations Act, as amended, by discharging Peter John Porrata because of his having engaged in **certain** protected concerted activity. Subsequently, on May 21, 1979, Respondent filed a petition for review of the Board's Decision and Order with the United States Court of Appeals for the First Circuit. Thereafter, the Board and Respondent filed a joint motion to withdraw the petition for review in order to allow the Board to reconsider its Decision and Order in light of various decisions of that court involving the standard to be used in adjudicating alleged violations of Section 8(a)(3) of the Act and those alleged violations of Section 8(a)(1) of the Act, such as the instant case, that involve an issue of a respondent's **motivation**.² On July 30, 1979, the First Circuit granted the parties' motion to withdraw the petition for review, without prejudice to its future reinstatement upon a supplemental decision by the Board. Subsequently, the case was returned to the Board for reconsideration.

The Board has reconsidered its original Decision and Order in light of the record, exceptions, and brief and has decided to affirm the findings and conclusions contained in its original Decision and Order for the reasons set forth below.

The complaint alleged and the Administrative Law Judge found that Respondent violated Section 8(a)(1) of the Act by discharging Porrata in retaliation for his having engaged in protected concerted activity, specifically his giving advice to other employees about overtime, and his activities in connection with that problem. The Administrative Law Judge rejected Respondent's defense that it terminated Porrata because of his allegedly deficient work performance. In reaching his determination, the Administrative Law Judge concluded that Respondent's "dominant and **controlling**" motive in discharging Porrata was his giving advice to em-

ployees about overtime, and his activities in connection with that problem, and not dissatisfaction with his performance as an employee.

The record, in particular the testimony credited by the Administrative Law Judge,³ provides ample support for his finding that Respondent's discharge of Porrata violated Section 8(a)(1) of the Act. Thus, Respondent's program manager, Pedro Riuz, complained to Porrata about his activities in connection with employee overtime pay claims, even going so far at the time of the discharge as to provide a thinly veiled hint that the real reason for Respondent's action was that particular activity. Furthermore, as noted by the Administrative Law Judge, the defense of alleged poor work performance is contradicted by the fact that Respondent permitted Porrata to work as a radio announcer on its station for an extended period after it had allegedly determined that his work performance was so poor as to require his **termination**. We agree with the Administrative Law Judge that Respondent's explanation for that is unconvincing. Accordingly, we agree with the conclusion that Respondent's real motive for the discharge was Porrata's activities in connection with the overtime pay claims and not dissatisfaction with his performance as an employee.

Subsequent to the issuance of our previous Decision and Order in this case, the First Circuit issued its decision in *N.L.R.B. v. Eastern Smelting*, supra, in which it articulated and applied in **dual-motivation** cases the causation analysis used by the Supreme Court in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977). Although the instant case is a pretext case, not a dual motivation case, we **find** that under any analysis Respondent's discharge of Porrata violated Section 8(a)(1) of the Act.⁴ In this regard, we note that the Administrative Law Judge applied a

³ 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), enf'd, 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

⁴ Also, subsequent to the issuance of our prior Decision in this proceeding, the Board issued its decision in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980). In that case the Board discussed at length the issue of causation in dual motivation cases and set forth the standard it will **apply** in such cases in the future. The instant case is **essentially** a pretext case, i.e., one in which the Employer's defense of business justification is found to be without merit. The General Counsel presented a *prima facie* case that the discharge of Porrata was unlawfully motivated by showing that Riuz complained to Porrata about his overtime pay claim activities just several days before the discharge, renewed that complaint at the time of the discharge, and even provided a thinly veiled threat that such conduct constituted the real **reason** for the discharge. Although **Respondent** attempted to demonstrate that it discharged Porrata because of poor work performance, it was unable to present convincing evidence in support of that defense.

¹ 241 NLRB 318 (1979).

² *N.L.R.B. v. Eastern Smelting and Refining Corporation*, 598 F.2d 666 (1st Cir. 1979); *Liberty Mutual Insurance Company v. N.L.R.B.*, 592 F.2d 593 (1st Cir. 1979); *Coletti's Furniture, Inc. v. N.L.R.B.*, 505 F.2d 1293 (1st Cir. 1977); and *N.L.R.B. v. Billen Shoe Co., Inc.*, 397 F.2d 801 (1st Cir. 1968).

"dominant and controlling motive" test consistent with several First Circuit pronouncements concerning the appropriate standard to be applied in cases presenting the type of issue involved **here**.⁵ In any event, we believe that the Administrative Law Judge's method of analysis was sufficient to satisfy any of the various causality tests that have been articulated as appropriate for this type of case. Accordingly, we reaffirm our previous Decision and

⁵ See *Coletti's Furniture v. N.L.R.B.*, *supra*; and *N.L.R.B. v. Billen Shoe Co., Inc.*, *supra*. As noted in *Wright Line*, *supra*, the "dominant motive" test **arguable places a greater burden** of proof on the General Counsel than is required by *Mt. Healthy*. However, in *N.L.R.B. v. Eastern Smelting and Refining Corporation*, *supra*, the First Circuit appeared to have moved away from the "dominant motive" test towards adoption of the test outlined in *Mt. Healthy*.

Order that Respondent violated Section **8(a)(1)** of the Act by discharging Porrata.

ORDER

Pursuant to Section **10(c)** of the National Labor Relations Act, as amended, the National Labor Relations Board reaffirms its Order issued in this proceeding on March 21, 1979 (reported at 241 NLRB **318**), and hereby orders that the Respondent, Quality Broadcasting Corp. of San Juan **d/b/a/** WQBS-AM Radio Station "La Gran Cadena," Santurce, **Puerto Rico**, its officers, agents, ~~successors~~, and assigns, shall take the action set forth in the said Order.