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Stemilt Growers, Inc. *and* Teamsters, Food Processing Employees, Public Employees, Warehousemen and Helpers, Local Union No. 760, Affiliated with International Brotherhood of Teamsters, AFL–CIO. Case 19–CA–26777

November 5, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND WALSH

On June 20, 2001, Administrative Law Judge Jay R. Pollack issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Dated, Washington, D.C. November 5, 2001

Peter J. Hurtgen, Chairman

Wilma B. Liebman, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Miriam C. Delgado and *Michelle L. Frank,* for the General Counsel

Timothy J. Pauley and *Wayne W. Hansen (Jackson, Lewis, Schnitzler & Krupman*), of Seattle, Washington, for the Respondent

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge, I heard this case in trial in Wenatchee, Washington, on January 31 and February 1, 2001. On December 3, 1999, Teamsters, Food Processing Employees, Public Employees, Warehousemen and Helpers, Local 760, affiliated with International Brotherhood of Teamsters, AFL-CIO (the Union) filed the charge alleging that Stemilt Growers, Inc. (Respondent) terminated employee Asuncion Santiago because of his activities in support of the Union. On September 20, 2000, the Regional Director for Region 19 of the National Labor Relations Board issued a notice of hearing and a complaint alleging violations of Section 8(a)(3) of the National Labor Relations Act. Respondent filed a timely answer to the complaint, denying all wrongdoing.

All parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. Upon the entire record, from my observation of the demeanor of the witnesses,[1] and having considered the posthearing briefs of the parties, I make the following findings of fact and conclusions of law.

FINDINGS OF FACT

I. JURISDICTION

Respondent is a Washington corporation, with an office and facility in Wenatchee, Washington, where it is engaged in the business of packing, storing and nonretail sale of fruit products. During the 12 months prior to the issuance of the complaint, Respondent sold and shipped goods valued in excess of $50,000 from its facilities within the State of Washington to customers outside the State, or sold and shipped goods valued in excess of $50,000 to customers within the State where such

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] In adopting the judge's finding that the Respondent did not violate Sec. 8(a)(3) and (1) when it suspended and discharged employee Asuncion Santiago, we find it unnecessary to pass on the judge's finding that the General Counsel failed to satisfy his initial burden under *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), to establish that Santiago's union activity was a motivating factor in the Respondent's decision to suspend and discharge him. Thus, even assuming arguendo that the General Counsel met his threshold burden under *Wright Line*, we agree with the judge's finding that the Respondent demonstrated that it would have suspended and discharged Santiago even in the absence of his union activity.

Chairman Hurtgen would adopt the judge's decision in its entirety, including his finding that the General Counsel failed to establish that Santiago's union activity was a motivating factor in the Respondent's decision to suspend and discharge him.

[1] The credibility resolutions here have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction to the findings, their testimony has been discredited, either as having been in conflict with credited documentary or testimonial evidence or because it was in and of itself incredible and unworthy of belief.

customers were themselves engaged in interstate commerce by other than indirect means. Accordingly, Respondent admits and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background and Issues

Respondent packs, stores, and sells fruit products in Wenatchee, Washington. Asuncion Santiago was a packer for Respondent. He was responsible for picking pears from a tub and placing them into boxes. Steel packing horses, weighing about 80 pounds each, hold the boxes of fruit and transport the boxes when full to a conveyor belt.

General Counsel alleges that Respondent violated Section 8(a)(3) of the Act by suspending and then terminating Santiago for union activity, following a history of resistance to the Union. Respondent denies the commission of any unfair labor practices. It argues that Santiago was terminated for committing a violent act rather than for his involvement with the Union.

B. Facts

General Counsel presented evidence intended to show that Respondent has resisted unionization since 1996. The Union filed a charge in 1996 against Respondent for retaliation against four employees, including Santiago. The parties settled that case. Pursuant to the settlement agreement, Respondent purged Santiago's personnel file of any mention of the contested warnings and reinstated him with backpay. Later, in January 1998, a representation election was held. The Union lost the representation election but filed timely objections. In 1998 and 1999, there were hearings on objections to the election and unfair labor practice charges. Santiago testified on behalf of the Union in these hearings. The parties finally reached a settlement resolving the unfair labor practices case and the representation case. As part of the settlement, the parties agreed to use a non-Board card-check process for determining majority status. The card-check hearing was held on October 19, 1999. The Union won the card-check and was certified as the exclusive collective bargaining representative in an appropriate unit that same day.

There is no issue that Santiago was in favor of the Union. Moreover, there is no dispute that Respondent knew of Santiago's position. His support was visible: He wore T-shirts with large union emblems to work approximately two times per week since 1998, distributed about 50 prounion flyers every 15 days, gave interviews to newspapers in support of the Union, gathered approximately 80 signatures from employees for the Union since 1996, testified in a proceeding against Respondent, and placed union stickers on his cart. Supervisors saw Santiago passing out flyers in the lunchroom sometime before the 1998 election. After hearing of the Union's majority status following the card count on October 19, Santiago distributed "victory flyers" to employees leaving work.

At a company meeting in October 1999, attended by 70 employees, Santiago suggested that employees should "move united and work quickly," so fruit would not fall to the floor. In response, employee Elizabeth Ramirez commented that those who made suggestions should be the first to follow them. Santiago felt Elizabeth was "mocking" him. Later, after work on October 13, Elizabeth's husband, Manases Ramirez, approached Santiago in the parking lot because Elizabeth had told him Santiago was "making angry faces" at her. An altercation between Santiago and Manases, with spitting and use of profanity, took place in the parking lot after work.

On October 14, Elizabeth Ramirez complained to her supervisor, Kevin Newell, about Santiago's "angry faces." She also informed him of the altercation between her husband Manases and Santiago, the night before, in the parking lot. Newell discovered that Santiago had called Manases at home after the altercation and told him that it was not fair for Elizabeth to be working while others had been laid off.

On October 15, Santiago told Newell that Manases had spit on him during the altercation, but that he did not spit on Manases. Newell decided not to discipline anyone for the altercation after Larry Memmott, Respondent's human resources manager, informed him that Respondent did not own the parking lot. Shortly thereafter, Elizabeth told Newell that Santiago had pushed his packing horse at her. Memmott and Newell met with Manases and Elizabeth. Elizabeth was "teary-eyed," according to Memmott. She was not sure whether Santiago had pushed the cart or whether it had been an accident. Newell learned that although Elizabeth was able to avoid being hit, the horse did strike another employee, Blanca Torres, who had been working 6 feet from Santiago.

According to Respondent's usual procedure and at Memmott's suggestion, Newell suspended Santiago, Elizabeth, and Manases in order to keep witnesses untainted during further investigation. He suspended Elizabeth and Manases for one day, because he could talk to all the witnesses offered by Santiago that evening. He suspended Santiago for an additional day, because one of the witnesses offered by Elizabeth was on vacation. Newell told the employees that if they were found innocent of wrongdoing, they would receive pay for the suspensions.

Newell interviewed the witnesses named by Santiago and the Ramirezes as well as other employees. Blanca Torres, who worked behind Santiago, did not see Santiago push the packing horse, but confirmed that the cart that hit her belonged to Santiago. Maria Sanchez, who also worked behind Santiago, did not see anything happen between Santiago and Elizabeth. Neither did anyone else see Santiago push the cart. However, Newell talked with employees experienced in packing, who told him that a cart would need to be pushed in order to travel 6 feet. Sandra Barahona, a packer with 10 years of experience, told Newell that because the carts are counterbalanced, they would only move a distance of 6 feet if they were pushed. Three other employees, including one with over 10 years of experience, told Newell that they had never seen a cart move as far as 6 feet without being pushed. Newell testified that there are 5 ½ feet between the tubs and 3 feet between the tubs and the conveyor belt, that the floor is level, and that the carts each weigh about 80 pounds without fruit. From all this information, he deduced that Santiago deliberately pushed his cart toward Elizabeth.

Newell testified, "The conclusion I made was that Blanca felt the cart hit her and she was at a distance of 6 feet away and the only way to get the cart from the location that Asuncion was packing was either to ricochet the cart off the box conveyor, which would take an extreme amount of velocity, or turn the cart, aim it, and push it in the opposite direction toward Elizabeth." Based on this testimony, my review of the documentary evidence and my in court inspection of the cart, I find that the packing horse had to be intentionally pushed by Santiago in order to travel from Santiago's work station to Torres' work station.

Newell decided to terminate Santiago on the morning of October 19, 1999, before he could have known the results of the card-check that day at noon. He gave Santiago news of the decision that afternoon. Newell told Santiago he was discharged for "creating a violent act in the workplace and creating a lack of harmony." According to Respondent's employee discharge report, Santiago was discharged for "engaging in acts of violence toward anyone on company premises and engaging in behavior designed to create discord and lack of harmony." The report continues, "Asuncion turned his packing horse, aimed it at another employee, and pushed it with extreme thrust." Respondent's employee handbook provides for the immediate dismissal of employees who engage in "fighting, or horseplay or provoking a fight on company property, or negligent damage of property" and "behavior designed to create discord and lack of harmony." Memmott investigated and found that another employee had been discharged for pushing a cart at a coworker. He also found that several employees had been discharged for "fighting, or horseplay or provoking a fight on company property" or similar acts. Memmott reported this information to Newell. I credit the testimony of Newell and Memmott. I do not credit Santiago's testimony that he did not push the packing horse towards Elizabeth Ramirez. Elizabeth and Manases Ramirez did not testify in these proceedings.

C. Conclusions

In *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or (1) turning on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a motivating factor in the employer's decision. Upon such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The United States Supreme Court approved and adopted the Board's *Wright Line* test in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399–403 (1983). In *Manno Electric*, 321 NLRB 278, 280 at fn. 12 (1996), the Board restated the test as follows: the General Counsel has the burden to persuade that antiunion sentiment was a substantial or motivating factor in the challenged employer decision. The burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employees had not engaged in protected activity.

1. General Counsel's prima facie case

In order to make a prima facie case, General Counsel must show: (1) Santiago engaged in union or protected activity; (2) Respondent knew of that activity; (3) Respondent harbored animus against Santiago because of the activity; (4) Respondent discriminated in terms of employment; and (5) the discipline was temporarily connected to the protected activity. *Goodyear Tire & Rubber Co.*, 312 NLRB 674 (1993). General Counsel has shown that Santiago actively supported the Union and that Respondent knew of his support. However, General Counsel has not shown that Respondent harbored animus against Santiago because of his involvement with the Union. Contrary to the General Counsel, I can draw no inference of animus or discrimination from the prior settled cases. Further, the General Counsel argues that the Union was certified on October 19, 1999, at 12:40 p.m., only a few hours before Santiago was discharged. The General Counsel argues that this was not mere coincidence. Rather, he posits that Respondent was angered and bitterly disappointed by the result; that Respondent seized upon Elizabeth's complaint as an opportunity to punish a Union activist, deliver a coercive message to other employees, and sap the newly recognized union of support. However, the record clearly demonstrates that on October 15, Respondent learned that Santiago had pushed a packing horse at Elizabeth Ramirez. Respondent acted quickly to investigate that matter. The investigation took until October 18, because of an intervening weekend and the absence of an employee-witness. Once the investigation was over, Respondent took swift action pursuant to its policy against violence and harassment in the workplace. Thus, I find that the timing of the discharge does not support an inference of union animus or discrimination.

Blatant disparity between treatment of union employees and that of nonunion employees is sufficient to support a prima facie case of discrimination. *Fluor Daniel, Inc.*, 304 NLRB 970, 970–971 (1991). General Counsel argues that, due to Elizabeth's stance against unionization, she and Manases were suspended for 1 day less than Santiago. However, the disparity in the suspensions is legitimately explained by Respondent's attempt to keep the testimony of the witnesses untainted. Newell needed an extra day to interview a witness against Santiago. Santiago, Elizabeth, and Manases were all told that they would be paid for the suspensions, if they were found innocent of wrongdoing. Thus, I find a legitimate business reason for the extra day of suspension granted to Ramirez. Respondent's sequestration of witnesses was not perfect, but it was not motivated by union animus. It was simply motivated by a desire to keep an employee, under investigation, from influencing a witness who might be giving evidence against him.

General Counsel's argument ignores the fact that there was no allegation of misconduct against Elizabeth Ramirez. Santiago denied that he pushed his packing cart towards Elizabeth and apologized *if* he accidentally moved his cart towards Elizabeth. However, neither Santiago nor any other employee implied or asserted that Elizabeth had acted improperly towards Santiago. While Respondent had evidence that Manases Ramirez and Santiago had engaged in fighting and spitting, the matter had been dropped against both employees, prior to the sus-

pensions, because the incident took place off company property and after work hours.

General Counsel correctly argues that direct evidence of union animus is not necessary to support a finding of discrimination. The motive may be inferred from the totality of the circumstances. *Fluor Daniel, Inc.*, 311 NLRB 498 (1993); *Asociacion Hospital Del Maestro, Inc. v. NLRB*, 291 NLRB 198, 204 (1988). In the present case, the General Counsel presented a 1997 settlement agreement, reinstating Santiago with backpay, which resulted from a previous unfair labor practice complaint. The General Counsel also presented evidence of objections stemming from a representation election in January 1998, and settlement agreements from 1998 and 1999 disposing of those cases. Although motive may be inferred from the totality of the circumstances, past settlement agreements do not provide an adequate basis for a finding of union animus because they are simply a compromise of a disputed claim. Such evidence is not admissible to prove wrongdoing under Rule 408 of the Federal Rules of Evidence. It would be illogical to draw an inference, as argued by the General Counsel, of union animus from an employer's agreement to a card-check instead of a Board-conducted election.

2. Respondent's defense

Assuming *arguendo,* General Counsel has made her prima facie case, I find, for the reasons stated below, Respondent would have discharged Santiago because of the cart-pushing incident, absent any union activity.

An employer cannot carry its *Wright Line* burden simply by showing that it had a legitimate reason for the adverse employment action, but must prove by a preponderance of the evidence that it would have made the same decision absent the protected conduct. *Centre Property Management*, 277 NLRB 1376 (1985); *Roure Betrand Dupont, Inc.*, 271 NLRB 443 (1984). In other words, the mere presence of legitimate business reasons for disciplining or discharging an employee does not automatically preclude the finding of discrimination. *J.P. Stevens & Co. v. NLRB*, 638 F.2d 676, 681 (4th Cir. 1981). The evidence establishes that Respondent discharged Santiago for a single, violent incident pursuant to company policy. Respondent attests that incidents of this nature are grounds for immediate dismissal for anyone, regardless of union affiliation. Documentary evidence appears to support that argument. As stated above, I find that Newell's conclusion that Santiago deliberately pushed his cart so as to hit Elizabeth was reasonable. I find that this conclusion motivated the decision to terminate Santiago. Thus, I conclude that Respondent proved that it would have made the same decision absent Santiago's activities in support of the Union.

The General Counsel has not shown that Respondent discharged Santiago for any reason other than Respondent's reasonable belief that Santiago had engaged in a violent act on the company's premises. Respondent had discharged perpetrators of similar offenses, has a written policy on aggressive behavior, and has a legitimate business interest in maintaining harmony among its employees. Respondent discharged Santiago in accord with the disciplinary policy set forth in its employee handbook. I cannot find that Respondent discharged Santiago because of his Union activities. Therefore, I find Respondent did not violate Section 8(a)(3) and (1) of the Act as alleged in the complaint.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union, Teamsters Local No. 760, International Brotherhood of Teamsters, AFL–CIO, is a labor organization within the meaning of the Act.

3. It has not been established that Respondent has violated Section 8(a)(3) and (1) of the Act as alleged in the complaint.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended [2]

ORDER

The complaint is dismissed in its entirety.

Dated, San Francisco, California, June 20, 2001

[2] All motions inconsistent with this recommended Order are denied. 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