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

BOCH IMPORTS, INC. d/b/a BOCH HONDA

and **Case Nos. 01-CA-071499**
01-CA-072879
INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, DISTRICT LODGE 15, LOCAL LODGE 447 **01-CA-079615**

***Laura Pawle, Esq.*, and *Gene M. Switzer, Esq.*, Counsel for the General Counsel**
***Thomas J. McAndrew Esq.*, Counsel for the Respondent**

Decision

Statement of the Case

Raymond P. Green, Administrative Law Judge. I heard this case in Boston, Massachusetts on December 3 and 4, 2012. The charges in 1-CA-71499, 1-CA-72879 and 1-CA-79615 were filed respectively on December 28, 2011, January 20 and April 26, 2012. A Consolidated Complaint was issued on September 28, 2012 and alleged as follows:

1. That in or about early August 2011, the Respondent told an employee that it would put an end to the Union. [1]

2. That on or about, October 27, 2011, the Respondent told employees that the Union was holding up the implementation of the team leader system.

3. That on or about January 6, 2012, the Respondent issued a performance evaluation to Stephen Klansek that contained a negative comment regarding his activities as a union shop steward.

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

[1] At the hearing, the General Counsel withdrew this allegation.

Findings of Fact

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. It also was agreed that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. The Alleged Violations

The Respondent is one of several auto dealers owned by the Boch family. The facility involved in the present case is located in Norwood, Massachusetts. At the time that these events occurred, David Carlson was the Service Director and Dave Foy and Kenny Collazo were the service managers. Dennis Flaherty and Stephen Klansek were auto technicians.

After a Board conducted election, the Union was certified on November 29, 2010 as the representative of the dealership's 25 automobile service technicians. Thereafter, the parties engaged in bargaining for a first contract and these negotiations continued from January 2011 to January 2012, when a decertification petition was filed. On September 2012, the Union lost another election. During at least some of the time Klansek acted as a de facto shop steward.

The Complaint alleges that on or about, October 27, 2011, the Respondent, by Dave Carlson told employees that the Union was holding up the implementation of the Team Leader System.

During the negotiations the Union and the Company both agreed that the then existing system of assigning work to the technicians was unfair because it could and was being gamed by some so that they would obtain more lucrative assignments to the detriment of others. The evidence shows that both union and company representatives wanted to replace the existing system with a new one that would utilize certain bargaining unit employees as "team leaders" who would be responsible for a more equitable distribution of work. Both sides agreed on the concept. The problem was agreeing on the details.

By August 2011, negotiations on this issue had gone so far that Service Director Carlson posted the team leader position. In September, Carlson interviewed four technicians for this position including Klansek. Everyone agrees that Klansek was an extremely good technician.

Nevertheless, disagreements arose over the concept's implementation. One of the problems was that the computer system that would be necessary to support a team leader concept could not handle the job. Another problem was how to deal with a situation where if someone given the team leader spot decided to give that job up. Although the parties agreed that such a person would go back to his old job title, there was some dispute as to whether he would be entitled to have exactly the same shift and be on the same team. Also, no agreement had been reached as to the compensation of someone appointed to the team leader slot. By the Autumn of 2011, the team leader concept had still not been implemented or fully agreed upon. [2]

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[2]Although the Union filed a charge in 01-CA-073177, alleging that the Company failed to implement an agreement made by the parties regarding the team leader idea, the Regional

Continued

The testimony of both side's negotiators show that each blamed the other for the inability to reach a final agreement on the team leader plan.

On October 27, 2011, Carlson allegedly had a conversation with technicians Flaherty and Martins regarding the dispatching of a particular job. Flaherty testified that when Martins said that the job would already have been dispatched if they had the team leader system, Carlson responded by saying that the Union was holding up the implementation of the team leader system. Although Carlson denied making the specific statement, it is probable that he did so because at the time, the Company's negotiators were of the opinion that it was the Union that was holding up an agreement on this issue. And although Carlson did not directly participate in the bargaining, he was kept apprised of the negotiations.

It is this one statement by Carlson that is alleged to violate Section 8(a)(1) of the Act.

At the time that this statement was made, each side had the opinion that the other was at fault for not having reached a complete agreement on the "team leader" concept. But as the statement by Carlson simply expresses an opinion and does not contain any threat of reprisal or promise of benefit, it seems to me that it would be permissible speech under Section 8(c) of the Act. *Chamber of Commerce of the United States v. Brown*, 554 U.S. 60 (2008). In *NLRB v. Gissell Packing Co*., 395 U.S. 620, the Court stated *inter alia*;

> But we do note that an employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the Board. Thus, Section 8(c)… merely implements the First Amendment by requiring that the expression of "any views, argument, or opinion" shall not be "evidence of an unfair labor practice," so long as such expression contains "no threat of reprisal or force or promise of benefit" in violation of Section 8(a)(1). [3]

I do not agree with the General Counsel's contention that this case is governed by *RTP Co*., 334 NLRB 466 (2001). In that case, an employer had a practice of granting annual wage increases to its employees and the Union gave an assurance during negotiations that it would not file an unfair labor practice charge if the annual increase was given as in the past. Despite the past practice and the Union's assurance, the Company nevertheless told employees that because of the Union it was not going to give the usual annual wage increases. Since withholding of annual wage increases, that were given in the past as a matter of course, would violate the Act under such cases as *Noah's Bay Area Bagels, LLC*, 331 NLRB 188, 189 (2000),

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Director, on January 25, 2012, dismissed that allegation and concluded that the parties had not reached an agreement. Having found that the parties did not reach an agreement on this issue, it is not within my purview to decide which party was more at fault for the failure to reach an agreement.

[3] In *Gissel*, the Court found that certain statements to employees constituted threats of plant closure and therefore not protected by Section 8(c). The Court noted that when management makes a prediction to employees that unionization may cause the plant to close, it "must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or convey a management decision already arrived at to close the plant in case of unionization."

the notification to employees of the withholding would also be unlawful. In the present case, the Respondent has not withheld any pre-existing benefit, but has simply asserted its opinion that the failure to reach an agreement on a future benefit should be blamed on the Union.

The remaining allegation of the Complaint involves statements placed into an annual review of Steve Klansek's work performance. It is alleged that these statements violated Section 8(a)(1) because they constituted interference with employee Section 7 rights as they could reasonably "chill" union support.

In the fall of 2011, Klansek had a conversation with Sean DaSilva who, at the time was working in the manager's office because of a disability issue. There is no contention in the Complaint that DaSilva was a supervisor and there was no evidence that he had any type of authority to hire, fire or discipline employees. At most, he handed out assignments to the technicians from time to time. In any event, Klansek testified that DaSilva told him that he had heard that management had concerns with the performance of a new employee named Sau Nepal. (Nepal had been recently hired in conjunction with his school work at a trade school). According to Klansek, DaSilva said that Nepal was slow, that he was taking too many breaks, and that his job could be in jeopardy.

According to Klansek, he then spoke to Nepal and told him what DaSilva had said to him. Klansek states that he told this to Nepal because he felt that as the acting shop steward, he should advise Nepal about management's concerns regarding his work performance.

The evidence shows that Nepal then talked separately to Service Manager Foy and Service Director Carlson about his desire to be transferred from the team he was on because the other employees seemed angry and made him feel uncomfortable. During these initial conversations, Nepal did not mention the statements made to him by Klansek.

Several weeks later, Nepal again asked Foy about changing his schedule. After stating that Klansek had made him feel uncomfortable, Nepal said that unless he could change his shift, he would quit. At a later point, Nepal spoke to Carlson and told him that Klansek had told him that management perceived him to be lazy. Nepal repeated that if his shift could not be changed, he would resign.

On or about September 28, the Company's in house counsel began making inquiries as to the basis for Nepal's belief that management perceived him as being lazy. Both Foy and Carlson testified that they did not have any qualms about Nepal's work performance, that he was far from lazy, and that they reported this to counsel. As a result of this, Nepal's shift was changed in early October.

This seems to be the kind of misunderstanding that sometimes occurs when people pass on gossip. DaSilva made a statement to Klansek about management's alleged opinion of Nepal. Klansek then turned around and told Nepal what he had been told by DaSilva, believing that DaSilva knew what he was talking about. Nepal, who apparently interpreted the relayed message as meaning that management thought he was lazy, became upset and sought to change his shift. Being a somewhat emotional person, Nepal seems to have overreacted and told Foy and Carlson that he would quit unless he could be put on a shift that did not have Klansek. Nepal's shift was changed, but in October he quit anyway.

Three months later, Klansek was given his annual evaluation which was dated January 6, 2012. This was a favorable evaluation and Klansek consequently received a $1 per hour wage increase. Notwithstanding the generally favorable review, the evaluation also stated:

> You generally work well with other technicians and pro-actively have made recommendations to help improve the department. However, there was a concern about your upsetting another technician with an incorrect statement about how management supposedly viewed his performance.
>
> Overall, you are an asset to Boch Honda and the Service Department. We appreciate everything you do to satisfy our company and customer needs.
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> * * *
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> Steve is willing to share his ideas with management to help improve our department. However, in September Steve incorrectly told another technician that management viewed him as lazy and to watch out as management would come after him for that type of thing; the technician was so uncomfortable that he informed management he would resign if he was required to work on that team any longer.

In my opinion, there was no evidence to suggest that the comments made in Klansek's favorable work evaluation were meant to be or could reasonably be construed as constituting either a direct or implied warning of some form of disciplinary action. The comments had absolutely no adverse impact on Klansek's pay or working conditions; indeed the evaluation as a whole, resulted in him getting a wage increase. There simply was no adverse effect on Klansek's employment as a result of these remarks and it is impossible for me to imagine that these comments could possible "chill" Klansek's, (or any other employees'), ability to engage in union or protected concerted activity.

In my opinion, the General Counsel's reliance on *Penn Tank Lines, Inc*. 336 NLRB 1066 (2001) is misplaced. In that case an employee named Steckler who was simply soliciting on behalf of a union, was told by a manager that he had received reports that Steckler was harassing the drivers and that he was *warning* Steckler to leave those men alone. These statements, unlike the statements in the present case, were unambiguous warnings of adverse action by management. Moreover, the warning in that case was fulfilled when the employee in question was suspended shortly thereafter.

Conclusions of Law

The Respondent has not violated the Act in any respect.

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

ORDER

The Complaint is dismissed.

Dated, Washington, D.C., February 1, 2013.

Raymond P. Green
Administrative Law Judge

[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.