American Motors Corporation *and* Vester Hargett *and* Freeman Davis, Jr.. Cases 30–CA–3191 and 30–CA–3196

April 8, 1976

DECISION AND ORDER

BY CHAIRMAN MURPHY AND MEMBERS JENKINS AND WALTHER

On January 9, 1976, Administrative Law Judge Melvin J. Welles issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions to the Decision and a supporting brief, and Respondent filed a brief supporting the Decision and an answering brief to exceptions of the General Counsel.

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 conclusions 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.

[1] 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.

At par. 8, sentence 3 of sec. II, C of his Decision, the Administrative Law Judge, while discussing the degree of hostility allegedly directed against Vester Hargett by Respondent's Supervisor Ed LaFave, inadvertently used the name of George Koch, whereas it is clear that he intended to use the name "Hargett." We hereby correct this inadvertent error.

DECISION

STATEMENT OF THE CASE

MELVIN J. WELLES, Administrative Law Judge: This case was heard at Kenosha, Wisconsin, on September 18, 19, and 23, 1975, based on charges filed on June 18 and 20, 1975, and a complaint issued on August 7, 1975, alleging that Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act, as amended. The General Counsel and Respondent have filed briefs.

Upon the entire record in the case, including my observation of the witnesses, and upon consideration of the briefs, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE EMPLOYER AND THE LABOR ORGANIZATION INVOLVED

Respondent, a Maryland corporation, is engaged in the manufacture of automobiles at several locations throughout the United States, including the Kenosha, Wisconsin, plant involved in this proceeding. During the past calendar year, Respondent caused goods and materials valued in excess of $50,000 to be shipped across the lines of several States. It is, as it admits, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Local Union No. 72, herein called the Union, is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Issue*

The sole question in this case is whether, as the General Counsel contends, Respondent discharged employees Vester Hargett and Freeman Davis, Jr., because of their activities as union stewards, or because Hargett punched out Davis' time card when Davis was not at the plant, as Respondent contends. Obviously, the General Counsel has the burden of proving by a preponderance of the evidence that Respondent's motive was discriminatory; Respondent need not "prove" that Hargett punched out Davis' card on the occasion in question, or that this alleged incident motivated the discharges. The posture of the case is such, however, as to make resolution of whether Hargett punched out Davis' card virtually decisive.

The General Counsel contends that Hargett and Davis were both quantitatively and qualitatively the most active of the 10 stewards in their department, being especially aggressive in their presentation of grievances, and thereby incurring the enmity of various officials of Respondent, particularly Foreman Wayne Pautsch. This enmity, claims the General Counsel, resulted in their discharge. The General Counsel contends that the asserted misconduct by Hargett and Davis involving Hargett signing out Davis when the latter was at a bar was a fabrication by Foremen Pautsch and LaFave. Alternatively, the General Counsel contends that, even if the incident occurred, the discipline was not only more severe than the offense warranted, but also demonstrated disparate treatment of the two stewards, in that other employees guilty of similar offenses were not discharged, and in that it was the first offense for both Hargett and Davis.

B. *The Facts*

The nature and extent of the activities of Hargett and Davis as union stewards is plain on the record. Hargett, as the General Counsel states, was much more active than Davis.[1] Hargett had worked for Respondent from 1958 until 1967, when he quit. During his earlier employment he had been a steward for 2 years and assistant chief steward for 1 year, both in Department 2836, where he was subsequently reemployed in June 1973. In his earlier stint as union steward and assistant chief steward, Hargett carried out his duties "in the same manner" as during his later period. Hargett represented as steward about 52 employees in his department, and dealt with all the department supervisors on the second shift.[2]

The evidence indicates that between January 1 and June 14, 1975, Hargett filed 23 grievances of the 117 grievances filed on the second shift of Department 2836 by all 10 stewards. A number of grievances filed by Hargett involved Foreman Pautsch; others involved other supervisors.

Davis has worked for Respondent since 1967. Like Hargett, he was on the second shift and in Department 2836 at the time of his discharge, working under Foreman Pautsch, and was a union steward for about a year prior to his discharge. As steward, Davis represented between 40 and 50 employees, was involved in many (from 3 to 6 per week) oral grievances, and filed about 12 written grievances during his year's tenure as steward.

The General Counsel adduced evidence, principally from Hargett, concerning reactions to various grievances by supervisors or management officials indicating resentment by them. Pautsch, for example, told Hargett, in connection with a safety grievance in April 1975, that if Hargett "interfered with these employees doing this job, he [Pautsch] would expend [sic] me." Hargett was told he was suspended, but the suspension was lifted by Riesselmann, and there was no loss of time or pay. The next day, Riesselmann said to Hargett, "You blackmailed me last night, Vester, but next time I'll get you." On another occasion, in May after Hargett had successfully processed two grievances, Riesselmann told him, "I'll pay this time, but I won't pay no more." And Pautsch, in connection with Hargett attempting to secure rate increases for two employees on his last day of employment, told Hargett the employees were not doing a good job, and giving them a raise would be "stealing money from the company."[3]

On May 30, 1975, Hargett and Davis were discharged. Foreman Pautsch and his assistant, LaFave, were responsible for the discharges in that they observed and reported the incident which Respondent asserts motivated the discharges. About 12:30 a.m., Saturday, May 30, according to Pautsch and LaFave, they saw Hargett punch out two timecards, his own and Davis'. In addition, George Koch, a general maintenance foreman for Respondent, testified that he saw Davis in Jessie's Bar at 11:50 p.m. that same night, and that Davis remained there until about 2 a.m.[4]

Davis testified that he was at the plant, and not at Jessie's Bar, that night, and that he punched out his own card at 12:31 a.m. Hargett asserts that he punched out his own card, and only his own card, also at 12:31 a.m. that night. Hargett also testified that punching out directly behind him was employee Harold Pierce. Pierce also testified that he punched out directly behind Hargett, and that Hargett punched out only one card. Employee Robert Williams testified that he went to Jessie's Bar shortly after midnight to cash a check. Williams was "in kind of a hurry," was there less than 5 minutes, and saw Koch there, but did not see Davis. Employee William Shipman testified that he saw Davis in the plant about midnight. Hargett testified that he saw Davis in the plant about 10 minutes earlier. I defer until the discussion of the merits, below, resolution of the credibility conflicts concerning the May 30 incident.

C. *Discussion*

The General Counsel, although basing his case primarily on the assertion that Hargett and Davis should be believed, contends, as noted above, that even if Hargett did punch out Davis' card, the affirmative evidence of hostility toward them, coupled with the disparate nature of the treatment accorded them, establishes a violation of Section 8(a)(1) and (3) of the Act. This contention may be disposed of in short order. In the first place, what hostility there was toward Hargett and Davis (really only Hargett) was almost exclusively that of Foreman Pautsch. But the decision to discharge Hargett and Davis was made by higher management officials, not shown to have possessed such hostility.[5] More importantly, the evidence does not, in my view, support the General Counsel's assertion of disparate treatment.

The evidence shows that, although one employee punching out another's timecard is not permitted, there are two kinds of this offense, one involving "fraud," and the other "convenience." Fraud is involved when the employee whose card is punched by another is, based thereon, being paid for time not worked. Convenience involves all other situations, for example, two employees leaving with one going directly to the parking lot and the other punching out both cards. None of the instances of card-punching for another where the punishment was less than a discharge involved fraud. The evidence does disclose that discharge was invoked in a number of cases that did involve fraud.

[1] So much more that General Counsel argues "Even if Davis is not viewed as an especially active steward, his discharge was designed to lend legitimacy to or camouflage Respondent's unlawful motive in discharging Hargett and is thus unlawful."

[2] An employee group of 52 is more than the usual complement represented by a steward. The 1974 contract seems to provide for 1 steward for each 35 employees, and the full bargaining unit, consisting of about 10,000 employees, has about 250 stewards, or an average of about 40 employees per steward.

[3] Riesselmann denied the statements attributed to him; Pautsch did not. I am not at this juncture resolving the credibility conflicts involved.

[4] Koch did not know, he testified, who Davis was at the time, ascertaining Davis' identity the following Monday, but did know that Davis was a union steward.

[5] George Riesselmann, superintendent of Department 2936 on the second shift, did not, in the remarks attributed to him which he denied, evince the kind of hostility that would suggest a discharge otherwise not warranted by the offense.

Indeed, in one instance, an employee (Hubermeyer) was initially discharged for having his card punched out, but the discharge was rescinded at the intercession of steward Hargett, who pointed out the lack of any fraud.

There is also nothing in the record to suggest that a fraudulent punching out situation did not warrant discharge if it was only a "first offense." The only situation the General Counsel asserts as involving "fraud," with no discharge, concerned employee Mark Marano, who "forged" a gate pass, and was suspended for 2 weeks. But this situation did not involve being paid for time not worked, and hence is not "fraud" of the kind that distinguishes the two different punch-out situations. The evidence, in short, demonstrates a consistent policy, based on that distinction, and requires rejection of the General Counsel's contention that the discharges of Hargett and Davis were disparately imposed.

Having concluded that their discharges were not "disparate," the primary question remains—were the offenses committed by Hargett and Davis? Although it is conceivable that Pautsch and LaFave thought they saw Hargett punch out two cards, when in fact he did not, and that the discharges could therefore have been legitimately motivated even though two supervisors were mistaken, no such conclusion seems possible in the light of the direct conflict between the testimony of Foreman Koch and Davis as to Davis' whereabouts between about 10 to 12 midnight and 1 a.m.[6]

The General Counsel contends that witnesses Shipman, Pierce, and Ziegler should be credited over Respondent's witnesses because the former "are all still working for Respondent and testified against Respondent's interest." (Williams is also in this category, but, as just noted, his testimony is not irreconcilable with that of Koch.) The General Counsel also claims that "General Counsel's witnesses were sequestered and thus their testimony not affected by anyone's testimony. Although Respondent's witnesses were sequestered their stories had been previously rehearsed" at a grievance meeting, an unemployment compensation hearing, and in preparation for the hearing. He asserts further that the General Counsel's witnesses were supported by "documentary evidence" in that Pierce's timecard was punched out at 12:31 a.m., supporting his and Hargett's testimony that Pierce punched out directly after Hargett. Finally, the General Counsel claims that the "demeanor and forthrightness" of his witnesses "further substantiates their credibility."

Were the first reason advanced sound, it would mean that, with no other factors involved, employees would always be credited over supervisors or management officials. Manifestly that is not the law. As to the second reason, only the testimony of Pautsch and LaFave could be involved at all, and their telling the truth could as well account for the fact that they told the same story, in general, as the fact that they had "rehearsed" their testimony. It is not, that is, a basis for discrediting their mutually corroborative testimony that they had occasion on previous occasions to repeat their stories. I expect Hargett and Davis, indeed, both had occasion to repeat *their* stories, in probably much the same settings.

As to the claim that Pierce's testimony that he punched out directly after Hargett is supported by documentary evidence, based on both cards being punched out at 12:31 a.m., since the testimony establishes that about 35 employees could punch out in 1 minute, and that it took only a few seconds to get out the door from the timeclock, two men could easily have their cards read in the same minute without seeing each other. Indeed, it would as well be argued that Davis' card, also being punched out at 12:31 a.m., without Hargett or Pierce claiming to have seen him, shows that both were not telling the truth. It is in fact somewhat surprising that with 19 cards punched out at 12:30 a.m. that night, and 2 (aside from Davis') at 12:31 a.m., none saw Davis either punch out, or somewhere else in the vicinity about that time in what would have to have been at most about a full minute. This "documentary evidence," then, tends to support Respondent's position more than it does the General Counsel's. I take this into account in assessing credibility.

I also take into account the fact, adverted to above, that the degree of hostility shown by Pautsch toward Hargett—the evidence does not show any hostility directed at Davis[7]—was not so intense as to occasion a conspiracy to get rid of him. Yet a conspiracy it would have to be, with Supervisors LaFave and Koch directly in on the conspiracy. LaFave's only "hostility" toward Koch would have stemmed from his being Pautsch's assistant; there is no evidence demonstrating any overt hostility. Koch had nothing to do with Hargett or Davis, and did not even know Davis' name. Were only Pautsch, or perhaps even Pautsch and LaFave, involved, the General Counsel's theory would be tenable. But with Koch directly involved, and Riesselmann and Waltemath at least indirectly,[8] and considering also the lack of any hostility (or any reason for hostility) toward Davis, finding for the General Counsel requires too many untenable inferences, conclusions, and credibility resolutions. It requires a willingness to conspire to fire a man who was seemingly just "another steward," Davis, (an argument the General Counsel does advance, i.e., that Davis' discharge "was designed to lend legitimacy to or camouflage Respondent's unlawful motive in discharging Har-

[6] As noted above, Williams, who testified that he did *not* see Davis when he went to Jessie's Bar about midnight, was "in a hurry" and was at the bar only a few minutes. This testimony therefore does not present a significant credibility problem. Shipman's testimony that he saw Davis in the plant about midnight does, and will be discussed below.

[7] In fact, the record does not establish that Davis was any more active in filing grievances than the average steward of the 250 stewards in the plant or the 10 in his department. Ziegler testified that "they" (Hargett and Davis) were "probably more active than most of the other stewards. . . .") Davis alone, however, does not appear to have been so, nor does the General Counsel advert to any evidence at all showing even a scintilla of hostility towards Davis in connection with his stewardship.

[8] They testified that Shipman "offered himself as a witness to the fact that he punched out after Mr. Davis and before Mr. Hargett." Shipman's own card having been punched out at 12:30, this, of course, could not have been so. Although, at the hearing, Shipman did not so testify, being called only to testify that he saw Davis in the plant shortly after midnight, he specifically denied having volunteered as a witness on behalf of Davis, stating that he "at no time" discussed the situation with Riesselmann or Waltemath. Shipman's credibility is thus brought directly into question, as he was the only witness, other than Hargett, who said that he saw Davis in the plant at any critical time that night.

gett") to "get" Hargett.

It is of some significance that Hargett had been a steward and an assistant chief steward in his earlier tenure with the Company, just as active then as he was later, yet had no problem being rehired. If company officials resented his kind of activism as a union steward, it would have been simple to close the door to him then. In sum, I conclude that the surrounding circumstances, the background, and the probabilities, all tend to militate against the General Counsel's position, impelling me to credit Respondent's witnesses over the General Counsel's witnesses, and require, bearing in mind that the General Counsel has the burden of proof, a dismissal of this complaint.

Accordingly, I issue the following recommended:

ORDER [9]

The complaint is dismissed in its entirety.

[9] 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.