Fitel/Lucent Technologies, Inc. ***and*** **Communications Workers of America, Local 3218, AFL–CIO.** Case 10–CA–29626

August 13, 1998

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS LIEBMAN AND HURTGEN

On February 9, 1998, Administrative Law Judge Robert C. Batson issued the attached decision. The Respondent filed exceptions and a supporting brief.

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

The Board has considered the decision and the record[1] in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order as modified.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Fitel/Lucent Technologies, Inc., Carrollton, Georgia, its officers, agents, successors, and assigns shall take the action set forth in the Order as modified.

Substitute the following for paragraph 2(e).

"(e) Within 14 days after service by the Region, post at its Carrollton, Georgia facility copies of the attached notice marked 'Appendix.'[27] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 6, 1996."

[1] The Respondent filed a motion to supplement the record, and the General Counsel filed an opposition to the motion. The Respondent seeks to introduce a 1996 disciplinary report that it did not introduce at the unfair labor practice hearing. "Newly discovered evidence is evidence which was in existence at the time of the hearing, and of which the movant was excusably ignorant. A motion seeking to introduce evidence as newly discovered must also show facts from which it can be determined that the movant acted with reasonable diligence to uncover and introduce the evidence." *Owen Lee Floor Service*, 250 NLRB 651 fn. 2 (1980). To prevail on its motion, Respondent must show that it acted with the diligence required to establish that it was excusably ignorant of the existence of the report that was at all times in its sole possession and control. The Respondent asserts that the report was not found before the hearing despite a diligent search of its records. That assertion falls short of the requisite showing. Furthermore, the Respondent's motion fails to demonstrate that the introduction of the 1996 disciplinary report would require a different result than that reached by the judge. The Respondent's motion is therefore denied. See Sec. 102.48(d)(1) of the Board's Rules and Regulations; *Opportunity Homes*, 315 NLRB 1210 fn. 5 (1994), enfd. 101 F.3d 2525 (6th Cir. 1996); *Owen Lee Floor Service*, supra.

[2] The Respondent 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.

[3] We shall modify the judge's recommended Order in accordance with the Board's decision in *Excel Container, Inc.*, 325 NLRB 17 (1997).

Member Hurtgen agrees with his colleagues that the Respondent's treatment of employee Keith Horsley violated Sec. 8(a)(1) amd (3) of the Act. However, he believes that the Respondent's disciplinary write-up of Horsley for tardiness on September 13, 1996, was legitimate. Accordingly, he would not order the Respondent to expunge that write-up from its files.

Member Hurtgen also agrees that the Respondent's conduct toward employee Joel Snyder violated Sec. 8(a)(1) of the Act, but he does not pass on the question whether it also violated Sec. 8(a)(4).

Katherine Chahrouri, Esq., for the General Counsel.
Walter O. Lambeth Jr., and *Douglas H. Duerr, Esqs. (Elarbee, Thompson & Trapnell)*, of Atlanta, Georgia, for the Respondent.

DECISION

STATEMENT OF THE CASE

ROBERT C. BATSON, Administrative Law Judge. This case[1] was tried in Atlanta, Georgia, on June 16, 1997, on a complaint, dated May 12, 1997, issued pursuant to a charge filed September 20, 1996,[2] by Communications Workers of America, Local 3218, AFL–CIO (the Union). The complaint, as amended at the hearing, alleges that Fitel/Lucent Technologies, (the Respondent), violated Section 8(a)(1) of the Act by threatening to discipline and to discharge its employee, Keith Horsley, because of his union activities; violated Section 8(a)(1) and (3) of the Act by terminating Horsley for reasons proscribed by the Act; and violated Section 8(a)(1) and (4) of the Act for having threatened to disciplinarily writeup and suspend its employee, Joel Snyder, for having attempted to take time off from work pursuant to subpoena served by the General Counsel in order to attend the hearing in this matter.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses and to file briefs. Briefs, filed by the General Counsel and Respondent, have been carefully considered.

On the entire record,[3] including my observation of the witnesses and their demeanor, I make the following

[1] The caption appears as amended at the hearing.

[2] All dates below are within 1996 unless otherwise indicated.

[3] The unopposed motions by counsel for the General Counsel and Respondent to correct the transcript record of this proceeding, respectively dated August 27 and 29, 1997, hereby are granted and received in evidence as G.C. Exh. 17 and R. Exh. 25.