JD(ATL)–16–07
Lorain, OH

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

CAMACO LORAIN MANUFACTURING PLANT

and **CASE 8–CA–36785**

UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, REGION 2B

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for the Respondent

BENCH DECISION AND CERTIFICATION

Statement of the Case

KELTNER W. LOCKE, Administrative Law Judge: I heard this case on March 13 and 14, 2007 in Cleveland, Ohio. On March 15, 2007, after the parties rested, I heard oral argument, and on March 16, 2007, issued a bench decision pursuant to Section 102.35(a)(10) of the Board's Rules and Regulations, setting forth findings of fact and conclusions of law. In accordance with Section 102.45 of the Rules and Regulations, I certify the accuracy of, and attach hereto as "Appendix A," the portion of the transcript containing this decision.[1] Additional analysis, Conclusions of Law, and Order are set forth below.

ADDITIONAL ANALYSIS

In the present case, a supervisor testified that when he asked employees about attending a "meeting" (meaning a union meeting), he was joking. As Judge Scully observed in ***Nicholas County Health Care*****,** 331 NLRB 970, 977 (2000), the "unlawful effect of a coercive statement is not blunted by the fact that it is accompanied by laughter or made in a humorous way. ***Meisner Electric, Inc***., 316 NLRB 597, 599 (1995)." My conclusion that the supervisor did not violate the

[1] Because of minor errors not pertaining to the substance of the testimony, the court reporter issued a corrected version of transcript volume 4, and then a second corrected version. The bench decision appears in uncorrected form at pages 563 through 585 of the second corrected transcript. The final version, after correction of oral and transcriptional errors, is attached as Appendix A to this Certification.

Act is consistent with this longstanding principle.

As noted in the bench decision, the supervisor's intent in making a statement or asking a question generally is not relevant to determining whether that statement interfered with, restrained or coerced employees in the exercise of their Section 7 rights. Rather, the Board evaluates a statement's potential for such coercion based upon what that statement reasonably would communicate to an employee. The "only joking" excuse fails to cleanse statements of their coercive effect because employees can still detect the threat behind the smile and be affected by it.

Considering the unusual facts of this case, I have concluded not only that the supervisor actually was trying to make a joke (itself irrelevant to an 8(a)(1) finding) but also that the employees reasonably would understand it as such. One reason for this conclusion is that the employees, not the supervisor, initiated the joke. Because they originated the humor, they reasonably would be less likely to view the supervisor's remark as a reflection of management hostility towards or improper curiosity about employees' protected activities.

It should be stressed that this analysis creates no sort of bright–line rule and that who originated the joke is only one of the factors which I considered in this rather unusual case.

With respect to Respondent's one–day suspension of employee Sam Serrano in May 2006, I note that the record does not establish that Human Resources Director Mayfield bore any hostility towards Serrano or took into account his protected activities. Even though Serrano denied making the "threat" for which he received the suspension, I conclude that Mayfield believed that he had. The statement attributed to Serrano was somewhat vague, but in view of his eccentric behavior, it would be reasonable for her to be concerned about it.

In the bench decision, I concluded that the General Counsel had not established the initial four elements under ***Wright Line***, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), adding that even if the record had proven these elements, Respondent had carried its rebuttal burden of showing that it would have taken the same action in any event, even in the absence of protected activity.

In general, a respondent carries this rebuttal burden with evidence that it had treated other, similar employees in the same way in similar situations. However, Serrano's atypical behavior affected how Respondent evaluated the words attributed to him. In view of Serrano's eccentricities, it would seem unlikely that Respondent previously had dealt with a similar employee under similar circumstances.

As the Board recently observed in ***Sara Lee d/b/a International Baking Company,*** 348 NLRB No. 76 (November 22, 2006), it is not the law that an employer can prevail only by showing prior identical misconduct and discipline. Based on the present record, I conclude that had the government established the initial four ***Wright Line*** elements, Respondent still would have carried its rebuttal burden.

In reaching the conclusion that Respondent lawfully discharged Serrano, I distinguish his criticism of the Respondent's new incentive program from his statement indicating that he would

not make the effort for the program to succeed. Serrano's joining with another employee to protest the program constituted protected, concerted activity. However, he spoke for himself when he expressed unwillingness to try to meet the production standard.

CONCLUSIONS OF LAW

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

2. The Charging Party, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, Region 2B, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent did not violate the Act in any manner alleged in the Complaint.

On the findings of fact and conclusions of law herein, and on the entire record in this case, I issue the following recommended[2]

ORDER

The Complaint is dismissed.

Dated Washington, D.C., May 2, 2007.

Keltner W. Locke
Administrative Law Judge

[2] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, these findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board, and all objections to them shall be deemed waived for all purposes.

APPENDIX A

BENCH DECISION

This decision is issued pursuant to Section 102.35(a)(10) and Section 102.45 of the Board's Rules and Regulations.

Procedural History

This case began on September 18, 2006, when the United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, Region 2–B, which I will refer to as the "Union" or the "Charging Party, filed the initial charge in this case. The Union amended this charge on November 30, 2006.

After an investigation, the Regional Director for Region 8 of the National Labor Relations Board issued a Complaint and Notice of Hearing dated November 30, 2006. In doing so, the Regional Director acted for the General Counsel of the Board, whom I will refer to as the "General Counsel" or the "government."

The General Counsel amended the Complaint and Notice of Hearing, which I will call the "Complaint," once before and once during the hearing. Respondent filed timely answers to the Complaint and its amendments.

On March 13, 2007, a hearing opened before me in Cleveland, Ohio. The parties presented evidence on March 13 and 14, 2007. On March 15, 2007, counsel presented oral argument and today, March 16, 2007, I am issuing this bench decision.

Admitted Allegations

In its Answers to the Complaint and its amendments, Respondent admitted a number of allegations. Based on those admissions, I find as follows:

The Union filed the charge and amended charges, and Respondent received copies of them, as alleged in paragraphs 1(A) through 1(D) of the Complaint, as amended.

Respondent, a Delaware corporation with an office and place of business in Lorain, Ohio, manufactures automotive seat frames. At all material times Respondent, which meets the Board's standards for the exercise of jurisdiction, is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

During all times relevant to the allegations in the Complaint, the following individuals were Respondent's supervisors within the meaning of Section 2(11) of the Act and its agents within the meaning of Section 2(13) of the Act: General Manager Mike Allen, Human Resources Manager Karin Mayfield, and Supervisor Lewie Jones.

At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

Contested Allegations

Complaint Paragraph 6

The subparagraphs of Complaint paragraph 6 allege that in April 2006 Respondent, by its supervisor, Lewie Jones, made unlawful statements to employees, more specifically, that Jones interrogated employees about their Union activities, created the impression that the Respondent was engaged in surveillance of their Union activities, and stated that such Union activities would be futile.

The record establishes that some time in the first part of 2006, employee Samuel Serrano contacted the Union, receiving instructions on how to organize Respondent's production workers. Serrano and five other employees attended a meeting with the Union organizer on April 26, 2006. This meeting took place at a Denny's restaurant in Lorain, Ohio, where Respondent's plant is located.

Employee Alejandro Velazquez testified that after he returned from this meeting, Supervisor Jones came up to where he was working and asked "How was the meeting?" Velazquez did not answer but continued to work. Jones never asked him again about any type of Union meeting,

Jones denied making the statement in question. Therefore, I must determine which testimony should be credited. At the time of the hearing, Velazquez remained employed by Respondent. Therefore, it was not in his interest to give testimony which might result in a finding adverse to Respondent. That factor militates in finding Velazquez' testimony to be credible.

Respondent, however, had discharged Jones before the date of the hearing. Although Jones did not manifest any hostility towards his former employer, it would be reasonable to conclude that he would not be inclined to slant his testimony in favor of a company which had discharged him. Thus, any biasing effect of employment status would be about equal for both Velazquez and Jones. Therefore, it provides no basis for determining which testimony more likely is reliable.

Similarly, my observations of the demeanor of both witnesses do not help decide which testimony to credit. Both witnesses appeared to be telling the truth.

Jones particularly impressed me because of his willingness to admit when he did not know the answer to a question. In other respects, he seemed candid almost to the point of bluntness. In view of this candor, I would be reluctant to conclude that Jones untruthfully denied asking about the meeting because personal pride prompted him to conceal a possible unfair labor practice.

In sum, both witnesses seemed to be reliable and any credibility resolution necessarily would entail too much guesswork for comfort. However, a decision must be made and, for two reasons, I credit Velazquez.

First, another witness, Raphy Argas, testified that Jones asked him a similar question. According to Argas, the day after the meeting, Jones approached him and asked, "How was the meeting yesterday?" Argas replied that he did not know what meeting Jones was talking about, and Jones did not say anything else.

Argas also remained employed by Respondent and the record provides no reason to believe that he harbored a grudge against his employer or its management. There is no reason to doubt the truthfulness of his testimony.

Second, Jones plausibly testified that because of Serrano's personality and behavior at work, there was no possibility that he would be effective in persuading others to support a union. Specifically, he said that Serrano did not have the "clout" to bring in a union and that other workers regarded him as a kind of "problem child."

For reasons discussed later in this decision, I conclude that Jones was not making up an opinion about Serrano to serve his own purposes but instead honestly believed it to be the case. Whether or not other employees regarded Serrano as a "problem child," they would have little incentive to follow him.

Jones credibly testified that employees joked about Serrano's effort to organize a union. When punching out on the time clock, some announced that it was "time to go to Denny's." Crediting Jones on this point, I find that some employees did joke in this manner, leading Jones also to regard it as a joke.

Which is why, ultimately, I conclude that Jones did ask employees how they enjoyed the meeting. It seemed to him an innocent joke rather than a serious attempt to discourage employees from union activity. The fact that Jones did not say "union meeting" but only "the meeting," and the fact that he never again brought up the subject, leads me to conclude that his questions were about the meeting were merely an unsuccessful attempt at humor.

Of course, Jones' intent in asking the questions is irrelevant. As the Board stated in ***Waco, Inc.***, 273 NLRB 746, 748 (1984):

> Union animus is an element in 8(a)(3) cases, but generally is not an element in 8(a)(1) cases. "It is too well settled to brook dispute that the test of interference, restraint and coercion under Section 8(a)(1) of the Act does not depend on an employer's motive nor on the successful effect of the coercion. Rather, the illegality of an employer's conduct is determined by whether the conduct may reasonably be said to have a tendency to interfere with the free exercise of employee rights under the Act." [Citing ***Daniel Construction Co.***, 264 NLRB 569 (1982).]

During oral argument, Respondent's counsel addressed the test which the Board should use to determine whether an alleged interrogation reasonably would tend to interfere with, restrain, or coerce employees in the exercise of rights guaranteed by Section 7 of the Act. Specifically, Respondent cited ***Bourne Co. v. NLRB***, 332 F.2d 47 (2d Cir. 1964).

In ***Rossmore House***, 269 NLRB 1176 (1984), affd. sub nom. ***Hotel Employees Union Local 11 v. NLRB*****,** 760 F.2d 1006 (9th Cir. 1985), the Board applied the standards articulated by the court in *Bourne*. The *Bourne* test factors are as follows:

1. The background, i.e. is there a history of employer hostility and discrimination?

2. The nature of the information sought, e.g. did the interrogator appear to be seeking information on which to base taking action against individual employees?

3. The identity of the questioner, i.e. how high was he in the Company hierarchy?

4. Place and method of interrogation, e.g. was employee called from work to the boss's office? Was there an atmosphere of "unnatural formality"?

5. Truthfulness of the reply.

See also ***Mediplex of Danbury***, 314 NLRB 470, 472 (1994). ***Donaldson Bros. Ready Mix, Inc.***, 341 NLRB No. 124 (May 19, 2004).

With respect to the first ***Rossmore House*** factor, the record does not establish a history of employer hostility or discrimination. Although the record includes references to a previous settlement, the government did not offer any settlement agreement into evidence, so it is not possible to determine whether such an agreement, if it exists, includes a non-admissions clause.

In ***Painters District Council 9 (We're Associates)***, 329 NLRB 140, 143 (1999), the judge noted that informal settlement agreements and formal settlement stipulations containing non-admission clauses cannot be used to establish a proclivity to violate the Act. Thus, the only type of settlement agreement that can be used to establish proclivity to violate the Act is a formal settlement, without a non-admission clause. See ***Teamsters Local Union No. 122, International Brotherhood of Teamsters, AFL–CIO***, 334 NLRB No. 137 (August 20, 2001).

The General Counsel bears the burden of proving antiunion animus, including, in the ***Rossmore House*** context, establishing a past history of employer hostility or discrimination. There is no indication that Respondent ever entered into a formal settlement without a non-admission clause. Accordingly, I conclude that the record does not establish any history of employer hostility or discrimination.

As to the second ***Rossmore House*** factor, the record does not establish that Jones was seeking information on which to base disciplinary action.

Jones was a first–line supervisor, not a member of higher management. Additionally, he asked the questions in the workplace, in what might be called the "employee's domain" rather than in a locus of authority. Thus, the third and fourth ***Rossmore House*** factors also militate against a finding of coercive interrogation.

The fifth factor concerns the employee's reply. One of the employees, Velazquez, just kept working and did not respond. The other denied knowing what Jones was talking about, and Jones did not try to explain.

In sum, all of the ***Rossmore House*** factors point against finding a violative interrogation. Therefore, I recommend that the Board dismiss these allegations.

Complaint paragraph 6 also alleges that Jones' questions created the impression of surveillance and that Jones communicated to employees that union efforts would be futile. Even in the absence of any evidence that Jones mentioned any union when he spoke with Velazquez and Argas, it would still be possible to find that questions created the impression of surveillance if employees reasonably understood him to be asking about a Union meeting and if, in context, the employees reasonably would interpret the questions to convey an intent to spy on their union activities.

However, I credit Jones' testimony that the employees regarded Serrano's attempts as a joke, and conclude that they reasonably would understand Jones to have been joking. It is true, of course, that a statement can violate Section 8(a)(1) even if offered as a joke. In the unusual circumstances of the present case, however, and particularly considering that employees themselves had joked about the matter when they clocked out, I do not conclude that employees reasonably would infer from Jones' questions that Respondent really was placing their union activity under surveillance.

Another employee, Andre Vinson Cheers, testified that the day after the meeting at Denny's, Supervisor Jones asked him how the meeting went. Also, according to Cheers, Jones requested that Cheers work late and then told him, "You're smarter than Sam [Serrano]. You've been around here longer than him." According to Cheers, Jones added that there was not going to be a union in the plant, that employees tried it before "and people got fired."

However, I do not credit Cheers' testimony, which Jones denied. Respondent had discharged him and resentment over that termination would incline him, if anything, to bend his testimony in a way that hurt Respondent. Jones also had been discharged, but testified in a way that did not offer him any satisfaction of revenge.

Moreover, Jones could be an abrasive supervisor if he became dissatisfied with an employee's work efforts. For all these reasons, I do not believe Cheers' testimony is as reliable as that given by Jones.

Because I credit Jones' denials, I recommend that the Board dismiss the allegations that Respondent told employees that attempts to unionize would be futile.

In sum, I recommend that the Board dismiss all the allegations raised by Complaint paragraph 6.

The 8(a)(3) Allegations

The 8(a)(3) allegations concern a one–day suspension which Serrano received in late May 2006 and his discharge on August 23, 2006.

Serrano began work for Respondent as a production employee in 2004 and initially received good evaluations and raises. His supervisor, Lewie Jones, credibly testified that at some point Serrano changed.

The record does not establish whether Serrano displayed eccentric behavior from the outset of his employment or whether his conduct became more bizarre over time, but there is no doubt that he behaved in ways different from other employees.

For example, at one point during his testimony, Supervisor Jones testified that Serrano sometimes hopped around the factory instead of walking. When Jones gave this testimony, Serrano was sitting beside counsel for the General Counsel at the counsel's table. After Jones described the hopping, Serrano smiled, or perhaps grinned would be a better description, and nodded his head affirmatively.

Regarding work performance, Jones credibly testified that Serrano was, in effect, a good worker when he wanted to be, particularly when Jones was around. However, Jones then cited the expression about when the "cat was away the mice will play," to indicate that Serrano's work became less productive in the supervisor's absence.

As already noted, Jones could be a difficult supervisor, and on at least one occasion, a number of employees complained to the human resources director about how Jones had treated them. Serrano frequently complained to the human resources director about Jones and, for the sake of analysis, I will assume that he was complaining on behalf of other employees as well as himself, making his complaints protected concerted activity,

In late May 2006, a lead man, Frank Dellipoala, reported to the human resources director that he had seen Serrano throwing his hands up and down in the air while standing by a machine. According to Dellipoala asked Serrano what was wrong, Serrano said that he wasn't going to complain any more to the human resources director. Dellipoala quoted Serrano as saying words to the effect that he was "about to go off. This may be his domain in here, but it's mine out there. Lewie is going to pay." Serrano vehemently denied making this comment.

However, the human resources director suspended Serrano for one day. Serrano's own testimony establishes that when the human resources director told him of this suspension, Serrano fell to the floor, grabbed his stomach, and told the human resources director that she had hurt him. He explained that he did so as a means of dramatizing his feelings.

Indeed, Serrano's demeanor while testifying was at least dramatic, and sometimes verging on the theatrical. This apparent partisanship called his credibility into question. There is no doubt that he engaged in unconventional behavior, such as doing what another witness called "the gator," meaning lying on the floor and writhing to make a point.

In analyzing whether Serrano's one day suspension violated the Act, I will apply the standards articulated by the Board in ***Wright Line***, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under ***Wright Line***, the General Counsel must establish four elements by a preponderance of the evidence. First, the government must show the existence of activity protected by the Act. Second, the government must prove that Respondent was aware that the employees had engaged in such activity. Third, the General Counsel must show that the alleged discriminatees suffered an adverse employment action. Fourth, the government must establish a link, or nexus, between the employees' protected activity and the adverse employment action. More specifically, the General Counsel must show that the protected activities were a substantial or motivating factor in the decision to take the adverse employment action. See, e.g., ***North Hills Office Services, Inc***, 346 NLRB No. 96 (April 28, 2006).

In effect, proving these four elements creates a presumption that the adverse employment action violated the Act. To rebut such a presumption, the respondent must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct. ***Wright Line***, 251 NLRB 1083, at 1089; ***Hyatt Regency Memphis***, 296 NLRB 259, 260 (1989), enfd. in relevant part 939 F.2d 361 (6th Cir. 1991). See also ***Manno Electric, Inc.***, 321 NLRB 278, 280 at fn. 12 (1996).

For the sake of analysis, I will assume that Serrano's activities were protected. Clearly, Respondent knew about them. Additionally, there is no doubt that a one–day suspension constitutes an adverse employment action.

However, I conclude that the evidence falls short of establishing a nexus between the protected activities and the suspension. The only evidence of animus consists of Jones' statements, already discussed, pertaining to the Union meeting. I have concluded that they did not violate the Act.

Moreover, they do not otherwise establish a hostility which would result in a one–day suspension a month later.

Accordingly, I conclude that the government has not carried its burden. However, even if the General Counsel had proven all 4 ***Wright Line*** elements, I would find that Respondent would have taken the same action in any event. Considering Serrano's unconventional behavior, his statement about Jones "going to pay" would be taken seriously.

Accordingly, I conclude that the suspension did not violate the Act.

In August 2006, Respondent's general manager, Mike Allen, implemented a team incentive system based on Japanese management practices. If a team made a certain production rate, 60 pieces per hour, then all members of the team would receive a dollar an hour bonus.

Based upon my observations, I credit Allen's testimony. I conclude that during a meeting at which Allen explained this program, Serrano said he did not intend to make the extra effort needed to comply. After considering this comment, Allen decided to discharge Serrano because his

unwillingness to make the effort kept the program from being effective. It also hurt the other members of the team.

Assuming that Serrano's complaints about the program were protected, I would conclude that the government has established the initial 4 ***Wright Line*** elements. However, I would further conclude that Respondent has proven that it would have discharged Serrano in any event for his unprotected statement that he would not make the effort required for the program to be a success.

The unique nature of this team program required every employee on a team to be dedicated to making the goal. An expressed unwillingness to do the work doomed the program to failure from the start.

In sum, I conclude that Respondent did not act unlawfully in any manner alleged in the Complaint. Accordingly, I recommend that the Board dismiss the Complaint in its entirety.

When the transcript of this proceeding has been prepared, I will issue a Certification which attaches as an appendix the portion of the transcript reporting this bench decision. This Certification also will include provisions relating to the Findings of Fact, Conclusions of Law, Remedy, Order and Notice. When that Certification is served upon the parties, the time period for filing an appeal will begin to run.

Throughout this proceeding, counsel for both parties have demonstrated great civility and professionalism which did expedite this proceeding tremendously. That civility and professionalism has been noted and appreciated. The hearing is closed.