NYP Holdings, Inc., d/b/a The New York Post *and* Local 94-94A-94B, International Union of Operating Engineers. Case 2–CA–38209

September 30, 2008

DECISION AND ORDER

BY CHAIRMAN SCHAUMBER AND MEMBER LIEBMAN

On February 8, 2008, Administrative Law Judge Raymond P. Green issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief to the Respondent's exceptions, as well as cross-exceptions and a brief in support. The Respondent filed a reply brief.

The National Labor Relations 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, and conclusions only to the extent consistent with this Decision and Order.[1]

The judge found no merit to the General Counsel's contention that the Respondent discharged Ernest Grant for his union and protected concerted activities on February 28 and April 18, 2007,[2] in violation of Section 8(a)(3) and (1) of the Act. The judge nevertheless found that the Respondent violated Section 8(a)(3) and (1) by terminating Grant in retaliation for sabotage of its printing presses a month earlier by persons unknown but perceived by the Respondent to be union members. As explained below, we reverse this finding because the judge's reliance on an unlitigated theory of violation deprived the Respondent of its right to due process.

Facts

The Respondent publishes a daily general circulation newspaper in the New York metropolitan area. The Union represents the Respondent's operating engineers. The Union's contract with a multiemployer association of which the Respondent was a member expired on December 31, 2006. The parties continued to negotiate and entered into a series of contract extensions, the last of which expired on February 28. The Respondent was notified that if there was no resolution to the issues being negotiated, there would be a strike on March 1.

On February 28, the eve of the strike, Grant and a coworker refused to accept a new assignment and claimed they were being locked out when Director of Distribution Ken Chiarella did not assign them their usual tasks during their shift. Both employees left the premises shortly after midnight and the Union established a picket line at the facility, which remained up until some time on March 1. Certain employees refused to cross the picket line and the Respondent was unable to deliver a significant number of its papers.

On April 7, the Respondent discovered that the ink tanks for its printing presses were blocked by two bowling balls. The Respondent increased security in the facility and reviewed security tapes in an effort to determine the saboteur(s). On April 18, Security Director Lloyd Vasquez was conducting a videotaped interview of one of Grant's coworkers. Grant was called over by the coworker and told him not to worry, to do his job,and that everything would be okay. Grant was later suspended for directing "menacing glares" at Vasquez. After an investigation, the Respondent revoked the suspension and reinstated Grant with backpay on April 21.

Around May 1, Chiarella was informed that a review of the security tapes revealed Grant removing a water cooler from the facility on April 8. He was suspended pending an investigatory review. On May 8, Chiarella, along with other officials, interviewed Grant. During the interview, Chiarella and Grant first discussed the water cooler. Grant claimed that Willie Clavijo, his then supervisor, gave him permission to take the water cooler; that he had repaired it at the plant; that he then took it home; and that he had not asked permission to remove it because Clavijo had given it to him. Chiarella then questioned Grant regarding the bowling ball incident. The Respondent terminated Grant later that day for theft and for repairing the water cooler during work hours with company parts and equipment.

Judge's Findings and the Respondent's Exceptions

The judge rejected the General Counsel's theory that the Respondent terminated Grant for his alleged union and protected concerted activities on February 28 and April 18. According to the judge, there was no basis for believing that the Respondent blamed Grant for the picket line or the employees' refusal to cross it on March 1. The judge additionally found that the April 18 incident involving the videotaped interview was inconsequential and did not entail any concerted activity on Grant's part.

Having rejected the General Counsel's theory of the violation, the judge nonetheless continued his analysis and interposed a new basis for finding Grant's termination unlawful. Specifically, the judge concluded that the

[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] All dates hereafter are 2007, unless otherwise indicated.

Respondent's stated reason for Grant's termination was pretextual, and that the true reason was to retaliate against the Union for the sabotage of the ink tanks. The judge inferred, from the way Chiarella interviewed Grant on May 8, that Chiarella was not actually concerned about the water cooler theft; rather that Chiarella focused his inquiries on the bowling ball incident and did not ask about the water cooler at the outset of the interview.[3] According to the judge, the Respondent blamed the Union and its members for placing bowling balls in its ink tanks.[4] When the Respondent's investigation into the incident proved inconclusive, the Respondent was frustrated. As a result, the judge found, the Respondent made Grant a scapegoat for its frustrations with the Union because he was the first union member whose actions "could be a reasonable basis for retaliation." On this basis, the judge concluded that Grant's discharge violated Section 8(a)(3) and (1).

The Respondent excepts, arguing inter alia that it had no notice that it should defend against the judge's theory of violation and therefore that its due process rights were violated.[5] We find merit in this exception.[6]

Analysis

The Board has indicated that "[t]o satisfy the requirements of due process, an administrative agency must give the party charged a clear statement of the theory on which the agency will proceed with the case. Additionally, an agency may not change theories in midstream without giving respondents reasonable notice of the change." *Lamar Advertising of Hartford*, 343 NLRB 261, 265 (2004) (citations and internal quotation marks omitted). In determining whether a respondent's due process rights were violated, the Board has considered the scope of the complaint, and any representations by the General Counsel concerning the theory of violation, as well as the differences between the theory litigated and the judge's theory. See generally *Sierra Bullets, LLC*, 340 NLRB 242, 242–243 (2003) (violation based on broader theory improper and violates due process when General Counsel expressly litigated case on narrow theory).

In the present case, the General Counsel's complaint and representations reasonably led the Respondent to believe that it was defending Grant's termination on the grounds of Grant's actions on February 28 and April 18. The complaint alleged that the Respondent discharged Grant because *he* engaged in "union organizational and other protected concerted activities. . . ." The General Counsel represented at the hearing that the "General Counsel will argue that the discharge was, quite simply, retaliation for *Grant's* union activities. . . ." (emphasis added), which the General Counsel later identified as Grant's specific actions on February 28 and April 18. Reflecting the General Counsel's representations, the judge's decision stated that "[t]he General Counsel contends that the Respondent discharged Grant because he engaged in union and protected concerted activity on February 28 and April 18, 2007." These representations indicate what the General Counsel alleged to be unlawful, "and the Respondent should not be expected to defend against other theories that are not part of the General Counsel's case." *Sierra Bullets*, supra at 243.

Plainly, the judge's theory of violation was not part of the General Counsel's case. As noted above, the General Counsel litigated the case under the theory that the Respondent discharged Grant in retaliation for *his* union and alleged protected concerted activities. In contrast, the judge concluded that the Respondent blamed the Union for the sabotage, and sought to make a scapegoat of Grant as the first union member "who came along and did something that could be a reasonable basis for retaliation." These matters were irrelevant to the theory of violation advanced by the General Counsel and the Respondent had no notice that they were at issue in this case. See *Champion International Corp.*, 339 NLRB 672, 673 (2003) ("It is axiomatic that a respondent cannot fully and fairly litigate a matter unless it knows what the accusation is."). Thus, the judge's theory of a violation deviated from the General Counsel's theory and the judge's theory (and the underlying facts) were not litigated at the hearing.

Conclusion

Based on the foregoing, it is apparent that the General Counsel chose to proceed on the specific theory of violation that Grant's union activities motivated his discharge. The General Counsel's representations on the record reasonably led the Respondent to believe that it would not have to defend Grant's termination on other grounds, and the complaint was litigated based on the General Counsel's representations. Nevertheless, the judge pro-

[3] Contrary to the judge, the Respondent questioned Grant about the water cooler prior to questioning him about the bowling ball incident.

[4] In so finding, the judge apparently relied on an e-mail from the Respondent to the Union suggesting a postponement of contract negotiations due to unsuitable circumstances. The Respondent cites to the following "circumstances": sabotage by union members, continuing misconduct, and "an issue that we are investigating now." Chairman Schaumber would not infer antiunion animus from the e-mail.

[5] The Respondent further excepts to the merits of the judge's theory of violation. We find it unnecessary to reach those exceptions in light of our disposition of the case.

[6] We also reject the General Counsel's cross-exceptions and affirm the judge's conclusion that the Respondent did not terminate Grant for his activities on February 28 for the reasons stated by the judge in his decision. The General Counsel has not excepted to the judge's findings regarding the April 18 incident on which he earlier relied.

ceeded to find a violation of the Act on an alternate and unlitigated theory, thereby denying the Respondent due process. The violation predicated on the judge's theory cannot stand on the present record. We therefore reverse his finding and dismiss the complaint in its entirety. *Paul Mueller Co.*, 332 NLRB 1350 (2000).

ORDER

The complaint is dismissed.

Simon-Jon H. Koike, Esq., for the General Counsel.
Jordan Lippner and *Elliot S. Azoff, Esqs.,* for the Respondent.
Michael J. D'Angelo, Esq., for the Union.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. I heard this case in New York, New York, on December 11 and 12, 2007. The charge and the amended charge were filed on April 19 and June 19, 2007. The complaint was issued on October 26, 2007. In substance, the complaint alleged that the Respondent discharged Ernest Grant because of his union and/or other protected concerted activities. As will be seen below, this case primarily involves bowling balls, bargaining, and water coolers.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

I. JURISDICTION

The parties agree and I find that the Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

NYP Holdings, Inc., publishes the New York Post as a daily general circulation newspaper in the New York metropolitan area. For a very long time and before the present employer acquired this newspaper in 1993, there has been a collective-bargaining relationship with nine labor organizations representing various categories of employees. For many years, the Charging Party, Local 94, has represented a unit of operating engineers who perform various tasks within the Bronx plant. Upon acquisition, the Respondent continued to recognize and bargain with Local 94 as well as the other labor organizations. At the time of the events herein, the unit represented by Local 94 consisted of 13 employees.

Until the end of 2006, the Respondent was a member of the Realty Advisory Board (RAB), a multiemployer association, through which it maintained a contract with Local 94. The last RAB/Local 94 contract expired on December 31, 2006. Prior to its expiration, the Respondent decided to engage in direct bargaining with Local 94 and to that end, withdrew from the Association. Bargaining for a new contract to cover the 13 operating engineers began in August or September 2006. The main union representative was its president, Kuba Brown, and the main company representative was Ken Chiarella. The alleged discriminate, Ernest Grant, testified that he attended one of the bargaining sessions but did not participate in the negotiations.[1]

Not having reached a new contract by December 31, 2006, the parties entered into a series of contract extensions, the last of which was to expire on February 28, 2007. On February 20, 2007, the Company made an offer to Local 94 which it characterized as a final offer. The Union's representatives told the Company that they would present the offer to the members but would recommend against its acceptance. The Company was notified that if there was no resolution, there would be a strike on March 1, 2007.

Anticipating the possibility of a strike, the Company brought in operating engineers from another newspaper that it owed. These people came into the plant, while the Local 94 members were still working, and watched the jobs that had to be done. Soon thereafter, the Company sought to obtain assurances from the other unions that in the event of a Local 94 strike, they would continue to work. According to Chiarella, all the unions except for the NMDU (representing delivery drivers), assured the Company that their members would go to work. According to Chiarella, as the deadline approached, he felt certain that Local 94 would strike at midnight. He also testified that based on viewing the Union's website, he saw that Local 94 members were told that in the event of a strike they were to shut off all equipment and lock all doors and cabinets.

On February 28, 2007, at about 11 p.m., the replacements began performing work in the engineering department. At the same time, Ernest Grant (the alleged discriminate) and Luvenci Bonneau arrived at the plant to start their shift. Instead, they were told by Chiarella that they were to work in the lobby, monitoring the security television, instead of reporting to their normal jobs. They were told that they could take their normal breaks and that they would be fully paid for the shift. After talking on his cell phone to union representatives, Grant insisted that the two employees were being locked out and Chiarella told them that this was not the case. The two employees waited in the lobby until midnight whereupon Grant got up to leave. After some give and take, Chiarella stated that if Grant left the building he would be engaging in a strike. (In this regard, there was some testimony by Grant and Bonneau that Chiarella told them that they would be terminated if they left. But this assertion, which is denied by Chiarella, seems to me to be far fetched since he is knowledgeable about labor law and no doubt is aware that strikers can only be replaced but not fired.) In any event, Grant and Bonneau decided to leave the premises whereupon Local 94 set up a picket line at the facility.

The evidence shows that upon setting up the picket line, the drivers represented by NMDU refused to take their trucks out to make deliveries. (Although it was asserted by NMDU representatives that they refused to man the trucks because of safety concerns, it is pretty obvious that they refused in respect for Local 94's picket line.) There then ensued a series of conversations between the Company, the NMDU, and the permanent

[1] Grant testified that he was an assistant shop steward but there is no evidence that he ever acted as a union representative in a grievance situation. Chiarella testified that he was not aware that Grant was an assistant shop steward.

arbitrator for that contract which resulted in the arbitrator issuing a cease-and-desist order based on that contract's no-strike clause. When that failed to get the NMDU drivers on the road, the Company agreed, at around 3:30 a.m., to meet further with Local 94. The parties also agreed that Grant and Bonneau would return to work with full pay, that the picket line would be withdrawn and that the NMDU drivers would make the morning delivery of the newspapers. As a consequence of the picket line and the refusal by the NMDU drivers to cross the picket line for about 4 hours, the Company failed to make delivery of approximately 125,000 papers.

On April 7, 2007, the Company discovered that one of its ink tanks was not sending ink to the presses. When the engineering department employees were trying to clean up the mess, they discovered that two bowling balls had been dropped into the tank which resulted in an obstruction of the lines to the presses. The Company then launched an intensive investigation in an attempt to discover who caused the problem. There is no question but that management was really steamed about what it (and I), consider an act of sabotage. Moreover, since this area of the plant is visited by the operating engineers, it was suspected that it was one or more members of Local 94 who were responsible. By letter dated April 12, 2007, from Joseph Vincent to Kuba Brown, he stated:

> [T]his week we endured a major act of sabotage in an area under the supervision of the Engineer's unit—the ink room. The perpetrator(s) had a working knowledge of the Post's ink tanks. Bowling balls were dropped into both tanks. Given that the tanks operate on gravity, the bowling balls ultimately disrupted operation of the tanks by preventing ink from reaching the presses. Only yeoman work by staff saved the night's production.
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> The aftermath in terms of clean up of hundreds of gallons of ink and investigation to identify the saboteurs has been and continues to be the focus of my work. I must bring closure to the investigation as quickly as possible. I do not have the time this week or next to consider and cost out proposals which I must do prior to meeting with you. I would suggest that we meet the afternoon of Thursday, April 26th. I truly hope that you will be willing to meet the Post half way in terms of the remaining issues. We do need to achieve a mutually satisfactory solution.

The Company's investigation into the incident failed to discover the culprit or culprits.

On April 18, 2007, Grant and Bonneau had some kind of run in with Lloyd Vasquez, the director of security. As a result, Gary Fescine, then the director of operations issued a suspension to both employees. However, when Chiarella reviewed the report and interviewed the two employees, he revoked the suspension of Grant.[2] On April 30, 2007, Grant submitted a letter to the Company stating that he was filing a grievance.

As part of the Company's investigation of the bowling ball incident, it started reviewing security tapes. Serendipitously, a review of the tapes showed Grant removing a water cooler from the facility. The water cooler tape was then brought to the attention of Chiarella and Grant was suspended on May 3 pending an investigatory interview. The reasons for the suspension were not given.

On May 8, 2007, Grant was interviewed by Chiarella in the presence of Steve Grossman, the security manager and John Kramer, the Union's business agent. Near the outset of the interview, and before telling Grant that he was being accused of stealing a water cooler, Chiarella asked about the bowling ball incident. And it seems to me that what he was doing was trying to get Grant to admit that he was involved in that incident. When Grant denied that this was the case, Chiarella then started asking, in a somewhat roundabout way, about taking company property out of the building. The bottom line is that Grant volunteered that he had removed a water cooler but asserted that it had been given to him some time ago by his then supervisor, Willie Clavijo. Grant stated that he had kept it at the plant and fixed it up there because he had no room at his home until he recently got another apartment. Grant told Chiarella that he had not sought permission to remove the water cooler because it had been given to him. (Indeed, the photos showed Grant with the water cooler in the presence of a security officer; hardly the actions of a man trying to steal something.)

Grant was fired on May 8, 2007, by Chiarella. The reason given was that Grant had stolen company property and had repaired it on company time with company equipment and parts. Chiarella did not check out Grant's story with Clavijo, who no longer worked for the Company. According to Chiarella he did not do so because he did not consider Clavijo a reliable person.

After Grant's discharge, the Union filed a grievance on his behalf. However, the Company refused to arbitrate the grievance because there was no contract in effect at the time.

Contemporaneously with the events involving Grant, the Company postponed a couple of bargaining sessions. On one occasion (May 3, 2007), Joseph Vincent, the Company's vice president sent an e-mail to the Union stating inter alia;

> I am also concerned that the circumstances are not now suitable for effective good faith negotiations. There continue to be problems at the plant from members of you Union. There has been prior sabotage and, in my view, appropriate discipline. However, rather than working cooperatively with me to resolve those matters, you have chosen to file complaints. The misconduct by members of your Union has not stopped. There is an issue that we are investigating now and, to be honest, I cannot be talking with you about a contract at the same time I am attending to matters of misconduct by your members. There are only 24 hours in a day.

With respect to the water cooler incident, the credited testimony of Grant and Clavijo is that at some point the Company decided to stop using all of its water coolers except for the one in the gymnasium. As a consequence, except for the cooler in the gym, Clavijo removed all of the water coolers and put them into the storage area. In 2005 or 2006, Clavijo was instructed to clean out the storage area because new boilers were being installed in that area. Clavijo credibly testified that he was instructed to give away anything in the storage area that employees might want and that Grant chose the water cooler in

[2] Grant had been given a suspension for "menacing glares."

question. It appears that the other water coolers were thrown away as they had been, for some time, simply discarded surplusage. According to Grant and Clavijo, Grant kept the water cooler in a storage "cage" because he had no room at home. This "cage" is an area where employees sometimes store their personnel belongings. Grant also testified that when he had time, he cleaned the water cooler and credibly testified that other employees did similar things when they were unoccupied.

III. ANALYSIS

The General Counsel contends that the Respondent discharged Grant because he engaged in union and protected concerted activity on February 28 and April 18, 2007.

The February 28 incident involved the refusal by Grant and Bonneau to accept the lobby assignment for the night shift which was coincident with the picket line and the refusal of the NMDU drivers to make their deliveries.

The April 18 incident involved a situation where Grant was called by Bonneau to come downstairs and where he allegedly saw Security Director Vasquez videotaping and interrogating Bonneau. According to Grant, he simply told Bonneau not to worry; to do his job; and that everything would be okay. There is no indication that Grant actually intervened on behalf of Bonneau or that he tried to perform any representational role in the incident. All that one can say about this incident is that Grant apparently gave Vasquez a dirty look and that Vasquez was offended.

In essence, the Respondent contends that it did not take any actions against Grant because of his union or protected activity. It contends that it discharged Grant because Chiarella reasonably believed that Grant was stealing company property (the water cooler), and was caught removing it from the facility.

It is my opinion that neither the February 28 or April 18 incidents had anything to do with the decision to discharge Grant. As to the February 28 incident, there is no basis for believing that the Company blamed Grant (or Bonneau) for the picket line that was established at midnight and the consequential refusal by the NMDU members to do their jobs. If management was angry at anyone, it would have been the NMDU and not Grant. I also do not believe that Grant and Bonneau were threatened with discharge on that occasion. The other incident was also, in my opinion, relatively inconsequential, did not really involve any concerted activity on the part of Grant and Chiarella immediately retracted the suspension that had been given to him.

There is, however, no question in my mind that management was extremely angry about the bowling balls being dropped into the ink tank. And I have to agree that this was an act of sabotage.

In my opinion, when the Company couldn't determine which individual or individuals were responsible for dropping the bowling balls in the ink tank, Chiarella, out of frustration, was willing to make a scapegoat out of the first Local 94 member who came along and did something that could be a reasonable basis for retaliation. And Grant happened to fit that bill.

There can be no doubt that if the Company had concluded that Grant or anyone else had caused the sabotage, it could have discharged that person without any question of liability. But in this case, the Company had no basis for concluding *or even believing* that Grant was responsible, in whole or in part, for putting the bowling balls into the ink tank. At the same time, it is clear that the Company blamed Local 94 and its members generally, for the bowling ball incident. But as the Company could not affix blame to Grant, *on any basis at all*, it follows that the motivation for Grant's discharge can only be because of the fact that he was a member of the Union. That is, it is my opinion, that the Company's motivation in discharging Grant was because he was a member of Local 94 and that he was the convenient scapegoat that allowed the Company to play tit for tat against what it believed to be the Union's act of sabotage.

The Respondent argues that Chiarella's decision to discharge Grant was based on his belief, mistaken or not, that Grant was stealing a water cooler from the Company. But I don't think that this was the case at all. From the way that Chiarella interviewed Grant on May 8, is clear to me that his real purpose was not to talk about the water cooler, but rather to gain information or an admission about the bowling ball incident. Thus, at the outset of the interview, Chiarella didn't ask about the water cooler or even accuse Grant of taking the water cooler. Instead his inquiries were focused on the bowling ball incident, thereby indicating that this was his real point of interest. In short, it is my conclusion that Chiarella was not really concerned about the water cooler, which at that point was just an abandoned appliance, but was using the cooler as a means to talk about bowling balls.

As it is my opinion that the Company's motivation for discharging Grant was not because he took a discarded water cooler out of the facility, and was not because it could be proven or even reasonably suspected that he engaged in the bowling ball incident, I conclude that the only remaining motivation was because he happened to be a member of Local 94.

CONCLUSIONS OF LAW

1. By discharging Ernest Grant because of membership in Local 94-94B International Union of Operating Engineers, the Respondent has violated Section 8(a)(1) and (3) of the Act.

2. The aforesaid unfair labor practices affect commerce within the meaning of the Act.

3. The Respondent has not violated the Act in any other manner.

REMEDY

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

As I have concluded that the Respondent illegally discharged Ernest Grant it must offer him reinstatement to his former position of employment or if that position is no longer available, to substantially an equivalent position of employment and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of such refusal 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).

[Recommended Order omitted from publication.]