

**Yokohama Tires a/k/a Yokohama Tire Corporation  
and Alexander Lieboff.<sup>1</sup> Case 22-CA-16571**

June 11, 1991

**DECISION AND ORDER**

BY CHAIRMAN STEPHENS AND MEMBERS  
DEVANEY AND RAUDABAUGH

On December 12, 1990, Administrative Law Judge D. Barry Morris issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,<sup>2</sup> findings,<sup>3</sup> and conclusions<sup>4</sup> and to adopt the judge's recommended Order.

**ORDER**

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

<sup>1</sup>In the caption and throughout his decision, the judge incorrectly spells the name of the Charging Party. This is the correct spelling.

<sup>2</sup>The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

<sup>3</sup>The General Counsel urges that the judge failed to consider Distribution Manager Joyce Zonneveld's testimony that a telephone conversation that she had with alleged discriminatee Alexander Lieboff on August 16 or 17, during which Lieboff sought again to raise his various complaints, played a role in her decision to terminate Lieboff. The General Counsel argues that the reference to the telephone conversation indicates that Lieboff's discharge was caused by his pursuit of protected concerted activities.

We disagree. Instead, we agree with the judge that Lieboff's discharge was triggered by Danison's August 18 memorandum describing his misconduct in smoking and failing to follow instructions. Since Lieboff's concerns as expressed to Zonneveld included his individual complaints that he was being incorrectly or unfairly treated on these same subjects, it was not unlawful for Zonneveld to consider this fact in concluding that "Alex was not going to try." There is nothing in Zonneveld's credited testimony indicating that the group complaints raised by Lieboff—which Respondent had already started to correct—played any role in the decision to terminate Lieboff. In any case, we agree with the judge that, even if the General Counsel were deemed to have established a *prima facie* case, the Respondent has demonstrated that the same action would have taken place even in the absence of the protected conduct.

<sup>4</sup>The judge misstated that, on August 23, Zonneveld sent a memorandum to employee Lieboff advising him that he was discharged as of August 31. According to Zonneveld, whom the judge found to be a credible witness, she sent this memorandum to Danison on August 30 to be given to Lieboff on August 31 with his payroll check. Danison, whom the judge also credited, testified that he gave this memorandum to Lieboff on August 31. This correction does not affect any of our findings.

*Julie L. Kaufman, Esq.* and *Bernard Suskewicz, Esq.*, for the General Counsel.

*Benjamin E. Goldman, Esq. (Graham & James)*, of Los Angeles, California, for the Respondent.

303 NLRB No. 50

**DECISION**

STATEMENT OF THE CASE

D. BARRY MORRIS, Administrative Law Judge. This case was heard before me in Newark, New Jersey, on April 4 and 5, 1990. Upon a charge filed on October 16, 1989, a complaint was issued on February 26, 1990, alleging that Yokohama Tires a/k/a Yokohama Tire Corporation (Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by discharging Alexander Lieboff, the Charging Party. Respondent filed an answer denying the commission of the alleged unfair labor practice.

The parties were given full opportunity to participate, produce evidence, examine and cross-examine witnesses, argue orally, and file briefs. Briefs were filed by the General Counsel and by the Respondent.

Upon the entire record of the case,<sup>1</sup> including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation with and office an place of business in Edison, New Jersey, has been engaged in the warehousing and wholesale sale of tires. It annually sells and ships from its New Jersey facility goods valued in excess of \$50,000 directly to points located outside the State of New Jersey. Respondent admits, and I so find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICE

A. *The Facts*

Lieboff was hired as a working supervisor on May 18, 1989.<sup>2</sup> As with all new employees he was on a 90-day probationary period. Lieboff testified that other employees complained to him during June and July concerning working conditions and that he spoke to Richard Danison, the warehouse manager, about the complaints.

On August 2 Danison sent a memorandum to Joyce Zonneveld, the distribution manager, concerning Lieboff. He advised Zonneveld that "the rest of the crew has come to me to complain" about Lieboff. Specifically, Danison complained about Lieboff's supervision of the unloading of the containers and his smoking in nonsmoking areas. Danison ended the memo by stating "at this point he is on his 90-day probation and I must recommend terminating him before he has time to adversely affect the rest of the crew." Zonneveld, who appeared to me to be a credible witness, testified that after she received the memo from Danison she contacted Danison and told him to start documenting problems that occur with Lieboff.

On August 3 or 4 Lieboff telephoned Zonneveld directly. Lieboff told Zonneveld that he had several complaints to make about Danison. As Lieboff was speaking, Zonneveld make a list of his complaints, which contained eight items. Lieboff complained that Danison would not buy supplies such as gloves, knives, and clipboards; that the dock lights

<sup>1</sup> Respondent's motion to correct transcript is hereby granted.

<sup>2</sup> All dates refer to 1989 unless otherwise specified.

and fan blowers were broken; that the manager changed his timecard; that Leiboff was not given keys to the facility; that the billing clerk maintains a "bad attitude" towards Leiboff; that Leiboff does not like taking orders from the billing clerk in the manager's absence; that Leiboff was promised 8 hours per week overtime before he was hired and that this has not been complied with; and that Leiboff claims he is being discriminated against for smoking in the warehouse.

After the telephone call from Leiboff, Zonneveld went to her superior, John West, National Operations manager, and told him about the phone call. It was decided that Zonneveld would make a trip to the New Jersey facility and, among other things, investigate Leiboff's complaints.

On August 8 Zonneveld came to the Edison plant and met with Danison. The following day, Zonneveld and Danison met with Leiboff. Zonneveld went through each of Leiboff's complaints. With respect to gloves she advised Leiboff that the Company never supplied gloves, but if the employees felt that they wanted them they should let her know and there would be no problem in providing them. With respect to knives, Zonneveld told Leiboff that if he preferred a different type of knife as long as it met safety requirements, he could be accommodated. Concerning the fans allegedly not working, Danison told Leiboff that they were working and "all you need to do is turn them on." Concerning dock lights, Zonneveld explained to Leiboff that Danison had been getting bids on repositioning them and this started as a result of her earlier trip in April. Zonneveld credibly testified that Leiboff never mentioned that live wires were exposed. With respect to smoking, Leiboff felt he was being discriminated against because the office personnel were permitted to smoke, whereas he was not permitted to smoke in the warehouse. Zonneveld explained to him that the warehouse contained very flammable material and that there were signs all over the warehouse that smoking was prohibited. Zonneveld decided to extend Leiboff's probation period for an extra 30 days and told Danison to continue to document Leiboff's activities and to send her a report on a weekly basis.

On August 18 Danison sent Zonneveld a memo detailing events that transpired with Leiboff from August 9 until August 18. The memo indicated that on several occasions Leiboff was smoking in prohibited areas and that unloading was not done in the way he was instructed. Zonneveld testified that after she read the memo she decided that "Alex wasn't going to try" and she made up her mind to discharge him. She then discussed the matter with the personnel manager, wrote up a termination notice and telephoned Danison to tell him that she had decided to discharge Leiboff. On August 23 Zonneveld sent a memorandum to Leiboff advising him that his employment would end effective August 31. The memorandum stated in pertinent part:

Although you are a working supervisor you are considered part of the management team expected to conduct yourself in this manner. During the past two weeks since my visit you have been in direct violation of company policy and procedure. On August 10th you were caught taking an unauthorized smoke break, on August 15th you were caught smoking in a container, on August 10th the manager was informed by several employees that you were issuing instructions which were in direct violation of Yokohama's shipping policy and

on August 17th you were instructed to put away returns yet nothing was put away and no explanation offered.

#### B. Discussion and Conclusions

Under *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), the Board requires that the General Counsel make a prima facie showing sufficient to support the inference that protected conduct was a motivating factor in the employer's decision. Once this is established, the burden shifts to the employer to demonstrate that the "same action would have taken place even in the absence of the protected conduct."

I do not believe that the General Counsel has made a sufficient showing that protected conduct was a motivating factor in the decision to terminate Leiboff. Leiboff was a probationary employee. On August 2 Danison wrote to Zonneveld pointing out problems he was having with Leiboff and recommending that Leiboff be terminated. On August 3 or 4 Leiboff telephoned Zonneveld with a list of complaints. Zonneveld decided to extend the probationary period and to make a trip to New Jersey to investigate the complaints. After meeting with Leiboff the following week, Zonneveld agreed that with respect to Leiboff's concerns about knives and gloves if it were the desire of the employees those concerns would be rectified. Concerning Leiboff's complaint about smoking, Zonneveld told him that smoking was prohibited in the warehouse. Zonneveld told Danison to continue monitoring the situation and advise her. After receiving Danison's report of August 18, noting that Leiboff continued to smoke in prohibited areas and continued to disregard instructions, Zonneveld decided to terminate him.

I do not find that the General Counsel has made a prima facie showing that Leiboff's complaints concerning working conditions were a motivating factor in Respondent's decision to terminate him. On the contrary, when Zonneveld was told that there may be some employee dissatisfaction with gloves and knives she immediately said that if that were the case that would be rectified. Zonneveld appeared to me to be a credible witness and from her testimony it appears that her decision to terminate Leiboff was based solely on the fact that Leiboff continued to smoke in prohibited areas and that he was not complying with company policies in various other respects.

Accordingly, I find that the General Counsel has not made a prima facie showing sufficient to support the inference that protected conduct was a motivating factor in the decision to terminate Leiboff. Moreover, even if the General Counsel were deemed to have established a prima facie case, I believe that Respondent has demonstrated that the "same action would have taken place even in the absence of the protected conduct." I credit Danison's testimony that he saw Leiboff smoking in the warehouse during July and August. Similarly, I credit Welter's testimony that he saw Leiboff smoking in prohibited areas. In Danison's memo to Zonneveld dated August 2, among other complaints that Danison had concerning Leiboff's performance was the complaint of smoking in prohibited areas. In addition, in Zonneveld's memorandum of August 23 advising Leiboff that he would be terminated, among other problems concerning his performance Zonneveld referred to his smoking in

prohibited areas. Therefore, the allegation that Respondent has violated Section 8(a)(1) of the Act is dismissed.

#### CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.
2. Respondent has not engaged in the unfair labor practice alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>3</sup>

#### ORDER

The complaint is dismissed.

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<sup>3</sup>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 .