JD(NY)–40–12
Buffalo, NY

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

ALLIED BARTON SECURITY SERVICES, LLC

and

PLANT PROTECTION ASSOCIATION NATIONAL, LOCAL 104

Case Nos. 3-CA-78926
3-CA-80126
3-CA-83471

Jesse Feurestein, Esq., Counsel for the General Counsel
Mathew D. Crawford, Esq., Counsel for the Respondent

Decision

Raymond P. Green, Administrative Law Judge. I heard this case on October 3 and 4, 2012 in Buffalo, New York. The charge in 3-CA-78926 was filed on April 17, 2012. The charge in 3-CA-80126 was filed on May 2, 2012. And the charge in 3-CA-83471 was filed on June 20, 2012. A Consolidated Complaint was issued on August 10, 2012. As amended at the hearing, the Complaint alleged that on April 14 and April 20, 2012, the Respondent first suspended and then discharged James Wilk because of his union activities and because he filed or assisted in the filing of unfair labor practice charges against the Respondent.

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

Findings and Conclusions

I. Jurisdiction

It is admitted and I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(1), (6) and (7) of the Act. I also find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. The alleged unfair labor practices

Allied Barton is a nationwide guard service company. On July 1, 2011, it took over from another company, the guard services provided to a Ford stamping plant. When it took over it hired the previous employees and set some initial terms of employment that were different from what was contained in the collective bargaining agreement that the Union had with the predecessor. (A company called Guard Mark). At the same time, the Respondent did not adapt the previous contract and negotiations for a collective bargaining agreement commenced in or about the middle of July 2011.

The President of the Local Union was James Wilk who had been an employee of the previous employer for some time and who, with all of the other guards, had been hired by Allied Barton when it took over the operation. There are approximately 13 employees in the bargaining unit.

The first hint of trouble occurred in August 2011 when paper payroll checks for Wilk and other employees failed to arrive on time at the plant. Wilk called up Dolina Hurtley who was in the Human Resources department and demanded to know where his check was and why it hadn't arrived. According to Hurtley, she was the one who happened to answer the phone and Wilk, who identified himself as the Union's president, was abusive to her in the tone of his raised voice. Apart from the fact that Wilk may have raised his voice when expressing his complaints about not being paid on time, there is no indication that he made any threats or used any abusive language.

As a result of this transaction, Karen Healy-Case, the Company's Area Director issued a verbal warning to Wilk on September 8, 2011. In pertinent part, this stated that Wilk was "disrespectful and irate when speaking to Ms. Hurtley;" that "he was very nasty, he was yelling that the checks being late would not be tolerated" and that he slammed down the phone. Wilk refused to sign this warning and filed a grievance on September 12, 2011. The Company refused to accept the grievance, apparently asserting that as there was no contract between the parties, that there was no obligation to honor the grievance procedure. [1]

With respect to this incident, the record shows that when Hurtley related her conversation with Wilk to Healy-Case, the latter called Wilk and they had a heated conversation about the employees' missing checks. Kenneth Boehm, a former supervisor who was in the room when Healy-Case took the phone call credibly testified that she said after hanging up; "Mr. Wild had better learn I'm not afraid of him or his union. I won't tolerate this." Boehm further testified to a similar comment made by Healy-Case made after she issued the warning to Wilk on September 8, 2011. He reported that she stated: He's going to learn that … we don't do that stuff at Allied Barton and I'm not afraid of him or if he's got a union, I'm not afraid of it."

In addition, Boehm testified that in November 2011, he attended a meeting with Ford where Ed Nelson, Ford's Safety Manager said that Allied Barton could not make changes overnight, especially in a union setting. According to Boehm, Healy-Case responded by saying: "I'm not worried about James Wilk or his union."

Wilk was also involved in another incident in late August that resulted in a "first written warning" issued to him. This involved a situation where he forced open a Ford owned lock box that held cab receipts for when employees had to leave the plant, for example, to go to a hospital. He states that he did not break the lock but because the key was unavailable, he needed to get the box open in order to provide a receipt to the person who needed it. Boehm, who was the site supervisor at the time, testified that he thought that although Wilk had an explanation he thought that Wilk was wrong in opening the box. In any event, Wilk did receive this warning and this was the last disciplinary action received by him before the events that led

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[1] This would not be a correct position under the law. In this case, the Respondent did not assume the collective bargaining agreement of its predecessor. Therefore, the arbitration provision of that contract was not enforceable. Nevertheless, as the Respondent was a *Burns* successor, it still had an obligation to bargain in good faith over grievances as they arose.

to his discharge. On September 12 Wilk filed a grievance as to this matter, but the Company refused to accept it.

During the second half of 2011 and the first half of 2012, the Union by Wilk and other union officers filed a number of grievances and unfair labor practices. Some of the unfair labor practice charges were dismissed as being non-meritorious, but others have resulted in the issuance of Complaints and the execution of settlement agreements.

On September 12, 2011, William Sprague filed a grievance alleging that the Company had breached the contract in regard to weekend pay for lead officers. The Company refused to accept this grievance.

In relation to the allegations in the September 12 grievance, the Union filed a charge in 3-CA-69218 that alleged that the Company had changed provisions of the previous collective bargaining agreement. This charge was investigated and ultimately led to a settlement agreement that was executed on February 28, 2012. By the terms of the settlement, the Company agreed that it would process grievances and would not make any changes in wages, hours and working conditions without first notifying the Union and giving it an opportunity to bargain. As affirmative relief, the Company agreed to restore wage differentials for employees working outside of their classifications and maintain that practice until such time as good faith bargaining about such changes resulted in an agreement or an impasse.

On November 19, 2011 and January 27, 2012, the Union, by Sprague, filed a charge and an amended charge in 3-CA-69220 alleging that he was unlawfully suspended because of his activities on behalf of the Union. This charge was dismissed.

On December 28, 2011 and January 18, 2012, the Union by Paul Donahue, filed a charge in 3-CA-71474 alleging, *inter alia*, that the Company unilaterally changed the promotion procedure and the Christmas week schedule procedure. This charge was dismissed.

On January 27, 2012, the Union by Sprague filed a charge alleging that he was discharged because of his union activity. This charge was dismissed.

On January 31, 2012, the Union by James Wilk, filed a charge in 3-CA-73447 alleging that the Company unilaterally changed the job classifications of unit employees. This charge was dismissed.

On January 31, 2012, the Union by Wilk, filed a charge in 3-CA-73451 alleging discriminatory actions taken by the Company since January 18, 2012. These seem to relate to a contention that the Company required the Union to move its office within the Ford plant. This charge was dismissed.

On April 17, 2012, and amended on June 20, the Union by Wilk, filed a charge in 3-CA-78930 that alleged that the Respondent made a number or unilateral changes without bargaining. A Formal Settlement was entered in that case on September 18, 2012 as to some, but not all of the allegations contained in the charge. In substance, the agreement made a finding that the Employer had made unilateral changes in the “leave post” policy and the job duties of lead officers; and that it had unilaterally instituted a new employee push button system and unilaterally implemented a policy restricting the use of recording devices. The Order portion of the Settlement required the Respondent to bargain upon request for a collective bargaining agreement and to rescind the changes described above if requested by the Union.

On April 11, 2012, employee Scott Krisiak [2] discovered a white substance in his locker and notified supervisor Okelberry about it. Later in the day, Wilk discovered a similar substance that was put into an office that was used by the Union. When he told Okelberry of this, Wilk was told that something similar had happened to Krisiak. For better or worse, Wilk assumed that Krisiak was responsible for vandalizing the Union's office.

On April 12, Wilk arrived at about 3:40 p.m. This was prior to the shift change and Wilk saw Krisiak at the other end of the security office. Wilk asked Krisiak why he would pour powder into the Union's office and Krisiak stated that he had nothing to do with that. Wilk again accused Krisiak of pouring the powder; stating that he should stop playing his fucking games and that he should "man up." By this time, the two men were raising their voices from across the room and Wilk stated either; "I just hope you get what's coming to you," or "you'll get what's coming to you; don't worry you'll get what's coming to you." There were a number of other people who witnessed this event including Okelberry and employees Warren and Lastowski. There is no evidence that would indicate to me that Wilk made any gestures or movements that reasonably could be construed as threatening.

Before the April 12 shift was finished, Okelberry notified Karen Healy-Case about the incident between Wilk and Krisiak. In doing so, he characterized Wilk's statement and conduct as being threatening. Healy Case then contacted her superior, Paul Caruso and she was advised to obtain and send to him statements from all the parties and witnesses.

On April 13, Krisiak gave a statement to Okelberry who transmitted it with a memo to Healy-Case, Caruso and other managers. After reciting his version of the incident, Krisiak summarized his position by stating that he felt that Wilk had threatened him and made false accusations against him. Okelberry''s memo basically reiterated what happened; stating that when Wilk arrived, he confronted Krisiak on the issue (powder or sugar in the union office) and that after some raised voices, Wilk stated; "You'll get what's coming to you."

Another witness to the event, David Warren, also submitted a statement in which he stated *inter alia*, that Wilk accused Krisiak of pouring sugar and coffee creamer in the union office, that Krisiak said that it was in his locker too and told Wilk to walk away. According to Warren's statement, as Wilk was walking away, he said "you will get what's coming to you."

After obtaining these statements, Healy-Case participated in a conference call with Okelberry, Caruso and Deodata Arruda, the Respondent's Vice President of Operations. She told them that she construed Wilk's actions as a threat of physical violence and that he should be suspended. Notwithstanding that the Company had not yet received a statement from Wilk or Lastowski, the decision was made to suspend Wilk.

Wilk was notified of his suspension by Okelberry on April 14. Okelberry told Wilk that if he wanted any more information, he should contact Healy-Case. He did and left a voice message.

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[2] There was testimony that Krisiak was anti-union. Krisiak testified that other employees had that impression of him even though it was not true. However, I do not think that this is particularly relevant to the facts in this case.

On April 16, Healy-Case called Wilk and he related his version of the incident asserting that Krisiak had threatened him. She invited him to furnish a statement about the event which should be turned in by Friday, April 20. Wilk said that he would send in a statement and also try to obtain a statement from Lastowski.

On June 20, Wilk hand delivered his statement which is pretty much consistent with the versions given by everyone else. In it, he stated that he told Krisiak that he "hopes you get what's coming to you," after which Krisiak threatened to kick his ass. Wilk also delivered a statement by Lastowski which corroborated Wilk's version of the event. Healy-Case testified that she read these statements and transmitted them to Caruso and Arruda.

Caruso testified that after receiving the statements from Wilk and Lastowski he made the determination that Wilk should be discharged based on the fact that Wilk had said to Krisiak during the transaction; "I hope you get what's coming to you."

Arruda testified that after reviewing the statements and the recommendations of Healy-Case and Caruso, he decided to terminate Wilk.

At around 1:45 p.m. on April 20, Healy-Case called Wilk and told him that he was being fired.

Analysis

The legal standard applicable to these kinds of cases is set forth in *Wright Line*, 251 NLRB 1083 (1980). If the General Counsel makes out a prima facie showing sufficient to support an inference that protected or union activity was a motivating factor in the decision to discharge or take other adverse action against an employee, then the burden shifts to the Respondent to demonstrate that it would have taken the same action in the absence of the protected activity.

In my opinion, the General Counsel has made out a primae facie case that the motivating factor in Wilk's discharge was his union and protected concerted activity. The record shows that since taking over the security operations at the Ford facility, the relationship between the Respondent and Union, of which Wilk was President, was strained at the very least. It is also clear that notwithstanding the fact that the Respondent was a successor bound to bargain with the Union it made various unilateral changes and refused to bargain over grievances that arose at the work place.

With respect to Wilk specifically, the evidence shows that when he raised a complaint about paychecks not being received on time, he was given a warning on September 8, 2011. In that instance, although Wilk may have been rude and raised his voice during his phone call, there is nothing to suggest that he made any threats or engaged in any other conduct that would transform this concerted activity into unprotected activity. Were it not for the fact that this incident occurred outside the 10(b) statute of limitations period, I would find that this warning violated Section 8(a)(1) & (3) of the Act.

The evidence also shows that Healy-Case on several occasions made comments to the effect that she would take actions despite Wilk or the Union and that she was not afraid of him or his union.

The Company essentially defends its decision to discharge Wilk on the assertion that his statement to Krisiak on April 12 constituted a threat of physical violence. It asserts that the

Company has a strict policy with respect to acts or threats of physical harm and presented examples of other employees who were discharged for such acts or statements.

In my opinion, the statement by Wilk that he hopes that Krisiak will get what's coming to him cannot objectively be construed as a threat of physical harm. It just isn't, and the claim that the statement evidenced an actual threat, is in my opinion, either over interpreted or simply disingenuous. Moreover, all of the examples produced by the Respondent to show that its discharge of Wilk was consistent with actions taken against other employees are really not all that similar. All of the examples that were presented and supported by documentary evidence involved explicit and unambiguous threats of violence. [3]

The Respondent also contends that even if Healy-Case and Okelberry may have harbored some anti-union animus against Wilk, this is irrelevant because the decision to discharge Wilk was made at a higher level; namely Caruso and Arruda. However, Healy-Case and Okelberry were the persons who initiated and participated in the entire process leading up to Wilk's discharge on April 20. As such, even if the evidence were to show that neither Caruso nor Arruda were subjectively motivated by anti-union considerations, their decisions were influenced and came about because of the actions of Healy-Case and Okelberry. In *Goldens Foundry & Machine Co*., 340 NLRB No. 140 (2007), the Board held that unlawful animus and motivation must be imputed to the Human Resource Manager who made the discharge decision because were it not for the fact that the supervisor brought the employee's purported misconduct to his attention, he would not have been discharged.

In my opinion, the Respondent has not met its burden under the standards of *Wright Line* for demonstrating that it would have discharged Wilk for reasons other than his protected or union activities. I therefore conclude that by suspending and then discharging Wilk on April 20, 2012, the Respondent violated Section 8(a)(1) & (3) of the Act.

I also conclude, based on this record, that the General Counsel has made out a primae facie showing, and the Respondent has not sufficiently rebutted, the allegation that the Respondent discharged Wilk because of his activities in relation to the filing of various unfair labor practice charges.

Conclusions of Law

1. By suspending and discharging James Wilk in retaliation for his union and concerted protected activities, the Respondent violated Section 8(a)(1) and (3) of the Act.

2. By suspending and discharging James Wilk in relation for his role in filing various unfair labor practice charges, the Respondent violated Section 8(a)(1) & (4) of the Act.

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[3] One incident involved a situation where one employee allegedly threatened to shoot another employee. A second incident involved an employee who aimed what appeared to be a firearm at another employee. A third incident involved a situation where an employee allegedly threatened to punch another employee in the mouth. And the fourth incident involved a situation where an employee allegedly made arson threats and other threats of physical harm. In all of these situations, the Company made an investigation and the documentation of those investigations were placed into evidence in this case. See General Counsel Exhibits 28 and 29 and Respondent Exhibits 9 and 10.

3. The unfair labor practices committed by the Respondent affect commerce within the meaning of Section 2(6) and (7) 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 discharged James Wilk, it must offer him reinstatement and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him. Backpay shall be computed in accordance with *F.W. Woolworth Co.*, 90 NLRB (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1187 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), enf. denied on other grounds sub. nom., *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011).

On these findings of fact and conclusions of law and on the entire record, I issue the following conclusions and recommended [4]

ORDER

The Respondent, Allied Barton Security Services, LLC., its officers, agents and assigns, shall

1. Cease and desist from

(a) Discharging or suspending employees because of their activities on behalf of or support for the Plant Protection Association National, Local 104 or because of their protected concerted activities or because they file or are involved in the investigation of unfair labor practice charges at the National Labor Relations Board.

(b) In any like or related manner interfering with, restraining or coercing employees in the rights guaranteed to 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 James Wilk full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make James Wilk whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the Remedy section of this Decision.

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[4] 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.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful actions against James Wilk and within three days thereafter, notify him in writing, that this has been done and that the suspension and discharge will not be used against him 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 Buffalo, New York facilities copies of the attached notice marked "Appendix" [5] Copies of the notice, on forms provided by the Regional Director for Region 3, 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 email, 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 April 14, , 2012.

(f) Within 21 days after service by the Region, file with the Regional Director 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.

Dated, Washington, D.C. December 7, 2012

Raymond P. Green
Administrative Law Judge

[5] 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."

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 the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.
To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT suspend or discharge employees because of their union activity or to discourage employees from engaging in union or protected concerted activity.

WE WILL NOT suspend or discharge employees because they file or assist in the filing of charges with the National Labor Relations Board or because they become involved in the investigation of a case before the Board.

WE WILL reinstate James Wilk to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him.

WE WILL remove from our files any reference to the unlawful suspension and discharge of James Wilk and notify him, in writing, that this has been done and that these actions will not be used against him in any way.

Allied Barton Security Services LLC.
(Employer)

Dated _____ **By** _____
(Representative) **(Title)**

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

130 S. Elmwood Avenue, Suite 630
Buffalo, New York 14202-2387
Hours: 8:30 a.m. to 5 p.m.
716-551-4931.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 716-551-4946.