

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

SHINTECH, INC.

and

CASE 16–CA–26077

INTERNATIONAL UNION OF
OPERATING ENGINEERS, LOCAL 564

Dean Owens, Esq., for the General Counsel
Neil Martin, Esq. and Laura Goodson, Esq.
(Gardere Wynne Sewell LLP),
for the Respondent

BENCH DECISION AND CERTIFICATION

Statement of the Case

KELTNER W. LOCKE, Administrative Law Judge: I heard this case on August 14, 2008 in Houston, Texas. After the parties rested, I heard oral argument, and on August 15, 2008, issued a bench decision pursuant to Section 102.35(a)(10) of the Board’s Rules and Regulations, setting forth findings of fact and conclusions of law. In accordance with Section 102.45 of the Rules and Regulations, I certify the accuracy of, and attach hereto as “Appendix A,” the portion of the transcript containing this decision.¹ The Conclusions of Law and Order are set forth below.

CONCLUSIONS OF LAW

1. The Respondent, Shintech, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Charging Party, International Union of Operating Engineers, Local 564, is a labor organization within the meaning of Section 2(5) of the Act.

¹ The bench decision appears in uncorrected form at pages 233 through 241 of the transcript. The final version, after correction of oral and transcriptional errors, is attached as Appendix A to this Certification.

3. The Respondent did not violate the Act in any manner alleged in the Complaint.

On the findings of fact and conclusions of law herein, and on the entire record in this case, I issue the following recommended²

ORDER

The Complaint is dismissed.

Dated Washington, D.C., September 10, 2008.

Keltner W. Locke
Administrative Law Judge

² If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, these findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board, and all objections to them shall be deemed waived for all purposes.

“APPENDIX A”

Bench Decision

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This decision is issued pursuant to Section 102.35(a)(10) and Section 102.45 of the Board’s Rules and Regulations. The Complaint alleges that two of Respondent’s supervisors made statements to employees which violated Section 8(a)(1) of the Act. Because I do not credit the government’s principal witnesses, I recommend that the Complaint be dismissed.

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Procedural History

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This case began on March 4, 2008, when the Charging Party, the International Union of Operating Engineers, Local 564 (the “Union”), filed its initial charge in this proceeding. The Union amended this charge on March 10, 2008.

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On June 25, 2008, after investigation of the charge, the Regional Director for Region 16 of the National Labor Relations Board issued a Complaint and Notice of Hearing, which I will call the “Complaint.” In issuing this complaint, the Regional Director acted on behalf of the General Counsel of the Board, whom I will refer to as the “General Counsel” or as the “government.”

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On August 14, 2008, a hearing opened before me in Houston, Texas. Both the General Counsel and the Respondent called witnesses, presented evidence and, after resting, delivered oral argument. Today, August 15, 2008, I am issuing this bench decision

Admitted Allegations

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Based on the admissions in Respondent’s Answer, I find that the General Counsel has proven the allegations raised by Complaint paragraphs 1(a), 1(b), 2, 3, 4, 5, and 6. Therefore, I conclude that the charge and amended charge were filed and served as alleged.

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Moreover, I conclude that the Respondent, Shintech, Inc., is an employer engaged in commerce and within the Board’s statutory jurisdiction. Further, I conclude that Respondent satisfies the Board’s discretionary standards for the exercise of its jurisdiction.

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Additionally, I conclude that at all material times, Plant Superintendent Randy Stanford and Shift Supervisor Steven Gomez were Respondent’s supervisors and agents within the meaning of Section 2(11) and 2(13) of the Act.

Also, I conclude that the Charging Party, International Union of Operating Engineers, Local 564, is a labor organization within the meaning of Section 2(5) of the Act.

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Contested Allegations

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Complaint Paragraphs 7(a) and 7(b)

10 Complaint paragraphs 7(a) and 7(b) allege that on or about the first week of December 2007, the exact date being unknown, Respondent, by Steven Gomez, interrogated an employee about the employee’s union membership, activities, and sympathies and threatened an employee with discharge because the employee supported the Union. Respondent denies these allegations.

15 The General Counsel’s proof rests on the testimony of Jose David Rodriguez Jr., who was employed by Respondent in December 2007 although later discharged. On November 12, 2007, Rodriguez had signed a petition being circulated among employees. The petition bore the caption “Yes! We want a voice through collective bargaining.” Employees who signed it designated the International Union of Operating Engineers and its Local 564 to represent them.

20 According to Rodriguez, some time during the first week in December 2007, he and another employee, Patricia Gomez were in the break room at work. No one else was in the room. They began discussing the petition which Rodriguez had signed. Rodriguez testified that about 3 minutes after he told Patricia Gomez that he had signed the petition, Shift Supervisor Steven Gomez came into the break room and said words to the effect, “You signed it, cuz?” Rodriguez explained that “cuz” was a term similar to “buddy.”

25 According to Rodriguez, he answered that he had signed the petition and that Supervisor Gomez replied that it was his choice, then added that a management official would be upset about it and that there was a chance that he, Rodriguez, could lose his job if the Union did not come into the plant.

30 Supervisor Gomez denied asking any employee whether he had signed the petition and also denied making any threat. Because of the conflict between the testimony of Gomez and Rodriguez, the third witness becomes particularly significant.

35 Patricia Gomez, who is not related to Supervisor Steven Gomez, testified under subpoena. She did not recall the conversation in question. However, her inability to remember such a conversation does not rule out the possibility that it took place.

40 Ms. Gomez’ testimony will be accorded limited weight for the following reasons: Besides her inability to recall the alleged conversation between Rodriguez and Supervisor Gomez, her testimony about other matters wasn’t always crystal clear. Moreover, in evaluating the reliability of her testimony, her reluctance to be a witness may be taken into account.

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5 The Board agent had to subpoena Ms. Gomez to obtain a pretrial affidavit from her, and, as already noted, she appeared at the hearing pursuant to subpoena. From observations of her demeanor, I do not infer that she was particularly enthusiastic about testifying and she may have demanded little of her memory. Her inability to recall the alleged break room conversation does not resolve whether it occurred or what was said if it did.

10 Therefore, I rely heavily on my conclusions about the credibility of the testimony given by Rodriguez and Supervisor Gomez. For several reasons, I have doubts about the reliability of Rodriguez’ testimony.

15 During direct examination by the General Counsel, when asked when his coworkers started discussing the Union, Rodriguez answered “the first week in December.” Rodriguez adhered to this response until the General Counsel showed him his signature on a petition authorizing Union representation. The signature bore the date November 12, 2007.

20 It appears that Rodriguez had conflated the date when employees began talking about the Union with the date of the alleged unfair labor practice. This confusion contributes to my impression that Rodriguez was testifying by rote rather than drawing upon his memory of events.

25 On cross–examination, Rodriguez sometimes failed to answer responsively. For example, at one point, Respondent questioned Rodriguez about what appears to have been an inadvertent error in his pretrial affidavit. The affidavit attributed to Supervisor Gomez the statement that he, Gomez, could vote in a representation election because Gomez “was a supervisor and exempt.”

30 From the context, it appears clear that Rodriguez intended to state in the affidavit that Gomez said he could *not* vote in an election because he was a supervisor and exempt, which would be consistent with Rodriguez’ testimony during the hearing. However, it seems likely that, somehow, the word “not” was left out. On cross–examination, Rodriguez did not attribute the difference between his testimony and this portion of his affidavit to an inadvertent error, and his testimony on this matter seemed rather oblique.

35 On the other hand, Supervisor Gomez’ testimony was much clearer and he appeared to be testifying from memory rather than memorization. Accordingly, I credit Steven Gomez rather than Rodriguez.

40 Crediting Gomez, I find that he did not make the statements attributed to him by Rodriguez, which form the basis for Complaint paragraphs 7(a) and 7(b). Therefore, I recommend that the Board dismiss these allegations.

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Complaint Paragraphs 8(a), 8(b) and 8(c)

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Complaint paragraphs 8(a), 8(b) and 8(c) allege that on or about the first week of December 2007, the exact date being unknown, Respondent, by Randy Stanford in his office, (a) interrogated its employees individually about their union membership, activities and sympathies, (b) told an employee that the Employer was upset about the union organizing drive, and (c) made statements implying a threat of unspecified reprisal if the employee selected the union as bargaining representative. Respondent denies these allegations.

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Jose David Rodriguez testified that on December 10, 2007, Plant Superintendent Stanford called him into Stanford’s office and that no one else was present during the ensuing conversation.

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According to Rodriguez, Stanford asked him, “Did you sign that petition for representation?” Rodriguez replied that he had, and that he felt he had been doing the right thing. Rodriguez testified that Stanford said “they were pretty upset about it” and that Rodriguez should be sure he made the right decision.

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Stanford denied the statements Rodriguez attributed to him. According to Stanford, Rodriguez came to his office on his own, that is, unsummoned, closed the door, and said that he didn’t have anything to do with the Union and didn’t want to have anything to do with the Union. Rodriguez contradicted Stanford on this point. However, although Rodriguez denied going to Stanford and disavowing the Union, he admitted that he contacted another management official, Jim Hodges, and made such a statement.

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For the reasons already stated, I do not have confidence that Rodriguez’ testimony is reliable. On the other hand, based upon my observations of the witnesses, I credit Stanford’s testimony. Stanford expressly and credibly denied asking Rodriguez whether he had signed a Union petition.

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Based on Stanford’s credited testimony, I find that he did not make the statements which Rodriguez attributed to him.

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To establish the allegations raised in Complaint paragraph 8, the General Counsel also relies on the testimony of Chad Moehle, who worked for Respondent in 2007 and 2008 before accepting a position with another company. Moehle testified that, sometime at the beginning of December 2007, Stanford asked him to come into Stanford’s office.

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According to Moehle, Stanford asked if anyone had asked Moehle to sign a petition for the Union. Moehle further testified that Stanford said that the employees at a Dow Chemical plant were unhappy with the union representing them because it would make promises it didn’t keep. Moehle said that Stanford then told him he would invite Moehle to “think about it” before he made a decision.

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Stanford denied interrogating any employee about his Union activity or sympathies.
5 This credibility conflict must be resolved.

As already discussed, based on my observations of Stanford while he testified, I believe
his testimony to be reliable. He appeared to be frank, even to the point of bluntness, and did
not give any impression of equivocation.
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On the other hand, Moehle no longer works for Respondent and thus has no apparent
reason to testify in a particular way. However, my observations give rise to some reservations
about the reliability of his testimony.

As noted above, Moehle testified that Stanford said that Dow Chemical employees were
dissatisfied with the union representing them and invited him to “think about it” before making
a decision. At one point during this testimony, Moehle paused, mid-sentence, for a
considerable period of time. This pause, of course, would not be apparent from a reading of the
written transcript.
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Additionally, at times Moehle appeared to be uncertain about some parts of his
testimony which, at points, did not seem entirely self-consistent. For these reasons, I have less
confidence in Moehle’s testimony than in Stanford’s.

Assessment of credibility certainly isn’t a science. However, the trier-of-fact must
25 resolve conflicts in the testimony even when all of the indications do not point in the same
direction. In the present case, my doubts about the testimony of Moehle and Rodriguez lead
me to conclude that it is not reliable enough to support findings that the Act has been violated.
Accordingly, I conclude that a preponderance of the evidence does not establish any of the
unfair labor practices alleged in the Complaint, and recommend that the Complaint be
30 dismissed.

When the transcript of this proceeding has been prepared, I will issue a Certification
which attaches as an appendix the portion of the transcript reporting this bench decision. This
Certification also will include provisions relating to the Findings of Fact, Conclusions of Law,
35 and Order. When that Certification is served upon the parties, the time period for filing an
appeal will begin to run.

Throughout this hearing, counsel demonstrated high standards of professionalism and
civility, which I truly appreciate. The hearing is closed.
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