

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

LIFE EMS AMBULANCE OF KALAMAZOO, INC.

and

Case GR-7-CA-50655

INTERNATIONAL ASSOCIATION OF EMTS AND
PARAMEDICS, NAGE/SEIU

Colleen Carol, Esq., for the General Counsel.

David M. Buday, Esq., for the Respondent.

BENCH DECISION

Statement of the Case

GEORGE CARSON II, Administrative Law Judge. This case was tried in Grand Rapids, Michigan, on December 13, 2007, pursuant to a complaint that issued on October 25, 2007. The charge was filed on September 5, 2007. The complaint alleges that the Respondent threatened employees with discharge for engaging in activities on behalf of the Union. The Respondent's answer denies any violation of the Act. The General Counsel presented employee Michael Weaver, the employee to whom the threat allegedly was made. The Respondent presented John Walker, the supervisor who allegedly made the threat. After hearing oral argument, I issued a Bench Decision pursuant to Section 102.35(a)(10) of the Board's Rules and Regulations.

The Union began an organizational campaign among the Respondent's employees in June 2007. The alleged threat was purportedly made on August 30, 2007, at the end of a short meeting in which supervisor Walker, according to Weaver, presented to him and the paramedic with whom he worked, Kari Olson, a letter to employees from the Respondent that reflected the Respondent's opposition to the Union. Thereafter, Walker, Weaver, and Olson engaged in two or three minutes of small talk. The threat allegedly was made in the context of the small talk and occurred shortly before the employees left. Weaver testified that Walker stated that "individuals that tend to stir things up might be let go; something to that context." On cross examination, Weaver was asked, "That's exactly what he said?" Weaver answered, "That's approximately what he said, sir." He was then asked, "You don't remember exactly what he said?" Weaver answered, "No." See *Harrah's Marina Hotel & Casino*, 296 NLRB 1116, 1119 (1989).¹

Olson was not called to corroborate Weaver's testimony. Weaver's admission that his testimony was "approximately" what Walker allegedly said left me unable to determine exactly

¹ My bench decision fails to set out the statement or the specific words by which Weaver admitted that he was unable to "remember exactly what ... [was] said." As discussed therein, the issue is whether the General Counsel established that any unlawful statement was made.

what was said. Weaver admitted that he did not feel threatened. My decision states that Weaver's admission regarding his subjective reaction is not material. I failed to qualify that statement by noting that I was referring to the inapplicability of subjective reactions when determining whether Section (8)(a)(1) has been violated, i.e. a threat that violates Section 8(a)(1) is not vitiated because the recipient does not feel threatened. In this case, Weaver's admission is relevant as an evidentiary matter. His admission that he did not feel threatened, when coupled with his acknowledgement that he did not remember "exactly what he [Walker] said," calls into question whether whatever was uttered by Walker constituted a threat.

Walker, who is a daytime field supervisor, did not recall any conversation with Weaver or paramedic Olson on August 30, 2007. He denied that he presented the letter to them, testifying that he assumed that the field supervisor on the next shift would have done so.

I found both Weaver, who candidly acknowledged that he could not recall "exactly" what Walker said, and Walker, who recalled no conversation and denied that he gave the letter to Weaver, to be credible. Nothing in their demeanor either detracted from or bolstered their credibility. In the absence of independent evidence either corroborating or contradicting the testimony of either, I determined that the General Counsel failed to carry the burden of proof. *Old Dominion Freight Line*, 331 NLRB 111, fn. 1 (2000); *Sea Crest Construction Corp.*, 330 NLRB 584, fn. 1 (2000).

I certify the accuracy of the portion of the transcript that sets out my decision, attached as Appendix A, page 63, line 18, through page 65, line 22.²

In view of the foregoing, the findings of fact and conclusions of law as set out in my bench decision, and on the entire record, I issue the following recommended³

ORDER

The complaint is dismissed.

Dated, Washington, D.C., January 9, 2008.

George Carson II
Administrative Law Judge

² Appendix A has been corrected. The corrections are reflected in Appendix B.

³ 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.

APPENDIX A

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18 The complaint alleges, the answer admits, and I find and conclude that
19 the Respondent is a corporation with several offices and
20 places of business in various Michigan towns and cities
21 including one at Kalamazoo, Michigan, the
22 facility about which the testimony today related.
23 The Respondent annually in conducting its business
24 operations derives gross revenues in excess of \$500,000 and
25 purchases and receives at its Michigan facilities goods and

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1 materials valued in excess of \$50,000 directly from points
2 located outside the State of Michigan.

3 The Respondent admits, and I find that the Union,
4 International Association of EMTs and
5 Paramedics, NAGE/SEIU, is a labor organization.

6 I am struck by the absence of any affirmative animus in
7 this proceeding directed specifically at the Union in that
8 Mr. Weaver admitted that during the campaign employees were
9 permitted to post pro-union literature, that they identified
10 themselves on occasion when they did post it, and that no
11 adverse action occurred relative to those employees. Taking
12 the statement to which Mr. Weaver testified at face value, a union is
13 not mentioned as Counsel for the Respondent correctly pointed
14 out, and although it is certainly not material to my
15 decision, Mr. Weaver admitted that he did not feel threatened

16 by the statement that was made.

17 My real problem is the statement itself. Mr. Weaver

5 18 indicated that he could not recall absolutely the specific

19 words that were used, and I find that inability to recall

20 specifically the words that were used to be critical to the

10 21 General Counsel establishing by the greater weight of the

22 evidence that in fact words which constituted a threat in

15 23 violation of Section 8(a)(1) of the Act were used.

24 Mr. Walters recalls no conversation with Mr. Weaver, and

25 certainly insofar as he does not deny a conversation as such,

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1 his testimony that he does not recall it is a fully credible

25 2 response to the question relative to his recollection of it,

3 and I do credit his lack of recollection with regard to it.

4 Critical to this case is the fact that there were three

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5 people in the room when the statement was allegedly made.

6 I do not draw an adverse inference against the General Counsel with

35 7 regard to the failure to present Ms. Olson to corroborate,

8 but the absence of corroboration, coupled with the

9 acknowledgement by Mr. Weaver that he cannot recall

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10 specifically what was said, in fact is compelling evidence

11 that the statement as stated in his testimony is the best of his recollection

45 12 and not the statement that was actually made, whatever that

13 statement may have been.

14 In short, considering the absence of animus, the absence

15 of corroboration, and the arguable ambiguity of the statement

16 that Mr. Weaver does recall to the best of his ability even
17 though he acknowledges that he cannot recall the exact words
5 18 said, I cannot find that the General Counsel by the greater
19 weight of the evidence has established that the Respondent
20 violated Section 8(a)(1) of the Act, and therefore I shall
10 21 recommend that the Complaint be dismissed. That concludes my
22 bench decision.

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APPENDIX B

Page	Line	Delete	Insert
63	18	Complaint alleges the Answer admits, and I find	complaint alleges, the answer admits, and I find and conclude
	21	Michigan to with the Kalamazoo	Michigan, the
	22-23	During the--the	The
	25	Facilities	facilities
64	2	state	State
	3	find that the union	find and conclude that the Union
	4	Charging Party/Union,	
	7	union	Union
	9	and	that
	10	it	it,
	12	he	Mr. Weaver
	13	the counsel for	Counsel for the
65	1	but testifies that he does not recall it,	his testimony that he does not recall it
	5	this room when this statement was allegedly made,	the room when the statement was allegedly made.
	6	and General Counsel, I do not draw an adverse inference	I do not draw an adverse inference against the General Counsel
	8	corroboration	corroboration,
	9	that, by	by
	10	fact,	fact
	11	as stated	as stated in his testimony