

**Anthony Forest Products Co. and United Furniture Workers of America, AFL-CIO. Case 16-CA-6773**

August 31, 1977

**DECISION AND ORDER**

BY MEMBERS JENKINS, MURPHY, AND  
WALTHER

On April 7, 1977, Administrative Law Judge James T. Rasbury issued the attached Decision in this proceeding. Thereafter, the General Counsel and Respondent filed exceptions and supporting briefs. Respondent also 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, and conclusions<sup>1</sup> 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 be, and it hereby is, dismissed in its entirety.

<sup>1</sup> In view of our decision to adopt the Administrative Law Judge's Decision dismissing the complaint herein, Member Murphy finds it unnecessary to pass on Ricardo Medrano's employee status.

**DECISION**

**STATEMENT OF THE CASE**

JAMES T. RASBURY, Administrative Law Judge: This case was heard by me in Marshall, Texas, on January 20, 1977.<sup>1</sup> The original charge was filed by the United Furniture Workers of America, AFL-CIO (herein Union), on September 7; an amended charge was filed by the Union on October 12. Respondent admits having been served with a copy of both the original charge and the amended charge. Complaint was issued on October 15 alleging Respondent to have violated Section 8(a)(1) and (3) of the Act in that Respondent's supervisor, James Gilliam, orally warned an employee that he was being laid off because he was working for the Union and thereafter on August 17 discharged said employee because said employee was engaging in protected union activities.

<sup>1</sup> The relevant and significant dates concerning this matter occurred in the year 1976. All dates shown hereinafter will refer to the calendar year 1976 unless otherwise indicated.

Respondent's answer, filed October 25, admitted all jurisdictional and procedural allegations, the supervisory status of Gilliam, and the fact of Ricardo Medrano's discharge, but denied commission of any unfair labor practices.<sup>2</sup>

The parties were given full opportunity at the hearing to introduce relevant evidence, to examine and cross-examine witnesses, and to argue orally. Helpful briefs were received from the General Counsel and Respondent and have been carefully considered.

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

**FINDINGS OF FACT**

**I. JURISDICTION**

Respondent is, and at all times material herein has been, a corporation duly organized under, and existing by virtue of, the laws of the State of Delaware, maintaining a plant at Atlanta, Texas, where it is engaged in the operation of a lumber mill. During the past 12 months, which period is representative of all times material herein, in the course and conduct of its business operations, Respondent shipped goods valued in excess of \$50,000 directly to points located outside the State of Texas. Respondent admits and I herewith find Respondent to be an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

**II. THE LABOR ORGANIZATION**

The Union is now, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.

**III. THE ALLEGED UNFAIR LABOR PRACTICES**

**A. The Issues**

(1) Can a full-time employee of the Union who has sought and obtained employment from a company for the express purpose of organizing its employees, become an employee of said employer entitled to all of the protection afforded by the Act? (2) Was Ricardo Medrano discharged because of his union activities?

**B. The Evidence**

**1. Relating to the status of Medrano**

Medrano testified that he owns a small grocery store in Dallas, Texas, which is managed by his wife and provides him a small income that has enabled him to do volunteer work for a number of different unions. In May he was hired by the United Furniture Workers of America as a union organizer and was paid a regular weekly salary. His salary was \$200 per week and in addition he was furnished a 1976 Chevrolet Impala automobile for his use and was reimbursed for out-of-pocket expenses including lodging

<sup>2</sup> Medrano testified that his first name is Ricardo but that he is also known as Richard and throughout the record he is frequently referred to as Richard.

and \$6 per day for meals. Medrano testified that on or about August 11 he was instructed by his superior, Jack Houston, to go to Atlanta, Texas, and seek employment with Respondent for the purpose of organizing the plant.<sup>3</sup>

Medrano stated that he proceeded to Atlanta on August 12 and on the same date applied for, obtained, and went to work on the afternoon or evening shift as a laborer for Respondent. August 12 was a Thursday and Medrano worked that Thursday and Friday for which he received a check, was off on Saturday and Sunday, and then worked August 16 and 17 which was Monday and Tuesday of the following week. He was paid at the rate of \$2.50 an hour and received two separate checks for the 4 days that he worked. He was laid off or discharged at the conclusion of the afternoon or evening shift on August 17. Medrano testified that he received his full salary and expenses while he was working for Respondent and that he turned the paychecks received from Respondent over to the Union. Under cross-examination Medrano acknowledged that while at Respondent's plant in Atlanta he was generally under the direction of Jack Houston, and had he been asked to leave there and take an assignment elsewhere he would have done so.

### Analysis

#### 1. The employee status of Medrano

The evidence is crystal clear and undisputed that Medrano was a full-time union employee working under the Union's direction at the time he sought and obtained employment by Respondent and at all times while employed by Respondent. The question to be resolved is: Under such circumstances was Medrano an "employee" of Respondent entitled to the protection afforded by the Act?

Respondent contends Medrano should not be afforded protection of the Act and relies rather heavily on selective language from two Board cases concerned with the same subject matter. In *Sears, Roebuck and Co.*, 170 NLRB 533, at 535, fn. 1 (1968), the Administrative Law Judge set forth this comment:

Of course, if he [the discriminatee] seeks only temporary employment in order to organize, and withholds from his employer the fact that he seeks only temporary employment, a different result might follow, but no such showing is made on this record.

The Board, in agreement with the Administrative Law Judge, dismissed the complaint but in a footnote of their own specifically stated, "We find it unnecessary to pass upon the 'comment' and statements of the trial examiner expressed in footnote 3 of his decision." Other language from the same questionable footnote clearly indicates that the Administrative Law Judge found the discriminatee to be "a bona fide employee. The fact that he was also paid by the Union to organize does not militate against that finding." Counsel then points out that in *Dee Knitting*

*Mills, Inc., et al.*, 214 NLRB 1041 (1974), the Board specifically approved the Administrative Law Judge's footnote in *Sears, supra*. Respondent then contends that based on the Board's holding in *Dee Knitting Mills* that it would appear to have decided that persons such as Medrano, whose employment was solely to organize, are not employees within the meaning of the Act.

Such an argument tends to mix and confuse what the Board has said. The footnote in the *Sears* case makes it quite clear that the discriminatee with which that case was concerned was a bona fide employee even though he was working full time for a union also. The note only suggested that it might have been otherwise if there had been some indication of temporary employment. In the *Dee Knitting Mills* case, *supra*, the pertinent comments by the Board were concerned with the question of whether or not the particular employee was a temporary or a permanent employee so as to determine whether or not her union authorization card should be counted. A "temporary" employee is not permitted to vote in a Board-conducted election because he or she does not have any longtime community of interest with the regular employees. However, that is not to say that a "temporary" employee is not to be accorded all of the protection afforded under the Act insofar as discriminatory treatment because of union activity is concerned. In the *Dee Knitting Mills* case, the Board said:

*The Administrative Law Judge notes, and we agree, that an employee does not lose his status because he is also paid to organize. See Sears Roebuck & Co., 170 NLRB 533, 535, footnote 3 (1968.) The real question, as the cited case shows, is whether the employment itself was solely to organize, so that the employment is really only temporary, whether the employer knows it or not. [Emphasis supplied.]*

In *Elias Brothers Big Boy, Inc.*, 139 NLRB 1158 (1962), the Board found a violation of discriminatory discharge. However, on appeal to the Sixth Circuit, the court denied reinstatement of the discriminatee on the theory that the individual was not a bona fide employee within the intent of Section 2(3) of the Act because she was receiving pay from the Union during the period of her employment as a waitress for Respondent.<sup>4</sup>

In a more recent case<sup>5</sup> the Board was confronted with the issue as to whether or not two employees who were paid professional union organizers were employees of Respondent within the meaning of Section 2(3) of the Act. The Board said, "the issue of whether Mary Calligarias and Antoinette Jackson are entitled to the protection of the Act is not whether they sought, with respect to Respondent, 'an employment relationship of a permanent nature.' In recognition of the broad definition of 'employee' in Section 2(3) of the Act, the Board consistently has held, at least since 1947, that unlawful discrimination includes discrimi-

<sup>3</sup> Throughout the record, Jack Houston's last name has been spelled Houston although Respondent's brief indicates that the correct spelling is Huston. Regardless of the correct spelling, Jack Houston was the district director of District 9 for the Union which included the States of Georgia, Tennessee, Mississippi, Alabama, Arkansas, Texas, and Oklahoma.

<sup>4</sup> *N.L.R.B. v. Elias Brothers Big Boy, Inc.*, 327 F.2d 421 (C.A. 6, 1964.)

<sup>5</sup> *Oak Apparel, Inc.*, 218 NLRB 120 (1975).

nation against members of the working class generally." Board Member Kennedy dissented in the *Oaks* case.<sup>6</sup>

On the basis of Board Decisions, it seems unmistakably clear that a full-time union organizer may be hired by a company and is to be accorded the full protection afforded any other employee under the Act. I find, therefore, that Medrano was a bona fide employee of Respondent.

## 2. Relating to the cause of Medrano's discharge

While there is no doubt of Medrano's purpose in seeking employment with Respondent, his own union conversations, or activity, as testified to by him were confined to three incidents. (1) Medrano testified that on Monday, during his lunch hour he passed out four union cards. (2) Medrano also testified that at approximately 10:30 p.m. on August 17, the night he was discharged, that Ottie Walker<sup>7</sup> told him that he wanted to talk to him and they moved about 75 feet away from the outside of the building where Walker asked him . . . .

If I worked for the Union, and I told him yes, I did work for the Union, and he said that they had my business card up front, and that they knew that I worked for the Union.

And he started to tell me that he was sympathetic with the Union. It was a worthwhile cause, and he too had belonged to the Union, and he reached into his back pocket, pulled out his wallet and showed me a Teamsters membership card.

(3) According to Medrano, "about five minutes before quitting time Mr. Gilliam came and told me that he had to let me go because we had too many employees working, and these are his words, and that they knew that I had worked for the Union, and they didn't like it, and they had to let me go, but it wasn't none of his doing."

The complaint did not allege Ottie Walker to be a supervisor and/or agent of Respondent and this record is wholly inadequate to support such a finding. Walker is a millwright who has worked on more than one occasion for Respondent and there is reason to believe that he is a knowledgeable employee frequently relied on by Respondent to make emergency repairs and generally keep the machinery operating. The record totally fails to reflect any of the usual indicia of supervisory status for Walker and Respondent's witness denied that he was a supervisor.

Medrano testified that there were other employees hired after he was hired who were not laid off, or terminated at the time of his termination. He described one such person as a young black about 18 years of age, named Peoples. No further identification regarding where Peoples may have worked was made. Medrano also testified that he had no knowledge of anyone who was hired after he was hired or

after his discharge that performed exactly the same type of laboring duties that he had been assigned.

James Gilliam testified that he is the evening shift foreman for the Respondent; that he had hired Medrano and that he had been responsible for telling Medrano that he was to be laid off because of a curtailment of the number of employees on the day shift which in turn allowed the employees on the day shift to bump back on to the evening shift (see Resp. Exh. 4). Gilliam denied that he made any reference to Medrano's union activities and further denied that he had any knowledge that Medrano had been or was active for the Union at the time of the discharge. Gilliam regarded Medrano as a good worker. Gilliam further testified that no one has been hired to take Medrano's place; that the only employee performing laboring type duties is Donald Taylor who was on the payroll and working at the time Medrano was hired; that the only employee who has been hired of which he has any knowledge since Medrano's termination is a man by the name of Humphrey. He is an "edgerman," which is a skilled position.

## Conclusion

In every case a violation of the Act must be proved by the General Counsel by a preponderance of the evidence.<sup>8</sup> Where there is no direct evidence of discriminatory motive, the Board may examine the record to determine if there is support for an inference of such motivation. In order to draw such an inference, however, it must be based upon evidence, direct or circumstantial, not upon mere suspicion.<sup>9</sup> I find insufficient evidence to support such an inference based on all the testimony in this case. Walker was not called by the General Counsel to lend credence to Medrano's testimony that Walker had knowledge that the Company knew of Medrano's union activities. No explanation was given as to why he was not called. The Act does not give the Board control over an employer's policies, including his policies concerning tenure of employment; it is immaterial whether the discharge was arbitrary, unfair, or unreasonable, so long as it was not discriminatorily motivated.<sup>10</sup> In order to find that a discharge is discriminatorily motivated the General Counsel must prove some knowledge or belief on the part of Respondent associating the dischargee with union activities or interests. In this case the only evidence indicating union activity on the part of Medrano and/or knowledge on the part of Respondent concerning Medrano's union activities consisted of the testimony of Medrano. The evidence fails to reveal the circumstances under which the union cards were distributed to the four employees or in what manner Respondent might have obtained some knowledge of this activity. Walker, who supposedly had some information reflecting on the knowledge of Respondent regarding Medrano's activities, was not called to corroborate Medrano's testimo-

<sup>6</sup> I personally have great difficulty in understanding how an individual can be an employee of two different employers at the same time for the same working hours. There is a certain master-servant relationship encompassed in any employer-employee relationship which is absent under such circumstances. However, I am bound by the Board's Decision and shall find accordingly.

<sup>7</sup> Walker's first name is variously spelled in the transcript as "Odell" and as "Audi." but Respondent has indicated in his brief that the correct spelling should be Ottie.

<sup>8</sup> *Falstaff Brewing Corporation*, 128 NLRB 294, 295, fn. 2 (1960), enf. as modified 301 F.2d 216. (C.A. 8, 1962.)

<sup>9</sup> *Cedar Rapids Block Co., Inc. and Cedar Sand and Gravel Co. v. N.L.R.B.*, 332 F.2d 880, 884. (C.A. 8, 1964.)

<sup>10</sup> *N.L.R.B. v. Ace Comb Co. and Ace Bowling Co., Division of Amerace Corp.*, 342 F.2d 841, 847 (C.A. 8, 1965); *N.L.R.B. v. T.A. McGahey, Sr., et al., d/b/a Columbus Marble Works*, 233 F.2d 406, 413 (C.A. 5, 1956).

ny. While I was impressed with the demeanor and apparent credibility of Medrano as a witness, I was generally impressed by the demeanor and apparent credibility of the testimony given by James Gilliam. Under such circumstances it cannot be said that the General Counsel has proven this case by a preponderance of the evidence.<sup>11</sup> I find that the General Counsel has failed to prove that Medrano was discharged by Respondent because of an unlawful discriminatory motive.

#### CONCLUSIONS OF LAW

1. Respondent, Anthony Forest Products Co., is engaged in commerce, and the Union, United Furniture

<sup>11</sup> *Blue Flash Express, Inc.* 109 NLRB 591 (1954); *Casa Grande Cotton Oil Mill*, 110 NLRB 1834 (1954); *Brotherhood of Painters, Decorators and Paperhangers of America, Union No. 76 (Gomez Painting & Decorating Co.)*, 182 NLRB 405 (1970); cf. *AAA Lapco, Inc.*, 197 NLRB 274 (1972).

<sup>12</sup> In the event no exceptions are filed as provided by Sec. 102.46 of the

Workers of America, AFL-CIO, is a labor organization all within the meaning of the Act.

2. Respondent has not violated the Act with regard to the allegations contained in the complaint.

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

#### ORDER<sup>12</sup>

The complaint is hereby dismissed in its entirety for lack of merit.

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.