Alfred M. Lewis, Inc. *and* **Richard K. Hollabaugh.**
Case 28-CA-5354

July 9, 1980

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS JENKINS AND TRUESDALE

On April 14, 1980, Administrative Law Judge Earldean V. S. Robbins issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief to General Counsel's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt her recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

[1] The General Counsel has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing her findings.

DECISION

STATEMENT OF THE CASE

EARLDEAN V. S. ROBBINS, Administrative Law Judge: This case was heard before me in Phoenix, Arizona, on October 2, 1972. The charge was filed by Richard K. Hollabaugh, an individual, herein called Hollabaugh, and served on Alfred M. Lewis, Inc., herein called Respondent, on May 25, 1979. The complaint, which issued on July 6, 1979, alleges that Respondent violated Section 8(a)(1) of the National Labor Relations Act, as amended.

The principal issue herein is whether Respondent violated the Act by discharging Hollabaugh, a supervisor, because he had agreed to give testimony favorable to the position of an employee of Respondent involved in an arbitration proceeding scheduled pursuant to the collective-bargaining agreement between Respondent and Transport and Local Delivery Drivers, Warehousemen and Helpers, Local Union No. 104, herein called the Union.

Upon the entire record,[1] including my observation of the demeanor of the witnesses, and after due consideration of briefs filed by the parties, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent, a California corporation with an office and place of business located in Phoenix, Arizona, is engaged in the wholesale sale and distribution of dry groceries, refrigerated foods, and related products. During the past calendar year, which period is representative of its annual operations generally, Respondent, in the course and conduct of its business operations, purchased and caused to be transported and delivered to its Phoenix, Arizona, place of business, dry groceries, refrigerated foods, and other goods and materials valued in excess of $50,000 directly from States of the United States other than the State of Arizona.

The complaint alleges, Respondent admits, and I find that Respondent is, and at all times material herein has been, an employer engaged in commerce and in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The complaint alleges, Respondent admits, and I find that the Union is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Facts*

Hollabaugh, an admitted supervisor, was first employed by Respondent as a night shift supervisor in the grocery warehouse in January 1976. In September 1976 he was transferred to a position as night shift supervisor in the frozen food warehouse. In November 1976 he was promoted to safety supervisor. As safety supervisor, his duties were to reduce industrial accidents, investigate injuries, conduct safety meetings, etc. In early June 1977 personnel functions were added to his responsibilities and his job title changed to manager of employee relations and safety. His additional responsibilities were to recruit employees, handle grievances, and various other personnel functions. As manager of employee relations and safety, he reported directly to Robert Burke, vice president and manager of Respondent's Arizona Division.

Respondent and the Union are parties to a collective-bargaining agreement, effective by its terms from March 1, 1978, through February 28, 1981, covering warehouse and trucking employees. The agreement contains the following provision:

[1] Errors in the transcript have been noted and corrected.

ARTICLE XVIII

SENIORITY

The principle of seniority shall govern layoffs and rehiring within the warehouse in which a man is employed, provided senior employees are capable of performing available work.

Employees shall lose seniority for the following reasons:

* * * * *

F. If an employee is absent due to illness, accidents or industrial injury from work more than two (2) months and does not report in writing to the Company during the first week of each month beginning with the third month, advising as to his whereabouts and physical condition.

In August 1978, warehouse employee Marvin Muench commenced an industrial leave following an accident on the rail dock which resulted in an injury to him, a few weeks after his leave commenced Muench telephoned Hollabaugh and, among other things, inquired if it was necessary for him to submit the monthly reports as set forth in the collective-bargaining agreement. Hollabaugh said Respondent had been lax about enforcing the requirement, that past practice had not been uniform, so he was uncertain and would have to check with Burke.

According to Hollabaugh, a few minutes later he asked Burke if Muench had to submit the reports. Burke replied that Hollabaugh should tell Muench not to worry about it, that Respondent was no longer going to enforce the provision. A few minutes thereafter, according to Hollabaugh, he had occasion to go to the office of Cornelius Caldwell, superintendent of operation. He related Muench's inquiry to Caldwell. Caldwell told Hollabaugh to tell Muench not to worry about it, that they were not pushing that article any more, and there should be no problem. Thereafter, according to Hollabaugh and Muench, Hollabaugh informed Muench that it was not necessary for him to submit the reports as required by the collective-bargaining agreement. Both Burke and Caldwell deny any such conversations.

On October 29, 1978,[2] Hollabaugh was demoted back to warehouse night-shift supervisor. Hollabaugh testified that at the time of his demotion Burke told him that he felt the job no longer required the attention of a full-time manager. However, he admits that his demotion was precipitated by his handling of the settlement of an Equal Employment Opportunity Commission matter. Burke contends that Hollabaugh signed a settlement agreement without complying with his specific instructions not to sign until the agreement was approved by legal counsel. Hollabaugh does not dispute that he did not obtain approval of legal counsel. However, he contends that he was never instructed that he should not sign the actual agreement prior to such approval. His undenied testimony is that he had received prior approval of the substantive aspects of the settlement from both Burke and Ron Huber, corporate director of personnel and labor relations.

Hollabaugh testified that about 2 or 3 days after he signed the settlement agreement, Burke told him that he could either take a week off with pay to look for another job or he could return to the warehouse as a night- shift supervisor. Burke testified that he told Hollabaugh he was discharged and explained that it was because he had signed the settlement agreement. Hollabaugh said he was to be married the following week and asked if he could work in the warehouse. Burke said Hollabaugh could ask Caldwell for a job, that he would have no objections. According to Burke, he then telephoned Caldwell, told him he had terminated Hollabaugh, and that Hollabaugh would be asking Caldwell for a job. Burke told Caldwell that he should only give Hollabaugh a job if a job opening existed.

Hollabaugh admits that he told Caldwell that if Caldwell had a job for him, he would be transferred to the warehouse, and that he would no longer be performing personnel functions. He denies that Burke told him he was discharged. He also denies that Burke said the transfer was contingent upon a job being available. According to Hollabaugh, he was the one who added that qualification when he spoke to Caldwell. Following his transfer back to the warehouse Hollabaugh's immediate supervisor was Bill Sala, night superintendent of operations. On weekends his immediate superior was Larry Smith, who functioned as head night shift supervisor on weekends.

In February, Respondent hired Norma Thelen as employee relations manager. On March 28, Muench, an employee of Respondent for 14-1/2 years was terminated for failure to comply with article XVIII F of the collective- bargaining agreement. He filed a grievance protesting his discharge which subsequently went to arbitration. About 2 or 3 days after he received his discharge, Muench telephoned Hollabaugh, explained that he had been terminated and asked if Hollabaugh would be willing to testify and tell the truth. Hollabaugh said he would if he were subpenaed.

Thereafter in April or May, Hollabaugh told Sala that he might have to testify and explained why. According to Hollabaugh, Sala said that Hollabaugh did have a problem. Hollabaugh asked what Sala would do if he were in this situation. Sala said, "find another job." Hollabaugh asked what Sala would do other than that. Sala replied, "Really you don't owe Marvin Muench anything, you could just forget the whole thing." Hollabaugh said, "No, I couldn't do that, I do know that it happened and I do have to tell the truth."

On May 15 or 16, Hollabaugh went to Thelen's office and informed her that he might be subpenaed to testify on behalf of Muench. He explained to her that Burke had told him to tell Muench he did not have to comply with the contract provision and that he did so inform Muench. Thelen said it was a rough situation to be in and that she would have to talk to Burke and Caldwell. She further said that Burke would be out of town until Friday. Hollabaugh then informed Caldwell of his conversation with Thelen and asked if he remembered Hol-

[2] All dates hereinafter in October through December are in 1978 and all dates in January through July are in 1979.

labaugh speaking to him in September regarding Muench's inquiry. Caldwell said he did not.

Caldwell testified that when Burke returned on Friday, May 18, he came to Caldwell's office on a routine visit. Caldwell informed him of what Hollabaugh had told him about Muench. Burke told Caldwell to discharge Hollabaugh. He further said, "We always enforce the contract to the letter. I don't care if he lies about what I said, you should have fired him a long time ago. You make yourself look dumb by keeping a guy like that around. Fire him, I don't care what he says or lies about me." Burke testified in substantial agreement with Caldwell.

That same day, which was Hollabaugh's day off, Caldwell telephoned him and asked him to come into Caldwell's office, which he did. According to Hollabaugh when he went into Caldwell's office, Caldwell and his assistant, David Ashby, were there. Caldwell said, "Well, Dick, we don't have a job for you anymore." Hollabaugh said, "Oh, what exactly does that mean?" Caldwell said, "You're just undependable and unreliable." Hollabaugh said, "Well, I see you've had your meeting with Mr. Burke." Caldwell said, "I can't tell you anymore." At this point Ashby went into another office to answer the telephone. Hollabaugh asked if he and Caldwell could talk privately. Caldwell said he did not think that would do either of them any good. Ashby returned and Hollabaugh asked if there was any room for discussion. Caldwell said no.

According to Hollabaugh, he then inquired as to how his termination slip would be worded, stating that if it was going to state "undependable and unreliable" he might as well resign. Ashby said, "Do I understand you're willing to resign." Hollabaugh said, "Well, what choice do I have?" Caldwell replied, "Well, none." Hollabaugh said, "Well, in that case I'll voluntarily resign and give you two weeks notice effective immediately." Caldwell said notice would not be necessary and he would check into whether a resignation would be acceptable. After some discussion regarding severance pay, Hollabaugh left. Hollabaugh's termination states as the reason for his discharge, "poor decisions and too many errors."

Caldwell did not testify in detail as to the termination interview. He states that the reasons he gave for the discharge were too many errors and undependable. He further testified that Hollahaugh asked if he would have retained his job if he had not talked to Caldwell earlier that week and continued talking so fast that Caldwell could not answer. Attendance and pay were mentioned. Caldwell denies that he told Hollabaugh that he was being discharged because he was going to testify at the Muench arbitration or that this was, in fact, the reason for his discharge.

Caldwell admits that at Hollbaugh's unemployment insurance appeal hearing in July, he testified that there were several reasons for Hollabaugh's discharge, "but if you want the specific, it was due to the fact that he was going to be a witness at an arbitration that we didn't, you know, we didn't go along with what he was going to testify to because we live by the contract and the contract says, 'you will do this.'" When asked if he made any other statements at the unemployment hearing as to the reasons for Hollabaugh's discharge, he testified: "Well, we found the employee to be careless, made errors, was undependable as far as attendance goes and also we have always enforced the Union contract and we never encourage a supervisor and anyone else for that matter to tell an employee that we don't live up to the contract. That is our Bible." He further testified that at that hearing he stated that the precipitating reason for Hollabaugh's discharge was learning that he had advised Muench that he need not follow the provisions of the collective-bargaining agreement.

Burke testified that he made the decision to discharge Hollabaugh because he had just learned that Hollabaugh had instructed Muench that he did not have to comply with the provisions of the collective-bargaining agreement and that he did not intend to have supervisors who would make such decisions. Burke further testified that Respondent has had problems with article XVIII F, which has been included in successive contracts since 1970. One, they have had administrative problems. Specifically, after a 1978 strike, some of the administrative procedures collapsed. Through an oversight of the employee charged with the responsibility of keeping track of these monthly reports several employees did not comply with the provision but were not discharged. Most of them returned to work shortly after the report was due out prior to any action being taken. Thelen testified that during the past 4 years, four employees were discharged for failure to comply with the provision. Six employees were not discharged despite failure to comply. The second problem, according to Burke, is that Respondent's compliance or noncompliance affects the relative seniority of other employees so that any employee whose relative seniority is adversely affected by a failure to strip an employee of seniority in accordance with article XVIII F has valid grounds for a grievance. Also in 1972, Respondent was charged by EEOC with discriminatory enforcement of this particular provision.

Hollabaugh did testify at Muench's arbitration hearing on July 2. Lloyd Cox, Muench's supervisor also testified on Muench's behalf. Cox testified that his testimony essentially related to character. Cox further testified that he notified Caldwell that he had been subpenaed. He did not discuss with Caldwell what his testimony would be and no one ever suggested to him that he should not testify.

B. *Conclusions*

Many of the facts herein are undisputed. However, there are several areas of dispute—what Burke told Hollabaugh regarding a transfer to the warehouse, whether Burke and Caldwell told Hollabaugh to tell Muench he was not required to submit monthly reports during the period of his industrial leave, and the reason for Hollabaugh's discharge. I credit Burke as to his conversation with Hollabaugh at the time that Hollabaugh was removed from his job as manager of employee relations and safety. I found certain inconsistencies in Hollabaugh's account. Thus, Hollabaugh testified that Burke told him he felt the job of manager of employee relations

and safety no longer required the attention of a full-time manager. Yet, he admits that his demotion was precipitated by his handling of the settlement agreement. Since Burke communicated to Hollahaugh that his action was precipitated by the handling of the settlement agreement, it seems unlikely that he would also give as a reason, that he felt the job did not require a full-time person. In this regard, I also note that within about 4 months another person was employed in that position. Another inconsistency is Hollabaugh's testimony that Burke told him definitely, that if he wished, he would be transferred to the warehouse. Yet, Hollabaugh admits that he told Caldwell that he would be transferred to the warehouse if Caldwell had a job opening. This is more consistent with Burke's account of the conversation. I do not credit Hollabaugh that he initiated this qualifier.

Similarly, I do not credit Hollabaugh that Burke and Caldwell told him to tell Muench he did not have to comply with the requirements of article XVIII F of the collective-bargaining agreement. Counsel for the General Counsel carefully elicited testimony which drew a portrait of Burke as one who manifested an inflexible attitude of compliance with the letter of the contract without regard to the equities of a particular situation. I do not credit that a person who evinced such an attitude would indicate verbally that either the Union or the employees did not have to comply with the contract. Even Hollabaugh admits that Respondent paid "lip service" to a policy of strict enforcement of the contract. Thus, even though actual enforcement might not always be so strict, it seems unlikely that when a direct verbal commitment was required, Burke would do anything other than reiterate company policy. I credit Caldwell that he did not have such a conversation with Hollabaugh. Accordingly to Hollabaugh, he questioned Caldwell after his conversation with Burke. This seems unlikely since there would be no reason to pose such an inquiry to Caldwell after Caldwell's superior, Burke, had allegedly told him what to do.

The critical issue, of course, is whether Hoallbaugh was discharged because of the instructions he gave Muench. The complaint alleges that Hollabauqh was discharged in violation of Section 8(a)(1) of the Act because he agreed to testify on Muench's behalf at an arbitration hearing held pursuant to the grievance procedure of the collective-bargaining agreement. It is well established that employees have a right to a full and fair hearing on their grievances under contract procedures and that an employer violates Section 8(a)(1) of the Act by discriminating against a supervisor for testifying favorably to the union's position in such proceedings. *Ebasco Services, Incorporated*, 181 NLRB 768 (1970); *Illinois Fruit & Produce Corp.*, 226 NLRB 137 (1976): See *Better Monkey Grip Company*, 115 NLRB 1170 (1956). Clearly the same rationale should apply in the case of a discrimination in anticipation of such testimony.

In support of the contention that Hollabaugh was discharged because he intended to testify adversly to Respondent, General Counsel argues that illegal motivation is shown by Burke's antiunion attitude as manifested by the strict adherence to the contract despite Hollabaugh's involvement in the Muench situation, the timing of his discharge, the insubstantial nature and post-decision invention of other asserted reasons for his discharge, and Caldwell's testimony at Hollabaugh's unemployment appeal hearing. I do not find these arguments convincing. In the circumstances herein, little weight can be accorded to timing since Burke learned of the possibility that Hollabaugh would testifiy in Muench's behalf at the same time that he learned that Hollabaugh had instructed Muench that it was not necessary for him to comply with article XVIII F. Similarly, I do not find decisive the uneven enforcement of the contract provision or Respondent's continuing position that the contract supports its discharge of Muench.

Further, I credit Caldwell and Sala that Hollabaugh's work performance had been unsatisfactory in some respects during the 2 or 3 months prior to his discharge. This is corroborated by Supervisor Larry Smith and Assistant Supervisor of Operations David Ashby.[3] Hollabaugh admits that Sala, Caldwell, and Ashby had spoken to him regarding his deficiencies and that Sala had warned him that he must consider the discussion with Caldwell as serious. Thus, I cannot conclude that Respondent considered these deficiencies to be insubstantial or that they are post-decision inventions. There is nothing on the record to establish that Burke and Caldwell have ever deviated from the position that Hollabaugh's discharge was precipitated by the Muench's incident. I credit Sala that, although no decision had been made to discharge Hollabaugh, within the month prior to his discharge they had begun to discuss the probability that Hollabaugh's performance would not improve and whether Respondent could operate for a time with one less supervisor. Thus, I find nothing suspect in the mention of these deficiencies and in the circumstances cannot conclude that the offering of evidence as to such warrants an inference of illegal motivation.

As to Caldwell's prior testimony, although it may have been phrased inartfully, a consideration of the totality of his testimony as to the reasons he gave at the unemployment appeals hearing for Hollabaugh's discharge indicates that, in essence, he testified that Hollabaugh was discharged because Burke learned that he had instructed Muench to disregard the requirements of the collective-bargaining agreement rather than because he intended to testify on Muench's behalf. In this regard, I note that no attempt was made to dissuade either Hollabaugh or Cox from testifying on Muench's behalf. Cox is still in Respondent's employ. I further note that on a prior occasion, Hollabaugh was discharged for failure to comply with company policy, which discharge, upon Hollabaugh's request, was reduced to a demotion to warehouse supervisor. Accordingly, in the circumstances set forth above, I find that the General Counsel has failed to establish that Hollabaugh was discharged because he testified on Muench's behalf and further find that he was discharged because he instructed Muench to disregard the requirements of the collective-bargaining agreement.

[3] Subsequent to the event involved herein, Caldwell had a serious illness and at the time of the hearing he and Ashby had exchanged positions.

Accordingly, I find that Respondent did not violate the Act by its discharge of Hollabaugh.

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 violate Section 8(a)(1) of the Act as alleged in the complaint.

Upon the foregoing findings of fact, conclusions of law, and the entire record,[4] and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[5]

It is hereby ordered that the complaint be, and hereby is, dismissed in its entirety.

[4] During the hearing herein the General Counsel offered into evidence as G.C. Exh. 3 a transcript of Caldwell's testimony at the Hollabaugh's unemployment insurance appeal hearing. I reserved ruling on the admission of the exhibit to allow counsel for Respondent to check the exhibit to ensure that it included all relevant pages of the transcript. Since counsel for Respondent admits that the exhibit is, in fact, an excerpt from the official transcript of the unemployment appeals hearing, and since counsel for Respondent raised no further question either during the hearing or in its post-hearing brief as to the admissibility of the exhibit or that the exhibits includes all of Caldwell's testimony, G.C. Exh. 3 is received into evidence.

[5] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.