

CATV Service Company, Inc. a subsidiary of Storer Communications, Inc. and International Brotherhood of Electrical Workers, AFL-CIO, Local 827. Case 22-13395

23 May 1986

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS
JOHANSEN AND STEPHENS

On 8 November 1985 Administrative Law Judge D. Barry Morris issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed a brief in opposition to the General Counsel's exceptions.

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.

¹ We find it unnecessary to pass on the judge's findings concerning Janice Mason's supervisory status

Jacqueline Young, Esq., and *Marta Figueroa, Esq.*, for the General Counsel.

Michael T. McMenamin, Esq., and *Nancy A. Noall, Esq.* (*Walter, Haverfield, Buescher & Chockley*), of Cleveland, Ohio, for the Respondent.

DECISION

STATEMENT OF THE CASE

D BARRY MORRIS, Administrative Law Judge. This case was heard before me in Newark, New Jersey, on 17, 18, and 19 December 1984¹ and 11 February 1985. On a charge filed on 13 August and amended on 27 September, a complaint was issued on 27 September alleging that CATV Service Company, Inc., a subsidiary of Storer Communications, Inc. (Respondent) violated Section 8(a)(1) and (3) of the National Labor Relations Act. Respondent filed an answer denying the commission of the alleged unfair labor practices

The parties were given full opportunity to participate, to produce evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs were filed by the General Counsel and by Respondent on 17 April 1985

¹ All dates refer to 1984 unless otherwise specified

On the entire record of the case, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I JURISDICTION

Respondent, a corporation with a place of business in Port Murray, New Jersey, is engaged in providing cable television service. Its total annual volume of business exceeds \$100,000. Respondent admits that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and I so find. In addition, I find that International Brotherhood of Electrical Workers, AFL-CIO, Local 827 (the Union) is a labor organization within the meaning of Section 2(5) of the Act. See *Ana Colon, Inc.*, 266 NLRB 611, 612 (1983).

II THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Issues*

The issues are:

1. Did Respondent assign more onerous working conditions to its employee, Janice Mason, and discharge her, in violation of the Act?
2. Was Mason a managerial employee or supervisor and thus not entitled to the protection of the Act?

B. *The Facts*

1. Background

Janice Mason began her employment with Respondent in May 1981. In early 1982 she became project manager at the Port Murray facility. As such, she was the coordinator for cable construction of the system. In January 1984 she was advised by the then system manager, Mark Greenberg, that her title was being changed to field survey coordinator. Mason testified that Greenberg told her that her new position was "basically . . . the same" as her prior position with a "few omissions." She testified that Greenberg told her she would still coordinate cable construction but that Joe Salvero, who would become technical manager, would be handling longdrop surveys and extensions.

Mason testified that after her title was changed to field survey coordinator she continued to perform the six job categories listed on the General Counsel Exhibit's 9, which had been her responsibilities as project manager. Although as project manager she had also been responsible for longdrop surveys and extensions, this work was eliminated in her new position.

2 Union activity

In January 1984 a meeting of all employees in Port Murray took place when it was announced that a petition had been filed for an election. An election was held on 1 March in which Mason voted. However, her ballot was challenged. Mason testified that she attended approximately six union meetings between January and April and attended union organizational meetings for several of Respondent's other systems.

3. Events leading to discharge

On 16 May James Robinson became system general manager, replacing Greenberg. During May Robinson became aware of Mason's union activities by having read Respondent's exceptions to the Regional Director's report on objections to the election and related papers.

On 17 July Robinson attended a meeting in Respondent's area office in which each system was given a deadline to compile budget information for the following year. The deadline for the Port Murray system was 24 July. Accordingly, Robinson decided that he needed information from his system's personnel by Friday, 20 July. He intended to review the material on Saturday because the area personnel, Charles Monahan, area business manager, Richard Grace, area sales manager, and Francis Sankner, area plant manager, planned to come to the system on Sunday, 22 July, to compile a rough draft of the budget.

On 18 July Robinson requested that Mason furnish him with information concerning construction projects that were pending for 1984 and were projected for 1985. He gave her a deadline for completing the project of 5 p.m., Friday, 20 July. He gave the same deadline to the system's sales manager, Gloria Domkowski, the office manager, Regina Robinson, and Salvero, the technical manager, for the information requested of them. Robinson's request to Mason was followed by a memorandum dated 19 July reiterating the information he had requested from her the day before. On Friday afternoon, 20 July, Mason came into Robinson's office and told him that "she was having a hard time gathering the information." Robinson replied, "Do the best that you can on it. Get as much as you can together."

Mason did not meet the 5 p.m. deadline on Friday. At approximately 7:30 that evening as Robinson was getting ready to leave for home, he checked with Mason to see how she was progressing. Robinson testified:

She held up a sheet of information indicating that she was going through the information that she had. I indicated to her to do the best that she could and with that, upon completion, she should go ahead and put the information underneath the door of my secretary. I was returning the next morning and I was going to take that information along with everyone else's and start to compile the budget process for 1985.

On Saturday, 21 July, Robinson arrived at the office at 9 a.m. The information he requested from Mason had not been left for him. Robinson was "quite upset" and placed a telephone call to Mason. She was not in and he left a recorded message on her answering machine indicating that he needed to speak with her at once. He tried calling her several times that day but was unable to reach her. Robinson credibly testified that not having the information from Mason severely impeded his efforts in preparing the budget. He stated, "It basically put everything into a dead heat, stopped everything cold." On discussing the matter with another system manager during the course of the day, Robinson told the other manager that because of the lack of information he was "extremely

upset." Robinson testified that by Saturday evening he had made up his mind to discharge Mason.

Robinson remained working at the office until 4:30 Sunday morning and returned again at approximately 9:30 a.m. Mason came to work at approximately 7:45 Sunday morning and by the time Robinson arrived, she had completed 80 percent of the work. When Grace arrived at 11 a.m., Mason had still not completed the work and Robinson was "furious." Robinson apologized to Grace and Monahan and asked Mason to come to his office. He told Mason she had 15 minutes to complete the project and bring it to him. On Monday morning, 23 July, Robinson told his superior, Barbara Silkworth, area vice president, that he wished to terminate Mason. She told him to contact the corporate legal department because "Mason had displayed pro-union activity and she wanted to make sure that I consulted with them first."

The budget presentation took place on Tuesday, 24 July, and was not well received. Robinson credibly testified that he was in the meeting approximately 15 minutes when Silkworth "threw out" his presentation. "She told us to go back and do it again." On 31 July Robinson advised Mason that she was terminated. Robinson credibly testified that he told her the reason for her termination was "primarily . . . due to the lack of communication and information in the budget process. That it was very vital and it had upset a lot of people and it delayed a number of the reports."

III DISCUSSION AND ANALYSIS

A. Termination of Mason

Under *Wright Line*, 251 NLRB 1083, 1089 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989, 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 Mason. Mason attended several union meetings and Robinson became aware of her union activity soon after he became system manager in May. Mason testified that Robinson never discussed her union activity with her nor did he ever say anything which gave her the impression that he held her activities on behalf of the Union against her. I believe that Robinson's reason for terminating Mason was her failure to complete compiling the budget information on time. Robinson was new to the Port Murray system and was eager to create a favorable impression on his superiors. The area personnel were due to come to his office on Sunday morning, 22 July. Robinson desired to have the information from his staff completed by 5 p.m., Friday, 20 July, so that he could work on it the following day. The Friday deadline was imposed not only on Mason but also on the three other key personnel as well.

Mason conceded that as field survey coordinator she continued to perform the six categories of work which she had been performing previously as project manager. Although she had previously also been responsible for longdrop surveys and extensions, those items do not involve construction. Robinson requested information concerning construction and Mason conceded that as field survey coordinator she coordinated construction for the Port Murray system.

Mason did not meet the deadline of completing the project by 5 p.m., Friday. At 7:30 that evening Robinson told her to "put the information underneath the door of my secretary" so that he would have it along with everyone else's on Saturday morning. When Robinson arrived at the office on Saturday Mason had not left the information nor had she left a note indicating her progress. Robinson tried to contact her by phone but was unable to reach her and, accordingly, was very upset. During the course of the day Robinson discussed the matter with another system manager and mentioned how upset he was over Mason's failure to supply the information. The record contains testimony that the manager of the Monmouth County system was terminated partially because of his failure to provide timely information during the budget process.

I credit Robinson's testimony that by Saturday evening he had decided to terminate Mason. His decision was reinforced on Sunday morning when the area personnel came to review the budget and Mason had still not completed the project. Robinson was "embarrassed" and "apologetic." Mason confirmed this in the following testimony:

Q. In this meeting with Mr. Robinson . . . on the morning of the 22nd when Mr. Grace and Mr. Monahan were also present did you receive the impression that Mr. Robinson was displeased with your performance?

A. Most definitely.

Q. How did you receive that impression?

A. He seemed angry when he was speaking. He said it in no uncertain terms. He said, I am very annoyed that I don't have this information and it's very important and I need it immediately.

On 31 July Robinson advised Mason that she was being terminated. I credit his testimony that he told her at the time of termination that it was due primarily to her failure to provide the budget information on time. Although he may have mentioned secondary reasons as well, it is clear to me that he was fearful of being embarrassed before his superiors and he was very disturbed by the fact that Mason did not finish the project when requested.

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 Mason. Moreover, even if the General Counsel were deemed to have established a prima facie case, the evidence establishes that Mason would have been discharged even in the absence of her union activities. Therefore, the allegations that Respondent violated Section 8(a)(1) and (3) of the Act are dismissed.

B. Supervisory Status

Respondent contends that Mason was a supervisor within the meaning of Section 2(11) of the Act and, accordingly, was not entitled to the protection of the Act. Mason conceded that the General Counsel Exhibit's 9 is an accurate description of her duties and responsibilities as project manager. The exhibit lists six categories of work and states that such person "supervises and directs construction personnel." Mason testified that she continued to perform the six categories after January 1984 when her title was changed to field survey coordinator. Indeed, Mason replied affirmatively to counsel's statement that "I had gotten you to agree that in fact you do supervise and direct construction personnel." The record also contains evidence that Mason gave employee, Louis Usa, "directions as to which maps to work on." Accordingly, I conclude that as field survey coordinator, Mason was a supervisor within the meaning of Section 2(11) of the Act.²

CONCLUSIONS OF LAW

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

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3 Respondent has not engaged in the unfair labor practices alleged in the complaint

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³

ORDER

The complaint is dismissed.

² Respondent also maintains that Mason was a managerial employee and thus not entitled to the protection of the Act. In view of my conclusion that she was a supervisor, it is unnecessary for me to decide whether she was also a managerial employee.

³ 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.