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Dickens, Inc. and Wenqing Lin. Cases 29–CA–29080, 29–CA–29198, and 29–CA–29254

May 26, 2011

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS PEARCE
AND HAYES

On June 10, 2010, the National Labor Relations Board issued a decision in this case,¹ affirming Administrative Law Judge Raymond P. Green’s finding that Respondent Dickens, Inc. (Dickens) had violated Section 8(a)(1) of the Act by falsely accusing employee Wenqing Lin of stealing and assault and by calling the police to harass him because of his protected conduct (Lin had prevailed in a prior unfair labor practice proceeding against the Respondent). The Board also affirmed the judge’s finding that the General Counsel had shown that protected activity on the part of Lin and Miaona Wu (who had cooperated with the Region’s investigation of the prior case involving Lin) was a substantial or motivating factor in Dickens’ decision to select Lin and Wu for layoff.² However, the Board found that Dickens had presented some evidence that Lin’s and Wu’s lack of facility in English was one reason for their layoffs, and therefore that the judge had erred by finding that Dickens had not presented any evidence tending to demonstrate that it would have taken the same action absent Lin’s and Wu’s protected activity.³ Accordingly, the Board remanded the complaint allegations concerning the layoffs of Lin and Wu to the judge for him to assess that evidence and determine whether Dickens had met its rebuttal burden.

On July 16, 2010, Judge Green issued the attached supplemental decision.⁴ Judge Green assessed the evidence in question and found that Dickens had not met its rebuttal burden. Accordingly, he reaffirmed his prior findings that Dickens violated Section 8(a)(1) by laying off Lin and Section 8(a)(1) and (4) by laying off Wu. Dickens filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

¹ 355 NLRB No. 44.

² *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. on other grounds 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 (1983).

³ *Wright Line*, above, 251 NLRB at 1089.

⁴ In discrediting James Chou’s testimony, the judge inadvertently stated that “I do rely on it for any purpose.” In context, it is clear that the judge meant to say “I do not rely on it for any purpose.” We correct the error.

The Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the supplemental decision and the record in light of the exceptions and briefs and has decided to affirm the judge’s rulings, findings,⁵ and conclusions and to adopt the relevant portions of the judge’s recommended Order, as modified and set forth in full below.⁶

ORDER

The National Labor Relations Board orders that the Respondent, Dickens, Inc., Commack, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Laying employees off because of their protected concerted activity of seeking higher wages or better terms and conditions of employment.

(b) Laying employees off because they cooperate with the National Labor Relations Board or furnish affidavits to Board agents during its proceedings.

(c) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Wenqing Lin and Miaona Wu full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Wenqing Lin and Miaona Wu whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set

⁵ 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.

⁶ The judge described Dickens’ treatment of Lin and Wu as both layoffs and discharges. The record indicates that the actions are more aptly described as layoffs. We shall modify the judge’s recommended Order and notice accordingly. We shall also modify the judge’s notice to conform to the Board’s standard remedial language.

We shall modify the judge’s recommended Order to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB No. 9 (2010). For the reasons stated in his dissenting opinion in *J. Picini Flooring*, Member Hayes would not require electronic distribution of the notice.

Finally, in accordance with our decision in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), we shall modify the judge’s recommended remedy by requiring that backpay shall be paid with interest compounded on a daily basis.

forth in the remedy section of the judge's initial decision as amended in this decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful layoffs, and within 3 days thereafter, notify the employees in writing that this has been done and that the layoffs will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Commack, New York facility, copies of the attached notice, in English, Cantonese, Mandarin, and Spanish, marked "Appendix."⁷ Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by e-mail, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 9, 2008.

(f) Within 21 days after service by the Region, file with the Regional Director for Region 29 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

⁷ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Dated, Washington, D.C. May 26, 2011

Wilma B. Liebman, Chairman

Mark Gaston Pearce, Member

Brian E. Hayes, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD
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 lay off or otherwise discriminate against any of you for engaging in the protected concerted activity of seeking better pay or better working conditions.

WE WILL NOT lay off or otherwise discriminate against any of you because you cooperate with the National Labor Relations Board or furnish affidavits to the Board's agents during its proceedings.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Wenqing Lin and Miaona Wu full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Wenquing Lin and Miaona Wu whole for any loss of earnings and other benefits resulting from their layoffs, 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 reference to the unlawful layoffs of Wenquing Lin and Miaona Wu, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the layoffs will not be used against them in any way.

DICKENS, INC.

Henry Powell, Esq., for the General Counsel.

James Chou, for the Respondent.

SUPPLEMENTAL DECISION

RAYMOND P. GREEN, Administrative Law Judge. On June 10, 2010, the Board, at 355 NLRB No. 44, issued a Decision that remanded certain matters for further consideration. In pertinent part, the Board stated that it agreed that the General Counsel showed that Lin's and Wu's protected activity was a substantial or motivating factor in the Respondent's decision to select them for layoff and that the burden of proof shifted to the Respondent to prove that it would have taken the same action even absent their protected activity. However, the Board concluded that I did not sufficiently consider whether the Respondent had met its burden of sustaining its contention that it "selected Lin and Wu for layoff at least in part because of their lack of facility in English."

I conclude that the Respondent has not met its burden for the following reasons.

1. In my opinion, Chou's testimony was not credible. Although he was given the opportunity to testify as to the reasons for his decision to lay off the two discriminates, his testimony was so marred by incoherence and irrelevancies that I do rely on it for any purpose.

2. By a letter to the NLRB's Regional Office dated December 29, 2008,¹ Chou reviewed his experiences in the prior case and responded to new unfair labor practice charges that had been filed. Among other things, he attached a letter to the Regional Office dated June 20, 2008, where he asserted that because business was down, he was going to have to reduce his work force in the warehouse. Chou stated inter alia:

As shown on the attached list, currently we have 15 people working in the warehouse and we are planning to cut down at least 6 people immediately. Based on employee performance and the company's need, Mr. Wenquing Lin and Ms. Miaona Wu are in the list to be laid off and they are involved in a pending case with the NLRB.

Please let us know if we are not allowed to lay off Mr. Lin or Ms. Wu. We are also more than happy to meet you to answer your questions. We have had enough problems with the NLRB and we are not looking for extra troubles.

¹ This is R. Exh. 2. This is a letter explaining his position to the Regional Office and contains a large number of attachments.

As an attachment to a letter sent to the Regional Director dated October 16, 2008, Chou submitted a spreadsheet, listing all of his warehouse employees, setting forth their job duties and his opinion of their performance. Wu was ranked in this chart as the lowest performing employee.

Respondent's Exhibit 2, consisting of multiple emails and letters (with attachments), between Chou and personnel in the Brooklyn Regional Office are out-of-court statements and therefore constitute hearsay for the truth of the matters asserted, if offered for that purpose by the Respondent. This exhibit was received in evidence, in part, because Chou wanted to demonstrate his alleged persecution by the Regional Office and it was easier to receive the documents than to fight him on an evidentiary issue that he did not understand. The bottom line is that the letters, emails, and attached documents that were submitted by Chou to Region 29 in the course of the investigation are not substitutes for actual evidence that must be presented in any subsequent trial. Any assertions made by Chou in these letters and attached documents do not constitute competent evidence in support of his contention that Wu and Lin were laid off or terminated for good cause. And in this connection, I specifically advised Chou that when he gave his testimony, he should testify as to the reasons why he laid off Wu and Lin.

3. Although Chou testified under oath, without interruption by either the General Counsel or me for 4 hours, he never once stated during his testimony that the reason he chose Lin or Wu for layoff was because they had difficulty with the English language. In fact, he didn't even describe any reasons why he laid off either individual.

4. The fact that Wu conceded that Chou told her on the day of her layoff that he had selected her because she could not speak English and because she was the highest paid employee, does not prove that this was the actual reason Chou selected her for a layoff. Wu also testified that when he said this, she stated that she never had any trouble doing her work and that he remained silent when confronted with her response. Although her testimony as to what Chou said to her at the time of her layoff should be considered as evidence regarding the issue, it is still up to the Respondent to establish, by competent evidence including testimony under oath, that this was in fact the reason and not simply a statement made by Chou to set up a pretext.

5. In the prior case involving this Respondent, at 352 NLRB 667 (2008), the Respondent made essentially the same contention with respect to the previous discharge of Lin. This was rejected by the administrative law judge and the Board. The ALJ concluded:

Chou also testified that part of his decision was "cost savings," inasmuch as Lin cannot lift heavy boxes and did not speak English and Chou could hire college students at \$8 per hour who could speak English and were capable of lifting heavy boxes. . . . I note that Liu and Wu had higher salaries than Lin and also speak limited English. More importantly, Respondent could have enjoyed cost saving at any time, by hiring more college students and terminating Lin, but it did not do so until Lin engaged unprotected conduct on September 29. In my view, it is clear that Lin's protected conduct was the sole and only reason for Respondent's decision to termi-

nate him. In any event, it is even clear that Respondent has failed to show that it would have discharged Lin absent his protected concerted activity.

6. The evidence here established that both Lin and Wu had been performing their work for many years and that their limited skills in English did not impede their work. (Wu had been employed in the warehouse since September 2000).

For all of the reasons described above, I conclude that the Respondent has not met its burden of establishing that it would have terminated or laid off Lin or Wu for any reason apart from

their protected concerted activities. In the case of Wu, I also conclude that her termination was motivated by her participation in an NLRB proceeding and that the Respondent has not met its burden of showing that it would have laid her off for any other reason. I therefore reaffirm my previous decision that the Respondent violated Section 8(a)(1) of the Act by laying off Lin and violated Section 8(a)(1) and (4) of the Act by laying off Wu.

Dated, Washington, D.C. July 16, 2010