

NOT TO BE INCLUDED
IN BOUND VOLUMES

LSP
Caguas, PR

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

LM WASTE SERVICE, CORP.

and

UNION DE TRONQUISTAS DE
PUERTO RICO, LOCAL 901, IBT

Cases 24-CA-10837
24-CA-10894

and

MARVIN J. CARDONA

and

DS EMPLOYMENT AGENCY, INC.

ORDER REMANDING PROCEEDING TO ADMINISTRATIVE LAW JUDGE

On June 10, 2009, Administrative Law Judge Keltner W. Locke issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief. The General Counsel filed cross-exceptions and a supporting brief, and the Respondent filed an answering 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 remand this case to the judge for further findings and conclusions consistent with this Order.

This case involves multiple complaint allegations that the Respondent violated Sections 8(a)(1) and (3) of the Act. As discussed below, we find it necessary to remand several allegations to the judge for further findings and analysis, and to hold all other issues in abeyance pending issuance by him of a supplemental decision.

1. Allegations of Unlawful Conduct by Operations Manager Ramos

Amended Complaint paragraph 7 alleged that Manager Ramos violated Section 8(a)(1) of the Act on January 11, 2008,¹ when he interrogated employees Santiago, Maldonado, and Espada, solicited their support to get rid of the Union, and threatened them with discharge if they continued to support the Union. In considering the interrogation and solicitation allegation, the judge credited the employees' collective testimony to the effect that Ramos said he had a source who reported that Santiago and Maldonado were engaged in the Union's organizing effort.² Based on this testimony, the judge stated that the Respondent violated Section 8(a)(1) by creating the impression of surveillance, but made no express finding with respect to the unlawful interrogation and solicitation violation alleged in the Complaint. However, in his summary Conclusions of Law and in the recommended Order and notice, the judge included provisions – apparently in reference to the January 11 incidents – that would be consistent with a finding that the Respondent violated the Act as alleged by

¹ All dates are in 2008 unless otherwise indicated.

interrogating employees and soliciting their support to get rid of the Union. Accordingly, we find it necessary to remand the interrogation and solicitation allegation to the judge to explain the basis for finding these violations, if that is what he intended. Further, as the impression of surveillance violation found by the judge was not alleged in the Complaint, the judge should clarify whether he intended to find this unalleged violation and, if so, whether the issue was "closely connected to the subject matter of the complaint and [was] fully litigated [at the hearing]." *Pergament United Sales*, 296 NLRB 333, 334 (1989).

Addressing the allegation that Ramos threatened the employees with discharge, the judge noted that Ramos denied that he ever threatened employees concerning their union activities, and that Espada failed to corroborate Maldonado's testimony about Ramos' threat. The judge dismissed the threat allegation without discussing Santiago's testimony that Ramos told him in a separate conversation that "jobs were scarce" and that Santiago should "think about [his] family." Later in the judge's decision, however, when discussing the allegation that the Respondent unlawfully discharged Santiago, the judge referred to Ramos' statement above as a "not-so-subtle threat" and considered it as evidence supporting the General Counsel's initial burden of proving an union motivation under the *Wright Line* test.³ Accordingly, on remand, the judge must resolve

² The testimony relates to separate conversations on the same day, first between Ramos and Santiago, and later between Ramos and the other employees.

³ 251 NLRB 1083 (1980), *enfd.* 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, 399-403 (1983). Under *Wright Line*, the General Counsel bears the initial burden of showing by a preponderance of the evidence that protected conduct was a substantial or motivating factor in the adverse employment action. If the General Counsel makes the required initial showing, the burden then shifts to the employer to show, as an

(Continued)

the apparent inconsistency between his recommended dismissal of the Section 8(a)(1) threat allegation and his finding that the same statement constituted a “not so subtle threat” in analyzing the evidence pertaining to Santiago's discharge.

2. Allegations of Unlawful Conduct by Supervisor Santiago

Amended Complaint paragraph 9 alleged that Respondent's supervisor Santiago violated Section 8(a)(1) in a conversation with employee Rafael Cruz on January 15 by creating the impression that employees' union activities were under surveillance, and by informing Cruz that he and other employees were discharged because of their union activities. The judge specifically mentioned Cruz's testimony that Santiago told him, a day after Cruz's discharge, that Cruz and the other discharged employees had brought their fate upon themselves because they supported the Union, and the Respondent had a private detective who had photographed employees at their union meetings. Relying on this testimony, the judge found that Santiago created the unlawful impression of surveillance. However, he made no express credibility finding or conclusion of law as to whether Santiago violated Section 8(a)(1) as alleged by telling Cruz that he and other

affirmative defense, that it would have taken the same action even in the absence of the employee's union activity. See *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996).

We note that the judge described the General Counsel's initial burden in terms of four evidentiary elements, rather than the Board's traditional description of three elements: union or other protected activity by the employee, employer knowledge of that activity, and antiunion animus on the part of the employer. See *Intermet Stevensville*, 350 NLRB 1349, 1357 (2007). Member Schaumber observes that the Board and the circuit courts of appeals have variously described the evidentiary elements of the General Counsel's initial burden of proof under *Wright Line*, sometimes adding as an independent fourth element the necessity for there to be a causal nexus between the union animus and the adverse employment action. See, e.g., *American Gardens Management Co.*, 338 NLRB 644, 645 (2002). As stated in *Shearer's Foods*, 340 NLRB 1093, 1094 fn. 4 (2003), since *Wright Line* is a causation standard, Member Schaumber agrees with this addition.

employees were discharged because of union activities, even though the judge relied on Santiago's statement later in his decision to find that the General Counsel met his *Wright Line* burden of proving that the discharges of employees Cruz and Espada violated Section 8(a)(3). Accordingly, on remand, the judge must make an express finding with respect to the credibility of Cruz's testimony, and, if credited, whether Santiago violated Section 8(a)(1) by stating that employees were discharged because of their union activities.⁴

3. Allegations of Unlawful Discharges

Amended Complaint paragraph 11 alleged that the Respondent violated Section 8(a)(3) by discharging employees Maldonado, Cruz, Espada, Santiago, and Cardona. We will remand these discharge issues to the judge to assess whether the above-directed further analysis of the Section 8(a)(1) allegations requires clarification or modification of his analysis of the discharge allegations. In addition, with respect to Maldonado's alleged discharge, the judge found that the Respondent failed to satisfy its *Wright Line* rebuttal burden of demonstrating that it would have discharged Maldonado even absent his union activities. However, Joel Cruz Velasquez (Joel Cruz), Maldonado's former helper on commercial customer pickup routes, testified that he saw Maldonado make unauthorized trash pickups and collect payment for this service, and that Maldonado threatened Joel Cruz with physical harm when Joel Cruz would not

⁴ The judge's Conclusions of Law, recommended Order, and notice include provisions related to unlawfully informing employees that they were unlawfully discharged for union activities. These provisions are apparently based on the judge's finding regarding the allegation in complaint paragraph 9(c) that Supervisor Santiago so informed employee Cardona on March 17. The paragraph 9(c) allegation and the judge's related finding are not a part of this remand order.

accept any of the money. Although the judge noted Joel Cruz's testimony, he did not make a specific finding as to its credibility. Accordingly, on remand, the judge shall determine the credibility of Joel Cruz's testimony and whether that testimony, if credible, has an impact on the analysis of the allegation that Maldonado's discharge violated Section 8(a)(3) of the Act.

In light of the foregoing, we remand this case to the judge to reconsider the issues specifically discussed herein. All remaining issues not remanded will be held in abeyance pending the judge's supplemental decision on remand.

ORDER

IT IS ORDERED that this proceeding is remanded to Administrative Law Judge Keltner W. Locke for further action consistent with this remand order.

IT IS FURTHER ORDERED that the judge shall prepare and serve on the parties a supplemental decision setting forth credibility resolutions, findings of fact, conclusions of law, and a recommended Order, as appropriate on remand. Copies of the supplemental decision shall be served on all the parties, after which the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

Dated, Washington, D.C. , May 11, 2010.

Wilma B. Liebman, Chairman

Peter C. Schaumber, Member

Mark Gaston Pearce, Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD