Trinity Technology Group, Inc. *and* Mark Schumerth. Case 12–CA–165643

October 25, 2016

ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND MCFERRAN

On June 30, 2016, the General Counsel issued a complaint alleging that the Respondent, Trinity Technology Group, Inc., violated Section 8(a)(1) of the Act by discharging employee Mark Schumerth because he engaged in protected concerted activity, and by directing employees not to talk to other employees about their wages and not to speak negatively about the Respondent at checkpoints. On September 27, 2016, the Respondent filed a Motion for Summary Judgment and a brief in support, and on October 4, 2016, the General Counsel filed an opposition to the motion.

Having duly considered the matter, the Respondent's motion is denied. The Respondent has failed to establish that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law.[1] This denial is without prejudice to the Respondent's right to renew its arguments to the administrative law judge and before the Board on any exceptions that may be filed to the judge's decision, if appropriate.

Dated, Washington, D.C. October 25, 2016

Mark Gaston Pearce, Chairman

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, concurring.

In *L'Hoist North America of Tennessee, Inc.,* 362 NLRB No. 110, slip op. at 3 (2015) (concurring), I observed that "in response to a motion for summary judgment, . . . the General Counsel at least must explain in reasonably concrete terms why a hearing is required. Under the standard that governs summary judgment determinations, this will normally require the General Counsel to identify material facts that are genuinely in dispute." See also *Leukemia & Lymphoma Society*, 363 NLRB No. 124, slip op. at 2 (2016) (Member Miscimarra, dissenting).

In the instant case, the Respondent's Motion for Summary Judgment is supported by sworn affidavits, and Respondent points out that the conduct leading to the employee discharge at issue here, which is alleged to constitute protected concerted activity, consisted of a telephone call to a national radio show that is reflected in a written transcript of the show. In contrast, the General Counsel's opposition appears to presume that the Board will deny motions for summary judgment and conclude that a hearing is necessary merely because a respondent has denied liability, or merely because the General Counsel disagrees with the respondent's version of events. See, e.g., General Counsel's Opposition to Respondent's Motion for Summary Judgment (hereinafter "Opposition"), p. 3 ("Respondent argues that 'there is no evidence that Charging Party was acting on behalf of other employees, and his conduct was not protected by the NLRA,' thus demonstrating that there are issues of material fact as to whether [the employee] engaged in protected concerted activity on behalf of himself and other employees").

The Board's rules provide for the entry of summary judgment without a hearing when there is no genuine issue of material fact and when one party is entitled to judgment as a matter of law, even though the parties obviously disagree. For example, it does not establish that summary judgment is inappropriate merely because the Respondent here maintains "there is no evidence that Charging Party was acting on behalf of other employees, and his conduct was not protected by the NLRA." I do not prejudge whether the employee in this case engaged in protected concerted conduct. However, the absence of "evidence" supporting the General Counsel's legal theory would be a reason that summary judgment should be granted, not denied. Here, notwithstanding the complaint's contrary allegations, the Respondent has made a credible claim that everything needed to resolve this case is reflected in the transcript of the radio show telephone conversation involving the employee. Therefore, if Respondent is correct that "no evidence" supports a finding that the Charging Party's conduct was "protected by the NLRA," then the Board should appropriately decide this case on summary judgment without a hearing. Obviously, the General Counsel's attorneys disagree, since they are charged with the hard work associated with prosecut-

[1] Our concurring colleague agrees that this case involves genuine issues of material fact that require a hearing. Therefore, we need not address the other matters that he discusses.

ing claims against respondents. But a party's disagreement does not, standing alone, mean summary judgment should be denied.

In short, under our rules, I believe it is inappropriate for the General Counsel or other parties to presume that summary judgment should never be granted, or that a hearing is always necessary merely because one party argues the other party incorrectly maintains there is no dispute as to material facts. Here, regarding the question of whether the employee engaged in protected concerted activity, the General Counsel's opposition does not identify any contention or particular facts—disputed or not—that explain why the Board, with the benefit of a hearing, may ultimately decide that the employee's conduct has the Act's protection. I believe the General Counsel must provide some explanation "in reasonably concrete terms" regarding particular facts that support the complaint's allegations and regarding the theory by which the General Counsel believes relevant legal issues, following a hearing, may be resolved in the General Counsel's favor. *L'Hoist North America*, supra.

Notwithstanding the conclusory nature of the General Counsel's opposition, the General Counsel has identified some facts material to the disposition of this case, including potential questions regarding "the nature of the duty [the employee] had to keep certain information confidential" that allegedly may also be affected by "widespread public information available at the time." Opposition, pp. 3–4. Moreover, it remains possible that evidence regarding these questions may influence whether the employee whose conduct is at issue here engaged in protected concerted activity. For these reasons, I concur in the denial of the Respondent's Motion for Summary Judgment.

Dated, Washington, D.C. October 25, 2016

Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD