JD(NY)–01–10
Brooklyn, NY

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

ALLSTATE POWER VAC, INC.

and **Case Nos.** **29-CA-28264**
29-CA-28351
LABORERS INTERNATIONAL UNION OF **29-CA-28394**
NORTH AMERICA, LOCAL 78 **29-CA-28556**
29-CA-28594
29-CA-28637
29-CA-28683

ALLSTATE POWER VAC, INC.
Employer

and **29-RC-11505**

LABORERS INTERNATIONAL UNION OF
NORTH AMERICA, LOCAL 78
Petitioner

Brent E. Childerhose, Esq. and
Linda Crovella, Esq., Counsel
for the General Counsel
Robert Ziskin, Esq. and Richard
Ziskin, Esq., Counsel for the
Respondent

SUPPLEMENTAL DECISION

Raymond P. Green, Administrative Law Judge. On November 30, 2009, the Board issued its Decision in these cases at 354 NLRB No. 111. In pertinent part, the Board remanded certain allegations for further consideration. The allegations involved were:

1. That the Respondent subjected Angel Rivera to more onerous working conditions because of his union membership or activities.

2. That the Respondent discharged Jose Adames because of his union membership or activities.

3. That the Respondent discharged Rafael Bisono and suspended William Dominich and Hector Soler for their union membership or activities.

4. That the Respondent discharged Miguel Bisono for his union membership and activities.

In my previous decision, I concluded and the Board affirmed, that the Respondent violated Sections 8(a)(1) and (3) of the Act by **(a)** discharging or laying off certain employees because of their membership in or support for the Laborers International Union of North

America, Local 78 and **(b)** by prohibiting employees from using or wearing union decals on their hardhats or wearing union T-shirts, hats or jackets.

Given those findings, which evidence animus toward the Union and a demonstrated willingness to take adverse actions against employees who join or support the Union, I would conclude that the General Counsel has made out a prima facie case relating to all of the remanded allegations.

The legal question as defined by the doctrine set out in *Wright Line*, 251 NLRB 1083, (1980) enfd. 662 F.2d 889 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), is whether the Respondent has satisfied its burden of showing that "it would have taken the same adverse action even in the absence of union activity."

I. Imposition of more onerous working conditions on Angel Rivera

Angel Rivera, along with Jose Castillo, started working at the Company on April 16, 2007. They were, unbeknownst to the Respondent, covert salts and did not engage in any organizing activity until May 30, 2007 when they commenced handing out union literature. Both were laid off on June 4, 2007. I have already concluded that their layoffs were unlawful because they were motivated by their union activities. [1]

Between May 30, 2007 and June 4, 2007, Rivera was assigned to do a number of essentially useless tasks. These included loading and then unloading a truck on two or three occasions. It also involved digging, refilling and then re-digging two holes in the yard. Given the timing of these assignments, the nature of the assignments, and the lame reasons given by the Respondent for these assignments, I conclude that the General Counsel has established a prima facie case of discrimination and that the Respondent has not met its burden of showing that these assignments would have been made but for Rivera's coming out as a union supporter. I therefore conclude that in this respect, the Respondent has violated the Act and I would amend my recommended Order to reflect this finding.

II. The October 1, 2007 discharge of Jose Adames

I previously concluded that by laying off Adames on June 4, 2007, the Respondent had violated Section 8(a)(1) and (3) of the Act. He was recalled to work on July 24, 2007.

Having already determined that the layoff on June 4, 2007 violated the Act, it is obvious that the General Counsel has made out a prima facie case that Adames' later discharge on October 1, 2007 was also a violation of the Act. The question then is did the Respondent meet its burden of showing that it would have taken the same action notwithstanding Mr. Adames' union activities? I conclude that it did.

The facts are not in dispute and there are no material credibility issues.

The evidence shows that the Company had given Adames permission to take time off and expected him to return to work on September 24, 2007. Nevertheless, Adames remained in

[1] I also concluded that the June 4, 2007 layoffs of Miguel bison, Victor Vasquez and Jose Adames were violative of the Act.

the Dominican Republic until September 30, 2007 and did so without notifying the Company where he was or when he intended to return to work. According to the credited testimony of Burke, he called Adames' home, spoke to his wife, and she stated that she did not know where he was or when he was returning to the United States.[2]

By letter dated September 25, 2007, the Respondent advised Adames that if he did not report to work by September 27, his employment would be terminated.

Adames finally showed up for work on October 1, 2007 and was told that there was no work for him.

One might argue that the Company's action of discharging Adames was too harsh given his relatively long tenure as an employee. But this is not an arbitration case. The evidence shows that the discharge was consistent with past practice and the Company demonstrated that in 2005 another employee, Michael Young, was terminated for identical reasons. As such, I reiterate my previous findings as I conclude that the Respondent has met its burden of showing that it would have discharged Adames notwithstanding his union activities.

III. The incident involving Rafael Bisono, William Dominich and Hector Soler

There is no dispute that on October 4, 2007, the day before the election, these three employees were discovered together, violating safety procedures by standing around an open Con Ed transformer vault without wearing proper safety clothing. There is no real dispute that the failure to wear safety equipment when standing at or near an open vault can pose a remote but real risk of serious injury resulting from an electric spark.

In my opinion, the Respondent has met its burden of showing that it would have taken the actions against these employees notwithstanding their union membership or activities. I note, however, that it is also my opinion that this conclusion is a close one and that reasonable people might reach a contrary result.

As indicated in my previous decision, the Company's records show that in the past and before any union activity, at least five other employees had received disciplinary actions for their failure to wear protective gear; one of which was a short suspension. While the instant case does not present precisely the same set of facts as past situations, the evidence leads me to conclude that the Company's decision to suspend Dominich and Soler was not substantially inconsistent with its past practice.[3] Therefore, I would conclude that the Respondent has met its

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[2] Although the General Counsel asserts that Adames' wife told Burke that Adames could not return by the September 27 deadline, there is no competent evidence to support this contention. I note that she was not called to testify in this case.

[3] I do not think it is reasonable to expect different managers, over time, to impose discipline in accordance with a precise mathematical formula. No two situations are ever identical and no sets of employees or managers are quite the same. The question is whether the present disciplines are within the range of past practice. In this case, the incident involved three employees, all of whom ignored safety procedures at the same time. As such, it is reasonable to me that the Company would have viewed this collective infraction as being more serious and therefore warranting more serious discipline. Had all three employees been discharged, I would have reached the opposite conclusion.

burden of demonstrating that it would have taken this action notwithstanding the employees' union activities. [4]

With respect to Rafael Bisono, while the company's records do not show that any employee had ever been discharged for failing to wear protective clothing, it is my opinion that in this instance, the Respondent has shown that it would have discharged Bisono notwithstanding his union activities, because of his attitude during the disciplinary interview. From all the evidence presented in this case, I conclude that Bisono essentially said that he could do as he wished and did not need to be told how to do his job.

IV. Miguel Bisono

Again, there is no material dispute regarding the facts. In this case, the Company was angrily advised by another employee, that an employee had urinated in his not empty juice bottle. Upon investigation, it was discovered that the culprit was Miguel Bisono and he was discharged.

It is of no consequence as to whether Bisono thought the bottle was empty. It wasn't. And this resulted in a serious complaint by a fellow employee regarding what can only be described as disgusting conduct. It is true that the Company cannot point to any prior case where it discharged an employee for this kind of conduct. But neither can the General Counsel point to any prior case where similar conduct engaged in by a known or knowable culprit, was condoned. [5] In my opinion, this clearly is beyond the pale. I simply cannot imagine any employer that would be willing to tolerate such behavior. Therefore, although the General Counsel has made out a prima facie case regarding the discharge of all of these employees, including Miguel Bisono, I conclude that the Respondent has met its burden of showing that it would have discharged Bisono notwithstanding his union activities.

Amended Conclusions

By imposing more onerous working conditions on Angel Rivera, because of his union membership or activities, the Respondent has violated Section 8(a)(1) and (3) of the Act.

As to the other remanded allegations, the Respondent has not violated the Act.

Dated: January 22, 2010

Raymond P. Green
Administrative Law Judge

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[4] The General Counsel relates certain conversations that Bisono and Dominich had with Guerrero. Guerrero was, at the time, the safety manager for the Company and may have been an agent for certain purposes. There is no evidence that Guerrera had anything to say about the decision to either suspend or discharge these three employees. I therefore do not rely on any statements that he allegedly made that the disciplines were unfair, or that "pro-company" employees were treated differently. Rather than constituting "admissions," I would view these statements as his personal opinions.

[5] There was an incident involving Jose Mota. But in that case, Mota could not say, and no one else could prove, who the alleged culprit was.