American Arbitration Association, Inc. *and* Billie J. Holbrook. Case 7–CA–12909

October 19, 1977

DECISION AND ORDER

BY MEMBERS JENKINS, PENELLO, AND MURPHY

On May 31, 1977, Administrative Law Judge Morton D. Friedman issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and the Respondent filed cross-exceptions and a brief.

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, and conclusions[1] of the Administrative Law Judge and to adopt his 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] Aside from the issue as to whether the use of Holbrook's list of lawyers and arbitrators with whom she was familiar through her position as a tribunal administrator involved a breach of confidentiality, we find in agreement with the Administrative Law Judge that the tone and content of Holbrook's letter and the attached questionnaire constituted disloyalty to and disparagement of Respondent's judgment and capacity to effectively perform its work. Accordingly, we agree that Holbrook's conduct was not protected by the Act, and her discharge was warranted and lawful. Cf. *Jefferson Standard Broadcasting Company*, 94 NLRB 1507 (1951).

DECISION

STATEMENT OF THE CASE

MORTON D. FRIEDMAN, Administrative Law Judge: This case was heard at Detroit, Michigan, on the complaint of the General Counsel issued on August 26, 1976, which complaint was based upon a charge filed on April 9, 1976, by Billie J. Holbrook, an individual. The complaint alleges, in substance, that American Arbitration Association, Inc., herein called the Respondent or the Association, discriminatorily discharged Billie J. Holbrook because the latter engaged in protected concerted activity, such discharge being in violation of Section 8(a)(1) of the Act. The Respondent, in its duly filed answer, denies the commission of any unfair labor practices.

After the close of the hearing herein, the Respondent filed a brief. Both parties were given an opportunity to make oral argument.

Upon the entire record herein, and upon the arguments and contentions made by the parties in their oral arguments and by the Respondent in its brief, and upon my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent, a public service corporation organized under the laws of the State of New York, maintains its office and principal place of business in the State of New York and maintains various offices throughout the United States including the one involved herein located in Detroit, Michigan, herein referred to as the Detroit office. At its various offices, the Respondent is engaged, primarily, in the administration of voluntary arbitration tribunals and other factfinding and dispute-resolving procedures. During the year ending December 31, 1975, a representative period, Respondent performed services of a value in excess of $500,000, of which services valued in excess of $50,000 were received from numerous organizations which, on an annual basis, either purchase or sell goods or services of a value in excess of $50,000 in interstate commerce.

It is admitted, and I find, that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Issues*

The Respondent admits the discharge of Billie J. Holbrook, hereinafter called Holbrook, but denies that the reasons therefor are discriminatory, maintaining that it discharged Holbrook for conduct harmful to the Respondent. Thus, the issues presented are:

1. Whether the conduct in which Holbrook engaged constituted concerted activity within the meaning of Section 8(a)(1) of the Act.
2. Whether such concerted activity, if any, was protected within the meaning of Section 8(a)(1) of the Act.
3. Whether, if the action in which Holbrook engaged was protected concerted activity, did the Respondent discharge her for that reason or for cause.

B. *The Nature of Respondent's Operations*

The fact that the Respondent is a nongovernmental, impartial, administrative agency which provides the means for resolving disputes of various types through the process of arbitration is generally well known. However, in order to successfully fulfill its mission, it must preserve the confidentiality of its proceedings, which, by the Respondent's own rules, are private to the parties. Only the arbitrator, in a particular case, with the consent of the parties, can decide who shall be present at any proceeding. Unlike governmentally established courts, the Respondent's records and the records of proceedings conducted under its auspices are not public records and are maintained in the strictest of confidence. Although the decisions of the arbitrators on the Respondent's list are published by various services from time to time, all other matters relative thereto, including its

list of arbitrators in the various fields covered by its operations, are confidentially maintained.

Additionally, under the Respondent's rules, the parties to a proceeding may not make contact with the arbitrator during the course of the proceeding, except at the hearing, and the Respondent very vigorously discourages any contact by a party with the arbitrator even after the arbitrator's decision has been rendered. Thus, the sterility of the process is assured.

To further insure the confidentiality of the entire process, among the Respondent's employees are individuals classified as "tribunal administrators," who assist in the selection of arbitrators, select hearing dates, handle the correspondence which comes into the office from the parties, and sends the parties the awards made by the arbitrators. To assist in maintaining confidentiality, the tribunal administrators handle all communication between the parties and the arbitrators once a proceeding has begun so that no personal contact is made between any party and an arbitrator in any particular proceeding.[1]

It is in the context of this strictly confidential mode of operation that the events which constitute the alleged unfair labor practice herein occurred.

C. *The Events*

One of the tribunal administrators, whose duties are outlined above, was Holbrook, the Charging Party herein.

Although the Respondent had no specific dress code, its employees' handbook stressed personal appearance and requested that, because employees meet and serve the public, they maintain a high standard of personal appearance. However, about the time of the events which ultimately led to Holbrook's discharge, the Respondent's management had observed a deterioration in the personal appearance of many of its clerical employees and, on one occasion, when Harry B. Payne, the Respondent's regional director, was otherwise engaged and was thereby forced to send someone else to a meeting, the only available individual was wearing jeans. As a result, and after at least two meetings with the employees, at which attire was discussed, on Wednesday, November 19, 1975, a day when Holbrook was not at work, Regional Director Payne informed the employees they could no longer wear jeans to work in the office. He explained the reason therefor, which was as noted, that lawyers, arbitrators, and litigants regularly came into the office and jeans did not appear to be proper dignified attire.

When Holbrook returned to the office on Thursday, November 20, she was accosted by various clerical employees and other female employees with the news of the ban on wearing jeans in the office. The matter was discussed by Holbrook with the said individuals at that time and at another time the next day when the individuals were having lunch with Holbrook. During these discussions Holbrook, who normally did not wear jeans in the office because of her position, but who at one time during a period of severe storms did wear jeans, expressed her sympathy with the individuals who complained about the ban on jeans and told them that if they wanted to do something about it they should do so as a group and complain to the regional director. At that time, Holbrook did not volunteer to speak on behalf of the individuals, nor did they request that she do so.

At the luncheon meeting on Friday, November 21, the girls told Holbrook that they thought it was unfair and that they should be allowed to wear what they wanted; that jeans were a much less expensive mode of dress than other kinds of clothing which they could ill afford on their salaries. Again Holbrook said she felt they were right in their objections. At about that time, a supervisor in the office, Michael Hartford, approached and said there would be no further discussion on the matter. This ended the meeting.

Over that weekend, Holbrook thought over the matter and on Sunday, November 23, wrote a letter to the American Arbitration Association's headquarters in New York, addressed to Michael F. Hoelloring, vice president of the Respondent, telling how she felt about the ban on jeans and other matters. This letter, dated November 23, 1975, related the history of the complaints with regard to the wearing of jeans in the office and the ultimate decision of Payne to the effect that jeans could no longer be worn. Holbrook went on to state that, despite the fact that because of her position she did not wear jeans and wore a more formal mode of dress, she would not compromise her position on the right to wear jeans. Holbrook went on to relate, in the letter, that she was therefore taking a stand on behalf of the secretaries to the effect that it was unfair and displayed an uncompromising and unliberal point of view to forbid the wearing of jeans in view of the fact that the secretaries' salaries were not adequate to provide the type of clothing which would necessarily have to be worn to satisfy what Payne required by way of proper attire. The letter also refers to the fact that Holbrook had, once before, been discharged by Payne but had been rehired after a group of supervisors refused to support Payne's position. However, the letter did not outline what the reason for the earlier discharge was.

Additionally, the letter related that Holbrook was told by Supervisor Robert Newman that Payne had stated that if anyone called New York they would be discharged. However, Holbrook emphasized that if she was to teach "young minds to have the courage of their convictions, I feel at this point I can only do so by example. Tomorrow morning I shall take the type of clothing I usually wear with me to the office, but I shall wear my jeans."

Holbrook ended the letter by stating that she was not trying to be retaliatory, obstinate, or vindictive, but felt that Payne left her no alternative. Significantly, the letter also stated that when Newman had warned her about contacting New York with regard to the clothing issues she told him that she was contacting New York as well with regard to a "myriad of others [issues] that I had let go asunder because in these times of high [un]employment I felt my job would be in jeopardy."

In testifying Holbrook stated that one of the matters which she had "let go asunder" was the fact that a public

[1] From uncontroverted portions of the testimony of the Respondent's regional director, Harry B. Payne, and Holbrook.

relations position had opened in the Detroit office for which she had applied but had not been considered for by Payne.

On the next workday, Monday, November 24, Holbrook appeared at the office in a pair of tight, worn jeans. She appeared in the same clothing the next day, November 25. Later in the day, when she was observed wearing these clothes by Payne, he instructed her to go home until she wore proper attire. He did not, even according to the testimony of Holbrook herself, use the word "suspended." However, evidently Holbrook took Payne's sending her home to get proper attire to mean suspended, and consulted an attorney. The attorney told her that "suspended" did not mean discharge, but it did not mean that she could go to work. However, as noted above, there is no evidence in the record that Holbrook actually was ever suspended by Payne for wearing jeans.

Holbrook did not appear at the office for the balance of that week except on Saturday, when no one was there. She came into the office on that day to check on her caseload and to see that her work was not neglected. However, despite this loyalty to her work, on Wednesday, December 1, while she was on what she thought was suspension, she sent a letter to a list of individuals and companies who did business with the Respondent in that they brought matters before the Respondent for arbitration or were themselves arbitrators. This letter stated that due to her violation of Payne's ban on jeans in the office she had been suspended from her position as tribunal administrator with the Respondent. She then stated in that letter that the secretaries had asked that the question of jeans in the office be resolved at the next staff meeting, but that, since it was the people who used the Respondent for their arbitration matters, the sooner the vital issue was settled the sooner the staff at the Respondent's Detroit facility would be able to give their undivided attention to the cases of the individuals to whom the letters were addressed. She then stated that they could help solve the dilemma by completing an enclosed questionnaire and returning it to Holbrook as soon as possible.

The questionnaire which was attached to the foregoing letter contained five questions which are set forth below in the order and in the manner which they appear on the questionnaire.

JEANS QUESTIONAIRE [sic]

1. Should jeans suits be allowed to be worn by (a) supervisors, (b) secretaries, (c) the director, (d) administrators? ———.
2. Are jeans hats more appropriate when worn on the heads of (a) administrators, (b) secretaries, (c) janitors, (d) directors, (e) supervisors? ———.
3. Do jeans jackets look better on (a) dogs, (b) directors, (c) administrators, (d) all of the above, (e) none of the above? ———.
4. When worn in the reception area, are jeans coveralls more attractive on (a) attorneys, (b) secretaries, (c) supervisors, (d) nobody in the whole world? ———.
5. Should jeans be worn in the office of the AAA by (a) children, (b) monkeys, (c) directors, (d) administrators, (e) electricians, (f) letter carriers, (g) claimant's attorney, (h) respondent's attorney, (i) claimant, (j) dogs, (k) grownups, (l) the President, (m) temporary help, (n) part time help, (o) permanent part time help, (p) supervisors, (q) janitors, (r) anyone from the firm of Sommers, Schwartz, Silver, (s) nobody from D.A.I.I.E., (t) reporters, (u) Italians, (v) Xerox sales representatives, (w) witnesses, (x) secretaries, (y) some of the above, (z) all of the above? ———.

IF RETURNING THIS QUESTIONAIRE [sic] IS TOO INCONVENIENT, PLEASE CALL AND I WILL BE GLAD TO TAKE YOUR PREFERENCE OVER THE PHONE.

On December 2, Holbrook wrote a letter to Payne in which she stated that she was advised by Mildred York, one of the officials in New York who held the title of personnel director, that no final decision regarding her suspension had been made. She said that she therefore assumed her position at that time was at best tenuous but that she had been advised by her attorney that one does not return to work when suspended. According to Holbrook she had spoken to York the day before and York had told her that her suspension was still in effect.

However, Payne, in testifying, insisted that he never advised anyone that Holbrook was suspended, he merely told Holbrook to go home until she could wear proper attire. I credit Payne over Holbrook in this regard because his testimony conformed more logically to the events as they occurred than did the testimony of Holbrook. I conclude that Holbrook attempted to tell the truth as she saw it. There is no doubt that she did feel that she was suspended although she was not told that in so many words. However, I do not credit Holbrook with regard to what she was told by York with regard to any suspension.

It should be noted, that Holbrook's conversation with York on the telephone occurred on the day before Holbrook wrote the questionnaire. Holbrook had returned to work on Monday, December 1, and had left, according to Holbrook, only after she received a call from York that she was still on suspension. As noted above, she mailed the letter with the questionnaire on December 2 to attorneys, among others, who were on her caseload, approximately 40 altogether.

Although Holbrook did call her secretary, Jean Merrett, and another secretary, Karen Jenkins, on December 2 before she mailed the December 1 letter to which the questionnaire was attached, and although Holbrook testified that Merrett and Jenkins both told her something to the effect that the questionnaire "sounds good. We're behind you," both of these individuals, in testifying, denied that they consented to the questionnaire or approved the same.

On December 4, secretary Merrett called Holbrook and told the latter that Payne had returned from New York and announced to the staff that there would no longer be a ban on wearing jeans. As a result of this call and a call to her attorney, Holbrook testified that she called Payne on December 5, who told her she was to come back to work. She then told Payne that she had to buy a car on Monday, December 8, but would be on the job as usual on December 9. According to Holbrook, and in this respect I

credit her, Payne told her, "You are needed in the office, but I'll give you Monday off." Accordingly, Holbrook purchased the automobile on Monday and reported to work at her normal hour on Tuesday, December 9. Shortly thereafter she was summoned to Payne's office where Payne informed her, "Your services are no longer needed."

When Holbrook stated that she did not understand, Payne told her she had used an office mailing list and further told Holbrook that she was to leave immediately. Payne explained that the New York office told him that Holbrook had used an official list to send out the questionnaire. Holbrook, in testifying, denied that the Respondent had an official mailing list and that Holbrook had gotten the names of the lawyers from a "Lawyers Handy Book." She stated that she also may have used the telephone book. She further stated that she sent the questionnaire because she thought it would be an effective way to get permission for the secretaries to wear their style of dress. Holbrook admitted that she distributed the questionnaire to get the ban on jeans rescinded.

Payne testified, as noted above, with regard to the confidentiality of the work of the Respondent. He stated, therefore, that he was instructed by New York to discharge Holbrook because of what they felt constituted a breach of that confidentiality by using the list of attorneys and arbitrators who were on the panel and who used the services of the Respondent. Payne, in testifying, also related that he was called by several individuals, arbitrators and attorneys, who wanted to know what kind of behavior had led to what they considered the childish and immature questionnaire. Payne explained that this greatly embarrassed the organization for which both he and Holbrook were working. These, according to Payne, were the reasons why Holbrook was discharged.

D. *Discussion and Conclusions*

As noted above, the General Counsel contends that Holbrook was engaged in protected concerted activity when she protested the ban against jeans and that the material which she sent, the letters which she wrote, and her behavior, including the wearing of the tight jeans to the office on 2 successive days, were the reasons for her discharge and that, accordingly, in discharging her for these reasons the Respondent violated Section 8(a)(1) of the Act, in that it interfered with the Section 7 rights not only of Holbrook but of the other employees in the office. On the other hand, the Respondent contends that, in the first instance, there is no evidence that Holbrook was engaged in concerted activity and, furthermore, the activity in which she engaged, the use of the confidential list, and the questionnaire which caused the Respondent much embarrassment were the reasons for Holbrook's discharge and therefore, even assuming Holbrook engaged in concerted activity, such activity was not protected.

Counsel for the General Counsel argues that the questionnaire sent to various individuals, as above outlined, and the letters to Payne and to Respondent's New York headquarters were all in support and furtherance of the efforts by the secretaries and others to seek the revocation of Payne's prohibition against the wearing of jeans, and were the result of the meeting between the secretaries and Holbrook at which the secretaries and Holbrook expressed their opposition to the ban on wearing jeans in the Respondent's office. According to counsel for the General Counsel, it follows, therefore, that the discharge of Holbrook for sending the letters and questionnaire constitute interference, coercion, and restraint in violation of Section 8(a)(1) of the Act in that the discharge was in retaliation for Holbrook engaging in protected concerted activity.

The Respondent, on the other hand, argues that Holbrook undertook to act on her own, neither at the request, nor with the consent of, the secretaries or others who were unhappy with Payne's ban on wearing jeans. Accordingly, the Respondent concludes that Holbrook was not engaged in concerted activity. Moreover, the Respondent argues that the use of the list of lawyers and arbitrators, which was maintained in confidence by the Respondent, and the questionnaire sent to these individuals, because it was childish and disparaged the Respondent, constituted acts of disloyalty and thus the activity in which Holbrook engaged cannot be considered protected, even if found to be concerted.

In its very recent Decision, in which it discusses what constitutes concerted activity,[2] the Board stated that an employee's activity was concerted and protected "irrespective of whether she was overtly designated by other employees to act on their behalf or informed any employee that she was doing so. It is clear from the circumstances set forth above that Birdwell's fellow employees shared her concern and interest in the subject matter of the letter and, consequently, that Birdwell was acting concertedly on behalf of her fellow employees."[3] The Board further stated that designation to act is not necessary "so long as there is evidence that fellow employees share the acting employee's concern and interest in common complaints."[4]

Although the above quotations are from dicta in the *Diagnostic Center Hospital Corp. of Texas* case, inasmuch as the Board decided that case upon other grounds, nevertheless, it would seem that the Board, at the present time, would find that Holbrook's intention of assisting the secretaries and herself with regard to what they all considered an unfair ban on wearing jeans constituted concerted activity in that although Holbrook was not appointed by the other individuals involved to act as their spokesman, she, nevertheless, was attempting to make a point with regard to a matter which was of common interest to all of them and which constituted a common complaint. I therefore find and conclude that Holbrook was, indeed, engaged in concerted activity.

However, whether this concerted activity was protected is another matter. Although Holbrook testified that she took the names of the individuals to whom she sent the letter enclosing the questionnaire above set forth from the "Lawyers Handy Book," which is accessible to any individual and which is in no way a confidential document, and that she also used the telephone book, nevertheless, she

[2] *Diagnostic Center Hospital Corp. of Texas*, 228 NLRB 1215, 1217 (1977).

[3] *Id.*

[4] *Ibid.*, citing *Alleluia Cushion Co., Inc.*, 221 NLRB 999 (1975).

also testified that she sent the letter to attorneys and arbitrators who were on her caseload. Inasmuch as the attorneys and arbitrators who were on her caseload would had to have been listed in a confidential manner by the Respondent because of its overall desire to keep all of the matters in which it was involved confidential by reason of the very nature of the Respondent's activities, it would seem that there was a breach of such confidentiality in using the names of the attorneys on Holbrook's caseload.

Although not above recited, Holbrook's caseload constituted only automobile accident claim cases. Holbrook admitted that the arbitrators, who were on the panel for this type of claim, were unpaid and volunteered their services. Accordingly, it is understandable that the Respondent would have been very much upset by Holbrook's use of the list of such volunteer arbitrators, and having the latter see the questionnaire. Therefore, I find it believable that Respondent considered the actions of Holbrook not only to have been disloyal but very possibly to have had the effect of discouraging the arbitrators from volunteering their services in these matters in the future. This is particularly true inasmuch as the fifth question in the questionnaire mentioned a prominent law firm which used the arbitration services in accident claim cases and the D.A.I.I.E., which is an organization involved directly in the insurance adjusting of auto accident claims. It would seem, from a perusal of the entire questionnaire, that in a very real sense the questionnaire constitutes a holding up to ridicule of the Respondent in the very comparisons which the questionnaire requests the reader to make. The mention of dogs and other animals in the same breath as law firms and insurance adjusters would indicate not only a lack of good judgment on the part of Holbrook, but would give the reader the impression that she was purposely endeavoring to embarrass the Respondent in order to force the Respondent to change its clothing code insofar as Payne had forbidden the wearing of jeans in the Respondent's office. While it may not have been Holbrook's intention to embarrass or disparage, in the circumstances surrounding the distribution of the questionnaire, this could well have been the result in the mind of the reader of the questionnaire. The very fact that some of the recipients of the questionnaire called Payne and wanted to know what the "childish" questionnaire was all about is indicative of this result.

Additionally, although Holbrook claimed in her letter to the New York headquarters of the Respondent that she was not writing the letter or complaining about Payne and his administration of the Respondent's Detroit office in any retaliatory, obstinate, or vindictive sense, she nevertheless mentioned in the letter a "myriad of others that I had let go asunder," referring to matters which she considered were unfair to her that had occurred by reason of certain actions of Payne.

Accordingly, I must conclude that in sending the questionnaire, Holbrook was not completely innocent or unaware of the possible results but, rather, I find and conclude that there was some pique and vengeance involved. It could well be said that "the lady doth protest too much" when she stated in her letter to New York that she was not seeking vengeance.

However, whether Holbrook meant to disparage the Respondent through the use of the questionnaire and the use of the list of the lawyers and the arbitrators with whom she was familiar through her position as a tribunal administrator, the use of which I have already found to have been a breach of the Respondent's policy of confidentiality, is immaterial. Although the disparagement and the embarrassment caused the Respondent by the questionnaire which Holbrook composed and distributed may not have been as severe as in the cases cited by counsel for the Respondent,[5] nevertheless, it did constitute an attack upon the Respondent which was sufficient to deprive Holbrook of the protection of Section 7 of the Act. Otherwise put, Holbrook's action went beyond the outer limits the Congress envisioned when it established the Section 7 rights of employees. The combination of the use of the confidential files with the ridicule evident in the questionnaire constitutes disloyalty for which Holbrook was discharged and which, accordingly, deprived Holbrook of the protection of the Act and gave the Respondent reason for Holbrook's discharge, which I find to have been warranted and lawful.

Accordingly, I find and conclude that in discharging Holbrook the Respondent has not violated Section 8(a)(1) of the Act because the concerted activity in which Holbrook engaged was not protected.

CONCLUSIONS OF LAW

1. American Arbitration Association, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. By discharging Billie J. Holbrook, an individual, the Respondent has not violated Section 8(a)(1) of the Act.

On the basis of the foregoing findings of fact and conclusions of law, and upon the entire record, and pursuant to Section 10(b) of the Act, I hereby issue the following recommended:

ORDER[6]

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

[5] *N.L.R.B.* v. *Local Union No. 1229, International Brotherhood of Electrical Workers [Jefferson Standard Broadcasting Company]*, 346 U.S. 464 (1953); *The Hoover Company*, 90 NLRB 1614, enfd. 191 F.2d 380 (C.A. 6, 1951).

[6] 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.