C & S Distributors, Inc. *and* Stanley T. Flasinski Jr. Case 34–CA–6956

May 31, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

The issue presented for Board review is whether Administrative Law Judge Wallace H. Nations correctly found that the Respondent did not violate Section 8(a)(3) and (1) of the Act by discharging employee Stanley T. Flasinski Jr.[1] The 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,[2] and conclusions and to adopt the recommended Order.

ORDER

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

[1] On February 20, 1996, the judge issued the attached decision. The General Counsel filed exceptions and a supporting brief. The Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[2] 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. In affirming the judge's findings, however, we do not rely on the adverse inference drawn by him from the General Counsel's failure to call employee Richard Neal as a neutral witness to corroborate the testimony of alleged discriminatee Stanley Flasinski. However, as recently stated in *Queen of the Valley Hospital*, 316 NLRB 721 fn. 1 (1995), a judge may properly consider the failure to call an identified, potentially corroborating witness, such as Neal, as a factor in determining whether the General Counsel has established by a preponderance of the evidence that a violation has occurred. It is on this basis alone that we consider Neal's failure to testify in affirming the judge's credibility findings.

Thomas E. Quiqley, Esq., for the General Counsel.
Thomas M. Cloherty, Esq. and *Jeffrey S. Brody, Esq.*, of Hartford, Connecticut, for the Respondent Employer.

DECISION

STATEMENT OF THE CASE

WALLACE H. NATIONS, Administrative Law Judge. This case was tried in Hartford, Connecticut, on December 6, 1995. The charge was filed March 6, 1995,[1] and the complaint was issued May 31, 1995. The complaint alleges that C & S Distributors, Inc. (C & S or Respondent) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) by discharging its employee Stanley T. Flasinski Jr. on November 9. Briefs were received from the parties on January 26, 1996. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, engages in the nonretail manufacture, sale, and distribution of home remodeling materials at its facility in South Windsor, Connecticut. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that Local 671, International Brotherhood of Teamsters, AFL–CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Issue for Determination and Relevant Facts*

C & S Distributors, Inc. operates as a manufacturer and wholesale distributor of building materials, both its own and those of other manufacturers. It conducts business from a large warehouse facility in South Windsor, Connecticut. Insofar as is relevant to this proceeding, its management is composed of CEO Samuel Cohen, Vice President Mark Cohen, Warehouse Manager Ray McCarthy, and Foreman Craig Bloking. Its pertinent employee complement consists of six or seven nonunion warehouse workers who perform normal warehousing functions including pulling loads for delivery and assisting truckdrivers in loading and unloading trucks. It also employs about nine truckdrivers in a bargaining unit represented by the Union.

The alleged discriminatee in this proceeding is Stanley Flasinski Jr., who began his employment with C & S in July 1991 and was discharged, allegedly in retaliation for engaging in union or other protected concerted activities on November 9, 1994. Respondent asserts that Flasinski was discharged by McCarthy on the spot for twice refusing to obey a direct order to pull an order for delivery. Flasinski was employed as a bargaining unit truckdriver stationed at Respondent's South Windsor, Connecticut warehouse.

The Union has represented this unit for over 15 years and until about May, the relationship between it and Respondent had by all accounts been a good one. At all relevant times, the Union's then business agent, David Lucas, was responsible for representing the unit. The last contract between Respondent and the Union expired in the spring of 1994. The parties entered into negotiations for a new contract, but were unsuccessful in reaching agreement. As of the date of this hearing, there is still no agreement. In late May, the Union took the Company's two final offers to its membership and they rejected the offers. The differences between the unit employees and Respondent centered on the costs of insurance. To further its position the Union called an economic strike at the end of May which lasted about 10 days. This period is during Respondent's busiest sales season and apparently seriously upset Respondent.[2] During the strike, on June 1,

[1] All dates are 1994 unless otherwise indicated.

[2] One of the striking employees was Ronald Baker, a driver and employee union steward. At the conclusion of the strike, he was re-

Mark Cohen hit the Union's business agent, David Lucas, with a truck at the picket line. Flasinski observed the incident and gave a statement to the police who investigated it. Other people at the site also gave statements to the police. Flasinski never thereafter spoke to Cohen or any other member of management about the incident. He did speak with Cohen's attorney who called him in August about the matter, telling the attorney what he had seen and reported to the police. Cohen received a form of probation for this incident.[3]

During the strike, Respondent filled a number of driver's positions with permanent replacements. When the Union offered to return to work, Respondent recalled five drivers by seniority. Flasinski was recalled to his position in the third week of August when an opening came up. Flasinski was next to last on the seniority list. On the day of his return to work, he spoke in private with Supervisor McCarthy before beginning work. According to Flasinski, McCarthy told him that he did not want to hear anyone being called a ''scab,'' did not want any union rabble-rousing, did not want Flasinski causing trouble and to ''Just keep your mouth shut and do your job.'' Flasinski said, ''Okay'' and the conversation ended. Flasinski's affidavit to the Board describes this conversation thusly, ''He said the strike is over, we want to put that behind us. He said I don't want any name calling, I don't want any arguments. He said just keep your mouth shut and do your job.'' Flasinski admitted that at this point, he and McCarthy shook hands and McCarthy said ''go to work.''

According to McCarthy, he was instrumental in getting Flasinski back to work after the strike. Flasinski had been replaced by another driver, and McCarthy did not consider him competent. He on several occasions asked the Cohens to fire the replacement and return Flasinski. The Cohens at first refused saying they had to give the replacement a chance. They eventually complied with McCarthy's request, fired the replacement, and recalled Flasinski. McCarthy considered Flasinski the best driver he had. On the other hand, he considered Flasinski moody and not friendly. In this regard, he testified that in the meeting with Flasinski when he returned to work poststrike, he told Flasinski he had an attitude problem and a chip on his shoulder and that he hoped that would change. Flasinski admitted that it was common knowledge that he and McCarthy did not get along, and that this had been the case before he was recalled from the strike.[4]

Flasinski described the working conditions on the dock after he returned from the strike as very tense, as opposed to conditions existing prestrike. He also testified that employees joke around at work to relieve the tensions. He added that he joked around with Dock Foremen Craig Bloking and Bill Dyer and tried to joke with McCarthy. A little later in his testimony, Flasinski testified that about 2 weeks prior to his discharge, he had joked around with McCarthy, stating that McCarthy ''Probably asked me to pull something. The way they ask you to pull an order, they say, 'Do you want to get this order,' and being a jokester, I said, 'No, I don't WANT to get that order' and then they say, 'Well, do it anyway.''' On this occasion, according to Flasinski, he pulled the order and nothing came of the incident.[5]

Flasinski wore his union hat to work every day after the strike, as did a number of other union member employees of Respondent. No one from management commented on this practice. He testified that he had heard McCarthy speak about unions on occasion, stating that McCarthy did not like unions, saying they just take your money and do not do anything for you. According to Flasinski, these comments were made well before the strike. McCarthy, on the other hand, stated that he had no animus toward the Union and was a former member of the Teamsters and a union steward before becoming a supervisor.

Flasinski's normal workday began about 5 a.m., and he would pull orders until 7 to 9 a.m., and then make deliveries and pickups until 2:30 to 7 p.m. With respect to the events of November 9, Flasinski testified that he worked on that day with a nonunion dockworker named Richard Neal, who was helping him load his truck in the morning for deliveries. He testified that he and Neal were in the back of the truck loading it and talking. According to Flasinski, Neal was complaining that he did drivers' work, but was being paid the lesser dockworkers hourly wage.[6] Flasinski responded by saying, ''Well, join the Union. Stand up and have somebody fight for you.'' Neal did not comment on this statement as they then saw McCarthy standing at the end of the truck some 10 feet away. They had not seen McCarthy when the conversation started. Flasinski contended that it was quiet in the truck at the time of this conversation and that McCarthy could have overheard them. McCarthy did not comment to the men and walked away.

This alleged conversation is crucial to the General Counsel's case as it is the protected activity that the General Counsel contends triggered Flasinski's discharge. McCarthy denied ever seeing or hearing Neal and Flasinski having a conversation that morning and I credit his denial for the reasons that follow. First, Neal, though still employed by Respondent, was not called to testify. The General Counsel has the initial burden of proof in this proceeding and not calling the only neutral witness to this alleged conversation must be considered in an adverse manner. Perhaps more important, however, is the fact that this alleged conversation is first

called to work and attended a meeting with four or five other returning strikers called by Samuel Cohen. According to the undisputed testimony of Baker, Cohen told the men that ''The Union didn't own the company, that he owns the Company, and when the Union went on strike, it was just like when the Japs raided Pearl Harbor.'' He added that he did not expect the strike and thought everything was all right. Cohen told the returning strikers not to bother workers hired to replace them and that if they did bother them, they would be in trouble.

[3] McCarthy denied any knowledge of Flasinski's role in this incident, I credit the denial as there was no showing that he had such knowledge, and it is unlikely it would come to him in the regular course of business.

[4] Union Steward Ron Baker recounted an incident involving Flasinski and Mark Cohen that took place in the spring of 1994 on the dock. Cohen said, ''good morning'' to Flasinski, who did not answer him. Cohen followed him to the warehouse and told him if he did not like working there, why didn't he leave. Flasinski did not respond.

[5] This testimony was not specifically denied though McCarthy categorically testified that employees did not joke with him in this fashion.

[6] Neal drove a truck for Respondent on occasion though he was not in the bargaining unit. He was paid as a warehouse worker at an hourly wage considerably below that of the drivers. Baker testified that he had complained to McCarthy about this practice, but that no formal grievance had been filed objecting to it.

mentioned in an affidavit given by Flasinski to the Board in mid-April 1995, some 5 months after the alleged fact.[7] It was not mentioned in any conversation between Flasinski or the Union and Respondent's management after the discharge, though they met to discuss the matter on two occasions.[8] It was likewise not mentioned in a sworn statement given to the State of Connecticut in relation to an unemployment compensation claim filed by Flasinski.

According to Flasinski, about 10 minutes after the above conversation is alleged to have taken place, he was at his truck finishing his morning loading when McCarthy approached and said, ''Bud, do you want to pull this order.''[9] The order in question was a small one that did not require help in loading. Flasinski testified that jokingly, he said, ''No, I don't want to get this.'' And again, according to Flasinski, McCarthy replied, ''No, really, do you want to get this?'' And Flasinski said, ''No, I REALLY don't want to get this,'' horsing around. McCarthy then said, ''Go home, you're fired.'' Flasinski testified that McCarthy should have known he was kidding because of the way he refused the order and by the fact he was smiling. Flasinski testified that he was ''flabbergasted'' and said ''No,'' and just walked away, though not before McCarthy pulled the order form from Flasinski's hands.

McCarthy gave a different version of this incident. He testified that on the morning of November 9, he observed Flasinski standing by his truck doing nothing. At this time, Neal was in the warehouse pulling an order. McCarthy approached Flasinski and asked what he was doing. Flasinski said he was waiting for Neal to bring an order to him. McCarthy looked at Flasinski's list of jobs for that day and noted there was one more order to pull. He told Flasinski to go pull that order so it would be ready when Neal returned. According to McCarthy, Flasinski said, ''No.'' McCarthy told him again to pull the order, and Flasinski put his finger in McCarthy's face and again said, ''No.'' McCarthy then fired him. McCarthy testified that Flasinski was not kidding and was not smiling when he refused to pull the involved order. McCarthy testified that he has the authority to fire employees and did not consult with any other member of management before firing Flasinski.[10]

Flasinski went to the men's room to cool down and then returned to his truck. McCarthy came to him and said, ''I want to see you upstairs.'' Then he went to get another supervisor, Craig Bloking, and Flasinski walked over to employee Union Steward Ron Baker and asked him to accompany him to the office.[11] Flasinski and Baker went to the office and after waiting a few minutes with McCarthy, Supervisor Craig Bloking joined them. According to Flasinski, McCarthy looked at Baker and said, ''As far as I'm concerned, he's all through here,'' and walked out the door. Flasinski testified that he did not say anything, and Baker told him to go to the union hall. Baker testified about this meeting and said that McCarthy said, ''I told Buddy to pull an order two or three times, and he refused, and as far as I'm concerned, he was fired,'' and that concluded the meeting. Bloking testified that after McCarthy spoke, Baker twice asked Flasinski, ''What happened? Do you have anything to say?'' Both times Flasinski said nothing. In his testimony, McCarthy indicated that Baker twice asked Flasinski if he had anything to say and both times Flasinski said nothing. If, as he contends, Flasinski was joking with McCarthy, there was nothing to prevent him from making this assertion during this meeting. He was not refused the right to speak. Moreover, he did not even tell Baker that he had been joking before going into the meeting so Baker could defend him. As best as can be discerned from the record of Baker's testimony, Flasinski did not tell Baker that he was joking after the meeting.

Flasinski then went to the union hall, but it had not opened and he returned home. A little later, he called Lucas and told him what happened. On learning from Flasinski that he had been fired, Lucas faxed a protest to Respondent. He talked with Samuel Cohen who told him that he was not going to put up with someone not following a direct order and that Flasinski had also threatened one of his salesmen. Cohen called back a little later and said he was mistaken about Flasinski threatening a salesman.[12]

Lucas arranged a grievance meeting over the discharge about a week later with Sam Cohen, Mark Cohen, Ray McCarthy, himself, and Flasinski. According to Flasinski, the meeting went as follows:

> We all sat down. Mr. Cohen said, ''Well, let's get on with it. You guys wanted this meeting.'' So I proceeded to tell my story about the little joke I tried to play on Mr. McCarthy, and Mr. McCarthy gave his version of it saying that I flatly refused to pull the order twice, saying that he gave me a chance to explain, when he didn't. ''Ron Baker was there.'' I said, ''You

[7] Flasinski also testified that he did not file an unfair labor practice charge over his discharge until March 1995 on advice from Lucas that the matter would be taken up in negotiations for a new contract. This is difficult to believe as the parties did not meet to negotiate between the date of the discharge, and the filing of the charge some 4 months later.

[8] Flasinski testified that he did not mention the matter for fear of getting Neal in trouble. This makes no sense whatsoever as if the conversation occurred as related by Flasinski, McCarthy heard the conversation and would have known of Neal's complaints.

[9] ''Bud'' is Flasinski's nickname.

[10] McCarthy testified that union activity played no part in the decision to fire Flasinski and that he was fired for insubordination. He also testified that if Flasinski had told him on November 9 that he was only kidding, he probably would have retained him. McCarthy kept some notes of the events in question which show that the first time anyone contended that Flasinski was kidding was in a grievance meeting with the Union over the discharge held on November 15.

[11] Flasinski was aware that Respondent had a work rule that stated that an employee could be terminated for refusing to carry out a work order.

[12] In the unemployment compensation proceeding initiated by Flasinski and which Respondent contested, C & S asserted Flasinski's refusal to obey an order as the reason for his discharge, and added that he had also been given a written warning for attendance. Flasinski denies he was ever given a written warning or any other discipline during his employment with Respondent. Respondent introduced a letter or memorandum to Flasinski dated April 20, 1995, called a ''Stage One Absence Reminder'' and which states that Flasinski was absent 2 days in April, and reminding him that pursuant to the Company's policy, additional absences will result in discipline. The part of the memo calling for employee acknowledgment is not signed by Flasinski. Respondent introduced a similar document dated April 28, 1992, also unsigned by Flasinski. Respondent had a similar warning for Ron Baker, who was also unaware of its existence.

> can ask Ron Baker.'' Samuel Cohen then proceeded to tell us that nobody fooled around at C & S. Nobody ever told jokes. Everybody worked very hard. That's all that went on at C & S, and he said that as far as he was concerned, he had to take Ray McCarthy's word for it and I was all done. Mark Cohen said, ''We all work very hard here,'' which I knew since I had been there for three years.

The meeting then ended. Flasinski made no mention of his conversation with Neal that he believed McCarthy overheard.

At this grievance meeting, Lucas remembers telling Cohen that a mistake had been made and Lucas asked Flasinski to tell his side of the story. Flasinski did so and then McCarthy told his version. According to Lucas, Flasinski told Cohen that McCarthy had given him an order to fill and Flasinski, kiddingly, as he had in the past, refused, saying, ''No, I don't want to get it.'' The asking and kidding refusals happened a couple of more times, and McCarthy told Flasinski he was fired. According to Lucas, McCarthy told a different version, saying he gave Flasinski a chance to redeem himself. According to Lucas, the meeting was going nowhere and ended with Flasinski fired.

Lucas testified that he attempted to formally arbitrate the discharge but was advised by the Company that because the contract had expired, they would not agree to arbitrate. He testified that he tried to wrap up Flasinski's discharge with contract negotiations, but was not successful. On cross, however, he admitted that there were no negotiations between the date of Flasinski's discharge and the filing of a charge with the Board in March 1995.

Both the General Counsel and Respondent introduced evidence of past discipline given to other employees to bolster their respective cases. Insofar as this information is relevant, it tends to support Respondent's position. The General Counsel asserts that the strike and/or the incident involving Mark Cohen are the reasons for Respondent's alleged animus against the Union and its employee members. Yet the record reveals that three drivers, including Flasinski, were discharged after the strike. Both of the other discharged drivers were replacement workers. One was discharged for incompetence to make way for Flasinski's recall, and the other was discharged for not reporting to work for 2 consecutive days. Another driver, Beauvais, was only given a verbal warning for calling a replacement driver a ''scab,'' even though both Baker and Flasinski stated they had been specifically warned about this type of conduct on returning to work after the strike. If Respondent was seriously looking for ways to rid itself of the union drivers, it could have seized on Beauvais' conduct to mete out more serious discipline. I also cannot find any evidence that Respondent was harassing its drivers in any fashion after the strike.

The General Counsel also points out that employees are normally accorded progressive discipline by Respondent. But where McCarthy is concerned it appears to me that the type of offense, specifically direct personal confrontation, is what triggers immediate termination. For example a nonunion employee, Ty Kohler, was fired by McCarthy much like Flasinski, on the spot for insubordination. McCarthy intervened in an argument between Kohler and another employee and Kohler turned on McCarthy and said, ''You put the fucking stuff away. I don't need this shit.'' McCarthy fired him at that point. Though the record shows that Kohler had been previously given some warnings, McCarthy did not ask for his personnel file and weigh what discipline to mete out, he just fired him.

B. *Discussion and Conclusions*

The applicable test for determining whether Respondent violated the Act in this proceeding is that set out in *Wright Line*, 251 NLRB 1083 (1980). Under *Wright Line*, the General Counsel has the initial burden of establishing a prima facie case of discrimination by showing (1) employer animus, (2) protected activity on the part of the discriminatee, and (3) employer knowledge of that activity. I find that under the credible facts presented, the General Counsel has not met this initial burden.

Whether one agrees with the decision to discharge Flasinski over the involved incident is not the issue in this case. The issue is whether or not the discharge was discriminatorily motivated by activity protected by the Act and I cannot find that such unlawful motivation has been proven. I find that Respondent discharged Flasinski for the reasons given by it. I have heretofore credited McCarthy's testimony that he did not overhear a conversation between Flasinski on November 9, which would have given an unlawful motivation for his actions toward Flasinski later that day. I have credited his denial that he knew of Flasinski's involvement in Mark Cohen's run in with Lucas. Flasinski admits to having refused to carry out McCarthy's order on November 9, and I have credited the evidence which established that the first time Flasinski asserted to management that he was joking was on November 15, a week after his discharge. Though the Cohens may have harbored union animus, there is no proof that McCarthy did and he was the person who did the firing. As I have noted earlier, there is no evidence that Respondent was harassing or otherwise discriminating against the unit members because of the strike or the Cohen picket line incident. Flasinski's discharge occurred some 5 months after these events. Flasinski was not engaged in any protected activity at or near the time of his discharge which could be found as a motive for the discharge.

Having concluded that Respondent did not discharge Flasinski in violation of the Act, I will recommend that the complaint be dismissed.

CONCLUSIONS OF LAW

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

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

3. The Respondent did not commit the unfair labor practices alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[13]

ORDER

The complaint is dismissed.

[13] 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.