

Philo Lumber Company, Inc. and Local Union No. 3-469, International Woodworkers of America, AFL-CIO. Case 20-CA-12080

May 31, 1978

DECISION AND ORDER

BY MEMBERS PENELLO, MURPHY, AND TRUESDALE

On December 2, 1977, Administrative Law Judge Henry S. Sahn issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and General Counsel filed a brief in opposition to Respondent's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,¹ and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Re-

¹ Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

The Administrative Law Judge made the following inadvertent errors which are hereby corrected. The Administrative Law Judge referred to a conversation between Hencz and Respondent's president, Morgan, indicating it occurred in either late September or early October 1976. The record reveals that the conversation occurred in late September or early October 1975. The Administrative Law Judge also found that the testimonies of former employees Sutton and Hencz and former Supervisor Smith corroborated Underwood's testimony. The record, however, indicates that only Sutton's testimony is directly corroborative of Underwood on a particular point. The testimony of Hencz and Smith, in contrast, is relevant in establishing Respondent's general union animus rather than corroborating Underwood on a particular incident.

Respondent has excepted particularly to the Administrative Law Judge's crediting of, and reliance on, the testimony of former employee Sutton because his testimony on a collateral matter, regarding the circumstances of his separation from Respondent's employ, was allegedly contradicted by documentary evidence indicating that Sutton did not resign but was discharged. Although the Administrative Law Judge did not resolve the credibility conflict concerning the circumstances under which Sutton left Respondent's employ, we find that his failure to do so does not affect the result reached. No unfair labor practice finding is predicated on Sutton's contradicted testimony. Therefore, even assuming, *arguendo*, that Sutton lied about the circumstances under which he left Respondent's employ, a matter not in issue herein, the Administrative Law Judge was not in error in crediting Sutton's testimony on matters related to this proceeding. See, e.g., *Big "G" Corporation*, 223 NLRB 1349, fn. 1 (1976); *Broadway Lumber Company*, 227 NLRB 1123, 1130 (1977) (testimony of Mangion).

lations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Philo Lumber Company, Inc., Laytonville, California, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

DECISION

STATEMENT OF THE CASE

HENRY S. SAHM, Administrative Law Judge: This proceeding was heard on May 11, 12, and 13, 1977, at Ukiah, California. The complaint which issued on December 6, 1976,¹ based on a charge dated October 28, alleges that Respondent engaged in unfair labor practices proscribed by Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, by refusing to "reemploy" James Underwood on September 23 because he engaged in protected concerted activities. Briefs were filed by the parties on July 1, 1977.

Upon the entire record and my observation of the testimonial demeanor of the witnesses, I make the following:

FINDINGS OF FACT

I. JURISDICTION; THE BUSINESS OF THE EMPLOYER AND THE LABOR ORGANIZATION INVOLVED

Respondent, a California corporation, owns three lumber mills in northern California which are engaged in processing lumber. Its main office is in Ukiah, California. The Philo lumber mill, where the incidents occurred which gave rise to this proceeding, annually sells goods valued in excess of \$50,000 directly to customers located outside of California and has annual gross sales in excess of \$500,000. It is found to be an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

The Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE UNFAIR LABOR PRACTICES

A. The Testimony

James Underwood, the alleged discriminatee, was first employed by Respondent in August 1973 at its Laytonville lumber mill plant as a debarker. In the latter part of 1974, this sawmill ceased operations because of economic reasons. Underwood then obtained another job at the Harwood Products Company lumber mill where he incurred a shoulder injury. In April 1975 Respondent Philo Lumber Company resumed operations whereupon Underwood returned to their employ on April 1, 1975, working principally as a debarker and occasionally as a bucksaw operator, log loader, cleanup man, green chain operator, gangsaw man, and off-bearman. At other lumber mills where he

¹ All dates refer to 1976 unless otherwise specified.

had worked in the past, he was a trim saw spotter and resaw man, chipper operator, hula trim saw man, tallyman, and carrier.

After he had signed a union authorization card in September 1975, he had a conversation at the mill the following month with Landis Morgan, owner of Respondent. Underwood's account of what happened is as follows:

... [Morgan] came up to the barking shack where I was working and he was kind of upset because I wasn't keeping logs peeled and stacked back in the yard. So, I told him, "Well, when you are trying to break in a new debarker and you have got only small redwood to start with, it's hard to keep up with the work in the mill in the first place."

Then I told him, "The only reason that I feel that you are picking on me is because I organized the plant here."

Underwood concluded this phase of his testimony by stating that Morgan had never heretofore criticized the quality of his work.

During the autumn of 1975, union organizational meetings were frequently held at the home of Underwood who was the most active employee-proponent of the Union. Notices that these meetings were to be held at Underwood's home were posted on the plant's bulletin board. In addition, testified Underwood, the approximately 35 employees in Respondent's plant were also notified orally of these union meetings at Underwood's home.

Beginning in September 1975, when the union campaign commenced, and during the entire campaign up until the Board election, the following December, Underwood wore to work a union button on his hat every day which read: "International Woodworkers of America, AFL-CIO & CLC."

In December 1975, the Board held an election at Respondent's plant to determine whether the employees desired the Union herein to represent them. Underwood was the Union's observer and also present at the polls on the day of the election was Morgan, owner of Respondent.

On April 1, Underwood testified on behalf of the Charging Party Union at a Board representation hearing. Also present during the time that Underwood was on the witness stand, testifying on behalf of the Union, was Landis Morgan, owner of Respondent. After the Board's representation hearing the Hearing Officer issued his report on June 16.²

At approximately the same time as the Board election was held, Underwood had a recurrence of his shoulder pain incurred while working at Harwood Products Company, another lumber mill. See above. He was under the care of a physician for some months which eventuated in his being hospitalized for tests, and he finally underwent surgery. Darrell Buzzard, the plant superintendent, who is a supervisor within the meaning of Section 2(11) of the Act, was kept informed of all these medical matters by Underwood.

² G.C. Exhs. 3 and 4 are the Hearing Officer's report dated June 16 with respect to Respondent's objections filed to the election, including Underwood's testimony which is incorporated by reference and made a part of the record in this proceeding.

On February 26, the last day that Underwood worked for Respondent, as his pain was such that he had to enter the hospital, he told Buzzard during working hours that:

... [I] had to take off to go have my surgery done and I asked him if I would have a job when I came back [from undergoing surgery] and he said I would.

After Underwood underwent surgery on May 3 and was discharged from the hospital 3 or 4 days later, he was unable to work. At the time he left the hospital, he was unable to move his right shoulder and arm which were swathed in bandages, a cast, and splints which rendered those parts of his body incapable of movement or use.

He spoke to Buzzard at the plant during the lunch hour in the presence of Jimmie Sutton, an employee, 3 weeks after he was discharged from the hospital. Underwood's testimony is as follows:

[Buzzard] asked me how I was doing and when I expected to be back at work. I told him I was doing pretty good and as soon as I got my arm out of the strap they had it in ... I was feeling a little better and just wishing they would hurry up and get it over with.

About 5 weeks later in the early part of July, Underwood again went to the plant and spoke to Buzzard. Underwood testified that he "told him [Buzzard] that I was still under a doctor's care and waiting for him to evaluate my situation." The doctor had informed him, Underwood told Buzzard, that his shoulder was improving.

Underwood visited the plant for a second time on August 17, at which time he informed three of the employees that the NLRB had certified the Union as the production employees' bargaining agent. On the same day and while he was in the plant, Underwood spoke to Buzzard who inquired as to the state of his health to which Underwood responded that he "was doing pretty good and I was supposed to get released to come back to work in about three weeks ... [Buzzard] said, 'That's good.'"

The following day, August 18, about noon, Morgan came to Underwood's home unannounced. According to Underwood, Morgan said:

"Jim, I understand you was out at the mill yesterday," and I said, "Yes, I was," and he said, "Well, I don't want you back out there anymore. As a matter of fact, I don't want you back at my property anymore." Then I said, "Okay." He got into his pickup and left and I went back in the house.

Underwood denied both on his direct and cross-examination that he had ever told Morgan or Buzzard that he had "quit" his job.

On September 23, Underwood telephoned Buzzard at the plant and informed him that his "doctor planned on releasing me on September 27 and I said I called to find out if I still had a job and Mr. Buzzard told me, 'No, I had to replace you.'"

On or about September 27, testified Underwood, his physician informed him that he "could go back to work ... He didn't limit me to any work or anything." Con-

temporarily with this release by the doctor, the disability payments for the injury incurred while he was employed by the Harwood Products Company lumber mill were discontinued by Harwood Products' insurance company. At or about the same time that Buzzard notified Underwood he had been "replaced," Underwood applied for jobs with other employers but was unable to obtain any work.

While chopping firewood at home for his stove on November 14, Underwood reinjured his same shoulder whereupon his doctor wrote a medical report which reads as follows:

9 May 1977

RE: James Underwood

To Whom It May Concern:

This is to certify that the above named patient was released to return to work on September 27, 1976. Due to the severity of his headaches and tenderness and pain in his right shoulder, disability was reinstated on November 15, 1976.

Thank you.

/s/ Robert A. Kraft
Robert A. Kraft, M.D.

Underwood then delivered the doctor's letter to Harwood Products, his former employer when he had injured his shoulder, whose insurance company reinstated Underwood's disability payments.

It was elicited on Underwood's cross-examination that, when he learned that these medical tests revealed he would have to undergo surgery, he so notified Buzzard shortly thereafter and requested "time off." See above. In response to questions by Buzzard in June and July, according to Underwood, he advised him that he had not been informed by his doctor how long it would be before he would be able to return to work. Also, in response to a question by Respondent's counsel, he testified that when he spoke to Buzzard on August 17, at the plant, he told him his doctor estimated that he should be physically able to return to work in about 3 weeks. Under further cross-examination, it was educed that Underwood telephoned Buzzard and informed him that the doctor was planning on releasing him on September 27 "and I wanted to know if I had my job . . . running the barker . . . [Buzzard] said, 'No, I had to replace you.'"

On cross-examination he testified that on September 27 he had an appointment with his doctor who told him "that I could go back to work." Upon learning this he did not convey this information to any of Respondent's plant officials "to request work" because, testified Underwood, Morgan had forbidden him on August 18, when he came to his home, not to ever "come back" to the plant. Underwood also testified that, when Morgan told him on August 18 that he was fired, he so informed Donald Nelson, business representative of the Charging Party Union. Underwood continued, in answer to a question by Respondent's attorney, that he telephoned Buzzard on September 23 and "asked for work" but was informed that he had been terminated.

Jimmie Sutton, an employee from 1975 to November 19

when he voluntarily left the employ of Respondent, testified that, shortly after Underwood entered the hospital on February 26, he was told by Buzzard that "[Underwood] always had his job there as soon as he got out of the hospital." On August 18, testified Sutton, he told Morgan at the mill entrance that he was interested in buying his pickup truck, and during this conversation he informed Morgan that the day before "Underwood had come out to the mill and told us we were certified union and that there was going to be a union meeting at his house on Thursday [August 19] . . . 'You mean [Morgan questioned Sutton] he came out here [to the plant] and said that' and I said, 'Yes,' and he said, 'Well, we'll just see about that,' and he left and started walking toward the mill real mad."

Steve Hencz, an employee, testified that he had a conversation with Morgan in late September or early October at the plant. According to Hencz, Morgan approached him and "asked me who were the union pushers. He mentioned a couple of names and said, 'If the union gets in, I'm going to shut that son of a bitch down and I'm going to get a new crew.'"

Garland Smith was formerly employed by Respondent for 4-1 2 years, 6 months of which he was plant superintendent. He testified that, during the Union's organizational campaign at the plant, Morgan told him in August 1975 "that he would shut the damn mill down for three years if the Union got in."

B. Respondent's Case

Darrell Buzzard, who is superintendent of Respondent's Philo lumber mill, testified that Underwood never requested a leave of absence to undergo tests at a hospital for his injured shoulder which had been injured when he was employed by Harwood Products Company. Nor could Underwood estimate, according to Buzzard, when he might return to work. Therefore, continued Buzzard, it was impossible for him to assure Underwood that his job would be available when his doctor certified him as being able to work inasmuch as "I had no assurance of when he would ever be able to come back to work." When questioned again whether he had assured Underwood that when he recovered from surgery he could return to his job, Buzzard testified:

Your Honor, to set the record straight here, when Mr. Underwood came to me at the mill and told me that he guessed that he was going to have to quit because he had to go into the hospital for an operation from this old injury, I told him at that time to hold on and see how it turns out, because he was a good barker operator and for a period of time up until I got my barker operator and trained him, if Mr. Underwood had come back with a slip from a doctor showing me that he was physically able to go back to work, I would have hired him, up to the date that I promoted this barker trainee to barker operator.

Morgan, the owner of Respondent, testified on direct examination that he first learned Underwood would be entering the hospital on February 26, which was a "few days before his last day of work." He continued that he spoke to

Underwood upon learning this and that Underwood told him "he was quitting and I said, 'well, that's awful short notice.' And I said that was kind of putting us on the spot. And he said that he had to go and have an operation on his shoulder." Morgan added that he neither recalls Underwood's notifying him he was entering the hospital nor does he remember Underwood ever requesting a leave of absence. Morgan explained that Underwood "was putting him on the spot" in that he gave Morgan "only three or four days [notice] before he was going to leave." Thus, added Morgan, he was put in a seriously precarious position inasmuch as Underwood was the only employee in the Philo plant at that time who was able to operate the debarking machine. Morgan concluded this phase of his testimony by describing Underwood as "a good debarker operator." However, it appears that Morgan resented Underwood's refusing Morgan's request that he postpone his surgery and "give us a little more time," to which Underwood responded, according to Morgan, "that he had made arrangements."

On cross-examination, Morgan phrased his version of the issue in this proceeding as follows:

[Underwood] mentioned to me that he was going to quit and that he had to have an operation on his shoulder I told him that was kind of putting us on the spot He said he was quitting because he had made arrangements to have an operation on his shoulder And I said that we should have a little more time.

On rebuttal, Underwood testified that he gave ample notice to Respondent through Buzzard that he was entering the hospital to take various tests which would last 2 weeks and that he kept Buzzard informed of his tests, surgery, and progress thereafter and told Buzzard, as soon as he learned of it, his doctor's estimate of when he would be able to return to work. He also testified that in the entire time he was employed by Respondent he was absent from work "maybe two or three days. And as far as being off sick, maybe I missed one day or two, but not many." He denied that he ever told either Morgan or Buzzard that due to this shoulder injury he was "quitting his job."

C. Analysis of the Testimony; Credibility and Conclusions

The testimony of the General Counsel's witnesses is credited based upon their testimony and demeanor while on the witness stand which was both consonant with the facts and delivered in a sincere, straightforward manner. This is in contrast with Morgan's and Buzzard's incredible testimony which is neither believable nor in accord with the findings of fact.³ The version of Underwood is accepted as the more accurate account of the various conversations he had with both Buzzard and Morgan when he spoke to them regarding entering the hospital and thereafter when he underwent tests and surgery and the progress of his state of health up until the time his physician discharged him as physically able to resume his duties as a debarker operator. Underwood's testimony, in conjunction

³ See Buzzard's self-contradictory testimony, *supra*.

with the entire background of evidence adduced in this case, merits belief. This conclusion is supported and strengthened when it is considered that there is other testimony corroborating Underwood's testimony; namely, the testimony of Sutton, Hencz, and Smith. This impression that Underwood and his corroborating witnesses were testifying truthfully is based on two cogent considerations: They were not intelligently capable of successfully practicing guile or deceit, and their testimony was not substantially shaken by able counsel for Respondent who vigorously and thoroughly cross-examined them.

Moreover, the reasons advanced by Morgan and Buzzard for their refusal to rehire Underwood are unconvincing as their testimony did not tend to establish the factual validity of the reasons assigned for Underwood's termination. Furthermore, for Underwood to quit his job immediately prior to entering a hospital knowing he would be incurring medical and surgical expenses, some of which undoubtedly were not reimbursable, strains, if not shatters, one's credulity. It is incredible that the reasons assigned therefor were the ones in fact that were alleged by Respondent to have been the reasons for Underwood's termination. On the contrary, it is believed that the reasons alleged were deliberately spurious and a pretext to screen Respondent's discriminatory motive; namely, retaliation for Underwood's union activities in refusing to rehire him after he recovered from his disability. It is concluded that the discredited defense that Underwood quit was manufactured and "furnished the excuse rather than the reason for [Respondent's] retaliatory action." *N.L.R.B. v. Thor Power Tool Company*, 351 F.2d 584, 587 (C.A. 7, 1965).

Under these circumstances and the record as a whole and the inferences to be drawn therefrom, including the testimony detailed above, as well as the corroborating testimony of Underwood's three fellow employees, including the background of Respondent's knowledge of Underwood's intensive union activities, it is concluded that this conflict in testimony is resolved in favor of the versions told by the General Counsel's witnesses. Accordingly, it is found that Respondent, when it seized upon the absurd story that he quit his job as a pretext to rid itself of Underwood, an active union adherent, was discriminatorily motivated and therefore such action was violative of Section 8(a)(3) of the Act.⁴

III. THE REMEDY

Having found that Respondent engaged in unfair labor practices proscribed by Section 8(a)(3) and (1) of the Act, it shall be recommended that it be required to cease and desist therefrom and that it take certain affirmative action designed to eradicate the effect thereof and to effectuate the policies of the Act.

Having found that Respondent discriminatorily terminated James Underwood by refusing to rehire him because of his union activities, it shall be recommended that Respondent offer him reinstatement to his former or substantially equivalent job, and make him whole for any loss of pay he may have suffered by reason of the discrimination

⁴ *N.L.R.B. v. Schill Steel Products, Inc.*, 480 F.2d 586, 593 (C.A. 5, 1973).

against him, with all his seniority and other rights and privileges, by paying to him a sum of money equal to the wages he would have earned from the date of Respondent's refusal to rehire and return him to his former debarker job until his reinstatement, less his net earnings during said period, with interest thereon to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).⁵

Upon the foregoing findings of fact, conclusions of law, and the entire record in the case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, I hereby issue the following recommended:

ORDER ⁶

The Respondent, Philo Lumber Company, Inc., Laytonville, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from: ⁷

(a) Discouraging its employees' membership in the above-captioned Union or any other labor organization or their concerted union activities by discharging them and/or refusing to rehire them or by otherwise discriminating in regard to their hire or tenure of employment or any term or condition of their employment because of their concerted activities.

(b) In any other manner interfering with, restraining, or coercing employees in the exercise of their right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act, or to refrain from any or all such activities, except to the extent permitted by Section 8(a)(3) of the National Labor Relations Act, as amended.⁷

2. Take the following affirmative action designed and found necessary to effectuate the policies of the Act:

(a) Offer to James Underwood immediate, full, and unconditional reinstatement to his former job or a substantially equivalent one, if such job no longer exists, without prejudice to his seniority or other rights, privileges, or working conditions, and make Underwood whole for any loss of earnings he may have suffered by reason of the discrimination against him in the manner prescribed in the section hereof entitled "The Remedy."

(b) Preserve and, upon request, make available to the National Labor Relations Board, or its agents, for inspection, examination, and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary or useful in determining compliance with this Order or in computing the amount of backpay due as herein provided.

(c) Post at its Philo Lumber mill at Laytonville, California, copies of the attached notice marked "Appendix."⁸ Copies of said notice, on forms provided by the Regional Director for Region 20, shall, after being signed by Re-

spondent's authorized representative, be posted by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 20, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

⁵ See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

⁶ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

See *Philo Lumber Company*, 229 NLRB 210 (1977).

⁷ In the event that this Order is enforced by a Judgment of a 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."

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

Following a hearing in which all parties participated and offered their evidence, it has been found that we violated the National Labor Relations Act, as amended. We have been ordered to post this notice and to do what we say in this notice.

WE WILL NOT discourage our employees from engaging in concerted activity on behalf of Local Union No. 3-469, International Woodworkers of America, AFL-CIO, or any other labor organization, by discharging or refusing to hire or rehire them or by discriminating in regard to their hire or tenure of employment or any terms or conditions of employment.

WE WILL NOT in any other manner interfere with, restrain, or coerce any of our employees in the exercise of the rights guaranteed in Section 7 of the National Labor Relations Act, as amended, to self-organization and to bargain through a union of their own choosing, except to the extent set out by Section 8(a)(3) of the Act, which gives you the right to decide not to become involved in any or all of the above activities.

WE WILL offer James Underwood immediate, full, and unconditional reinstatement to his former debarking job or a substantially equivalent position, and pay him, with interest, for the wages and/or earnings he may have lost because we refused to rehire him when he recovered from his disability.

PHILO LUMBER COMPANY, INC.