

Alcar Industries, Inc. and Local 240, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 2-CA-17225

March 5, 1981

DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND
HUNTER

On August 18, 1981, Administrative Law Judge Eleanor MacDonald issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering 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,¹ and conclusions of the Administrative Law Judge and to adopt her 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), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing her findings.

We herein correct a minor inadvertent error of the Administrative Law Judge. With respect to the Administrative Law Judge's discussion of the Respondent's contentions in sec. II.B. of her Decision, the Administrative Law Judge incorrectly stated that the General Counsel, rather than the Respondent, relies heavily on internal contradictions in Yusi's testimony. This inadvertent error does not affect the conclusions reached herein.

DECISION

STATEMENT OF THE CASE

ELEANOR MACDONALD, Administrative Law Judge: This case was heard in New York, New York, on January 21 and 22, 1981. The complaint, based on charges filed by Local 240, alleges that Respondent Alcar violated Section 8(a)(1), (3), and (4) of the Act by: (1) threatening its employees because they assisted the Union and gave testimony at a Board hearing; and (2) discharging

Robert Yusi because he assisted the Union and gave testimony at a Board hearing.

Respondent's answer denies the material allegations of the complaint.

Upon the entire record, including my observations of the demeanor of the witnesses and after due consideration of the briefs filed by the General Counsel and Respondent, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent Alcar, a New York corporation, maintains its place of business in Harrison, New York, where it is engaged in the manufacture and nonretail sale and distribution of paper-covered wire bag ties and related products. Respondent annually sells and ships products valued in excess of \$50,000 directly from Harrison, New York, to points outside the State of New York. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that Local 240, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

In April 1979, Local 240 began its organizing campaign at Alcar's premises in Harrison, New York. The Union's petition was filed on July 11, 1979, and an election held on August 17, 1979. Yusi was the sole union observer at the election and challenged a number of the ballots cast. A hearing on the challenges was conducted on various days in March 1980. Yusi was one of five witnesses for the Union at this hearing and he testified first. Yusi was discharged on April 30, 1980. In October 1980, the Board issued its decision; the revised tally of ballots which issued later that month showed that 14 votes had been cast for the Union and 15 against representation. The only charges filed against Alcar are those at issue in the instant case.

William Domini, business representative of Local 240, testified that he was chiefly responsible for the organizing campaign at Alcar. He spoke to the employees both at the front entrance and the garage entrance, sometimes with the assistance of a union employee named Juliano. Domini testified that he spoke to Yusi on every occasion on which he was present at Alcar, and that Yusi was the Union's main contact at the plant. Domini saw three members of management while he was talking to Yusi at various times during the campaign: Leonard Spinozza, general manager of Alcar, Phil Merlin, the owner of Alcar, and Ernani Silva, the supervisor of the shipping department, who is generally called "Lou Silva." In addition to Yusi, Domini testified, two other employees were quite active on behalf of the Union during the campaign and there were others who stopped to talk to the

union representatives.¹ He believed that certain members of management probably saw these employees talking to him on occasion. The substance of Domini's testimony was that while he talked to many employees as they appeared for work and left for the day, he spoke with Yusi for longer periods of time than he did with the other employees.

Robert Yusi testified that from August 1978, he was an assistant to Lou Silva in the shipping department. Due to Silva's complaints about the quality of his work, he transferred to the machine shop as an inspector around January 1979. He continued in this job until his discharge.

Yusi testified that he acted as liaison between the employees and the Union during the campaign, that he spoke to the union organizers outside the plant every time they appeared, that he was an observer at the election and that he testified at the hearing on the challenged ballots.² Yusi believed that Spinozza, Merlin, and Silva all saw him speaking to the union organizers.

Yusi stated that about 2 weeks after he testified at the Board hearing in March 1980, Spinozza approached him in the plant and told him that "if the Union does come in, he would stop being Mr. Nice Guy" and would start laying people off and discontinuing overtime. Yusi made no reply. On cross-examination, Yusi stated that this conversation lasted a minimum of 5 minutes. He could not recall any of the other subjects discussed, nor anything else that was said. Yusi testified on direct examination that about 2 weeks after the first conversation, Spinozza again approached him in the plant and said that Silva had complained about his work. Spinozza said that he had never before received complaints about Yusi's work as an inspector, and he asked Yusi if he had considered the fact that Silva might be shop steward if the Union came into the shop. Yusi answered that he had never considered this, whereupon Spinozza said that he would take Silva's complaints with a grain of salt. On cross-examination, Yusi testified that this conversation lasted from 5 to 10 minutes. He could not remember what else was said although he recalled Spinozza saying that he understood why Yusi had testified at the Board hearing and that there would be no hard feelings and no recriminations. After Yusi's recollection was refreshed by his sworn statement given to a Board agent 1 week after his discharge, he recalled that Spinozza asked him if he himself wanted to be shop steward.

On direct examination, Yusi testified that on the night of April 29, 1980, he was out celebrating his birthday with a few friends. He had between 5 and 10 drinks and was involved in a minor accident when his car backed into the fender of another automobile. The next day, he awoke with back and stomach pains and he could not move. He asked his mother to call Alcar and say that he would be absent due to illness, and she did so.³ Later

¹ The two other most active employees were Ronnie Van Horn and John Mayne.

² On cross-examination, Yusi stated that once the election was held, he engaged in no overt union activities because "it was just wait and see."

³ Respondent does not deny receiving this phone call.

that morning, Spinozza called him at home. Yusi testified that Spinozza "asked me why I was sick . . . what the problem was." Yusi replied that he had hurt his back the night before and was sick to his stomach. He mentioned that his mother had called in for him. According to Yusi, Spinozza then stated that he had not gotten the message, that Yusi's "attendance stinks" and that Yusi should not "bother coming to work the following day." Yusi then informed Spinozza that he would go to the Labor Board. Spinozza asked if Yusi was threatening to take him to the Labor Board, and when Yusi replied, "yes," Spinozza said, "well, try it" and hung up.

On cross-examination, Yusi at first maintained that he hit another car as he was backing out of a parking space, that he drove away without realizing that there had been a collision, and that he stopped his car a half block later when he realized that he had hit something; he then drove back to the scene and discussed the incident with the owner of the other car. Yusi stated that he became aware of the accident when he looked in his rear view mirror and noticed that his rear wind deflector was missing. Yusi at first denied that the police had found him before he returned to the scene of the accident. However, after further questioning by counsel for Respondent, Yusi acknowledged that he had seen a patrolman before pulling over, and that the patrol had escorted him back to the scene of the accident. Yusi paid \$400 to the owner of the other car, \$200 by check, and \$200 in cash.

In response to questions by counsel for Respondent, Yusi stated that the day after this accident he was hung over and nauseated, that he was sore around the neck and shoulders and was in no condition to report to work.

Yusi testified that his understanding of Alcar's sick leave policy was that the one-half day of sick leave per month accorded to employees could be used for illness, and that unused days would result in payments to the employees at the end of the year. He testified that he knew from comments made at his initial employment interview that Alcar did not want him to take too many days off, and that he should not take sick days unless he needed them. Yusi stated that he knew that if he took days off without a legitimate reason he could be discharged. "To get a sick day you have to be sick." Alcar did not require employees to document their sick days with a doctor's note.

Yusi testified that on April 15, 1980, he called in sick because a crown fell off his tooth, causing great pain, and that he had to have it attended to immediately. He stated that he went to see his dentist that day. Yusi denied going to Atlantic City with his uncle on April 15 instead of going to the dentist and he denied telling Lou Silva that he and his uncle had gone to Atlantic City.

Yusi was very often late in reporting to work in the morning and after lunch. Indeed, many of the employees were a few minutes late every day. Apparently, management at Alcar was resigned to this state of affairs. There is no contention by Respondent that Yusi was discharged for lateness.

Yusi testified that Albert Muzzullo, John Mayne, Ronnie Van Horn, and Eugene Caruanna testified at the Board hearing on behalf of the Union. These employees

all spoke to the union representatives when the latter were present at the plant; Mayne spoke to the Union every day and Van Horn was also active, but in Yusi's opinion they were all less active than he was.⁴

On cross-examination, Yusi testified that Muzzullo informed him that a friend of his who worked across the street from Alcar had heard rumors that Yusi would be fired. Yusi stated that these rumors did not mention which member of management had decided to fire him, however, he later changed his testimony to say the informant related that Spinozza would get certain people out because of their union activities.

Yusi testified that he caused the instant charges to be filed because when he was discharged he felt cheated in that he had a vacation coming up. He called the Union to discuss the matter and decided to file a charge. Yusi could not recall talking to Domini and Mayne outside his house concerning the filing of the charge; he stated that he had discussed the matter alone with Domini.

John Mayne was called by Respondent.⁵ He testified that during the Union's organizing campaign he spoke to the union representatives nearly every day right outside the plant and in plain view. Mayne stated that he was not disciplined for engaging in union activity nor for giving testimony at the Board hearing; in fact, his job "got better" after the hearing.

Mayne testified that a few days after Yusi's discharge, he was with Yusi and Domini in the street in front of Yusi's house. Domini asked Yusi, "What happened with his job." When Yusi told him, Domini said, "We could get his job back through the Union. We'd blame it on union activities and we'd say that Alcar fired you due to direct union activities." Mayne said that Yusi had not said that he was fired for union activities, and that Yusi responded to Domini that he "didn't care" and "wasn't interested."

On cross-examination by the General Counsel, Mayne testified that a few weeks after the election, he was talking to Silva about various matters. The subject of the Union came up and Silva said, "watch your step" because management was mad about the Union. But, Mayne stated, nothing ever came of this. Mayne further testified that at the time of the election, things were "intense" around the shop and Spinozza was "on the war-path." Spinozza was angry because it seemed the Union had won the election (before the challenged ballots were counted), and "he would just come over and yell at you, that's all. He wouldn't press the point that you would be fired or anything. There were no threats made." According to Mayne, Spinozza yelled when people were neglecting their jobs, but he added "Lenny is like that all the time, even before the Union came around."

Ernani L. Silva testified that he had spoken to Yusi concerning the latter's use of sick leave.⁶ Silva was plan-

ning a visit to Atlantic City, and Yusi told him that he had recently taken a day off to go to Atlantic City with his uncle. Silva reported this conversation to Spinozza. On the day Yusi was discharged, Silva received a phone call from Yusi's mother who informed him that Yusi was sick and was not coming to work. A short time later, an employee at Alcar told Silva that he had seen Yusi celebrating his birthday the night before in a local bar. Silva reported these facts to Spinozza.

Leonard Spinozza testified concerning the events relating to Yusi's termination. He stated that on the morning of April 30, 1980, Silva told him that Yusi's mother had called to say Yusi was out sick. Because of the "situation" on April 15, Spinozza said, he called Yusi's home to verify that he was in fact there. Yusi answered the phone and told Spinozza that he was sick, whereupon Spinozza stated that he had heard that Yusi had been out drinking the night before and had had an automobile accident. At that point, Yusi said, "Yes, its true. I did have an automobile accident, and I have to go see the insurance man this morning." Following that, Spinozza asked Yusi why he had lied, and said, "This is the second incident within a month that you have lied . . . I think we have to call it quits here." When Yusi asked if he was fired, Spinozza confirmed that he was discharged, and Yusi said, "We'll see what the NLRB has to say about this." Spinozza believes he then said, "Do what you have to do."⁷

Spinozza testified that he had heard about Yusi's trip to Atlantic City on April 15 but that he did not discharge Yusi for that incident because he had heard it only "second hand." He stated that when he called Yusi he had no clear intention of discharging him, but when Yusi lied for the second time, he decided to terminate his employment. It is clear from Spinozza's testimony that he was concerned about Yusi's absence because Yusi was the only inspector at the plant.

Spinozza testified that he knew Yusi was active in support of the Union, but he remembered that Yusi was no more active than a number of other employees. Spinozza was also aware that Yusi had testified on behalf of the Union in the representation case. He testified that Yusi's union activities played no part in the decision to discharge, and that he was aware when he fired Yusi that it would be unlawful to discharge an employee for union activities or for giving testimony before the Board. Spinozza further testified that he never told Yusi or any other person that any employees would be discharged if the Union got into the plant.

Spinozza testified that he often spoke to Yusi at the plant concerning his duties as an inspector. He could not recall saying to Yusi that there would be no more "Mr. Nice Guy." Spinozza did recall speaking to Yusi concerning complaints made by Silva about the quality of Yusi's work. Yusi told Spinozza that his work was good and that Silva was putting a lot of pressure on him, and Spinozza replied that Silva was very conscientious and that Yusi should correct whatever problem existed since he was the plant's only inspector. Then Spinozza men-

⁴ These employees are still employed at Alcar, except for Muzzullo who quit to take a municipal job, according to the testimony of Mayne.

⁵ Mayne was a careful witness who answered questions fully. He obviously strove to give exact, truthful, and complete answers, and I shall credit his testimony.

⁶ Silva testified in a careful, direct manner and I find that he is a credible witness.

⁷ Yusi did not deny Spinozza's testimony that he mentioned going to see his insurance agent.

tioned that if the Union came in, Yusi would be a likely shop steward. He suggested this because Yusi had worked hard for the Union, and because he and Yusi got along very well and he believed Yusi would make a good shop steward.

Spinozza testified that he had previously discharged an employee under similar circumstances as those relating to Yusi's discharge. The former employee was an alcoholic, was chronically absent, and was in jail when he was discharged.

On rebuttal, the General Counsel showed that Yusi had not visited his insurance agent on April 30, 1980.

B. Positions of the Parties

The General Counsel urges that Yusi is a credible witness and that his testimony should be relied upon. Thus, the General Counsel maintains that all of Yusi's testimony concerning conversations with Spinozza should be accepted as accurate. The General Counsel asserts that Yusi's version of the events is supported by the testimony of Mayne, and that Spinozza's assertion that Yusi told him he had to see to his insurance agent is discredited by the fact that Yusi did not in fact go to his insurance agent's office on April 30, 1980. Finally, the General Counsel argues that the reason given by Respondent for Yusi's termination is a pretext and that Yusi was in fact terminated for unlawful reasons.

Respondent argues that Yusi was discharged for cause. Pointing out that Respondent has not been charged with any other unfair labor practice since the beginning of the union campaign, Respondent asserts that if a pretextual reason had been sought to discharge Yusi, Respondent could have used his constant tardiness for this purpose. The General Counsel relies heavily on internal contradictions in Yusi's testimony and on his tendency to offer shifting testimony to support Respondent's contention that Yusi is not a credible witness. Respondent concludes that the evidence shows that Yusi was discharged for his lie and for no other reason, and that the General Counsel has not met its burden of proof under *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980).

C. Discussion and Conclusions

Manifestly, Yusi's credibility is a major issue in the instant case. I find that Yusi testified in an evasive manner, that he avoided giving complete answers unless pressed to do so, that he gave inconsistent testimony, that he changed his testimony in several material respects, and that his memory was not as complete as that of other witnesses such as Mayne, Spinozza, and Silva. Therefore, I do not find that Yusi is a reliable witness. I shall not credit Yusi's testimony where it is contradicted by other, credible evidence.

Based on the testimony of all the witnesses, I find that Yusi was a very active supporter of the Union during the campaign, probably the most active supporter. I find that overt activities ceased once the election was held in August 1979; thereafter, the only activity engaged in by Yusi and four other employees was the giving of testimony in mid-March 1980. I do not find that Spinozza told Yusi after the hearing that he would stop being "Mr.

Nice Guy" and would start laying people off and discontinuing overtime if the Union won the election. Spinozza, whose testimony I credit, denied this conversation. Further, Yusi could not recall anything else that had been said at this time and, in spite of his strong support of the Union and his knowledge of the availability of Board protection, he made no complaint upon allegedly hearing a blatantly unlawful, antiunion remark. Further, I attach no unlawful interpretation to the "shop steward" conversation between Yusi and Spinozza. I find that Spinozza was discussing the possibility of Yusi becoming shop steward, that no threat was expressed or implied, and that Spinozza reassured Yusi that there would be no recriminations due to his union activity.

Concerning the April 15 trip to Atlantic City, I find that Yusi told Silva he had taken such a trip while on sick leave and that Silva gave this information to Spinozza. I find that Spinozza thus believed Yusi had lied about being sick that day and had abused the sick leave policy. Further, I find that Yusi knew of this policy. Yusi testified that "to get a sick day you have to be sick."⁸

As to the events of April 30, 1980, I find that Spinozza called to check on Yusi's illness and that Yusi informed him that he was indeed ill. When Spinozza confronted Yusi with the information about the automobile accident, I find that Yusi admitted that he stayed home in order to see his insurance agent.⁹ Thus, Yusi admitted that he was not too sick to leave the house to take care of personal business. I find that Spinozza then asked Yusi about April 15, and finally told Yusi he was discharged. I find that Spinozza's reason for discharging Yusi was Spinozza's belief that Yusi had twice in the same month called in sick when he was not in fact sick and when he intended to be away from home on personal business.¹⁰

I do not find that the General Counsel has shown any antiunion motivation in connection with Yusi's discharge. There was ample cause for discharge in light of the facts available to Spinozza on April 30, 1980. Further, according to Mayne, the tension in the plant occurred at the time around the election, that is in August 1979, almost 1 year before Yusi's discharge, and Mayne emphasized that no threats were made even at that time. Finally, it is clear that if Spinozza had wished to use any pretext that came readily to hand for discharging Yusi, he would have relied on the April 15 trip to Atlantic City. The fact that he did not even ask Yusi about it at the time and thus seek to press any advantage from that incident shows that he was not biding his time until the first excuse for disciplining Yusi should arise.

In summary, I find that the General Counsel has not presented a *prima facie* case that Respondent discharged Yusi because he assisted the Union and testified at a

⁸ Further, I note that Yusi did not produce any documentary evidence, such as a copy of his dental bill, in support of his testimony that he went to the dentist.

⁹ It is immaterial whether he actually saw the agent. The fact is, he told Spinozza that he had remained out of work to see the agent.

¹⁰ Spinozza testified that he discharged Yusi for lying and "attendance." It is clear from the context that he meant by the word "attendance" Yusi's abuse of the sick leave policy which resulted in poor attendance.

Board hearing, and I find that the General Counsel has not presented a *prima facie* case that Respondent threatened its employees because they assisted the Union and testified at a Board hearing.

CONCLUSIONS OF LAW

11. Alcar Industries, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local 240, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. Based on the findings of fact set forth above, I conclude that Respondent has not violated Section 8(a)(1),

(3), or (4) of the Act as alleged by the General Counsel, nor violated the Act in any other manner.

Upon 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:

ORDER¹¹

The complaint is dismissed in its entirety.

¹¹ 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.