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Miceli & Oldfield, Inc. and Edward Ryce. Case 7–CA–52862

August 12, 2011

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS
BECKER AND PEARCE

On December 3, 2010, Administrative Law Judge Keltner W. Locke issued the attached bench decision and certification. The Acting General Counsel filed exceptions and a supporting brief, the Respondent filed an answering brief, and the Acting General Counsel filed a reply brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge’s rulings, findings,¹ and conclusions,² and to adopt his recommended Order dismissing the complaint.

¹ The Acting General Counsel excepts to the judge’s credibility findings. The Board’s established policy is not to overrule an administrative law judge’s credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

2. For the reasons stated by the judge, we find that the Respondent met with the Charging Party, employee Edward Ryce, in order to present him with a previously prepared disciplinary notice concerning Ryce’s chronic tardiness. The Acting General Counsel nevertheless contends that the meeting was transformed into an investigatory meeting when the discussion turned to Ryce’s performance and productivity, and that Ryce was therefore entitled to have a union representative present under *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975). The Acting General Counsel’s argument in support of his position is primarily based on Ryce’s testimony. Based on the judge’s decision as a whole, however, it is evident that the judge implicitly discredited the portions of Ryce’s testimony that could arguably establish a *Weingarten* violation and, as stated above, we have found no basis for overturning the judge’s credibility resolutions. Accordingly, based on the implicitly credited testimony of the Respondent’s vice president, Peter Miceli, we find that any additional discussion between Miceli and Ryce during their meeting was unrelated to discipline and did not give Ryce a reasonable basis for believing that he had a right to have a union representative present.

ORDER

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

Dated, Washington, D.C. August 12, 2011

Wilma B. Liebman, Chairman

Craig Becker, Member

Mark Gaston Pearce Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Eric Cockrell, Esq., for the General Counsel.

Russell Linden, Esq., for the Respondent.

BENCH DECISION AND CERTIFICATION

STATEMENT OF THE CASE

KELTNER W. LOCKE, Administrative Law Judge. I heard this case on October 26, 2010, in Detroit, Michigan. After the parties rested, I heard oral argument, and on October 27, 2010, issued a bench decision pursuant to Section 102.35(a)(10) of the Board’s Rules and Regulations, setting forth findings of fact and conclusions of law. In accordance with Section 102.45 of the Rules and Regulations, I certify the accuracy of, and attach hereto as “Appendix A,” the portion of the transcript containing this decision.¹ The Conclusions of Law and recommended Order are set forth below.

CONCLUSIONS OF LAW

1. The Respondent, Miceli & Oldfield, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party, Edward Ryce, is an individual.

3. The Respondent did not violate the Act in any manner alleged in the complaint.

On the findings of fact and conclusions of law herein, and on the entire record in this case, I issue the following recommended²

¹ The bench decision appears in uncorrected form at pp. 109 through 117 of the transcript. The final version, after correction of oral and transcriptional errors, is attached as Appendix A to this Certification.

² If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The complaint is dismissed.

Dated Washington, D.C. December 3, 2010

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BENCH DECISION

STATEMENT OF THE CASE

KELTNER W. LOCKE, Administrative Law Judge: In this case, the General Counsel of the National Labor Relations Board, whom I will call the "General Counsel" or the "Government," alleges that Miceli and Oldfield, Inc., which I will call the "Respondent," denied an employee's request for union representation in violation of Section 8(a)(1) of the Act. Based on the Charging Party's own testimony, I conclude that Respondent did not violate the Act. Therefore, I recommend that the Complaint be dismissed.

Procedural History

This case began on April 16, 2010, when the Charging Party, Edward Ryce, filed the initial charge in this matter. Mr. Ryce amended this charge on June 3, 2010.

After an investigation, the Regional Director for Region 7 of the Board issued a Complaint and Notice of Hearing, which I will call the Complaint, on July 29, 2010. Respondent filed a timely Answer.

On October 26, 2010, a hearing opened before me in Detroit, Michigan. Both the General Counsel and the Respondent called witnesses, introduced exhibits, and then rested. Counsel then presented oral argument.

Today, I am issuing this bench decision pursuant to Section 102.35(a)(10) of the Board's Rules and Regulations.

Admitted Allegations

Based on admissions in the Respondent's Answer, I find that the Government has proven the allegations raised in Complaint paragraphs 1(a) and 1(b), 2, 3, 4, 5, 6, 7(a), 7(b) and 7(c).

More specifically, I find that the Charging Party filed and served the charge and amended charge as alleged.

Further, I find that Respondent is a corporation with an office and place of business in Taylor, Michigan, and that at all material times it has been engaged in the nonretail sale and distribution of food products. Additionally, I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act, and that it meets the Board's standards for the exercise of jurisdiction.

Moreover, I find that at all material times, Respondent's president, Peter Miceli, has been a supervisor of Respondent within the meaning of Section 2(11) of the Act and its agent

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within the meaning of Section 2(13) of the Act.

Additionally, I find that Local 337, International Brotherhood of Teamsters, which I will call the "Union," is a labor organization within the meaning of Section 2(5) of the Act. At all material times, the Union has been the designated exclusive bargaining representative, within the meaning of Section 9(a) of the Act, of a unit of Respondent's employees which is an ap-

propriate unit within the meaning of Section 9(b) of the Act. This unit is described as follows:

All full time employees employed by Respondent at its Taylor facility, including warehouse employees, customer service associates without a commercial driver's license, and customer service associates with commercial driver's licenses, excluding confidential employees, guards and supervisors as defined by the Act.

The Charging Party, Edward Ryce, is an employee of Respondent and a member of this bargaining unit. At all times material to this case, Mr. Ryce worked in Respondent's warehouse.

The Alleged Violation

The Charging Party works a shift which begins in the late evening and ends the following morning. During the shift which began May 27, 2010, Mr. Ryce received his paycheck, attached to which was a note telling him to see Respondent's president, Peter Miceli. According to Mr. Ryce, he saw Mr. Miceli in the break room and asked whether the meeting involved disciplinary action, in which case Mr. Ryce wished to have a Union representative present. Mr. Ryce testified that Mr. Miceli replied that the meeting did not concern discipline.

The meeting itself took place in Mr. Miceli's office a few minutes later. Mr. Miceli showed Mr. Ryce a memorandum which stated as follows:

Date: 5.24.10
To: Eddie Ryce
From: Pete Miceli
RE: Written Warning—Tardiness

Our records indicate that the frequency and severity of your tardiness is unacceptable and is disruptive to the order and efficiency of the warehouse operations. Out of approximately 93 working days in 2010 you have been tardy approximately 89 times. The rate of tardiness is approximately 95%. The amount of minutes tardy is averaging 124 minutes per month. We can no longer tolerate your excessive tardiness for any reason. As of 5.18.10 you have been tardy a total of 425 minutes which equates to approximately 7.5 hours. You have been cautioned by management regarding your tardiness.

Our records indicate that you signed for a copy of the Company rules and regulations.

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For convenience purposes the rules and regulations are also contained in the back of the collective bargaining agreement.

Effective immediately you are being provided this Written Warning under the terms of the No Fault Absence Control program for acquiring two incidents of tardiness on May 17, 2010 and May 18, 2010. If you acquire another incident, you will be subject to a one (1) day suspension.

Furthermore the company rules and regulations make it is "a condition of employment that employees report all absences and late arrivals @734.946.4500. Furthermore, Employees

must report absences and late arrivals as soon as possible. Such reports must be made two (2) hours or more prior to the scheduled starting time. The call-in line is available 24 hours per day seven days per week and 365 days per year.”

Although the memorandum was dated May 24, 2010, Mr. Ryce did not see it or know about it until the May 28, 2010 meeting. However, Mr. Miceli did not provide the Charging Party with a copy of the memo during that meeting. During his testimony, Mr. Ryce gave the following explanation:

Well, the thing was, uh, I eventually told him, you know . . . you’re disciplining me and . . . I don’t have no representation here so we’ve got to stop right now . . . and then basically . . . we stopped.

Mr. Ryce further testified that he and Mr. Miceli then had a meeting on June 3, 2010 and Mr. Miceli gave him a copy of the May 24, 2010 memorandum at that time. Two Union representatives were present at this meeting.

Analysis

For two reasons, I conclude that Respondent did not violate the Act. First, the evidence does not establish that the May 28, 2010 meeting was a disciplinary interview at which the Charging Party had a right to Union representation. Second, even assuming that Mr. Ryce was entitled to such representation, when he requested that the meeting stop, Mr. Miceli did stop the meeting, and did not resume it until a Union representative, in fact, two Union representatives, were present.

In *NLRB v. Weingarten, Inc.*, 420 U.S. 251 (1975), the United States Supreme Court upheld the Board’s ruling that a bargaining unit employee has a right to union representation, on request, during an investigatory interview that the employee reasonably believed would result in disciplinary action. Stated another way, the Court affirmed the Board’s ruling that an employer violated the Act by denying a bargaining unit employee’s request for a union representative to be present during such an investigatory interview.

In *Baton Rouge Water Works Co.*, 246 NLRB 995, 997 (1979), the Board held that an employee has no Section 7 right to the presence of his union representative at a meeting with his employer held solely for the purpose of informing the employee of, and acting upon, a previously made disciplinary

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decision. However, the Board stressed that if the employer engages in any conduct beyond informing the employee of a previously-made disciplinary decision, the full panoply of *Weingarten* rights may apply.

The pivotal question, in such instances, is whether, in summoning an employee to appear before management, the employer is concerned solely with the administration of discipline or, on the other hand, seeks to obtain additional facts, evidence or an admission in support of the disciplinary action. *Texaco, Inc.*, 246 NLRB 1021 (1979).

Here, the record persuades me that Respondent had no purpose other than imposing the discipline previously decided. For one thing, the memorandum which Mr. Miceli gave to the Charging Party is dated May 24, four days before the May 28 meeting. This memo clearly states the discipline to be imposed for any further violation, namely, a one-day suspension.

Moreover, Respondent did not need any more evidence, or any admission from Mr. Ryce, to support its decision. Its own time and attendance records sufficed. Indeed, the memorandum draws extensively on those records to summarize the extent of the Charging Party’s tardiness.

In other respects, the record does not establish that Mr. Miceli was seeking other information to support the disciplinary decision when he called Mr. Ryce into his office. Therefore, based upon *Baton Rouge Water Works* and *Texaco, Inc.*, above, I conclude that Mr. Ryce had no *Weingarten* right to union representation at the May 28, 2010 meeting.

However, even assuming that he did have such a right, the Respondent did not violate it. When Mr. Ryce requested union representation, Respondent did not proceed with the meeting but rather postponed it for six days, resuming it with two union representatives present.

One other issue remains. Mr. Ryce testified that on May 28, he saw Mr. Miceli in the break room before the meeting in Mr. Miceli’s office. According to Mr. Ryce, while still in the break room, he asked Mr. Miceli whether the meeting would involve disciplinary action and Mr. Miceli said it did not.

Based on my observations of the witnesses, I have some reservations about the reliability of Mr. Ryce’s testimony. However, even assuming that Mr. Miceli did state, before the meeting, that it did not involve disciplinary action, and even assuming that Mr. Ryce did have a *Weingarten* right to union representation, Mr. Miceli’s statement would not be violative.

Under *Weingarten*, interference with a bargaining unit employee’s Section 7 rights occurs if the employer precludes a union representative from being present at an investigatory interview or unduly restricts the representative’s participation. However, Respondent did neither, but instead assumed that Mr. Ryce had a right to union representation and honored that right.

In these circumstances, Respondent did not violate the Act. Accordingly, I recommend that the Complaint be dismissed in its entirety.

When the transcript of this proceeding has been prepared, I will issue a Certification

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which attaches as an appendix the portion of the transcript reporting this bench decision. This Certification also will include provisions relating to the Findings of Fact, Conclusions of Law, and Order. When that Certification is served upon the parties, the time period for filing an appeal will begin to run.

Throughout the hearing, both counsel demonstrated a high level of civility and professionalism which I note and appreciate. The hearing is closed.