Mason & Hanger-Silas Mason Co., Inc. *and* International Guards Union of America, Local 69. Cases 28-CA-6944 and 28-CA-7255

30 April 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 30 December 1983 Administrative Law Judge David G. Heilbrun issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and the Charging Party filed briefs in answer to the Respondent's exceptions.[1]

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 in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The judge found that the Respondent violated Section 8(a)(1) and (3) of the Act by issuing a written warning to employee Romero 7 May 1982 and by discharging him 22 December 1982. The Respondent filed exceptions to these findings. We find merit in the Respondent's exceptions.

The pertinent facts, as more fully set forth by the judge, are as follows. Prior to October 1981, guard services at Los Alamos National Laboratories in Los Alamos, New Mexico, were performed by Federal employees working for the Department of Energy. In October 1981, the Respondent took over the guard function with a work force consisting of former Federal employees and new hires. Two months later, in December 1981, the Union was certified as the exclusive collective-bargaining representative for the Respondent's employees. Employee Romero, one of the former Federal employees, was elected union vice president and subsequently participated in virtually all of the negotiation sessions which began in February 1982 and concluded successfully in February 1983.

Romero worked on "Company C," or the C shift, which began at 3 p.m. Pursuant to company policy, employees had to line up "at formation" 6 minutes after the start of their shift. According to Romero, employees started to pick up their weapons and otherwise get ready for formation prior to 3 p.m. in order to be ready by 3:06 p.m. On 6 May 1982,[2] just prior to the start of the C shift, Romero advised employees in the gunroom that they should not be performing job tasks before 3 p.m. and asked them to wait until 3 p.m. Romero repeated this advice shortly before 3 p.m. in the parking lot 7 May. Apparently, a sufficient number of employees listened to Romero so as to result in formation being delayed. On 7 May the Respondent issued a written warning to Romero for "interference with the work of others," which the Respondent repeated orally to Romero at a grievance meeting 19 May. The Respondent also issued warnings to at least 10 other employees for being late to formation, but these were rescinded after the employees agreed not to engage in such conduct again.

On 15 June the Union filed an amended charge in Case 28-CA-6944 alleging, inter alia, that the Respondent took disciplinary action against Romero because he engaged in protected concerted activities. An 8(a)(1) and (3) complaint based on the warnings was issued 2 July. On 9 November, pursuant to an informal settlement agreement approved by the Regional Director, the Respondent notified Romero in writing that the 7 May warning was being removed from its files.

On 5 December, which was the first of Romero's 2 days off that week, the Respondent needed two employees to work overtime in order to have a full complement on the C shift. About 2:20 p.m. the Respondent's desk officer, Lieutenant Schmahl, began making telephone calls to employees on the "day off" list, starting from the top of the list.[3] Romero, who was number seven on the list that day, was the first one reached by Schmahl. Schmahl told Romero that he was needed for overtime, but Romero responded that he was leaving for Colorado. Schmahl then asked Romero if he was refusing to work overtime and Romero said, "I guess I am refusing." On 7 December Romero was called in to the Respondent's office where he was asked why he had refused the overtime. Romero explained that he had to go to Colorado to help out a friend whose car had broken down. The Respondent informed Romero that it would investigate the matter and, if it were determined that Romero had been insubordinate, he would be terminated. On 22 December, Romero was notified that his reason for refusing the overtime was not sufficient, and therefore he was being terminated for willful disobedience and insubordination.

On 23 December the Union filed a charge in Case 28-CA-7255, which was amended 9 February 1983, alleging, inter alia, that the Respondent vio-

[1] The Respondent's motion to strike the Charging Party's answering brief as untimely filed is denied.

[2] All dates refer to 1982 unless otherwise indicated.

[3] Employees were listed on the day-off list by the amount of overtime charged to their records, in descending order from the least amount to the most amount charged.

lated Section 8(a)(1), (3), and (4) by terminating Romero. On 11 February 1983 the Regional Director vacated his approval of the settlement agreement in Case 28–CA–6944, set aside the settlement agreement, and issued a consolidated complaint based, inter alia, on the 7 May warning and the 22 December discharge.

The judge found with regard to the 7 May warning that the Respondent's conduct in disciplining Romero for having advised employees not to perform work on their own time interfered with Romero's right to solicit protected group activity. With regard to the 22 December discharge, the judge found that the issue was close, but that on balance he could not avoid inferring that the Respondent discriminated against Romero because of his support for the Union. In so finding, the judge noted that Romero was a known union activist, and he found that Romero's reason for declining the overtime directive was "no less significant than" other reasons which the Respondent had accepted as excuses from other employees, and that Respondent's treatment of Romero was harsh. The judge also relied on the Respondent's postdischarge memo to its files about a blood donor decal on the back of Romero's turned-in badge as "a final telling indicator" of the Respondent's "obsessive desire to single [Romero] out for retaliatory treatment."[4]

Contrary to the judge, we find the evidence insufficient to establish that the Respondent discharged Romero because of his support for the Union in violation of Section 8(a)(1) and (3).[5] Although Romero's union activities were extensive, and although the contract negotiations may have been heated or even hostile at times, there is no probative evidence of animus toward the Union or toward Romero, except perhaps for the 7 May warning. We note, however, that the warning was issued over 7 months before the discharge and that it was rescinded as part of the informal settlement agreement entered into a month prior to the incident resulting in Romero's discharge.

We further find that the evidence adduced to show disparate treatment in the application of the Respondent's overtime policy is inconclusive. As the judge himself found, the Respondent's overtime policy was not precise, but rather varied depending on the shift, the supervisor, the point in time, and the acceptability of the excuse offered by the employee. In fact, the judge found that the policy was "so poorly structured and little understood as to lack . . . certainty" and that it was "suited only for managerial discretion within generalized guidelines." Any evidence of alleged disparate treatment must be viewed in the context of this unfixed and changeable policy.

Turning to the evidence of alleged disparate treatment, the record indicates that employee Guthrie was excused from overtime in October 1982 because she was expecting company, but it also appears that she was asked to volunteer for overtime rather than being ordered to come in. Similarly, although employee Northwang testified that in December 1982 he told Schmahl that he could not work overtime because he was babysitting for his children, it appears that he was told to stand by, but was not ordered to come in. The record further indicates that two employees, Kasik and Vigil, were excused from directed overtime because of illness or intoxication. In this regard, we also note that employee Gonzales was discharged 6 December 1982 for refusal to work overtime 4 December. As found by the judge, the Respondent investigated Gonzales' medical excuse and found it insufficient.

It is clear from the above evidence that there was no uniformity in how the Respondent obtained employees to work overtime, i.e., by requests to volunteer or by directing employees to work overtime, or in the reasons found by the Respondent to excuse a refusal to work overtime. Although Romero's treatment by the Respondent may have been harsher than that accorded to Kasik and Vigil, for example, it was no less harsh than that accorded to Gonzales around the same time. In any event, it is not the Board's function to substitute its own judgment for that of an employer as to what constitutes reasonable grounds for discharge.[6] In these circumstances, while it may be concluded that the Respondent's treatment of employee refusals to work overtime varied, there is insufficient evidence that its treatment of Romero was discriminatory.

Moreover, it is clear from the record that employees generally, including Romero, were aware that a refusal to work overtime could have serious consequences, including termination. In fact, Romero testified that he "believed that [he] could have been forced to come in on overtime," and that he had seen a memo issued by management regarding mandatory overtime which indicated that employees could be terminated for refusing to work overtime. Finally, although the Respondent's postdischarge memo concerning the blood donor decal on Romero's badge arguably is suspicious, it

[4] The Respondent's general security order No. 6, par. 5, states, "No item may be attached to the badge proper except the clip."

[5] The judge found, and we agree, that Romero's discharge was not violative of Sec. 8(a)(4).

[6] *Super Tire Stores*, 236 NLRB 877 fn. 1 (1978); *J. Ray McDermott & Co.*, 233 NLRB 946, 952 (1977).

is well settled that mere suspicion cannot serve as a basis for finding a violation.[7]

Based on all of the foregoing, we conclude that the General Counsel has not proven by a preponderance of the evidence that the Respondent discharged Romero in violation of Section 8(a)(3) and (1). Further, because the Respondent has not been shown to have committed any unfair labor practices since the November 1982 settlement agreement concerning the 7 May warning, we find it appropriate to reinstate that settlement agreement.[8] Accordingly, without reaching the merits of the alleged unlawful warning, we shall reinstate the settlement agreement and dismiss the complaint in its entirety.

ORDER

The complaint is dismissed and the settlement agreement in Case 28–CA–6944 is reinstated.

[7] See., e.g., *International Computaprint Corp.*, 261 NLRB 1106, 1107 (1982); *Kings Terrace Nursing Home*, 229 NLRB 1180 (1977).

[8] See, e.g., *Eaton Corp.*, 262 NLRB 86, 97 (1982); *Ann's-Schneider Bakery*, 259 NLRB 1151, 1160 (1982).

DECISION

STATEMENT OF THE CASE

DAVID G. HEILBRUN, Administrative Law Judge. This case was tried at Los Alamos, New Mexico, August 2–4, 1983, based on a consolidated complaint alleging that Mason & Hanger-Silas Mason Co., Inc. (Respondent), violated Section 8(a)(1), (3), (4), and (5) of the National Labor Relations Act by certain acts and conduct.

On the entire record,[1] including my observation of witness demeanor, and after consideration of briefs filed by the General Counsel, the Charging Party, and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a West Virginia corporation, maintains its principal office and place of business in Lexington, Kentucky, while operating in various States including New Jersey, New York, Nebraska, Iowa, and Texas. The only facility involved in this proceeding is located in Los Alamos, New Mexico, where Respondent provides security service under contract with the University of California's Los Alamos National Laboratories. During a past representative 12-month period Respondent performed services outside West Virginia in excess of $50,000, while deriving total gross revenue in excess of $100,000. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that International Guards Union of America, Local 69 (the Union), is a labor organization within the meaning of Section 2(5).

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Case Background and Procedural History*

As widely known, scientific research is conducted at the Laboratories relative to national security of the United States and pursuant to objectives of the Department of Energy (DOE). The facility consists of numerous buildings ranging from those in a concentrated central complex to separate structures at remote sites. Traditionally the guarding function was provided by Federal employees attached to an appropriate regulatory agency, most recently DOE. Private contracting out materialized in late 1981 as Respondent, whose national operations include security service at a principal nuclear weapons plant in Amarillo, Texas, assumed the security function at this facility. In December 1981 the Union was certified as exclusive collective-bargaining representative for guarding personnel, and a protracted course of bargaining ensued.[2]

Case 28–CA–6944 was filed in June, following which a complaint issued in July alleging that Larry Romero, vice president of the Union, was unlawfully warned, both verbally and in writing, in regard to certain concerted activities in which he had engaged. This case was informally settled in November, however, in December Case 28–CA–7255 was filed, in consequence of which during early 1983 the prior settlement agreement was vacated and both cases consolidated for purposes of this hearing. The issues so consolidated included those originally involving Romero in May, plus the allegations that during December both Demecio Gonzalez and Romero were terminated in the context of Respondent's application of and assertedly unilaterally changed overtime policy, and in Romero's case because he had previously filed a charge against Respondent and given testimony under the Act.

Respondent's hierarchy is Donald Harwick, contract manager, Tommy Hook, administrative manager, Robert Everhart, chief of security, and subordinate shift commanders, with assisting desk officers, all titled lieutenant. Operations consist of Company A, B, C, and D, these being midnight, day, and swing, plus a special 7 a.m. to 6 p.m. shift, respectively. Romero has worked continuously as a security inspector at Los Alamos since 1973 and transfered with seniority to Respondent. Gonzalez had begun his employment with the takeover, and both these employees worked C shift. In early May Romero advised various other security inspectors of C shift that a 6-minute formation time was inadequate, and they should not perform job related tasks before 3 p.m. without compensation. This 6-minute period was one in which authenticator codes were obtained, vehicle assignments picked up, and weapons donned for the shift. The resultant disruption caused Respondent to issue a written rep-

[1] The transcript is corrected in the manner requested by the General Counsel and Respondent in a brief (at p. 3) and separate motion, respectively.

[2] All dates and named months hereafter are in 1982, unless shown otherwise.

rimand to Romero on May 7 for interfering with work of others. Romero grieved this action and during a meeting of May 19 on the subject, Hardwick cautioned him about a continuation of what Respondent viewed as misconduct.

In May and again in September Everhart authored memos to shift commanders and to Bonifacio Vasquez, union president, respectively, which read:

> Station Manning
>
> Under no circumstances will a station be closed due to shortage of personnel.
>
> In the event it is not possible to obtain personnel for voluntary overtime, either from the concerned Company's call list or doubling from the preceding company, the junior Inspector from the concerned Company will be called and directed to work.
>
> Refusal to work directed overtime may have the most serious consequences, to and including termination.

> DIRECTED OVERTIME
>
> Meeting with Bonifacio Vasquez, IGUA 69.
>
> Hardwick, Hook, Everhart for Company.
>
> Problem of directing Junior Inspector to work necessary overtime could result in Junior Inspector on respective Company to work all of their days off.
>
> Advised we would direct Shift Commanders to institute procedure whereby the Junior Inspector of the concerned Company would be required to necessary to direct overtime the following day, the next Junior Inspector on first day off would be directed to work.

On December 4 Respondent sought to have Gonzalez double over from his C shift. This arose by telephone contact from A Shift Supervisor Paul Moore shortly after 11 p.m., and was augmented when Gonzalez protested to Frank Valdez, his own superior. Gonzalez described being ill and also intending to simply resign if the mandatory overtime was pressed. Valdez dissuaded him from resigning, and the following Monday Gonzalez met with Hook and Everhart. Upon a review of circumstances, including Gonzalez' conceded part-time employment doing typewriter repair, Respondent discharged him for refusing to work directed overtime.

December 5 was Romero's scheduled day off. As the C shift of that date was about to commence, Francis Schmahl, desk officer, was attempting to fill two openings by overtime. He telephoned all personnel on the day off roster, reaching only Romero at 2:26 p.m. Schmahl stated his need with Romero answering that he was leaving shortly for Colorado. Schmahl asked if this was a refusal to work overtime and Romero answered that it might be taken that way. On December 7 Romero met with Hook and Everhart, who asked him to elaborate on his unwillingness to work as Schmahl had requested. Romero explained that the circumstances related to completing assistance for a friend whose car had broken down in a remote area. An investigation of more details ensued, and other supervisors were canvassed as to how they would have reacted. When these steps concluded Respondent elected to discharge Romero, which it did on December 22 for willful disobedience of the overtime work directive.

B. *Further Relevant Evidence*

Homero had been vocal during late 1981 with respect to comparability of supplies and equipment to be furnished security inspectors in connection with Respondent's takeover. Following his election to union office shortly after the representation election, he participated extensively in the numerous negotiating sessions that commenced in February. The parties had jointly executed an elaborate Memorandum of Understanding with regard to bargaining procedure; however, sessions were occasionally heated with Romero and Hardwick arguing loudly on at least two early occasions.

Following the incident of May regarding Company C pre-formation time, Romero and Vasquez infiltrated a meeting being held by Robert Pogna, assistant division leader for lab security, in connection with preparations for a possible strike by guards. This came to be viewed by Respondent as an act of misrepresentation because access to the meeting was obtained while off duty but by use of official badges. Additionally Romero was warned during the summer and fall months of 1982 for minor lateness, for having entered a women's restroom under strange circumstances, and for once having a cigarette in his hand at the moment his shift formation whistle blew.

As to experiences of other rank-and-file security personnel under the overtime assignment policy, employee Jo Guthrie testified that she was excused from overtime in October because of expecting house guests, George Vigil testified that he escaped discipline in October after refusing an overtime directive by later explaining that he had been drinking, and Troy Nothwang testified that in late 1982 he had, without repercussion, routinely declined overtime contacts from supervision because of babysitting.

In a related vein, Security Inspector R. J. Romero was suspended for 2 days in June because of absence from work without acceptable reason, while in February Security Inspector John Martinez was officially warned for inaccuracies in explaining an earlier instance of failure to report for work as scheduled.

C. *Analysis*

The essential issues of this case arise from two separate aspects of employment and the dynamics that associate to each. Happenings in early May involved Romero's objecting to the limited form-up time allowed to guards after strict commencement of their shift on the hour. The terminations at issue involve Respondent's involuntary overtime assignment policy, with subsidiary or related questions being whether a unilateral change was made without notice to, or consultation with, the Union, and whether either employee was discharged for a pretextual reason.

The larger and pervasive context of this fact situation is the disputatious manner in which the parties dealt with each other. This manifested not only in stiff formalisms

of how the negotiating process was to unfold, but also in oral and written rhetoric in which peevish displays of temperament clashed and critical characterizations were exchanged. As one would expect, the confrontations resulted in sporadic efforts by union functionaries to seize advantage, and countervailingly determined intent by management to maintain a tightly disciplined approach to security at the facility.

The first skirmish was the matter of how working time principles applied to shift formation ritual. This was correctly perceived by Romero as a legal point of "hours worked" under applicable statute, and his actions of early May unwittingly dealt directly with the interpretive point of whether preparatory time may be deemed "an integral and indispensable part of the employee's principal activities." 29 CFR 785.25. It has been held that the statutory basis for this subject requires payment of wages to defense plant guards and firemen during a lunch period in which their vigilance was not fully relieved, as the 30-minute timespan was thus a continuation of engagement in their principal work activity. *Glenn L. Martin Nebraska Co. v. Culkin*, 197 F.2d 981 (8th Cir. 1952). However, the controlling question is whether, as alleged, Romero was unlawfully disciplined for having engaged in a protected concerted activity. His version of how the entreaty to fellow employees unfolded on May 6 was uncontroverted, and it amounted to no more than advice that a person's own time need not be used to undertake requirements of the job. This was the essential reason that Respondent reacted with discipline, and in doing so interfered with Romero's right to solicit protected group activity. *Red Ball Motor Freight*, 253 NLRB 871 (1980).

With respect to overtime assignment necessitated by unexpected vacancies on a shift, this subject is again an instance of how "hours worked" principles can apply in an employment situation and further was an arena in which the parties strove for institutional advantage. The fundamental approach to this aggravating problem of covering all stations at all times was to obtain volunteers where possible. This was the easy solution but not one which was available in all instances. Under Respondent's basic written criteria the sequence of contact was first to day off personnel of the needful shift and then to the guards about to leave for possible doubling over. If volunteers did not so materialize, the process was retracked with the objective of now directing a person to work. However, the very passage of minutes and changed circumstances as among those personnel at their homes meant that the policy was haunted by an intrinsic imperfection. This fault was that the methodical approach simply did not assure either that a volunteer would be found or, more importantly, that time and circumstance would permit a supervisor to even make a communication that some particular person cover a station on overtime.

It was this defect that explains the varied perceptions held by supervisors as to how to implement the involuntary phase. Some were more adroit at convincing a contacted guard to stand by for further developments. Others were impressed by relative seniority standing, and still others were influenced by the extent to which a particular guard had once or recently covered for the soliciting shift. One of these approaches, actually the preferred one, invokes a yet further point of whether wage and hour principles of Federal labor standards law are triggered by the standby scenario. Thus 29 CFR 785.14 contemplates this very notion of "waiting time" by emphasis on "common sense and the general concept of work or employment" in assessing when an individual is "waiting to be engaged" versus the compensable status of having been "engaged to wait." Nuances such as this lead in turn to a divergence of views, with the Union tacitly resentful of the entire system, preferring instead that the employer simply hire more guards to expand membership and dues revenue, and Respondent making authorization forays with its day off or departing personnel for the objective of elevating job loyalties over personal preference.

What resulted was not a precise policy but rather a purpose surrounded by discretionary techniques that varied as between shifts, as between individual supervisors, as between different points in time, as between persuasiveness of a particular authority figure, and as to the variances in what were excusable reasons to decline overtime. The upshot was a policy so poorly structured and little understood as to lack the certainly that would make it more than a mere day-to-day problem area suited only for managerial discretion within generalized guidelines. It was not therefore a subject of such material, substantial, or significant impact that it constituted a term or condition of employment susceptible of actionable unilateral change by the employer nor, as the Charging Party argues separately, unlawful on the theory of "manudatory" bargaining subjects.

For this reason Gonzalez had the misfortune to have received an unremitting order to work an overtime stint and, absent a showing of animus toward this individual, his refusal was done at peril. Respondent extended consideration in his case to the point of additionally evaluating his medical excuse, but final confirmation of discharge was done free of substantial proof that unlawful purpose was in any way a motivating factor. However, Respondent cannot have it both ways, and on the same line of reasoning Romero was dealt with so harshly as to warrant an inference of discrimination. He was singularly known and viewed as an activist for the Union, and his reason for declining Schmahl's overtime work directive was no less significant than others which has passed. Respondent has attempted to depict Romero as defiant in his conversation with Schmahl, but that is an unfair characterization, for his dismayed reaction was no more than an expression of disgust. The issue is close; however, on balance I cannot avoid inferring Respondent was resentful enough that when the opportunity presented itself a discriminatory discharge was visited on Romero. A part of this evaluation is to accept, as the General Counsel argues be done, that Everhart's written statement about Romero showing further "disdain" for his job by odd placement of a blood donor decal is a final telling indicator of obsessive desire to single him out for retaliatory treatment. I am satisfied with the validity of pertinent allegations to the extent that Romero's termination was be-

cause of his support for and identification with the Union, but find insufficient evidence that Section 8(a)(4) of the Act was violated.

CONCLUSIONS OF LAW

1. By discriminatorily discharging Larry Romero on December 22 because of his support for the Union, Respondent engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

2. By discriminatorily issuing a written warning to Larry Romero on May 7 Respondent has further violated Section 8(a)(1) and (3).

3. The General Counsel has failed to prove that Respondent unlawfully discharged Demecio Gonzalez.

4. The General Counsel failed to prove that Respondent unilaterally changed its established procedure for the overtime manning of vacant posts.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, it is necessary to order it to cease and desist and to take certain affirmative action designed to effectuate policies of the Act.

Respondent having discriminatorily discharged Larry Romero, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *Florida Steel Corp.*, 231 NLRB 651 (1977).

[Recommended Order omitted from publication.]