

**Whitelight Industries Division of White Metal Rolling
& Stamping Corporation and Pauline P. Johnson.**
Case 1-CA-14282

April 9, 1979

DECISION AND ORDER

**BY CHAIRMAN FANNING AND MEMBERS JENKINS
AND PENELLO**

On December 7, 1978, Administrative Law Judge Thomas A. Ricci issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and Respondent filed an answering brief.

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,¹ and conclusions² 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 complaint be, and it hereby is, dismissed.

¹ In adopting the Administrative Law Judge's findings, we have given no weight to his statement that there is something strange and perhaps significant in the fact that the Union took no part in the proceeding before him. In addition, while the Administrative Law Judge found that earned leave, as provided in the relevant contract, may be taken *only* one-half day at a time, we note that p. 33 of this contract states, "Such leave *may* be taken one-half (1/2) day at a time." (Emphasis supplied.) This error, however, does not affect the validity of his conclusions regarding the alleged discriminatory discharge.

² In adopting the Administrative Law Judge's dismissal of the allegation regarding the maintenance of an overly broad no-solicitation rule, we rely solely on the General Counsel's failure to litigate the issue at the hearing.

³ In view of our adoption of the Administrative Law Judge's recommendation that the complaint be dismissed in its entirety, we find that Respondent has not been prejudiced by the extension of time granted to the General Counsel for the filing of exceptions.

DECISION

STATEMENT OF THE CASE

THOMAS A. RICCI, Administrative Law Judge: A hearing in this proceeding was held at Bellows Falls, Vermont, on October 2 and 3, 1978, on complaint of the General Counsel against Whitelight Industries Division of White Metal Rolling & Stamping Corporation, herein called the Respondent or the Company. The complaint issued on April 25,

1978, upon a charge filed by Pauline P. Johnson, an individual, here called the Charging Party. The sole issue of the case is whether, as alleged in the complaint, Johnson was discharged by the Respondent in retaliation for her union activities and therefore suffered illegal discrimination in violation of Section 8(a)(3) of the Act. Briefs were filed by the Respondent and the General Counsel.

Upon the entire record, and from my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. JURISDICTION

The Respondent maintains its principal office and place of business in North Walpole, New Hampshire, where it is engaged in the manufacture, sale, and distribution of magnesium mill products, ladders, rakes and related products. In the course of its business the Respondent continually causes large quantities of magnesium products to be purchased and transported in interstate commerce from and through various States of the United States. It also receives annually at its New Hampshire place of business goods valued in excess of \$50,000 annually from out-of-state sources. I find that the Respondent is engaged in commerce within the meaning of the Act.

II. THE LABOR ORGANIZATION INVOLVED

I find that United Electrical, Radio and Machine Workers of America (UE), Local 218, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Question Presented

After working 13 months, Pauline Johnson was discharged on February 27, 1978, a Monday. The previous Friday she had taken a day off from work to enjoy an out-of-state trip with her husband, not an employee of this Company, who had occasion that day to attend a UE Local 258 meeting in connection with his own employment and his own union activities there. According to the complaint, the Respondent dismissed her because it was a union meeting that took place in Massachusetts that Friday, because the Company knew Johnson had been active in the affairs of UE Local 218 in this plant, and because it wanted to curb her union activities *vis-a-vis* the Respondent. As the Company would have it, Johnson was discouraged because she stayed away on February 24 not only without permission but after being told she was needed for production and must not leave, because this was not the first time she absented herself without regard to her supervisor's insistence that she not just take off whenever she felt like it, and because she had finally "pushed him too far," as George May, her supervisor, put it. The question is purely one of fact: Does the probative evidence on the record in its entirety prone affirmatively that the Respondent's real reason for discharging Johnson was the illegal one alleged in the complaint? I think not, and I will therefore recommend dismissal of the entire case.

B. *The Facts*

It is a fact Johnson was active in the affairs of UE Local 218, which has long represented the Respondent's shop employees under successive contracts. She was an elected member of the shop safety committee during 1977 and for 3 or 4 months, ending in December 1977, was a substitute member of the Union's executive board in the plant. The Company knew all this. To prove management animosity against her, Johnson spoke of a number of her absences from work, including the one on Friday which precipitated the discharge. Aware of the Company's contention that she repeatedly flouted instructions not to take time off at will, she colored her story to say she never did anything wrong and always either had advance permission to leave or acted in keeping with established work rules. At least she tried to do this, because by the time she was through she had herself virtually admitted she did more than once disregard instructions. The Respondent in turn calls attention to those same absences as proof of what it now calls "repeated unauthorized absences" as objective and proper basis for discharge.

There is a direct question of credibility with respect to Johnson's last absence, on February 24. She denied flatly even mentioning her intended absence to anyone, including, especially, Supervisor May. May testified she asked permission of him to leave on Thursday, February 23. His story is that he told her that day that he needed her for production—what with another woman in the department being in the hospital—and that he could no longer allow unauthorized absences. I credit May against Johnson. There are many reasons for this decision on my part; demeanor, general evasiveness by Johnson as a witness, and repeated refusals to answer questions directly are some of these reasons. A major reason for this holding, however, is her testimony in its totality with respect to one absence she took in September 1977 which contributed more than anything else to the supervisor's growing irritation over her total disregard of his work instructions.

In August 1977, Johnson decided she would like to take a whole week off in September to accompany her husband to New York City. Her first version was that when she asked could she take all that time next month May answered that "as far as he knew, it would be all right." May's testimony is that he told her instead that he would check on the vacation schedules of others and then let her know and that a few days later, on verifying that two other girls in the department were going on vacation that particular week in September, he told Johnson he could not afford to let her go. With this, still according to May, Johnson said nothing. May added that a day or two before Johnson took off he again told her she could not go, but she went anyway.

Continuing with her story, Johnson said that 2 days before departing she did learn that her leave had not been approved. "I asked the secretary if my days had been approved and she said no." This, of course, was direct admission by the witness that she did not have permission before leaving, else there would have been no occasion to inquire at all. From here Johnson went to her doctor and obtained a very small slip. It is dated September 8, and all it says is, "Pauline Johnson is under my care for illness and unable to

work until 9/19/77." On the basis of this slip, Johnson stated at the hearing: "I went on the week's vacation after my doctor put me on sick leave." With this, Johnson changed her entire story. Now it was not that she had been given permission by the Company to take a vacation but that she stayed away because she was sick, with the doctor taking the supervisor's place in authorizing the absence.

Johnson gave the medical slip to the Company immediately before her departure, on September 9, Friday. She left town that day and was back Monday, September 19.

From Johnson's testimony:

Q. What was the nature of your illness at that time?

A. My nerves.

* * * * *

Q. Now if you already had been granted earned leave time for that period, there would be no occasion to get a doctor's certificate, would there, Ma'am?

A. I was there for a pap smear test and my yearly physical.

Q. If you had already been given earned leave as you say you were, there was no occasion to send in a sick slip to the Company, was there?

A. I found out two days before that they were not approved.

* * * * *

Q. Were you sick between the 8th of September and the 19th of September?

A. I was very nervous. . . .

* * * * *

Q. Were you so ill that you could not work because of your illness?

A. No.

* * * * *

Q. Were you so ill that you couldn't report to White Metal for work because of your illness?

A. Yes, I had to get away from the place.

By the time she was finished with her story, Johnson virtually admitted she knew all along she had no permission for leave. Asked on cross-examination if it was not true Supervisor May had told her back in August he would check into the matter and "get back" to her, she answered, "He probably did." Asked again what May answered when she first asked permission, she replied: "He said that he didn't think that Ed Lemp [the manager] would be willing to go along with the three earned leave days."

In the face of this testimony, for Johnson to insist, at the hearing, that she had permission to leave for a week in September and that she did not in fact act in direct disregard of the directives of management was pure fiction. Wherever she is contradicted by other witnesses on this record, she cannot be believed. In the light of her own statement that she was not unable to work because of any ailment, the medical slip she produced—on its face therefore fake—removes all doubt as to where the credibility resolution must go.

There were other instances of absences in disregard of May's instructions. In January she just told May she was going to take time off to go to an executive board meeting. Because she was not a member of that Board, he told her not to go. He had a number of times given her this permission during the previous months, when she was an acting member of the Board. She went anyway. After her return, in his justified indignation, May told her she was suspended or discharged if she did it again.

C. Argument

If ever a respondent employer came forth with affirmative proof sufficient to explain convincingly a lawful basis for discharge, this is it. The Respondent says repeated defiance of the supervisor's instructions was its reason, and it is a fact Johnson was guilty of "repeated unauthorized absences." There have been cases where, notwithstanding probative evidence of misconduct by the discharged employee, countervailing evidence of disparate treatment offsets the persuasiveness of the affirmative defense. With this aim in mind, the General Counsel proved, from the Company's records, that there was no established rule about warnings or discipline or discharge with respect to straight absences and that there were other employees who had been absent—for many reasons, sick, vacation, bereavement, with permission granted—much more than Johnson had been absent yet had not been discharged in consequence. The argument goes that Johnson was picked out of the lot because she was a unioner, else why did they not treat her like everybody else? The fatal defect in this reasoning is that Johnson's repeated offense was different in kind from whatever faults were found in others. There was a problem of people losing too much time from work to suit the Company. In fact, the collective-bargaining agreement sets up a system of monthly percentage bonuses exactly to reward people for better attendance. But this entire system, with all its records, has nothing to do with disobedience, with absences for pleasure jaunts. When the boss says no, the employee may not just take time off at will. In her brief the General Counsel mixes apples and pears.

There is also much testimony about something called earned leave. Again as provided in the collective-bargaining agreement, there is a very detailed system under which employees enjoy up to 3 days annually away from work with pay. The rules are very precise. The time may be taken only one-half day at a time; in case of "sickness or bereavement" a person can just take off, but if the employee wishes to use "earned leave" for any other reason she must obtain advance permission. In her ever-changing testimony about the week she took off in September, Johnson kept referring to this earned leave business, how she had only taken so many days and was still entitled to 2 more days that year. How 2 days became 5 she did not say; why advance permission pursuant to the contract should apply to others and not her, she passed over. She made the same argument in connection with the February incident. But it was a whole day she took, not half, and again the contract requirement about advance clearance is conveniently ignored.

I suppose in support of this "disparate treatment" theory the General Counsel called Dawn Scott, another employee in the stepladder department, where Johnson worked. Scott

said there are times when employees take this "earned leave" without asking for permission in advance. She also said that whenever she asked for leave, of any kind and for whatever reason, and Supervisor May said no, she never took it. But more important, Scott, 11 years with the Company, testified she never heard of anyone who asked for earned leave, was denied, and then proceeded to take it in defiance of instructions.

Lemp, the manager, said the Company never had a case like Johnson's—a continuing story of just leaving work repeatedly after being told not to do so. The evidence relating to absences too great in amount, therefore, has nothing to do with this case and in no sense effectively weakens the relevance and persuasiveness of the Company's defense.

Actually, of course, the essential question—a never-changing one—is not whether the Respondent has made out a case but rather whether the General Counsel, all things considered, has proved illegal motive. It is a Section 8(a)(3) case, which means antiunionism charged to the employer. From all that is shown on this record, the Respondent has long had a perfectly good relationship with the Union. When Johnson was warned, in prior incidents, about taking off in violation of orders, she filed grievances and, with the Union's backing, won them. It does not follow from this—as the General Counsel suggests—that the credible evidence in this record about what in fact happened must be ignored. The basic prosecution assertion being that Johnson suffered illegal discrimination for having served as a union official in some capacity, there is something strange and perhaps significant in the fact the Union took no part in this proceeding.¹

As in every inference case—and that is all this case is about—absent direct evidence of unlawful purpose in the discharge, all relevant factors must be considered, not only one out-of-context grouping or another. A very significant fact is that in connection with both of the major incidents which precipitated the dismissal—the September week and the February 24 absence—Johnson was not engaged in union activities at all. On that score, at least, she was candid. As to February 24, from Johnson's testimony: "I wanted the day off with my husband and I just happened to attend a union meeting." About September: "Q: Tell me, when you went to that meeting, did you have anything to do with the union affairs that took place in that meeting, as a representative of your local? A: No. Q: So you didn't really go to a union meeting, you just went with your husband on a trip. A: Yes." There is uncontradicted evidence that when Johnson failed to appear at work on February 24, Supervisor May told one of the employees in the department: "... if Brenda LaCasse could verify that Pauline was at the meeting that Friday, that he was pulling her card on Monday morning."

The General Counsel's stress upon this phrase by the supervisor that day exalts description over substance. May had told Johnson the Thursday before not to go away. So far as he was concerned it mattered not whether it was a bridge party she chose to go to, a little vacation with her husband, or a union meeting. What he wanted to find out was whether she had flouted his instructions or not.

¹ After her discharge the Union filed a regular grievance on her behalf, but just before the arbitration stage she chose to withdraw the grievance.

Johnson spoke of two other incidents, each of which the General Counsel argues supports the inference of animus based upon concerted activities. She was not convincing as to either. In late January or early February 1978, 19 women circulated and signed a petition complaining about safety glasses they were required to wear at work. "As a group" they handed it to a supervisor named Atkins; he said he could do nothing about it. Johnson said it was she who drafted the petition. But there is no evidence, nor is it claimed, that her particular individual participation ever came to the attention of management.

Johnson was a member of the shop safety committee. She complained to OSHA about conditions in the shop, there was an inspection, and corrections were made. She said that thereafter she was assigned to another department where work was heavy and where there were no women. She testified that one day Supervisor May said to her: "See what happens when you're a naughty girl?" Again, as she went along, her testimony changed. Now she said she only did that work a few hours a day, maybe 2 or 3 days a week, for a few weeks only. Were there really no other women in that department working the same machine as she? "I didn't see any." Didn't she know certain other women also worked there when needed? Repeatedly she kept saying she did not know. Then came Gloria Langley, also called by the General Counsel, presumably in support of the complaint. She testified she too sometimes worked that same machine in the department in question, that it was not really a difficult job, and that it was a regular practice to assign other women there when necessary. May's version of the chat Johnson spoke about is that it was Johnson who asked him, "Is this what I get for being a bad girl?", and that he answered, "No, that has nothing to do with it, Pauline." I think Johnson was deliberately exaggerating, and I again credit May.

In conclusion, I find the evidence in its totality insufficient to support the essential allegation of illegal intent in the discharge of Johnson and shall therefore recommend dismissal of the complaint.

Postscript

Both the General Counsel's and the Respondent's briefs are dated November 20, 1978; this means Counsel for the Respondent did not see the prosecution brief until after he had mailed his own. In her brief for the first time in this entire proceeding—starting with the wording of the charge and complaint and continuing throughout the 2-day trial—the General Counsel articulated the contention that a certain phrase in the parties' collective-bargaining agreement constitutes an unfair labor practice by the Respondent on its face. She calls it the "employer's overly-broad no-solicitation rule." It reads as follows:

All grievances shall be processed in accordance with the grievance procedure as outlined above, and the Union agrees that there shall be no Union activity during working hours within the Company's property and there shall be no interferences with production or plant operations by any union officer or agent.

There is an allegation in the complaint reading:

At all times material herein Respondent has maintained an overly broad no-solicitation rule.

The contract, 42 printed pages, was placed into evidence by the General Counsel. Clause after clause was referred to and discussed from every angle while testimony was being offered and arguments were being made. Not once did the General Counsel even mention the one clause now said to prove the allegation that the Respondent maintains a no-solicitation rule. There was much talk about the detailed provisions covering attendance bonus, disciplinary actions, grievance procedures, leave of absence, earned leave, safety committee, etc. No-solicitation rules normally appear in employer handbooks, management-distributed rules of conduct, company instructions to its employees. Is it a *company* rule when union and employer agree upon procedures for handling their continuing relations in the shop—fixing time and place for the flow of collective bargaining? Is the distinction between "working hours" and "working time" of determinative significance in the circumstances of this case? Maybe, although Board law, even in the case belatedly cited by the General Counsel, is by no means clear.

I think it more important that the Respondent may have been misled into believing that the General Counsel had abandoned this pin-pointed conclusionary statement of law in the complaint, one which bears no relationship to the substantive issue which was so fully litigated. Certainly, not made aware in the slightest exactly what the complaint referred to, the Respondent was effectively denied any possible opportunity to come forth with any defense it might be able to advance. Were it to attempt, possibly in a reply brief, to offer a pertinent factual defense, it would be met with the old "too late" argument.

If there is one thing that has characterized Board proceedings over the years, it is that they must deal fairly with all parties. A respondent is entitled to know, at the very latest during the hearing, where it is defending itself, for which of its actions it is being called to account. In the very case cited by the General Counsel, the Board found no fault with a no-distribution rule to be in effect "during working hours." *Essex International, Inc.*, 221 NLRB 749 (1976). Among the related factors deemed pertinent to the Board's decision there was the fact there had been "no proof of enforcement" of the rule at issue. How could the Respondent here know which related matters it could bring forth in possible defense without being told what "rule" the complaint referred to? With passing reference to "no-solicitation" and "no-distribution" law, the General Counsel cavalierly overlooks the fact that this one uses neither phrase but speaks only of "union activity." Could that language be read, if the realities of what went on over the years in this plant were known, as no more than a limitation upon the grievance-processing "union activities"?

A complaint is supposed to state facts, as well as conclusions of law. But even assuming a special kind of pleading where particular details need not be specified at that early state, certainly before the hearing is over the respondent ought to be told. The critical allegation of wrongdoing in this case, coming at such a late stage, seems more like a postscript to a completed message. It may be that inclusion of that particular provision in the parties' contract, if and when the related factors come to light, would be found by

the Board to be an unfair labor practice by both the Union and the Employer. But as matters stand, in the interests of justice to all parties, I am unable to make such a finding on this record.

ORDER²

I hereby recommend that the complaint be, and it hereby is dismissed.

² 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.