

A & T Manufacturing Company and United Steelworkers of America, AFL-CIO-CLC. Cases 9-CA-15756, 9-CA-15898, and 9-CA-16029

30 September 1985

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS
DENNIS AND BABSON

On 16 December 1982 the Board issued the Decision and Order in this proceeding,¹ in which the Board, in agreement with the judge, found that the Respondent had violated Section 8(a)(3) and (1) of the National Labor Relations Act by laying off 25 shop employees. The Board also adopted the judge's finding that the Respondent violated Section 8(a)(1) by threats of plant closure or discharge, interrogations, promulgation of overly broad no-solicitation rules, threats to conduct surveillance and the actual surveillance of union meetings, informing employees that their fellow employees were laid off because of their activities on behalf of the Union, and warning employees not to sign union cards. The Board further found, in disagreement with the judge, that the Respondent discharged employee Jimmy Popp on 23 September 1980² in violation of Section 8(a)(3) and (1) of the Act.

Upon application for enforcement of the Board's Order, the United States Court of Appeals for the Sixth Circuit on 29 June 1984 refused enforcement with respect to the finding that the Respondent discharged employee Jimmy Popp in violation of Section 8(a)(3) and (1) of the Act and remanded the case to the Board for further proceedings consistent with its opinion.³ The court held that substantial evidence did not support the Board's finding that Popp's repeated violations of the Respondent's rule on reporting absence/tardiness played no part in the decision to discharge him. The court remanded the case to the Board to determine whether Popp's repeated failures to comply with the Respondent's rule in fact partially motivated the Respondent's decision at the time of the discharge and, if so, whether Popp would have been discharged for violating the rule even in the absence of protected activity.

Thereafter, the Board accepted the court's remand and notified the parties that they could file statements of position concerning the issues the

remand raised. Subsequently, the General Counsel and the Respondent filed statements of position.

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

The Board has considered the record as a whole in light of the court's order and the statements of position on remand and now makes the following findings.

The Board in its original decision and the court found that the General Counsel clearly demonstrated that union animus contributed to the decision to terminate Popp. The court, as had the Board and the judge, further found that the Respondent's reliance on the August 27 insubordination incident as a reason for Popp's discharge was clearly pretextual in view of the length of time between the incident and the decision to discharge. The court of appeals stated that the focal point in dual motivation cases is the employer's motive at the time the discharge takes place. Therefore, at issue is whether Popp's absences partially motivated the Respondent's action and whether he would have been discharged in the absence of his union activity.

We find the discharge of Jimmy Popp lawful, because the Respondent successfully met its burden under *Wright Line*, 251 NLRB 1083 (1980), of establishing that it would have discharged Popp notwithstanding his union activities. Popp was absent for 5 consecutive days; on 3 of those days he did not call in. When the Respondent's president, Charles Browder, discharged Popp, he told Popp that the reasons for the action were Popp's insubordination and his unreported absences. While the insubordination charge was pretextual, the Respondent established that Popp would have been discharged for his unreported absences in any event.

The Respondent presented its rule entitled "Reporting Absence/Tardiness," which requires employees to notify the Company as soon as possible on the day of an absence and specifies discharge as the penalty for unreported absences. The Respondent also demonstrated that it had discharged employees in the past for unreported absences.⁴ President Browder testified that, regardless of the insubordination incident, he would have discharged Popp for his consecutive unreported absences.

⁴ The Respondent's evidence is a list of 33 employees discharged for attendance-related reasons between January 1978 and March 1981. Eighteen employees were discharged for "excessive absenteeism", six for "absenteeism", four for "unreported absences", and one each for "absenteeism and failure to report to work by phone," "not reporting for work and tardiness," "unsatisfactory attendance and punctuality," "unexcused absences," and "absenteeism and failure to report to work 3 days in one week."

¹ 265 NLRB 1560 (1982). Member Babson was not a member of the Board at the time the Decision and Order issued.

² Except as otherwise indicated, all dates are in 1980.

³ *NLRB v A & T Mfg Co*, 738 F.2d 148 (6th Cir. 1984). The court granted enforcement of the Board's Order as to the Respondent's unlawful layoff of 25 shop employees on 22 August 1980 and as to the violations of Sec. 8(a)(1) of the Act.

The burden is on the Respondent to show that Popp would have been discharged notwithstanding his protected activity. Absent countervailing evidence, such as evidence of disparate treatment, we find that the Respondent has met its burden under *Wright Line*, supra, by establishing it has a rule requiring employees to call in on days of absence, the penalty for disobeying the rule is discharge, and other employees have been discharged for not calling in. That the Respondent was glad to be presented with the opportunity to discharge Popp is

legally inconsequential. *Klate Holt Co.*, 161 NLRB 1606, 1612 (1966). Accordingly, we find that Popp's discharge did not violate Section 8(a)(3) and (1) of the Act.

Therefore, we shall dismiss those complaint allegations that the Respondent unlawfully discharged Popp.

ORDER

The complaint allegations that the Respondent unlawfully discharged Jimmy Popp are dismissed.