Woodbury Partners, LLC d/b/a The Inn at Fox Hollow *and* Ana Hernandez.

Woodbury Partners, LLC d/b/a The Inn at Fox Hollow *and* Berta Luz Garcia. Cases 29–CA–28122, 29–CA–28164, and 29–CA–28235

March 18, 2009

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

On November 3, 2008, Administrative Law Judge Howard Edelman issued the attached supplemental decision.[1] The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the judge's decision.

The National Labor Relations Board has considered the Supplemental Decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.[3]

We affirm the judge's finding that the Respondent violated Section 8(a)(1) of the Act by discharging Supervisor Alicia Arvelo. We agree with the judge that the timing of Arvelo's discharge creates an inference that it was intended to interfere with or coerce employees in their choice of representatives and that the Respondent failed to rebut this inference.[4]

We find unpersuasive the Respondent's contention that Arvelo's discharge was the legitimate outgrowth of an investigation that predated the advent of the Union and, therefore, it cannot reasonably have been motivated by a desire to discourage union activity. We also find unpersuasive the Respondent's argument that the discharge was necessary to avoid potential liability under State and Federal antidiscrimination laws and that it would have taken place even absent the union campaign. The record establishes that the Respondent had been aware of employee complaints about abusive treatment by Arvelo since at least July 2006.[5] After unsuccessfully attempting to communicate their concerns to management officials by telephone, the employees sent a letter to the Respondent on July 20. The letter stated that Arvelo threatened the employees with discharge "using extremely vulgar and offensive" language. It concluded, "We would like to have a meeting with you as soon as possible, with all of us present, to discuss this situation." However, the Respondent did not arrange the requested meeting or take any action against Arvelo. On August 17, frustrated with the lack of response to their letter, the employees picketed outside the Respondent's facility, carrying signs and chanting "no more unjust firings, no more disrespect and no more Alicia Arvelo." The Respondent still took no action against Arvelo.

This changed once the Union filed a petition on October 3 to represent the housekeeping employees. On October 20, within 2 weeks of learning of the union campaign, Owner Anthony Scotto announced to the employees:

> Well, I have done something for you. I let go of Alicia Arvelo, now I want you to help me. I do not want a union here.

Arvelo's speedy discharge after the Respondent learned that the Union was seeking to represent the housekeeping employees creates a strong inference (if not an admission) of unlawful motivation. To sustain its rebuttal burden, the Respondent relies heavily on the testimony of its General Manager Franklin Manchester that "immediately" after receiving the employees' July 20 letter, he began an investigation into their allegations regarding Arvelo. However, this testimony lends little support to the Respondent's defense. The investigation was allowed to languish for nearly 12 weeks, and it is

[1] On August 22, 2008, the Board issued a Decision and Order in the captioned cases. (352 NLRB 1072.) Although it decided the majority of the issues presented, the Board remanded to the judge, for findings and conclusions, the allegation that the Respondent unlawfully discharged an unpopular supervisor in order to induce its employees to abandon their support of the Union. The judge's supplemental decision now before the Board addresses that issue.

[2] The Respondent 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.

[3] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

[4] As we stated in our original decision, an employer violates Sec. 8(a)(1) where it discharges an unpopular supervisor in order to influence its employees' choice in an election. 352 NLRB at 1073 (citing *Burlington Times, Inc.*, 328 NLRB 750, 750–751 (1999); *Ann Lee Sportswear, Inc.*, 220 NLRB 982 (1975), enfd. 543 F.2d 739 (10th Cir. 1976)). "Such a discharge is viewed as the conferral of a benefit, and the circumstances may support an inference that the benefit is for the purpose of interfering with or coercing employees in their choice of representative. An employer may rebut this inference, however, by establishing an explanation other than the pending election." Id. (citing *Stanadyne Automotive Corp.*, 345 NLRB 85, 91 (2005), affd. in relevant part 520 F.3d 192 (2d Cir. 2008); *Honolulu Sporting Goods Co.*, 239 NLRB 1277, 1280 (1979)).

[5] All dates are in 2006, unless otherwise indicated.

clear that the Respondent was in no hurry to complete the investigation until it learned that the employees were seeking union representation.

The Respondent has presented no evidence to explain why it discharged Arvelo when it did, i.e., long after employees had reported abusive treatment by Arvelo and hard on the heels of its discovery of the union campaign. The record therefore strongly supports the conclusion that it was the arrival of the Union that jolted the Respondent into prompt action.

Such a conclusion is reinforced by the manner in which Arvelo's discharge was announced. In announcing the discharge, Scotto did not mention the Respondent's investigation or Arvelo's alleged violation of the Respondent's antiharassment policy. Instead, Arvelo's discharge was broached entirely in the context of the Respondent's opposition to the Union and its desire that the employees abandon the union campaign.

In these circumstances, we agree with the judge that the Respondent has failed to demonstrate that it would have discharged Arvelo when it did in the absence of the union campaign. We therefore affirm the judge's finding that the Respondent violated Section 8(a)(1) of the Act.[6]

ORDER

The National Labor Relations Board adopts the recommendation set forth in the administrative law judge's Supplemental Decision, amends its Order of August 22, 2008, as set forth below, substitutes the attached notice for its original notice, and orders that the Respondent, Woodbury Partners, LLC d/b/a The Inn at Fox Hollow, Woodbury, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order, as amended.

Insert the following as paragraph 1(c) and reletter the subsequent paragraph.

"(c) Discharging a supervisor in order to interfere with or coerce employees in their choice of representative."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT, without justification, place you under surveillance by photographing you while you are engaged in lawful picketing or other protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against you because you engage in protected concerted activities, or to discourage you from engaging in such activities.

WE WILL NOT discharge a supervisor in order to interfere with or coerce employees in their choice of representative.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Berta Luz Garcia full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Berta Luz Garcia whole for any loss of earnings and other benefits suffered as a result of our discrimination against her, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any references to the unlawful discharge of Berta Luz Garcia, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

WOODBURY PARTNERS, LLC D/B/A THE INN AT FOX HOLLOW

Kevin Kitchen, Esq., for the General Counsel.
Jeffrey Meyer, Esq. (Kaufman, Dolowich & Voluck, LLP), for the Respondent.

SUPPLEMENTAL DECISION

PRELIMINARY STATEMENT

HOWARD EDELMAN, Administrative Law Judge. On December 5, 2007, I issued my decision in this proceeding. On August 22, 2008, the Board issued an Order remanding this pro-

[6] We find it unnecessary to decide whether, as alleged in the consolidated complaint, the Respondent's conduct also violated Sec. 8(a)(3). Similarly, we find it unnecessary to decide whether the Respondent unlawfully timed the announcement of Arvelo's discharge to interfere with or coerce its employees in their choice of representative. These additional findings would not materially affect the remedy.

ceeding to me for the purpose of making additional credibility resolutions, findings, and conclusions. In accordance with the Board's instruction and after reviewing the record and considering the briefs filed, I hereby make the following

FINDINGS OF FACT

The employees of Respondent were supervised by Alicia Arvelo, an admitted 2(11) supervisor, as stated in my decision and the remand. Unit employees resented the vulgar language used by Arvelo throughout her employment. On or about July 20, 2006,[1] before the employees sought union relief, the employees mailed a letter to Respondent complaining about the way they were being treated as described above. On August 17, the employees peacefully picketed Respondent's facility stating, "No more unjust firings, no more disrespect, and no more Alicia Arvelo."

On October 3, the Union filed a petition covering a unit of housekeeping employees. On October 6, Respondent held a meeting with the employees. Anthony Scotto, the owner of Respondent's facility asked them why they needed the Union. This was the first time that Respondent was aware of union activity.

On October 20, Scotto met again with the entire housekeeping staff. At this meeting employees Berta Luz Garcia testified that Scotto said, "Well I have done something for you. I let go of Alicia Arvelo, now I want you to help me. I do not want a union here." Employee Ana Hernandez testified Scotto said, "I am here to tell you that no more Alicia Arvelo here. Now I've met your demands. Now I want you to meet my demands. I do not want the Union over here because the Union will not guarantee your money. It's not a guarantee. It's just a blank piece of paper. The only thing the Union will do is take away your money."

Scotto did not give any testimony through the entire case. Franklin D. Manchester, general manager, did not give any testimony concerning the October 20 meeting. On the other hand, Garcia and Hernandez' detailed testimony corroborated each other.

I find that Garcia and Hernandez are credible witnesses. Their testimony was detailed on direct and cross-examination and consistent with each other. Moreover, I find that such testimony was unlikely to be manufactured, given their lack of knowledge of National Labor Relations Board law. Their testimony has the ring of truth.

As set forth above, Respondent presented no credible evidence to dispute charging parties' testimony. Scotto, the owner, who conducted the October 20 meeting, did not testify. Manchester, Respondent's general manager did not testify as to the crucial October 20 meeting.

The Board has long held that an employer violates Section 8(a)(1) where it discharges an unpopular supervisor in order to influence its employees' choice in an election. Such a discharge is viewed as the conferral of a benefit, and the circumstances may support an inference that the benefit is for the purpose of interfering with or coercing employees in their choice of representative. An employer may rebut this inference, however, by establishing an explanation other than the pending election. *Stanadyne Automotive Corp.,* 345 NLRB 85, 91 (2005), affd. in relevant part 520 F.3d 192 (2d Cir. 2008); *Honolulu Sporting Goods Co.,* 239 NLRB 1277, 1280 (1979).

"Similarly, an employer cannot time the announcement of [a] benefit in order to discourage union support, and the Board may separately scrutinize the timing of [a] benefit announcement to determine its lawfulness." *Stanadyne,* supra, quoting *Mercy Hospital Mercy Southwest Hospital,* 338 NLRB 545, 545 (2002). The standard for determining whether the announcement of a benefit during the critical period is unlawful is the same as the standard for determining whether the grant of benefit itself violates the Act. Thus, the Board will infer that an announcement of benefits during the critical period is motivated by an intent to influence the employee' choice in the election. However, an employer may rebut the inference by demonstrating a legitimate business reason for the timing of the announcement. *Stanadyne,* supra*; Mercy Hospital,* supra.

Moreover, the timing establishes that although Arvelo was engaged in the conduct described above, Respondent took no action until the employees brought in the Union on October 3, as set forth above.

Respondent contends that Arvelo was terminated for abusive conduct to the employees and that she would have been terminated as a result, notwithstanding union activity. However, the facts establish that no action was taken against Arvelo during the months of June through October 6, even though the employees struck Respondent in protest of Arvelo's conduct on August 17. It was only after Respondent had knowledge of the Union's presence, that Respondent terminated Arvelo, on October 20.

As set forth above, the credible testimony of Garcia and Hernandez, established Respondent's first knowledge of union activity was when the Union filed its' petition on October 6, and thereafter on October 20, told its employees that he had terminated Arvelo and wanted in return for them to cease union activity as a result. Moreover, as set forth above, the timing of the termination tends to further establish a violation.

CONCLUSION OF LAW

Accordingly, I find Respondent violated Section 8(a)(1) of the Act. See, *Stanadyne,* supra, and *Burlington Times, Inc.*, 328 NLRB 750, 750–751 (1999).

With respect to the violation set forth above, I recommend that Respondent cease and desist from the conduct described above.

ORDER

I recommend that the previous Order issued by the Board be amended to add the following

(1) Cease and desist from discharging a supervisor in order to keep the Union out of their company.

(2) I further recommend that the prior appendix be amended to add the following

WE WILL NOT discharge a supervisor in order to keep the Union out of our company.

[1] All dates are in 2006, unless otherwise indicated.