

**American Greetings Corporation and United Steelworkers of America, AFL-CIO-CLC. Case 9-CA-10898**

December 16, 1977

**DECISION AND ORDER**

BY CHAIRMAN FANNING AND MEMBERS  
PENELLO AND MURPHY

On August 26, 1977, Administrative Law Judge James L. Rose issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and Respondent filed a brief in opposition to the General Counsel's exceptions.

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,<sup>1</sup> and conclusions,<sup>2</sup> as modified herein, of the Administrative Law Judge and to adopt his recommended Order.

**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 herein be, and it hereby is, dismissed in its entirety.

<sup>1</sup> The Administrative Law Judge, relying primarily on the demeanor of the witnesses, found the testimony of alleged discriminatee Robert Banks to be generally unreliable and, therefore, discredited Banks' testimony whenever it conflicted with that of other witnesses. Thus, Banks testified that Respondent Personnel Manager Richardson told him that "the company did not need the Labor Relations Board." Banks further testified that Supervisor Nolin made an obscene remark concerning Banks' wearing of union buttons and also told Banks that he (Nolin) would disregard any physical violence taken against Banks by other employees if Banks continued to "run off at the mouth for being in the union." Banks also testified that, on the night of his discharge, Nolin told him that, as long as the principal stockholder of Respondent still owned most of the stock, he (Nolin) would not have to take orders from any union. Richardson and Nolin each testified that they did not make these statements attributed to them by Banks, and although the Administrative Law Judge did not specifically mention these denials, he generally credited both Richardson and Nolin. We therefore find that Banks' testimony on these matters was contradicted by that of other, more credible, witnesses.

The General Counsel 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 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

<sup>2</sup> In adopting the Administrative Law Judge's Decision, we do not rely on his conclusion that "If the Respondent was embarked upon a course of action to discharge union adherents for pretextual reasons it follows there would have been others." The mere fact that an employer discharges one

union adherent and not others is, in our view, insufficient to support a finding that said discharge was nondiscriminatory. See *Broyhill Company*, 210 NLRB 288, 296 (1974).

**DECISION**

**STATEMENT OF THE CASE**

JAMES L. ROSE, Administrative Law Judge: This matter came to hearing before me on May 12, 1977, at London, Kentucky, upon the General Counsel's complaint which alleges that on or about June 18, 1976, the Respondent discharged Robert E. Banks in violation of Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. sec. 151, *et seq.* It is also alleged that the Respondent engaged in certain activity violative of Section 8(a)(1) of the Act.

Upon the record as a whole,<sup>1</sup> including my observation of the witnesses, briefs, and arguments of counsel, I hereby make the following:

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

**I. JURISDICTION**

The Respondent is an Ohio corporation engaged in the manufacture of greeting cards and related products at its Corbin, Kentucky, facility. At that facility, it annually receives goods, products, and materials valued in excess of \$50,000 which are shipped directly from points outside the State of Kentucky. The 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.

**II. THE LABOR ORGANIZATION INVOLVED**

United Steelworkers of America, AFL-CIO-CLC, is admitted by the Respondent to be, and I find is, a labor organization within the meaning of Section 2(5) of the Act.

**III. THE ALLEGED UNFAIR LABOR PRACTICES**

**A. Factual Outline**

Richard Banks was first employed by the Respondent in July 1975 and quit for personal reasons in September of that year. At the time he quit, he had been promoted to and was doing the job of a material handler on the night shift. His immediate supervisors were Donald Storm and Sally Smith.

While there is some conflict in the testimony, it appears that Banks had some personal difficulties with Smith. However, he was generally considered to be a competent employee and, upon his termination, was given a satisfactory evaluation including a comment by Storm that the Company would recommend him if called upon and would rehire him.

In April 1976, the Respondent's personnel manager, Richard M. Richardson, in fact contacted Banks and asked him if he would like to come back to work on the second shift where his supervisors would be Donald Nolin and Sally Smith. Banks agreed and was taken back on April 19, 1976, as a new employee.

<sup>1</sup> The Respondent's motion to correct the transcript in certain respects, having been unopposed and appearing appropriate, is hereby granted.

Richardson testified that he sought out Banks for reemployment because there was an opening in that department caused by the transfer of another employee to the day shift. A Mr. Stida, referred to by Richardson as a senior supervisor, had been impressed with Banks' work during his first tour of employment.

On May 12, Banks was excused from work to take his sister to a doctor in Lexington, Kentucky.

Banks was also absent on May 21 and 22, the 2 days before he left for National Guard summer camp. He apparently called in sick on May 21 and 22 and those absences were likewise "excused."

Nevertheless, on June 7, his first day back from summer camp Nolin gave Banks a warning as a result of having missed 3 workdays in the month of May. Nolin testified that the fact that the absences were excused was immaterial. Each employee who misses as much as 3 days a month is given a warning because such a pattern of absenteeism amounts to more than a month a year of lost time.

On June 17, Nolin gave Banks an "informative message" for unsatisfactory job performance with an indication on it that he would again be reviewed on July 8.

On June 18, Nolin discharged Banks for loafing, that is, standing at one machine for more than a half hour without doing anything.

The union activity here commenced about mid-May. Banks signed an authorization card and apparently attempted to get some other employees to sign as well. Banks signed his card on May 17 and within a day or two started wearing union buttons. He wore union buttons at work from that point until his discharge.

Although the record is quite sketchy on the organizational campaign generally, it is noted that there are approximately 1,100 employees at the Respondent's Corbin facility. An election was held on September 9 with a majority of eligible voters voting for no union. There were apparently no objections to conduct affecting the results of the election, nor any allegations of unfair labor practices prior to the filing of the election petition other than those set forth in the complaint herein.

## B. Analysis and Concluding Findings

### 1. The discharge of Robert E. Banks

The principal issue in this matter is whether or not Banks was discharged on June 18, 1976, in violation of Section 8(a)(3) of the Act. Thus the issue is whether Nolin, and hence the Respondent, was motivated by Banks' union activity when he effected the discharge or was motivated to discharge Banks in order to discourage union activity in general.

It is fundamental that an employer may discharge an employee for good reason, bad reason, or no reason at all except for that employee having engaged in union or other protected activity or to discourage union or other protected activity. Thus, the inquiry here concerns whether the Respondent was in fact motivated by Banks' union activity, or the union activity generally. In short, the question is whether there was some causal connection between the union activity and Banks' ultimate discharge. While motive must be proved by a preponderance of the

credible evidence, and the General Counsel has the burden of doing so, direct evidence is not required. The General Counsel can prove the unlawful motive, the causal connection, by inference from the surrounding facts and circumstances. *Shattuck Denn Mining Corp. v. N.L.R.B.*, 362 F.2d 466 (C.A. 9, 1966).

Given the surrounding facts and circumstances, can it reasonably be inferred that but for his union activity Banks would not have been discharged? That is, if Banks had not been involved in the organizational activity or had there been none, would Banks have been fired when he was? An analysis of the total factual situation leads me to conclude that the evidence preponderates in favor of finding that Banks would have been discharged absent any union activity. I conclude that neither his union activity specifically, nor the organizational activity in general, had any causal relation to Nolin's determination to fire him.

The General Counsel bases his case in this matter principally upon the timing of the discharge *vis-a-vis* the union activity and the argument that the reason offered for Banks' discharge was pretextual.

While timing is important, as is an unreasonable cause advanced for the discharge, they are not determinative. Other factors must be considered as well, in reaching an inference as to the motive. For instance, unexplained is why Banks was the only employee of the Respondent who was discharged for an allegedly pretextual reason. Banks was not shown to be the leader of the organizational campaign. At best, he wore some union buttons and passed out a few cards. Banks did engage in union activity, but it cannot be concluded he did so any more than anyone else. If the Respondent was embarked upon a course of action to discharge union adherents for pretextual reasons it follows there would have been others. That Banks alone, of the several hundred employees who favored the Union with their vote, was discharged negates the inference of an unlawful course of conduct.

Demonstrable union animus tends to infer unlawful motive. However, absence of union animus cuts the other way. Counsel for the Respondent stipulated that they did not want the Union to win the election and some documentary evidence submitted indicates that the Respondent engaged in a campaign against the Union. This, however, does not prove that the Company's animus was so strong as to infer that it would engage in unfair labor practices. Indeed, the only unfair labor practices alleged with regard to this entire matter are those relating to Banks and occurring in a short period of time and apparently before the election petition was filed.

There is no showing of any kind of design on the part of the Respondent to commit unfair labor practices or discharge union adherents. Thus, if Banks in fact was discharged in violation of the Act, it was because Nolin was so motivated. Of course, the Respondent is liable for Nolin's actions and such a motive on his part would bind the Respondent. But to establish such an unlawful motive requires proof.

There were other employees under Nolin's direct supervision who wore union buttons and presumptively were known to be active in or at least supporters of, the Union.

None of them, as far as this record shows, were discharged or had pretextual cases of discipline built against them.

If Banks' testimony were credited in its entirety, then some statements made to him by Richardson and Nolin on the day before and the day of his discharge would tend to establish animus and imply an unlawful motive. Thus, Banks testified that Richardson asked him if he had been to the National Labor Relations Board and made some comment about the Company not needing the Labor Board. Banks also testified that Nolin told him to take the union button and "stick it up his —." Finally, when Nolin discharged Banks, he stated that as long as the principal stockholder of the Company still owned most of the stock he would not have to take orders from any union.

My observation of all the witnesses and an evaluation of the testimony, some of which was uncontested, lead me to conclude that Banks was essentially unreliable and should not be credited where there was a direct conflict on material issues.

Critical in this regard is Richardson's testimony that shortly after the union activity began, Banks came to him and offered to be a "spy" and report back who favored the Union and the like. Richardson demurred and nothing further occurred. This event, however, undenied by Banks, tends to show his basic unreliability. Further, I found Richardson to be a generally credible and straightforward witness.

Then there is a substantial amount of conflicting testimony concerning events that occurred during Banks' first tour of employment, particularly as it relates to his problems with Supervisor Sally Smith. Banks generally denied that he had many of these problems whereas Richardson, and Michael Storm, his supervisor during this term, testified credibly to the contrary.

Whether Banks had problems during the first tour of employment is of course irrelevant as to the material issues here. In fact, the Respondent did give him a good evaluation when he quit and did hire him back. However, the conflicting testimony, which I generally resolve against Banks, tends to undermine his reliability as a witness.

A confusing bit of testimony relates to whether Banks in fact contacted the Board in May. This fact, if it occurred would seem to be favorable to Banks, and conversely not favorable to the Respondent if Nolin knew about it. Banks denied that he advised Nolin or anybody else that he in fact had gone to the Board in May. On the other hand, Nolin testified that Banks told him that on May 12, when he took his sister to Lexington, he filed charges against Nolin and that Nolin would be hearing from the Board within 2 weeks or so.

I resolve this against the event having occurred, believing that something along these lines may have taken place following Banks' discharge but not before. The point here is that Nolin, whose testimony in other respects is diametrically opposed to Banks and who to a large extent is the principal in the matter, in attempting to be forthright in fact testified to the existence of a detrimental fact. Such in my view tends to enhance Nolin's veracity, if not his recall.

Nolin testified that a number of employees complained about Banks. Those employees whom he named were

called by the General Counsel in rebuttal and each denied that they had complained to Nolin. The matter of "complaining" or not is generally a rather vague and conclusionary term. To that extent, therefore, it is not particularly meaningful that there would be a conflict between Nolin's testimony and that of the other employees.

There is other conflicting testimony, some on immaterial issues. For instance, ex-employee Margaret Hamblin testified that Banks was often around her machine bothering her and trying to get her to sign a union card. And he once asked her to go out with him. Banks testified to the contrary, that he did not ask her to sign a union card at her machine, that he did not bother her, and that she asked him to go out with her even though she is married. The precise truth of this is not so important as the fact that something like this occurred shortly prior to Banks' discharge. Such tends to establish that Banks was the type of employee who, in making his rounds with materials, would not be totally diligent. And this is the type of thing which a supervisor could observe critically.

Given these factors, I am constrained to conclude that the evidence does not establish a reasonable inference that Nolin determined to discharge Banks on June 18 because of his activity on behalf of the Union or to discourage union activity. Absent an inference, or direct evidence, of an unlawful motive, the fact of Banks' discharge cannot be found to be an unfair labor practice.

It might be noted further in this regard that neither the warning for absences on June 7 nor the "informative letter" of June 17 were alleged by the General Counsel to be discriminatorily motivated.

## 2. The 8(a)(1) activity

### a. Threats

It is alleged that on June 15 Nolin threatened an employee with discharge for engaging in union activities. According to Banks, Nolin said that if he caught Banks distributing union literature in the break area, even on his own time, he would march him over to the timeclock. If this occurred it would be a threat in violation of Section 8(a)(1). However, Nolin denies that such a thing occurred. Since not even Banks claims that he in fact was passing out union literature, I find it unlikely that this actually took place. Absent Banks passing out literature there would be no basis for it. Accordingly, I find this allegation has not been established by a preponderance of the credible evidence.

### b. Disregarding physical violence

It is also alleged that on or about June 15, apparently during the same time, Nolin informed an employee (Banks) that he would disregard any physical violence against him by other employees if he continued to "run off at the mouth for being in the union." The General Counsel argues that there is a section in the Company's rules that physical violence would lead to immediate discharge "except in self-defense." The General Counsel then reasons that when Nolin used the word "self-defense" he implicitly was telling Banks that, if another employee should hit

Banks, Nolin would not discipline the other employee. I find this reasoning somewhat strained and in any event, as with these other matters, I do not feel that Banks' version of this should be credited over Nolin's. Accordingly, I find that this allegation has not been sustained.

c. Denying employees pay raises and promotions

It is further alleged that on June 18 Nolin informed an employee that he was denying that employee a pay raise and a promotion because of his union activity. There is no evidence in the record to support this allegation and accordingly it has not been sustained.

d. Interrogation by Richard M. Richardson

It is finally alleged that the Respondent violated Section 8(a)(1) by interrogating an employee concerning his communication with the National Labor Relations Board on June 18. Banks testified that Richardson asked him whether he had been to the Board. Richardson denied any such event occurred. I find it quite improbable that Richardson would have in fact made such a statement, particularly in view of the fact that any contact with the Board was yet to come in time. It appears from the totality of the record that Banks did not have any contact with the

<sup>2</sup> 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.

Board or make any statements to that effect until sometime subsequent to his discharge. Given the probable unreasonableness of such an inquiry by Richardson and generally crediting his testimony over Banks, I conclude that this event did not happen as testified to by Banks.

In any event, I conclude that in this respect, as well as the others, the General Counsel has not supported the allegation by a preponderance of the credible evidence and therefore conclude the allegation has not been sustained.

THE REMEDY

Having found that the General Counsel has failed to establish the substantive allegations of unfair labor practices by a preponderance of the credible evidence, I shall recommend that the complaint be dismissed in its entirety.

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

ORDER<sup>2</sup>

It is hereby ordered that the complaint be, and the same hereby is, dismissed in its entirety.

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.