Horizon Contract Glazing, Inc. *and* District Council of Painters No. 16, Glaziers, Architectural Metal and Glass Workers Local Union No. 767, International Union of Painters and Allied Trades, AFL–CIO. Case 20–CA–32880

September 25, 2008

DECISION AND ORDER

BY CHAIRMAN SCHAUMBER AND MEMBER LIEBMAN

On October 4, 2006, Administrative Law Judge Jay R. Pollack issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Charging Party filed limited exceptions. The General Counsel filed a brief in support of the judge's decision and a brief in answer to the Respondent's exceptions. The Respondent filed a reply brief.

The National Labor Relations Board[1] has considered the decision and the record in light of the exceptions and briefs[2] and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

As explained below, we reverse the judge's finding that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to recall union salt Joseph Upchurch for work after November 8, 2005. Accordingly, we shall dismiss the complaint.

I. FACTS

The Respondent performs glazing work in Sacramento and elsewhere in Northern California. Pat Shurnas is the Respondent's owner and president. Michelle Klein, Shurnas' daughter, is the Respondent's secretary-treasurer. The Respondent has employed union members and was signatory to contracts with the Union for many years. In 2000, however, Shurnas broke off relations with the Union due to an economic dispute with the Union's new business manager, Gene Massey. Shurnas testified that he would not sign an agreement as long as the Union was under Massey's leadership.

Alleged discriminatee Joseph Upchurch is a paid union organizer and business representative for the Union. On October 18, 2005,[3] Upchurch applied for work with the Respondent as a covert salt. He did not disclose his union background and actual job history, but instead, gave a false job history with an employer in Louisiana, believing that it would be difficult to check this reference. During a job interview with glazing superintendent, Chris Toepfer, Upchurch said that he had worked for this employer for 10 years and was a displaced Hurricane Katrina victim.

Upchurch was hired and began working on October 19. As the employee with least seniority, Upchurch was laid off for lack of work on October 31. On that same day, Shurnas directed Klein to call the Louisiana employer listed on Upchurch's job application. After Klein did so, she told Shurnas that, "as far as she could find out," Upchurch had not worked for that employer. Shurnas testified that he did not take any action at that point because it wasn't "a paramount thing."

On November 1, Upchurch went with another union organizer to one of the Respondent's jobsites, where Upchurch identified himself as a union organizer and gave employees his union business card. When informed about Upchurch's union job and activities, Shurnas decided that Upchurch had falsely claimed to be a Katrina victim. Nevertheless, later that day Toepfer called Upchurch and offered him work at a jobsite in Santa Rosa. Upchurch reminded Toepfer that he had a previously scheduled vacation. They agreed that Upchurch would report to work on November 8 at the Santa Rosa jobsite.

Another subcontractor's delay caused an unexpected suspension of the Respondent's work at the Santa Rosa jobsite. On November 3, Toepfer left a voice mail for Upchurch instructing him not to report as originally planned. Upchurch did not get this message and went to the jobsite on November 8. Although other employees told him that he was not supposed to be there, Upchurch remained at the site for 2 to 3 hours until the morning break. At that time, he spoke with Klein, who told him that he was not supposed to be working and should leave the job immediately. Upchurch insisted that the Respondent had to pay him for time spent on the job that morning. Klein asked Upchurch how many hours he had been at the jobsite. Following a heated discussion over how much Upchurch was owed, Klein agreed to pay Upchurch for the time he had worked that morning.[4]

[1] 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 Schaumber and Member Liebman 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.

[2] We deny motions by the General Counsel and the Respondent to strike allegedly extra-record statements in each other's briefs. The challenged statements are in the nature of arguments based either on record evidence, the judge's decision, or reasonable interpretations of record evidence. See *Alaska Pulp Corp.*, 326 NLRB 522 fn. 1 (1998).

[3] All dates referred to 2005, unless otherwise indicated.

[4] Klein initially issued a check to the wrong person, but she corrected this action.

Upchurch was not recalled to work by the Respondent after November 8.

II. JUDGE'S DECISION

The judge found that the General Counsel carried his initial burden of showing that Upchurch's position as a union agent was a motivating factor for the failure to recall or rehire him. The judge initially observed that the Respondent's principals, Shurnas and Klein, bore no animus against unions or union members in general. They did, however, dislike and distrust the Union's current leadership. The judge reasoned that Upchurch's conduct on November 8 in demanding that he be paid properly reinforced the fact he was "an employee of the Union [and Massey] and not just a union member." Thus, the judge found that the Respondent's failure to recall Upchurch was motivated by its animus toward the Union's current leadership.

III. ANALYSIS

In cases involving allegations of antiunion discriminatory motivation for employment actions, the General Counsel bears the initial burden of proving by a preponderance of the evidence that animus against protected union activity was a motivating factor in the employment action. If the General Counsel meets this burden, then the burden of persuasion shifts to the employer to prove that it would have taken the same action even in the absence of the protected activity. See *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), and *FES*, 331 NLRB 9 (2000), supplemented 333 NLRB 66 (2001), enfd. 301 F.3d 83 (3d Cir. 2002).

We assume arguendo that the judge correctly found the November 8 conversation between Upchurch and Klein to be the sole reason for the refusal to reemploy Upchurch.[5] However, we find no basis for inferring animus and antiunion motivation from this conversation.[6] The evidence shows that, on November 8, Upchurch had a heated discussion with Klein over payment for the time Upchurch spent on the jobsite that morning. Neither Klein nor Upchurch made any reference to the Union, its leadership, or Upchurch's role in the Union. The conversation focused on Upchurch's personal pay demands and Klein's attempts to satisfy them in spite of her opinion, shared by Shurnas, that Upchurch should never have reported to the jobsite and was not entitled to any compensation for doing so.

There is no support for the judge's finding that Upchurch's actions on November 8 "reinforced" the recognition that he was an employee of the Union under Massey's leadership. Shurnas and Klein were already aware of Upchurch's status. In spite of that knowledge, Upchurch was offered reemployment on November 1 and, when he declined that offer due to vacation plans, was given the opportunity to report to work on November 8.[7]

In sum, there is nothing about the November 8 conversation to show that the Respondent harbored animus toward Upchurch because he worked for the Union's leadership. Certainly the outcome of that conversation fails to support the inference of such animus. The Respondent paid Upchurch for a full day's work even though neither Shurnas nor Klein believed he was entitled to it. Clearly, they were displeased about *this*. Thus, the only animus apparently arising from the November 8 conversation between Klein and Upchurch was the Respondent's ire at having to satisfy what it perceived to be an unjustified personal pay demand.

Based on the foregoing, we find that the General Counsel has failed to meet his burden of proving that animus against Upchurch's union status or activities was a motivating factor in the Respondent's decision not to recall him. We therefore reverse the judge and dismiss the complaint.

ORDER

The complaint is dismissed.

Micah Berul, Esq. and *Cecily A. Vix, Esq.,* for the General Counsel.

Thomas A. Lenz, Esq. (Atkinson, Andelson, Loya, Ruud & Romo), of Cerritos, California, for the Respondent.

Joseph Santos, Organizer, District Council No. 16, Northern California, of Livermore, California, for the Charging Party Union.

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[5] Accordingly, we need not pass on the Respondent's argument in exceptions that its decision not to reemploy Upchurch was justified by three cumulative factors, including falsification of his job history and identity as a Katrina victim, as well as his conduct on November 8. We also note that the General Counsel has not excepted to the judge's failure to find that the Respondent raised shifting defenses that warrant the inference of pretext and union animus as the real reason for the refusal to reemploy Upchurch.

[6] It is now undisputed that the General Counsel has met his initial burden of proof for all evidentiary elements other than animus.

[7] The judge's finding that Upchurch's conduct somehow reinforced the Respondent's awareness of his association with the Union's leadership is apparently based on a misreading of Klein's testimony. The judge stated that Upchurch gave Klein "an NLRB lecture" during their conversation. But, neither Upchurch nor Klein testified that the Board was even mentioned during this exchange. Klein's description at trial of Upchurch's "little NLRB lecture about . . . hours" was obviously after-the-fact and metaphorical, not literal.

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge. I heard this case in trial at Sacramento, California, on July 18, 2006. On February 6, 2006, District Council of Painters No. 16, Glaziers Architectural Metal and Glassworkers Local Union No. 767, International Union of Painters and Allied Trades, AFL–CIO (the Union) filed the original charge alleging that Horizon Contract Glazing, Inc. (Respondent) committed certain violations of Section 8(a)(3) and (1) of the National Labor Relations Act (the Act). On April 28, 2006, the Regional Director for Region 20 of the National Labor Relations Board issued a complaint and notice of hearing against Respondent, alleging that Respondent violated Section 8(a)(3) and (1) of the Act by failing to recall from layoff employee Joe Upchurch because he engaged in union activities or other protected concerted activities. On June 29, the Regional Director issued an amended complaint. Respondent filed timely answers to the complaints, denying all wrongdoing.

The parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. On the entire record, from my observation of the demeanor of the witnesses,[1] and having considered the briefs submitted by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a California corporation with a place of business in West Sacramento, California, engaged in the construction industry as a glass and glazing contractor. During the calendar year ending December 31, 2005, Respondent purchased goods valued in excess of $50,000 directly from suppliers located outside the State of California. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Respondent performs glass subcontracting work in the Sacramento area, with projects in other areas of northern California. Respondent was signatory to union contracts for 10 years until 2000. Respondent enjoyed an amicable relationship with the Union until there was a disagreement with the management of the Union. In sum, Respondent contended that Sacramento was a different market than the San Francisco Bay area while the Union's management, under the leadership of Gene Massey, business manager, sought the same benefits and wages for the Sacramento area. Since 2000, the Union has picketed Respondent on a regular basis.

Pat Shurnas is president and owner of Respondent. Shurnas is proud of his past affiliation with the Union and has no animus against union membership. Shurnas' dispute is with Gene Massey, the Union's business manager and secretary-treasurer, and Doug Christopher, the Union's director of services. The Union has sought to obtain a collective-bargaining agreement from Respondent but Shurnas has refused to sign an agreement while Massey is in charge of the Union. Shurnas' daughter, Michelle Klein, Respondent's secretary-treasurer, is also proud of her past affiliation with the Union. Klein formerly served on the joint apprenticeship committee, a joint employer-union apprentice training committee, and would like to serve on that committee again. Klein, similar to Shurnas, is unhappy with the way Massey runs the Union.

On October 14, the Union, pursuant to a newspaper advertisement, sent a number of organizers and business agents to apply for work with Respondent. These employees wore union hats and shirts and did not hide their union affiliations. These employees were overt union "salts." "Salting" is the name given to the practice of unions sending union members to nonunion employers seeking employment and once employed the "salt" tries to organize the employer. None of these overt salts were hired nor were their references checked.

On October 18, Joseph Upchurch, a union organizer and business representative, applied for work with Respondent. Upchurch is a certified journeyman glazier.[2] While Upchurch applied to work as a glazier he was also a covert union "salt." Believing that union affiliation would eliminate the possibility of employment, Upchurch did not list employment with union contractors nor his current employment with the Union on his job application. Rather, Upchurch listed a false employment history in Louisiana, believing that Hurricane Katrina would make checking employment references in that area difficult or impossible.[3] On October 18, Upchurch was interviewed by Chris Toepfer, Respondent's glazing superintendent. Toepfer asked why Upchurch listed only one former employer and Upchurch answered that he had worked for that employer for the 10-year history requested by the employment application. Upchurch was hired on that date and began work the following day.

During October, Upchurch worked 8 full days for Respondent. During that time Toepfer praised his work. On October 31, Upchurch was laid off for lack of work. Upchurch was laid off because he was the least senior employee and there is no contention that there were any issues with his work. Further, there is no contention that this layoff was related to his union activities or union membership.

Also on October 31, Shurnas directed Klein to call the employer in Louisiana listed on Upchurch's job application.

[1] The credibility resolutions have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction to these findings, their testimony has been discredited, either as having been in conflict with credited documentary or testimonial evidence, or because it was in and of itself incredible and unworthy of belief.

[2] Respondent concedes that Upchurch is a qualified glazier.

[3] Upchurch testified that he listed employment in the Hurricane Katrina area to make checking his references difficult and not to appeal for sympathy.

Shurnas does not normally check references, but testified that because he had lived in Louisiana and because Upchurch had worked for one employer for 10 years this interested him. When Klein called the employer in Louisiana, she was told that they had no record of Upchurch. Respondent took no action at that time. Shurnas testified, "I kept it to myself . . . it's not a paramount thing." In fact, the next day, Shurnas instructed Toepfer to recall Upchurch.

On November 1, Upchurch and Joseph Santos, another union organizer, went to one of Respondent's jobsites to organize. At this time, Upchurch identified himself as a union organizer and handed out his union business card. That same morning, one of Respondent's employees called Toepfer and told him that Upchurch was organizing for the Union and had handed him union materials. Toepfer then informed Shurnas of Upchurch's activities. At this time, after learning that Upchurch was a union organizer, Shurnas decided that Upchurch was not a victim of Hurricane Katrina.

However, on the afternoon of November 1, Toepfer called Upchurch to offer him work on a jobsite in Santa Rosa, California. Upchurch reminded Toepfer that he had a previously scheduled, prepaid vacation to Las Vegas. Toepfer and Upchurch agreed that Upchurch would report to work on November 8 at the Santa Rosa jobsite. Upchurch went to Las Vegas on his vacation.

On November 3, Toepfer left a voice mail for Upchurch instructing him not to report to the Santa Rosa jobsite. Upchurch arrived home from his vacation late on the evening of November 7 and reported to work on the morning of November 8. He had neglected to check his voice messages. When Upchurch arrived at the jobsite he was told that there was no work for him. Later that morning, Upchurch spoke with Klein and was told that he was not supposed to be on the job. After some discussion about how much Upchurch was due, Klein agreed to pay Upchurch for his time that day.[4] When he returned home, Upchurch heard the voice message previously left for him by Toepfer.

On November 17, Upchurch returned to Respondent's shop seeking further employment. Toepfer told Upchurch that there was no work available for him. Upchurch has not been recalled by Respondent although Respondent has since hired two employees to do glazing work for which Upchurch was qualified.[5]

Shurnas testified that he would not rehire Upchurch because of the falsification of his job application and because of Upchurch's behavior regarding the misunderstanding regarding Upchurch's reporting to work on November 8. Shurnas further testified that instead of receiving an apology from Upchurch for not listening to his answering machine, Respondent was required to pay Upchurch more than Upchurch needed or wanted. Shurnas testified that he would not rehire Upchurch "unless forced to do so."

B. The Failure to Rehire Upchurch

In cases involving dual motivation, the Board employs the test set forth in *Wright Line,* 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.,* 462 U.S. 393, 399–403 (1983). Initially, the General Counsel must establish by a preponderance of the credible evidence that antiunion sentiment was a "motivating factor" for the discipline or discharge. This means that the General Counsel must prove that the employee was engaged in protected activity, that the employer knew the employee was engaged in protected activity, and that the protected activity was a motivating reason for the employer's action. *Wright Line,* supra, 251 NLRB at 1090. Unlawful motivation may be found based on direct evidence of employer animus toward the protected activity. *Robert Orr/Sysco Food Services,* 343 NLRB 1183, 1184 (2004). Alternatively, proof of discriminatory motivation may be based on circumstantial evidence, as described in *Robert Orr/Sysco Food Services,* id:

> To support an inference of unlawful motivation, the Board looks to such factors as inconsistencies between the proffered reasons for the discipline and other actions of the employer, disparate treatment of certain employees compared to other employees with similar work records or offenses, deviations from past practice, and proximity in time of the discipline to the union activity. *Embassy Vacation Resorts,* 340 NLRB [846, 848] (2003).

When the General Counsel has satisfied the initial burden, the burden of persuasion shifts to Respondent to show by a preponderance of the credible evidence that it would have taken the same action even in the absence of the employee's protected activity. If Respondent advances reasons which are found to be false, an inference that the true motive is an unlawful one may be warranted. *Shattuck Denn Mining Corp. v. NLRB,* 362 F.2d 466, 470 (9th Cir. 1966); *Limestone Apparel Corp.,* 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982). However, Respondent's defense does not fail simply because not all the evidence supports its defense or because some evidence tends to refute it. *Merrilat Industries,* 307 NLRB 1301, 1303 (1992). Ultimately, the General Counsel retains the burden of proving discrimination. *Wright Line,* supra, 251 NLRB at 1088 fn. 11.

In order to establish a discriminatory refusal-to-recall violation, the General Counsel must establish the following elements: (1) Respondent was hiring or had concrete plans to hire or recall at the time of the alleged unlawful conduct; (2) that it excluded the discriminatee from the hiring or recall process; (3) that the discriminatee had experience and training relevant to the generally known requirements of the positions; and (4) that

[4] Klein testified that Upchurch gave her a lecture on the NLRB. She testified that she was confused about his intentions. Thereafter, Klein initially issued a check to the wrong person. Klein left Upchurch a message and then later corrected the situation. Klein stated that she was concerned that Upchurch would go to the NLRB "about a problem that wasn't even our fault."

[5] Respondent stipulated that it hired employees to positions for which Joseph Upchurch was qualified after November 8, 2005. An issue arose over the meaning of that stipulation and, therefore, Respondent stipulated that "two people were hired to glazing work." Respondent further stipulated that "falsification" was the main impediment to employment with Respondent. In its brief, Respondent argues that it has not hired any glaziers since November 2005. In view of its stipulations, I gave no credence to that statement in Respondent's brief.

antiunion animus contributed to the decision not to consider for recall and to recall the discriminatee. See *Landmark Installations, Inc*., 339 NLRB 422 (2003); see also *Wayne Erecting, Inc*., 333 NLRB 1212 (2001), citing *FES*, 331 NLRB 9 (2000).

In the instant case, there is no issue that Respondent hired employees for glazing work, that Upchurch was qualified for glazing work,and that Respondent had excluded Upchurch from recall. The issue is whether Respondent's actions were motivated by its animus against the Union's leadership or because of Upchurch's falsification of his job application.

In the instant case, Respondent had no animus against union members or union membership. Respondent, however, admitted animus against Gene Massey and his leadership of the Union. The overt union salts who applied for work shortly before Upchurch applied were not hired. Therefore, Upchurch, a union employee who worked under Massey, was sent as a covert salt. Believing that if he gave accurate employment history he would never be hired, Upchurch falsified his application and was hired.

In *Winn-Dixie Stores,* 236 NLRB 1547 (1978), the Board addressed this point and found a violation where a discharge was allegedly for failing to reveal in a job application previous employment as a union business representative. The Board held that the employee's failure to make such disclosure (employment by a union) is not analogous to false statements on other subjects such as education or criminal convictions. It, therefore, concluded that the evidence of that respondent's policy and practice of terminating other employees for falsifying their employment applications, even if proven, did not justify a finding that the respondent had discharged the employee for not disclosing his union employment. In *Winn-Dixie Stores*, at 1547–1548, the Board held:

> For, being aware of Respondent's hostility toward unions, [the discriminatee] knew that he must either falsify the information as to his employment background or face the probability that Respondent would (unlawfully) refuse to hire him. Certainly the purposes of the Act would not be effectuated by finding lawful a discharge for failure to disclose information which, were it the basis for a refusal to hire, would render such an initial refusal to employ a clear violation of the statute. Thus, we cannot find that the purposes of the Act would be served by finding that, after hiring him, Respondent could lawfully discharge [the discriminate] for failing to disclose his union employment, but if Respondent had refused to hire him in the first place for that reason it would have violated the Act. Accordingly, even if [the discriminatee] were discharged for the reason asserted by Respondent, we would find it thereby acted unlawfully.

After Shurnas learned that Upchurch falsified his job application, he took no action. Shurnas testified that it was not a paramount thing. In fact he had Toepfer recall Upchurch the very next day. Shurnas attempted to recall Upchurch even with knowledge that Upchurch was organizing the employees on behalf of the Union.

So what changed? On November 8, Upchurch gave Klein an NLRB lecture and demanded that he be paid properly. Klein and Shurnas were displeased by this action. I find by this conduct Upchurch reinforced the fact that he was an employee of the Union (and Massey) and not just a union member. Thereafter, Upchurch was told that there was no work for him and Shurnas decided not to recall Upchurch unless forced to do so. Based on a preponderance of the evidence, I find that the General Counsel has sustained the initial burden of showing that Upchurch's employment as a union agent was a motivating factor for the failure to recall or rehire him.

Thus, the burden shifts to Respondent to establish that the same action would have taken place in the absence of the employees' union activities. Where, as here, the General Counsel makes out a strong prima facie case under *Wright Line*, the burden on Respondent is substantial to overcome a finding of discrimination. *Eddyleon Chocolate Co.*, 301 NLRB 887, 890 (1991). An employer cannot carry its *Wright Line* burden simply by showing that it had a legitimate reason for the action, but must "persuade" that the action would have taken place even absent the protected conduct. *Centre Property Management*, 277 NLRB 1376 (1985); *Roure Betrand Dupont, Inc.*, 271 NLRB 443 (1984).

Respondent has not shown a policy of discharging employees for falsification of their job applications. If termination had been warranted for falsification, Shurnas would have taken action when he learned of the falsification. Rather, he stated the matter was not paramount and he had Upchurch recalled the following day. Shurnas expressed displeasure that Upchurch allegedly posed as a victim of Hurricane Katrina. Again, Shurnas decided on November 1 that Upchurch was not a victim of Hurricane Katrina but still offered him work in Santa Rosa. Thus, as stated above, the triggering event appears to be Upchurch's "NLRB lecture" and demands for payment for reporting to work on November 8.

Thus, I find that Respondent did not persuade that Upchurch would not have been recalled absent his position as a union employee.

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. By failing and refusing to recall or rehire Joseph Upchurch, Respondent violated Section 8(a)(1) and (3) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, having discriminatorily refused to recall or rehire Joseph Upchurch, must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Respondent must also be required to expunge any and all references to its unlawful refusal to recall or rehire Upchurch from its files and notify Upchurch in writing that this has been done and that the discrimination will not be the basis for any adverse action against him in the future. *Sterling Sugars, Inc.*, 261 NLRB 472 (1982).

[Recommended Order omitted from publication.]