

**U S Windpower, Inc and Brotherhood of Teamsters and Auto Truck Drivers, Local 70, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America Cases 32-CA-5848 and 32-RC-1856**

23 November 1984

**DECISION, ORDER AND CERTIFICATION OF RESULTS OF ELECTION**

**BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS**

On 20 July 1984 Administrative Law Judge Richard D Taplitz issued the attached decision. The Charging Party 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, findings,<sup>1</sup> and conclusions and to adopt the recommended Order.

**ORDER**

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

IT IS FURTHER ORDERED that the objections to the election held on 21 September 1983 be overruled.

**CERTIFICATION OF RESULTS OF ELECTION**

IT IS CERTIFIED that a majority of the valid ballots have not been cast for Brotherhood of Teamsters and Auto Truck Drivers, Local 70 International Brotherhood of Teamsters Chauffeurs Warehousemen and Helpers of America and that it is not the exclusive representative of the employees in the unit herein involved.

<sup>1</sup> The Charging Party 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) enf'd 188 F.2d 362 (3d Cir 1951). We have carefully examined the record and find no basis for reversing the findings.

In view of the judge's credibility findings, Member Dennis finds it unnecessary to pass on the issue discussed in fn. 8 of the attached decision.

**DECISION**

**STATEMENT OF THE CASE**

RICHARD D TAPLITZ Administrative Law Judge. These consolidated cases were heard at Oakland, California on June 11, 1984. The charge in Case 32-CA-5848 was filed on September 6, 1983 by Brotherhood of Teamsters and Auto Truck Drivers Local 70 International Brotherhood of Teamsters Chauffeurs Warehousemen and Helpers of America (the Union). The complaint, which issued on October 28, 1983 and was amended on May 29, 1984, alleges that U S Windpower Inc (the Company) violated Section 8(a)(1) of the National Labor Relations Act.

On July 13, 1983, the Union filed a petition for an election in Case 32-RC-1856. Pursuant to a Stipulation for Certification Upon Consent Election agreement approved on August 16, 1983, an election by secret ballot was conducted on September 21, 1983 among operations, production and maintenance employees of the Company in an appropriate bargaining unit.<sup>1</sup> After the election, each party was furnished with a tally of ballots which showed that 2 ballots were cast for the Union, 28 ballots were cast against the Union, and 15 ballots were challenged. On September 28, 1983, the Union filed timely objections to the conduct of the election and/or to conduct affecting the outcome of the election. On January 12, 1984, the Regional Director for Region 32 issued a report on objections, order consolidating cases and notice of hearing. The Regional Director recommended that Objections 1, 3, 4, and 5 be overruled and found that the conduct at issue in Objections 2, 6, 7, and 8 was the same as that alleged to constitute unfair labor practices in Case 32-CA-5848. He therefore ordered that those objections be heard and considered in the same proceeding. Cases 32-CA-5848 and 32-RC-1856 were consolidated for the purpose of hearing before an administrative law judge. In the order, the Regional Director requested that the administrative law judge prepare and cause to be served on the parties a report containing resolutions of the credibility of witnesses, findings of fact and recommendations to the Board as to the disposition of the outstanding objections. No exceptions to the Regional Director's report or request for special permission to appeal from his order were filed within the time provided and by order dated February 2, 1984, the Board adopted the Regional Director's recommendation as contained in his report.

**Issues**

1. Whether the Company through its supervisor Norman Reichert violated Section 8(a)(1) of the Act by interrogating an employee about union matters during the course of an interview in which the employee was being considered for a supervisory position.

<sup>1</sup> The bargaining unit was:

All full time and regular part time operations, production and maintenance employees employed by the Employer at its Livermore facility, Midway facility and its Dyer facility located at Livermore, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

2 Whether the Company through its supervisor Kenneth Geyer violated Section 8(a)(1) of the Act by asking an employee when the next union meeting was going to be held

3 Whether the Company through its supervisor Kenneth Geyer violated Section 8(a)(1) of the Act by responding to an employee's question as to whether the Union had anything to do with a layoff by saying it can't happen the union would put this company under

4 Whether the election should be set aside

All parties were given full opportunity to participate to introduce relevant evidence to examine and cross examine witnesses to argue orally and to file briefs. Briefs which have been carefully considered were filed on behalf of the General Counsel Respondent and the Union.

On the entire record of the case and from my observation of the witnesses and their demeanor I make the following

## FINDINGS OF FACT

### I JURISDICTION

The Company a Delaware corporation with an office and place of business in Livermore California is engaged in the manufacture and operation of wind machines and the maintenance and management of wind farms for the production of electrical energy. During the 12 months immediately preceding issuance of complaint the Company purchased and received goods or services valued in excess of \$50,000 directly from suppliers located outside of California. The Company is engaged in commerce within the meaning of Section 2(6) and (7) of the Act. The Union is a labor organization within the meaning of Section 2(5) of the Act.

### II THE ALLEGED UNFAIR LABOR PRACTICES

#### A Background

The Company's headquarters is located in San Francisco California. It operates facilities at field locations and maintains a field office at Livermore California.

In June 1983 the Union was engaging in an organizational campaign among the Company's employees in the unit described above.

On August 25 1983 a number of employees were terminated.<sup>2</sup> On September 6 1983 the Union filed a charge alleging that the Company violated Section 8(a)(1) and (3) of the Act by discriminating against employees because of their union activity. However the complaint is very narrow. There is no allegation that any of the terminations were unlawful. The complaint is limited to allegations that the Company interfered restrained and coerced employees through remarks and questions that supervisors directed to employees. The General Counsel's case consisted of the testimony of two witnesses Janelle Burns and Richard Ohlott. Both of those individuals were employees who were terminated on August 25 1983.

<sup>2</sup> The witnesses referred to the termination as a permanent layoff.

#### B *The Conversation Between Ohlott and Geyer—Facts and Conclusions*

Richard Ohlott performed site analysis and field maintenance work for the Company until his termination on August 25 1983. Ohlott testified that in the early morning of August 25 he had a 7 or 8 minute conversation with Overhaul Supervisor Kenneth Geyer<sup>3</sup> in Geyer's office at the Livermore facility. Geyer did not supervise Ohlott and they usually only saw each other in passing. Ohlott testified to the following: When Ohlott reported for work on August 25 1983 he found that he had been locked out. Geyer let him in. Ohlott asked Geyer whether there was going to be a layoff that day and Geyer told him that there was. Ohlott then asked Geyer whether the Union had anything to do with the layoff and Geyer replied it can't happen the union would put this company under.

Geyer who is no longer employed by the Company in his testimony denied that the conversation ever took place. He specifically denied saying anything to Ohlott about the Union. He testified that the only time he spoke to Ohlott that day was about 6:30 or 7 a.m. when he went into the office that he shared with another supervisor James Webb and saw Ohlott with Webb. Geyer averred that he did not hear what Webb or Ohlott was saying and that he simply asked Ohlott to leave the office because he had to conduct some business with Webb. According to Geyer nothing was said about the Union or a layoff.

Geyer was a more believable witness than Ohlott in terms of testimonial demeanor as well as in terms of the substance of the testimony. Ohlott was terminated on August 25. The charge that was filed on September 6 could have led to his reinstatement with backpay. Before the incident in question the company officials had been instructed by their attorney as to what their legal rights and duties were. Whether or not the company officials followed the lawyer's advice it is extremely unlikely that Geyer would gratuitously volunteer to a man who was about to be terminated evidence that the termination was unlawful. My observation of Geyer as he testified indicated that he was an intelligent individual who carefully chose his words. I credit his testimony to the effect that he did not make the remarks attributed to him by Ohlott and I do not credit Ohlott in that regard.

#### C *Janelle Burns Conversations with Reichert and Geyer—Facts and Conclusions*

Janelle Burns performed clerical work for the Company until her termination on August 25 1983. Though Burns was not in the bargaining unit involved in this case<sup>4</sup> she contacted employees at their homes to sign authorization cards notified employees of union meetings and attended such meetings.

Sometime prior to July 21 1983 the Company decided that it needed a personnel manager at its Livermore

<sup>3</sup> Respondent admits and I find that Geyer was a supervisor within the meaning of the Act.

<sup>4</sup> A separate representation case petition in a clerical unit was filed in Case 32-RC-1876 on August 10 1983.

facility It was anticipated that the personnel manager would interview employees for jobs author personnel policies and procedures and handle other personnel matters It was stipulated and I find that the personnel manager position was both supervisory and managerial

Burns applied for the personnel manager position by writing to Norman Reichert the Company's vice president of finance and treasury<sup>5</sup> She followed up the letter with a telephone call and succeeded in obtaining an interview On July 21 1983 she met with Reichert for a luncheon meeting at the Holiday Inn at Livermore Reichert questioned her concerning her experience education and other matters relating to her ability to do the job Near the end of the interview Reichert told Burns that he would probably want to hire someone who had more personnel experience than Burns Another individual was later hired<sup>6</sup>

Burns testified that during the interview Reichert said that he did not blame employees for wanting a union that Reichert asked her how she felt about the Union that Reichert asked her whether she had any union related experience and keeping unions out of the company and that Reichert asked her whether she knew what antiunion procedures were for the corporation Burns also testified that she replied by saying that she did not have any direct experience with union related matters

Reichert in his testimony denied the substance of Burns' assertions He averred that the only time the Union was mentioned was when Burns told him that she did not believe the Union would win the election and that he did not reply to Burns on that subject because he did not want to discuss the union situation He specifically denied asking her how she felt about the Union whether she had any union related experience or whether she knew antiunion procedures for the corporation The demeanor of both Burns and Reichert gave little ground for questioning their veracity Burns appeared to be an intelligent poised individual Her activities among her fellow employees with regard to union activity indicated a concern with the rights of others However some of her testimony was so in conflict with the impression she created on the witness stand that I am forced to have reservations concerning her complete candor On cross examination counsel for Respondent attempted to show that she had a bias against the Company that could affect her credibility Such matters must be considered as one of many factors in evaluating credibility even though a witness who has an interest in the proceeding may be completely credible Burns overreacted She knew that the Union had filed unfair labor practice charges against the Company claiming that the terminations were illegal She testified that it did not bother her that she was laid off She further testified that she was not bothered by the fact that other people had lost their jobs She averred that it did not have anything to do with her that she did not want to try to help the others get their jobs back and that the others were on

their own just as she was While Burns may very well not have wanted her job back I do not believe she was quite as callous as she sounded with regard to the other employees Her lack of candor in that regard raises doubts as to her credibility generally

I have little reason to doubt the credibility of Reichert It is true that there is a discrepancy between his testimony and an affidavit that he gave to the General Counsel on September 28 1983 However in context that discrepancy is more easily explained by an attempt on his part to be completely honest rather than an attempt to hide something In the affidavit he said that neither he nor Burns discussed the Union and the subject of the Union was not mentioned In his testimony on the stand he said that the affidavit was in error and that upon being interviewed by his attorney he remembered that Burns had volunteered her opinion that the Union would not win the election That testimony was offered on direct examination

Reichert testified that he met with his attorney on July 16 to discuss labor relations matters and he received advice in writing as to what he could and could not do He also averred that when he interviewed Burns it was not his intention that the personnel director would play a significant role in the union organizing campaign He explained that the Company was small the Company did not look for a personnel manager who could do every thing and with regard to union matters the Company used its attorney

In sum I believe that Reichert was a more believable witness than Burns I therefore credit Reichert's denial that he made the remarks attributed to him by Burns and I do not credit Burns<sup>7</sup>

Burns also testified concerning an incident involving Supervisor Geyer Burns did not work with Geyer and Geyer did not supervise her Burns testified that during the first week of July 1983 in the coffee area of the Livermore facility Geyer asked her when the next union meeting was going to be held and that she replied she did not know Geyer testified that he did not recall having such a conversation with Burns My evaluation of the credibility of Geyer and Burns is set forth above I believe that Geyer's recollection is more likely to be accurate than Burns' flat assertion I therefore do not credit Burns<sup>8</sup>

<sup>7</sup> An employer can lawfully engage in an antiunion campaign if that campaign does not exceed the limits described in Sec 8(c) of the Act It can also choose supervisors who will carry out lawful company policies with regard to such a campaign In interviewing an applicant for a supervisory position the employer can ask questions that are legitimately related to the applicant's ability to carry out such company policies In view of the credibility resolutions described above there is no need to draw the line between such lawful interrogation of an applicant for a supervisory position and unlawful coercive interrogation of an employee where the applicant for the supervisory position happens to be an employee

<sup>8</sup> Even if Burns were credited the current Board law seems to indicate that such a question standing alone would not violate the Act As the Board held in *Bardcor Corp* 270 NLRB 1083 (1984) in which a foreman asked an employee where a union meeting was to be held Such an isolated question in an atmosphere free of coercive conduct is not per se unlawful Absent other evidence that would make it coercive it was not unlawful See also *Metz Metallurgical Corp* 270 NLRB 889 (1984)

<sup>5</sup> It is admitted and I find that Reichert is a supervisor within the meaning of the Act

<sup>6</sup> There is no allegation that Burns was refused promotion to a supervisory position because of her union activity

As none of the allegations in the complaint are supported by credible evidence I shall recommend that the complaint be dismissed in its entirety

### III THE OBJECTIONS TO THE ELECTION

The evidence adduced with regard to the objections was the same as that which was brought out with regard to the unfair labor practice allegations. There was no credible evidence to support the objections. I therefore recommend that they be overruled and that the results of the election be certified.

### CONCLUSIONS OF LAW

1 The General Counsel has not established by a preponderance of the credible evidence that Respondent violated the Act as alleged in the complaint.

2 The objections to the election in Case 32-RC-1856 have not been established.

On these findings of fact and conclusions of law and on the entire record I issue the following recommendation<sup>9</sup>

### ORDER

The complaint is dismissed in its entirety.

IT IS FURTHER RECOMMENDED that the objections to the election held on September 21, 1983 in Case 32-RC-1856 be overruled and that the results of the election be certified.

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<sup>9</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.