

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

JAMES JULIAN INC. of DELAWARE

and

Case 4-CA-24973

LARRY W. DAVIS, an Individual

Donna D. Brown, Esq., of Philadelphia,
Pennsylvania, for the General Counsel.

Frank S. Astroth, Esq., of Baltimore,
Maryland, for the Respondent.

DECISION

Statement of the Case

JAMES L. ROSE, Administrative Law Judge: This matter was tried before me at Philadelphia, Pennsylvania, on November 17, 1997, upon the General Counsel's complaint which alleged that the Respondent failed to recall its employee Larry W. Davis in violation of Section 8(a)(3) of the National Labor Relations Act, as amended, 29 U.S.C. §151, *et seq.* The Respondent generally denied that it committed any violations of the Act.

Upon the record as a whole, including my observation of the witnesses, briefs and arguments of counsel, I hereby make the following findings of fact, conclusions of law and recommended order:

I. JURISDICTION

The Respondent is a Delaware corporation engaged in the business of heavy and highway construction from an office in Wilmington, Delaware. In the course and conduct of this business, the Respondent annually purchases and receives materials valued in excess of \$50,000 directly from points outside the State of Delaware. The Respondent admits, and I conclude, that it is an employer engaged in interstate commerce within the meaning of Sections 2(2), 2(6) and 2(7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is admitted, and I find, that United Steelworkers of America, AFL-CIO-CLC (herein the Union) and its Local 15024 are labor organizations within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts.

5 James Julian, Inc. (herein JJI) was a large heavy and highway construction company which for some years had a collective bargaining agreement with the Union. In 1994 or 1995, the majority stockholder of JJI, James Julian, decided to retire. This decision led to the formation of the Respondent in early 1995 by his son, Joseph Julian, which in effect became the successor to JJI. The Union and the Respondent agreed to apply the collective bargaining agreement to the Respondent's operations until a successor agreement could be negotiated.
10 JJI completed its jobs and the Respondent and JJI bid three jobs as joint venturers.

15 In February 1996 the Union and the Respondent completed negotiations for a collective bargaining agreement, which was submitted to the Union's International office for approval. At this time the Union determined that the Respondent was a new company, and pursuant to some kind of agreement with the building trades, the Union disclaimed interest in continuing to represent the employees. Thus by letter of April 12, 1996, Joseph Julian so advised all employees, and stated that the company would begin operating non-union but he would be pleased if they would continue their employment.

20 Larry Davis worked seven years as a truck driver for JJI, and for four and one half years, until July 1995, was the shop steward. During his tenure, he performed the usual functions of a steward, including filing 21 grievances from April 25, 1994 to May 1, 1995, on behalf of himself and other employees and taking pictures of supervisors operating equipment.

25 On July 5, 1995, Davis, along with other truck drivers, determined to take a 10 minute break to which they believed entitled under the collective bargaining agreement. This led to a dispute between them and foreman Joseph Ziegler, who called their action a wildcat strike. As a result, Davis was terminated, since, according to the Notice signed by Ziegler, he had two written warnings on June 2, 1995.
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Davis grieved the discharge and was reinstated, but as part of the reinstatement agreement, according to his undenied testimony, he resigned as the shop steward. He was replaced by William King.

35 Davis continued to work for JJI and the Respondent throughout 1995 and into April 1996; however, when the Respondent became non-union, Davis was not hired. James Hoban, the Respondent's project manager (and former Human Resources Director for JJI), testified that Davis was not hired because he would not perform laborer's work but "(h)is direct performance as a truck driver, it was not related. No." Subsequently, Hoban testified that in addition to wanting truck drivers who also could do construction work, truck coordinator Jack Allen evaluated dump truck drivers, ranking Davis next to last which was taken "into consideration" when the Respondent decided not to hire him.
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B. Analysis and Concluding Findings.

45 The General Counsel alleges that Davis was not hired by the Respondent because of his activity as the shop steward for JJI and/or his participation in the protected activity of taking a contractually permitted break while working for JJI.

50 The Respondent argues that Davis was not hired because of his low evaluation and because he would not do laborer's work. The Respondent further argues that since its

business is much smaller than that of JJI, it needed fewer dump truck drivers. Finally, the Respondent contends that there is no evidence of animus toward the Union and therefore no finding of discrimination can be made.

5 Davis was an aggressive steward who, during a one year period, filed 21 grievances. While the Respondent seems to argue such was not an excessive number, no objective evidence was offered to support this claim. In addition, Davis was clearly perceived as having caused what Ziegler called a wildcat strike. Of all the employees participating in taking the break, only Davis was disciplined in any way. He was discharged, but was subsequently
10 reinstated. According to Davis' unrefuted testimony, as part of the reinstatement agreement between the parties, he resigned as the steward.

15 It is therefore clear that the management of JJI, who held the same or similar positions with the Respondent, harbored animus against Davis for his protected, concerted and union activity. Such was put into words by Area Superintendent Jacob Baliff and truck coordinator Jack Allen, both of whom referred to Davis as a "troublemaker." The implication that management took a negative view of Davis' work as the steward is not diminished by the general testimony that Baliff also called others troublemakers. This general testimony is devoid of detail concerning the circumstances under which Baliff may have made such a reference.
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25 McDonald, who was the other driver not rehired, testified that he went to Zeigler's home to find out why and was told by Zeigler that he and Davis had been "blackballed." Zeigler recalled the meeting but testified that he did not remember what was said. Therefore, I credit McDonald testimony and find it additional evidence that the Respondent harbored animus against Davis.

30 Finally, Davis testified without contradiction that when he called Hoban to find out why he was not being rehired, Hoban told him "(o)ne was my attitude, and the other was my job performance." The only evidence of an attitude problem was Davis' activity as the steward and his participation in taking a break on July 5, for which he was discharged notwithstanding that it appears to have been protected, concerted activity.

35 I therefore conclude that the General Counsel proved a prima facie case of discrimination against Davis based on his previous union and protected activity. Thus the burden shifted to the Respondent to prove that Davis would not have been hired even without his having engaged in such activity. *Wright Line a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980) enfd. 622 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

40 When called by Counsel for the General Counsel, Hoban testified that Davis was not recalled because he would not perform laborers work, and his work as a driver not "related." However, when called by Counsel for the Respondent, Hoban testified that the low evaluation of Davis as a driver was also considered. Shifting reasons and the fact that some retained drivers also would not, for various reasons, perform laborers work, tend to discredit Hoban's testimony.

45 Finally, the Respondent offered no objective evidence that Davis was other than a competent driver. Allen did not testify, and there are no objective facts in the record upon which his purported evaluation might reasonably be based.

50 I discredit Hoban and I conclude that the Respondent failed to offer sufficient evidence to persuade that Davis was not retained because he was a poor employee and would not have

been retained even had he not been the steward. Accordingly, I conclude that the Respondent violated Section 8(a)(3) by refusing to retain Davis.

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IV. REMEDY

10 Having concluded that the Respondent committed certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act, including reinstating Larry W. Davis to his former job, or if that job no longer exists, to a substantially identical position of employment and make him whole for any loss of wages or other benefits he may have suffered in accordance with the formula set forth in *F.W. Woolworth Co.*, 90 NLRB 289 (1950) and *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

15 On these findings of fact, conclusions of law and on the entire record, I issue the following recommended ¹

ORDER

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The Respondent, James Julian Inc. of Delaware, its officers agents, successors and assigns, shall:

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1. Cease and desist from:

a. Refusing to hire or otherwise discriminating against employees because they engage in union or other concerted activity protected by the National Labor Relations Act.

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b. In any like or related 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:

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a. Offer Larry W. Davis immediate and 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, and make him 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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b. Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusal to hire and within 3 days thereafter notify the employee in writing that this has been done and that the refusal to hire will not be used against him in any way.

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¹If 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.

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c. Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

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d. Within 14 days after service by the Region, post at its facility copies of the attached notice marked "Appendix."² Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. 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 its 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 the date of this Order.

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e. 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.

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Dated, Washington, D.C.
January 22, 1998

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James L. Rose
Administrative Law Judge

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² If this Order is enforced by a Judgment of the 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."

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APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

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 refuse to hire or otherwise discriminate against employees because they engage in union or other concerted activity protected by the Act.

WE WILL NOT in any like or related manner, interfere with, restrain or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer Larry W. Davis immediate and full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position of employment and we will make him whole for any loss of wages or other benefits he may have suffered as a result of our discrimination against him, with interest.

James Julian Inc. of Delaware

(Employer)

Dated _____ By _____
(Representative) (Title)

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 with any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 615 Chestnut Street, 7th Floor, PA, Pennsylvania 19106-4404, Telephone 215-597-7643.

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