7UP of Cincinnati, a unit of Brooks Beverage Management, Inc. *and* Steven C. Saunders. Case 9–CA–38213

May 13, 2002

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS COWEN AND BARTLETT

On October 29, 2001, Administrative Law Judge Bruce D. Rosenstein issued the attached decision. The General Counsel filed exceptions and a supporting brief. 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, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

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

Naima R. Clarke, Esq., for the General Counsel.
Maynard A. Buck, Esq., of Cleveland, Ohio, for the Respondent-Employer.

DECISION

STATEMENT OF THE CASE

Bruce D. Rosenstein, Administrative Law Judge. This case was tried before me on August 30, 2001, in Cincinnati, Ohio, pursuant to a complaint and notice of hearing (the complaint) issued by the Regional Director for Region 9 of the National Labor Relations Board (the Board) on May 23, 2001. The complaint, based on an original charge filed by Steven C. Saunders (the Charging Party or Saunders) on January 19, 2001, alleges that 7UP of Cincinnati, a unit of Brooks Beverage Management, Inc. (the Respondent or 7UP), has engaged in certain violations of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). The Respondent filed a timely answer to the complaint denying that it had committed any violations of the Act.

Issues

The complaint alleges that Respondent, since about August 14, 2000,[1] has refused to hire the Charging Party.

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

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a corporation engaged in the distribution of soft drinks. It has an office and place of business located in Cincinnati, Ohio, where it annually purchases and receives goods valued in excess of $50,000 directly from points outside the State of Ohio. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. It also admits that Teamsters Local 1199, an affiliate of the International Brotherhood of Teamsters, AFL–CIO (the Union), is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Respondent is a business in the highly competitive beverage industry. As part of its sales marketing and distribution operations, the Respondent employs, among others, certain employees who are covered by collective-bargaining agreements with the Union. The bargaining unit positions include such titles as merchandiser, full service driver, and warehouse worker. At all material times, Mark Wendling was the general manager and Frank Doyle held the position of distribution manager at Respondent.

Saunders held the position of full-time paid union president between January 1, 1988, and December 31,1999, when he was removed from his position having been voted out of office. Once Saunders was removed from the presidency, he ceased to remain a member of the Union in good standing because he did not hold a bargaining unit job. Saunders, prior to becoming union president, worked as a production employee at Respondent's competitor Coca-Cola Bottling Company for approximately 12 years. During his tenure of employment at Coca-Cola, Saunders operated production machinery including depalletizers, palletizers, and forklifts. He also served in the quality control department as a sanitation technician and syrup mixer.

Saunders, while holding the position of union president, regularly engaged in contract negotiations and grievance administration with representatives of Respondent including Wendling and Doyle. Wendling, Doyle, and Saunders concurred that their working relationship was very cordial and not adversarial. In fact, no unfair labor practice charges were ever filed by the Union against 7UP, no work stoppages occurred, and all grievances were resolved before they reached arbitration.

B. The 8(a)(1) and (3) Allegations

The General Counsel alleges in paragraph 5 of the complaint that Respondent refused to hire Saunders because of his union activities. In explaining the theory of their case,[2] the General Counsel stated that it was not asserting that the Respondent refused to hire Saunders based on his prior union activities when he served as union president.[3] Rather, the General Counsel argues

[1] 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.

[1] All dates are in 2000, unless otherwise indicated.

[2] Under Sec. 102.35(12) of the Board's Rules and Regulations, I requested counsel for the General Counsel to clarify its position concerning the refusal to hire, issue, and explain their legal theory in the case.

[3] Saunders testified that in early August 2000 he had a telephone conversation with Doyle. During that conversation he told Doyle that he

that Respondent decided not to hire Saunders when they learned that he was seeking employment in order to use it as a spring board to becoming a union executive board member and possibly running again for union president. Thus, they assert that the Respondent did not want Saunders to become active in the Union and that is the reason it refused to hire him.

Saunders testified that he initially sought employment with 7UP in April or May 2000, when he telephoned Doyle to inquire about openings. Saunders knew Doyle from his prior service as a union steward and more recently when dealing with him on grievances in his role as distribution manager.

Saunders, on July 7, filed a formal employment application at Respondent (GC Exh. 2). Sometime in July 2000, but after he filed the employment application, Saunders and Doyle had a conversation sitting on a picnic bench outside the facility. Saunders, during this conversation, apprised Doyle that his time with the Union was running out and he was about to lose his standing. Saunders explained to Doyle that in order to maintain his standing in the Union he had to be in a bargaining unit position. If he could be hired into such a position, it would qualify him to get on the union executive board and possibly run again for union president.[4] Doyle asked Saunders whether he was considering running for union president again. Saunders said, "yes that is possible." Doyle said, "it would be good if you ran again because I hate that guy." "I have difficulty working with the new Union President, Randy Vurst."

Doyle, on September 13, informed Saunders in a telephone conversation that he would not be hired at Respondent. Saunders told Doyle that he heard that Respondent had just hired someone. Doyle said, "7UP will not hire you, but you can talk to Wendling about it." Saunders immediately telephoned Wendling who informed Saunders that it was Doyle's decision and it was based on qualifications. Wendling informed Saunders that he could call Doyle again if he had further questions. On September 14, Saunders telephoned Doyle who reiterated that 7UP chose not to hire him.

Wendling, who started his career in 1976 with 7UP on the production line and at the time was a member of the Union, testified that he was not regularly involved in the hiring process and delegated that responsibility to line managers and the human resources department. During the period in the summer of 2000, when Saunders applied for work at 7UP, there were no positions available in the warehouse as turnover was fairly light. On the other hand, Wendling and Doyle both agreed that there were vacancies in the position of merchandiser, as it had a particularly high turnover rate. Individuals hired in these positions built displays and were required to bring the product from the store's backroom and place it on the sales floor. The Respondent stipulated that at the time Saunders applied in July 2000, it was seeking applicants to fill the job of merchandiser and Saunders met the advertised requirements of the position.

Wendling testified that Doyle made the decision not to hire Saunders without consulting him. Doyle informed Wendling that Saunders was not hired because he felt he would not be a long-term employee. He based this conclusion on two factors. First, Saunders told Doyle that he needed a job in the bargaining unit so he could hopefully get a position on the executive board and eventually run for union president again (GC Exh. 5). Second, Doyle was skeptical about how long Saunders would remain in the merchandiser position as he was willing to take close to a 50 percent cut in pay from the approximately $45,000 he made as full-time union president. Doyle's experience was that individuals who took a large cut in pay would be continually looking for alternative employment to equal their prior wages. Therefore, Doyle informed Wendling that he felt Saunders was looking for a job as a means to an end and would only remain employed for a short period of time in order to pursue alternative career goals. Since this was exactly what the Respondent was trying to avoid, due to the large turnover rate in the merchandiser position, Doyle decided not to hire Saunders. Wendling testified that he supported Doyle's decision not to hire Saunders and had similar experiences with individuals who were overqualified for positions and were willing to accept a substantial cut in pay. In most cases, these individuals sought alternative employment and did not remain employed at 7UP for long periods of time.

In *FES (A Division of Thermo Power)*, 331 NLRB 9 (2000), the Board stated the elements that the General Counsel must establish to meet its burden of proof in a discriminatory refusal-to-hire case as follows:

> (1) that the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants.

I find that the General Counsel has met its burden of proof regarding the first two elements of the test set forth above. In this regard, Saunders possessed 12 years of related training and experience during the course of his employment at Coca-Cola that qualified him for Respondent's merchandiser position. Moreover, the parties stipulated that at the time Saunders was applying for positions at 7UP, the Respondent was hiring and he possessed the necessary experience and training relevant to the announced requirements of the merchandiser position. With respect to element (3), I am not convinced as argued by the General Counsel, that antiunion animus contributed to the decision not to hire Saunders for the following reasons.

First, there is no dispute that the Respondent had experienced a large turnover in the merchandiser position with a number of

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heard employee Mike Middendorf just left his driver's position and that he was interested in being hired to fill the position. Doyle informed Saunders that he was not permitted to hire anybody. Saunders asked, "whether it was a problem of him previously being union president that prevented his hiring." Doyle said, "yes, somebody up a level in the organization has a problem with that." Under normal circumstances, if credited, such a statement would be a violation of the Act. However, the General Counsel did not allege in the complaint that the statement violated the Act. Likewise, the General Counsel stated that it is not relying on the statement as the reason Saunders was not hired by Respondent (Tr. 30, 54, 64, 65, and 66).

[4] I note that Saunders primarily limited his employment applications to employers that had a collective-bargaining relationship with the Union.

individuals staying under a month (GC Exhs. 3(a)–(f)). Thus, I find that refusing to hire an individual who it was contemplated would not remain in the merchandiser position for a long period of time, is a legitimate reason for denying employment. Second, refusing to hire someone who would be taking a substantial pay cut from historical wage levels is a legitimate reason to deny employment.[5]

To establish union animus, the General Counsel points to the fact that Respondent knew that Saunders was seeking employment in order to get back in the Union so he could hopefully get a position on the executive board and eventually run for union president again. It was for that reason, according to the General Counsel, that Respondent refused to hire Saunders. In making such an argument, the General Counsel completely ignores Saunders' testimony that Doyle encouraged him to run for union president because he did not get along with the incumbent union president. Such a statement, in my opinion, militates against the General Counsel's position.

Accordingly, I find that the Respondent's refusal to hire Saunders was for legitimate business reasons rather then because he sought employment in order to get back in the Union so he could eventually run for union office again.[6]

As further evidence to establish that Doyle did not take union activities into consideration when he determined not to hire Saunders, I find that Respondent supported other bargaining unit employees who held union positions. In this regard, Wendling credibly testified that he was involved in the recommendations to promote three bargaining unit employees to supervisory positions during his tenure as general manager, including Doyle. These employees held union-steward positions or were members of the Union bargaining committee that participated in contract negotiations with Wendling. Respondent also points to its collective-bargaining agreement that was in effect when Saunders applied for a position. That agreement permits an employee elected to a full-time job as a union official to be guaranteed reemployment at the end of such period with the same seniority as though the employee had been continuously employed.[7] Lastly, I note that the Respondent had a very cordial relationship with both the Union and Saunders when he was president. Indeed, Saunders confirmed this good working relationship.

Under these circumstances, I find that the Respondent did not violate Section 8(a)(1) and (3) of the Act. Therefore, I recommend that the complaint be dismissed.[8]

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Respondent did not engage in violations of Section 8(a)(1) and (3) of the Act by its refusal to hire Steven C. Saunders.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[9]

ORDER

The complaint is dismissed.

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[5] See, e.g., *Kelly Construction of Indiana*, 333 NLRB 1272 (2001); *Micrometl Corp.* 333 NLRB 1133 (2001); and *J.O. Mory, Inc.*, 326 NLRB 604 (1998).

[6] Notwithstanding the Board's recent decision in *Aztech Electric Co.*, 335 NLRB 260 (2001), I do not find that Respondent's reliance on a high turnover rate and Saunders willingness to take a substantial pay cut in denying him employment is inherently destructive of employees' Sec. 7 rights. Here, there was no firm rule that gave rise to a blanket denial of job opportunities. Rather, the refusal to hire Saunders was an individual decision made on the basis of factors solely unique to him. Moreover, Doyle encouraged Saunders to run for union office. The denial of employment to Saunders was legitimately based on Respondent's opinion that Saunders did not intend to remain in the merchandiser position for a long period of time and Doyle's belief that Saunders' prior salary history would probably cause him to hastily look for new employment opportunities. If Saunders had indicated that he intended to remain in the employ of Respondent on a long-term basis, and he was not hired solely because of his interest in running for union office, it might dictate a different result. See *Donald A. Pusey, Inc.*, 327 NLRB 140 (1998). Lastly, I note that this is a case in which Respondent and the Union have a long-term collective-bargaining relationship and the right to union organization is not at issue.

[7] See, (R. Exh. 4, art. 10, sec. 3).

[8] Under *FES*, once the General Counsel has established a prima facie case, the burden shifts to the respondent to show that it would not have hired the alleged discriminatees even in the absence of their union activities or affiliation. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). While I found that the General Counsel has not established a prima facie case, if others disagree, I would still find that the Respondent met its *Wright Line* burden of showing that it would not have hired Saunders even in the absence of his union activity.

[9] 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.