JD–59–07
Edgewood, MD

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

SMITHS DETECTION, INC.

and 5–CA–33364

INTERNATIONAL UNION OF
ELECTRONIC, ELECTRICAL, SALARIED,
MACHINE AND FURNITURE WORKERS-
COMMUNICATION WORKERS OF AMERICA,
LOCAL 82-109, AFL-CIO

*James C. Panousos, Esq.,* for the General Counsel.
*Doreen S. Davis and John S. Ferrer, Esqs., (Morgan, Lewis & Bockius, L.L.P.)*
Philadelphia, Pennsylvania and Washington, D.C., for
the Respondent.

DECISION

Statement of the Case

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Baltimore, Maryland, on June 11-12, 2007. The Union filed the charge giving rise to this proceeding on November 20, 2006 and the General Counsel filed his Complaint on February 28, 2007.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

Findings of Fact

I. Jurisdiction

Respondent, Smiths Detection, Inc., has its headquarters in the United Kingdom. It manufactures equipment for the U.S. military at a facility in Edgewood, Maryland. From this facility, Respondent sells and ships goods valued in excess of $50,000 to points outside the State of Maryland. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and the Union, IUE-CWA Local 82-109, is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

The General Counsel alleges that Respondent violated Sections 8(a)(1), (3) and (4) by withholding a bonus from bargaining unit employees in October 2006. He also alleges that Respondent, by Supervisor Tom Gorius, violated Section 8(a)(1) in telling bargaining unit employees that they were not getting this bonus because of the Union's protected activities in filing grievances and unfair labor practice charges. Respondent contends it did not pay a bonus to unit employees for non-discriminatory reasons. While it admits that Supervisor Gorius did tell unit employees that they were not getting a bonus due to the Union's protected activities,

Respondent contends that this was incorrect and that it effectively disavowed his statements to that effect.

Respondent, Smiths Detection, Inc., purchased the Edgewood, Maryland facility in 1999. In calendar years 2000, 2002, 2004 and 2005, it paid a bonus to both salaried employees and bargaining unit employees. Respondent's salaried employees participate in a "full potential profit plan," on which their bonuses are based. A salaried employee's level of participation depends on his or her level of responsibility. Most salaried employees are eligible to receive a bonus of as much as 10% of their salary depending of how much profit Respondent's Edgewood and related operations realize in a fiscal year as compared to target profits set by corporate officials in England. A few salaried employees participate at levels of 20%, 30% and 40%.[1]

In 2004, salaried employees received a bonus of 3-5% of their salary and bargaining unit employees received 2%. The Union filed an unfair labor practice charge with regard to this disparity, which Region 5 dismissed. In 2005, unit employees each received a $1,500 bonus; salaried employees at the 10% participation level received a bonus equal to 10% of their salary.[2] In 2001 and 2003, neither salaried, with possibly a few exceptions, nor unit employees, received bonuses.

Respondent conducted a meeting for all employees on September 28, 2006. Damian Tracey, President of Smiths Detection, Military, whose office is in England, and Timothy Picciotti, Vice-President and General Manager, the senior company official at Edgewood, were the speakers at this meeting.[3] Picciotti has held the position of Vice-President and General Manager only since March 2006.

There is a conflict in the testimony as to what was said by both officials. However, it is uncontroverted that Picciotti discussed Respondent's financial performance for the fiscal year ending July 31, 2006.[4] It is also uncontroverted that Gwendolyn Jordan, a bargaining unit employee and union shop steward, asked Picciotti if employees were going to get a bonus for 2006.

Picciotti testified that he responded by saying that he had made his recommendation regarding the bonus to corporate headquarters and was awaiting a response. Jordan and Union President Stephen Blair testified that Picciotti responded by telling employees that they would be getting a bonus, but that he did not know how much of a bonus. Union Shop Committeeman Charlie Harris also testified that Picciotti told employees that they would get a bonus. There is no evidence that Picciotti told unit employees that they would not be receiving a bonus or that he had not yet made a decision as to whether or not unit employees would be receiving a bonus.

Nevertheless, I credit Picciotti's testimony over that of the General Counsel's witnesses. There is no apparent reason in this record for Picciotti to tell employees that they would be getting a bonus on September 28, and then change his mind in the ensuing month. This is also

---

[1] The 20-40% salaried employees are eligible for other bonus programs as well.

[2] The $1,500 bonus for 2005 was less than 10% of unit employees' wages.

[3] Picciotti reports to Tracey. Tracey reports, either directly or indirectly, to Stephen Phipson, Smiths Detection's Group Managing Director, who is also located in England.

[4] Some of Respondent's employees work in Boston, Massachusetts and in California, but none of these employees are members of the bargaining unit.

a factor in my decision to vacate the 8(a)(3)/8(a)(4) allegations in the Complaint. The only relevant event that occurred between September 28 and October 26 was the Union's filing of grievance 0549 on October 5.[5]

This grievance concerned one occurrence given to unit employee Geneva Knox for missing work on September 29, 2006 to obtain treatment for allergic dermatitis. There is no reason to believe that the filing of this grievance caused Respondent to have a change of heart with regard to a bonus for unit employees.

Picciotti testified that 9 days prior to this meeting, on September 19, 2006, he submitted his recommendations regarding bonuses to Mike Rizzo, the corporate human resources director in England. This recommendation, R. Exhibit 8, was submitted in the form of spreadsheet.

On September 19, 2006, Picciotti recommended that salaried employees at the 10% level receive a 1.3% bonus, based on the profit figures for the fiscal year ending on July 31, 2006. These figures showed that while Respondent's profits were significantly higher than in 2005, they just barely exceeded the minimum profit target set by corporate headquarters in March 2006. The minimum profit target for the "full potential profit plan" bonus set in March was $8.8 million. The profit realized was $9 million.

The spreadsheet sent to England on September 19, included a page listing bargaining unit employees. This spreadsheet reflected the fact that in 2005 each unit employee had received a $1500 bonus under a column titled "maximum bonus % eligibility." The column titled "actual bonus amount received," which was filled out for salaried employees (1.3% x their salary) was left blank for unit employees.

Picciotti attended a management conference in England on October 4-6, 2006. He testified that at that conference, Mike Rizzo, the corporate human relations director, asked him what bonus he was recommending for bargaining unit employees. Picciotti testified that he told Rizzo that he was recommending a zero bonus. However, Picciotti sent a memo to the Edgewood human resource director, Robert Libby, and financial director, Charisse Chel, on October 9, which states, in regard to the conference in England, "we did not discuss the bargaining unit." Despite this apparent inconsistency, there is nothing in this record that indicates that Picciotti's decision not to give unit employees a bonus was a reaction to anything that the Union had or had not done. This decision was made no later than October 13, 2006, R. Exh. 9.

At the conference, Rizzo informed Picciotti that salaried employees would receive a 5% bonus, in addition to that received under the full potential profit plan. This supplemental bonus was to account for new programs "captured" in fiscal year 2006 and Edgewood's ability to manage itself during the 4-6 month period from when Picciotti's predecessor left Edgewood until Picciotti assumed his current position.

---

[5] The General Counsel also argues that Respondent's decision was a reaction to the settlement of Case No. 5-CA-32866 on August 30, 2006 and the posting of the Notice to Employees in that case which occurred on September 7. Respondent paid over $16,000 to unit employees in settling this case. If Respondent's decision was made in reaction to this settlement and posting, it would make more sense for Picciotti, on September 28, to present his nondiscriminatory explanation for denying unit employees a bonus, rather than telling them they were going to get a bonus.

Picciotti testified that he recommended no bonus for unit employees in 2006 without consulting anyone else. He did not testify as to when he determined that unit employees should not receive a bonus. Further, Picciotti testified that he made this determination for the following reasons: first of all, Respondent's collective bargaining agreement with the Union did not require a bonus. Secondly, unit employees were guaranteed periodic wage increases of 10% over the three-year life of the contract. In contrast, salaried employees were not guaranteed any wage increases and had typically received only 8.5 % in merit increases during the same three-year period. Thirdly, Respondent's Edgewood and related facilities had barely exceeded the minimum target profit set by corporate headquarters for fiscal year 2006.

On October 26, 2006, Respondent held a meeting for its approximately 110 salaried employees. Respondent distributed bonus checks to the salaried employees at this meeting. Those at the 10% participation level in the "full potential profit plan" received a bonus check in the amount of 6.3% of their salary (1.3% pursuant to the plan, plus the supplemental 5% for "exceptional circumstances").

Shortly after the October 26 meeting for salaried employees, and possibly the next day, the bargaining unit's supervisor, Thomas Gorius, distributed wage checks to unit employees. Gwendolyn Jordan asked Gorius about a bonus. Gorius told Jordan that unit employees were not getting a bonus because the company believed the Union was filing too many grievances and that Respondent was spending too much money on arbitrations. Gorius said he had told Jordan this a long time ago and that the Union was going to have to stop filing so many grievances.[6]

Gorius made similar remarks to Shop Committeeman Charlie Harris. During calendar year 2006, the Union filed 17 grievances, 12 of which were filed prior to November 2, 2006. The most recent of these were grievance 0574 filed on September 20, alleging that non-unit employees were performing bargaining unit work, and 0549 filed on October 5, challenging Geneva Knox's receipt of an "occurrence" under Respondent's absenteeism policy. In addition, Respondent settled an unfair labor practice charge filed by the Union on August 30, 2006. Pursuant to this agreement, Respondent paid approximately $8,000 each to two unit employees, GC Exh. 4.[7]

On or about November 2, 2006, Tim Picciotti conducted a meeting for the 30-35 unit employees at Edgewood. Picciotti told unit employees that, "the reason why [they] were not getting the bonus …wasn't the reason that [they had] heard," and he explained to unit employees what he said was the real reason for his decision not to give them a bonus, e.g., Tr. 64. Picciotti also told unit employees that union activity had nothing to do with his decision. In response to a question from Shop Steward Gwendolyn Jones, Picciotti, may have at least implicitly informed the employees that Gorius had nothing to do with the decision, Tr. 69, 203-04.

Picciotti said that while unit employees were guaranteed raises under the collective bargaining agreement, salaried employees were not guaranteed any pay increase. While unit employees had received a 10% wage increase under the collective bargaining agreement, Picciotti said salaried employees had only 8.5% in their "available pool" for merit increases. He

[6] Jordan's testimony is uncontradicted; Gorius, who no longer works for Respondent, did not testify.

[7] Between November 2003 and November 2006, the Union filed ten unfair labor practice charges, Exh. G.C. – 10.

noted that while unit employees were paid time and a half for overtime work, exempt salaried employees were not paid for overtime.

At this meeting, Picciotti reviewed Respondent's financial results for fiscal year 2005 and 2006. He stated that in 2005, the company realized an actual profit of $7.3 million dollars, which was greater than the maximum profit target set by corporate headquarters. In contrast, he said, the $9 million dollar actual profit realized in 2006, was only $200,000 above the minimum profit target set for that fiscal year.

On January 5, 2007, after the Union had filed the instant unfair labor practice charge, Respondent posted a notice at the Edgewood facility, signed by Vice President and General Manager Tim Picciotti, disavowing the statements made by Gorius, GC Exh. 7. The notice stated:

> The Company has learned, because your union filed an unfair labor practice charge with the NLRB, that some employees believe that Tom Gorius told them they did not receive a discretionary bonus this year because of their union activities. This is an unlawful statement. While Tom did not intend to make an unlawful statement, it could be interpreted that way, and the Company apologizes and regrets this conduct.
>
> Tom did not play any part in the decision not to grant a discretionary bonus to the unit employees. As you were informed on November 2, 2006 by Tim Picciotti, the reason unit employees did not receive a discretionary bonus this past year is because of the Company's financial performance and because bargaining unit employees receive guaranteed wage increases under the collective bargaining agreement, while non bargaining unit employees do not have guaranteed wage increases. Union support, activity or membership did not play a part in the Company's decision on the discretionary bonus.
>
> Section 7 of the National Labor Relations Act gives all employees the following rights:...
>
> We will not tell employees that they are not receiving discretionary bonuses because of the union.

This notice was also handed to all unit employees on January 5, 2007, except for three who were not at work that day. Respondent handed the notice to these three employees on January 10.

*Analysis*

*Did the General Counsel prove that Respondent failed to give unit employees a bonus in violation of Section 8(a)(3) and/or (4)?*

In order to prove a violation of Section 8(a)(3) and/or (4), the General Counsel must generally make an initial showing that (1) the employee was engaged in protected activity; (2) the employer was aware of the activity; and (3) that animus towards the protected activity was a substantial or motivating reason for the employer's action. Once the General Counsel makes this initial showing, the burden of persuasion shifts to the Respondent to prove its affirmative defense that it would have taken the same action even if the employee had not engaged in protected activity, *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (lst Cir. 1981); *La Gloria Oil and Gas Co.,* 337 NLRB 1120 (2002).

In this matter there is no issue as to employer knowledge of protected activity. That at least some members of management bore animus towards the Union's protected activities is established by Supervisor Gorius' remarks to bargaining unit employees. On the other hand, I do not believe that one can assume anti-union animus solely from the fact that the Union has filed numerous grievances and unfair labor practices. Given Gorius' remarks, however, the only issue is Respondent's motivation in not granting unit employees a bonus. In this regard, the General Counsel concedes, citing *New Orleans Board of Trade,* 152 NLRB 1258, 1265 (1965) and *Speidel Corp.,* 120 NLRB 733 (1958), that discriminatory motive, and therefore a Section 8(a)(3) violation, is not established simply by showing that non-unit employees received a bonus in 2006 and unit employees did not.

Furthermore, the fact that Gorius told employees that they were not getting a bonus for discriminatory reasons does not establish that these were the reasons. This is particularly so in that there is no evidence establishing that Gorius knew the motivation for Respondent's decision. The fact that Gorius was an agent of Respondent when making these remarks is relevant to the 8(a)(1) allegation but not to the 8(a)(3)/(a)(4) allegations. The issue with regard to the latter is Respondent's motivation. On this record there is insufficient evidence that Gorius was privy to the reasons for Respondent's decision with regard to a bonus for unit employees.

By the time of the hearing, Gorius was no longer Respondent's employee. Therefore, an adverse inference cannot be drawn from the fact that Respondent did not call him as a witness, *Reno Hilton,* 326 NLRB 1421 (1998), n. 1; *Goldsmith Motors Corp.,* 310 NLRB 1279 (1993) n. 1.[8] Moreover, to the extent there is evidence as to the state of Gorius' knowledge, all this record establishes is that he played no role in the bonus decision. Additionally, there is no evidence on which to conclude that Gorius was repeating information he heard from officials who were privy to the reason(s) for the decision.

Aside for Gorius' statements, there is no evidence in this record on which to infer discriminatory motive for Respondent's decision not to give unit employees a bonus. As stated previously, there was no reason for Tim Picciotti to have a change of heart between September 28, and October 26. There is no basis, apart from Gorius' remarks, for concluding that anyone other than Picciotti made this decision, or that Picciotti made the decision for reasons other than those proffered by him in this record.

Unit employees were paid bonuses in other years in which they were covered by a collective bargaining agreement. Thus, Respondent's reliance on the collective bargaining agreement is insufficient, in isolation, to explain the withholding of the bonus in 2006. However, given the totality of Picciotti's explanation for his decision, i.e., barely meeting the profit target and the disparity in bonuses paid previously to salaried and unit employees, there is insufficient evidence in this record on which to draw an inference of discriminatory motivation. For example, the record does not establish that Respondent withheld the bonus from unit employees in 2006 in retaliation for an uptick in union activity. I therefore dismiss the General Counsel's Section 8(a)(3)/8(a)(4) allegations.

---

[8] The General Counsel established that Gorius was present at Respondent's facility during the week prior to the instant hearing for purposes of pre-trial preparation. I deem this to be insufficient to trigger an adverse inference on the assumption that Gorius would be favorably disposed towards the Respondent. There is no evidence as to the reason(s) Gorius left Respondent's employment and/or his relationship with his superiors that would justify such an assumption.

*Did Respondent, by Tom Gorius, violate Section 8(a)(1) by telling several unit employees that they were not receiving a bonus because the company was upset that the Union was filing too many grievances and unfair labor practice charges?*

It is undisputed that Tom Gorius, a statutory supervisor, told employees that they were not going to receive a bonus in 2006 because of the Union's activities in filing grievances and unfair labor practice charges. This is clearly an unlawful statement. However, an employer may, under certain circumstances, relieve itself of liability for unlawful conduct by repudiating it.

To be effective, such repudiation must be timely, unambiguous, specific in nature to the coercive conduct and free from other proscribed illegal conduct, *Douglas Division, The Scott Fetzer Company,* 228 NLRB 1016 (1977) and cases cited therein at 1014. There must be adequate publication of the repudiation to the employees involved and there must be no proscribed conduct on the employer's part after the publication. Such repudiation should give assurances to employees that in the future their employer will not interfere with the exercise of their Section 7 rights, *Passavant Memorial Area Hospital,* 237 NLRB 138 (1978).[9]

Respondent effectively repudiated Gorius' statements and conduct. On November 2, 2006, Tim Picciotti told unit employees that "the reason why [they] were not getting the bonus …wasn't the reason that [they had] heard," and he explained to unit employees what he said was the real reason for his decision not to give them a bonus, e.g., Tr. 64. Picciotti also told unit employees that union activity had nothing to do with his decision. In response to a question from Shop Steward Gwendolyn Jones, Picciotti, may have at least implicitly informed the employees that Gorius had nothing to do with the decision, Tr. 69, 203-04.

On January 5, 2007, albeit after the filing of the instant unfair labor practice charge, Respondent posted and distributed a notice informing employees that Gorius' statements were incorrect, that union activity had nothing to do with unit employees not receiving a bonus and reiterating the rationale given to employees by Tim Picciotti on November 2. The notice promised not to tell employees that they are not receiving a discretionary bonus because of the Union.

The General Counsel's argument that Respondent's disavowal was untimely ignores the explanation given by Picciotti to employees on November 2, and his assurances that the decision not to pay unit employees a bonus was not retaliatory.

Respondent, which obviously knew by November 2, what Gorius had been telling employees, could have been more direct in addressing his comments. One can also quibble with the statement in the January 5 notice which implies that Gorius might not have made statements that he clearly made, or that Gorius "did not intend to make an unlawful statement." However, I conclude that by assuring unit employees on November 2 and January 5, that its decision was not retaliatory, explaining its nondiscriminatory rationale and informing employees that Gorius had no input in the bonus decision (implicitly on November 2, and explicitly on January 5), Respondent effectively disavowed Gorius' conduct. Therefore, I dismiss the Section 8(a)(1) allegation as well.

[9] The Board majority has stated that does not necessarily endorse all the elements of *Passavant, e.g., Claremont Resort and Spa,* 344 NLRB No. 105 (2005). I find that under either the *Passavant* or *Douglas Division* standards, Respondent has effectively disavowed Gorius' conduct.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[10]

ORDER

The complaint is dismissed.

Dated, Washington, D.C., August 31, 2007.

Arthur J. Amchan
Administrative Law Judge

[10] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.