

**Warehouse Union Local No. 860, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Capel Klang Companies) and Lawrence Sayre.** Case 20-CB-3848

August 30, 1977

**SUPPLEMENTAL DECISION AND ORDER**

BY MEMBERS JENKINS, MURPHY, AND WALTHER

On March 29, 1977, Administrative Law Judge Bernard J. Seff issued the attached Supplemental Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting 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 Supplemental Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,<sup>1</sup> and conclusions 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.

MEMBER WALTHER, concurring:

I agree with my colleagues that the complaint herein should be dismissed in its entirety. As noted in my dissenting opinion in the previously issued order remanding this proceeding to the Administrative Law Judge,<sup>2</sup> I find it unnecessary to reach the question of Chessari's credibility. For, as fully explained in the previous dissent, if Chessari were to have been fully credited, the elements of a violation would still not be present in this proceeding.

<sup>1</sup> 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 clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (C.A. 3, 1951). In finding that Respondent did not request Sayre's discharge, the Administrative Law Judge specifically discredited Foreman Chessari's testimony that Respondent President Aguirre made such a request. The Administrative Law Judge also expressly credited Aguirre's denial that he requested Sayre's discharge. He based his credibility resolutions both on the demeanor of the witnesses and the reasonable probabilities of the situation. In addition, he drew an

adverse inference from the General Counsel's failure to call as his witness Supervisor Cal Parrott who made the ultimate decision to terminate Sayre. Whether we might have reached a contrary conclusion as to the probabilities of the situation if we were assessing the facts *de novo* is irrelevant, for we find no basis for reversing the Administrative Law Judge's credibility findings based on his observation of the demeanor of the witnesses.

<sup>2</sup> 228 NLRB 364 (1977).

**SUPPLEMENTAL DECISION**

BERNARD J. SEFF, Administrative Law Judge: The Board ordered on February 22, 1977, that the Decision in the instant case be remanded to the Administrative Law Judge for the purpose of reevaluating the evidence and making credibility resolutions concerning the telephone conversation between the Union's president, Henry Aguirre, and the Company's foreman, John Chessari. Additionally, I discredited Sayre's testimony that he was told by Foreman Parrott that the Company had to lay Sayre off so he could get another job. The Board noted that Sayre's testimony of this conversation may be affected by the testimony of Chessari and what disposition I make of that testimony.

Chessari testified that he received a phone call from Aguirre on March 11, 1976, the day before the layoff, in the course of which Aguirre asked the company supervisor to put Sayre on a regular journeyman's rate of \$6 per hour instead of the apprentice rate of \$3 per hour. The record indicates that Aguirre made a personal plea on behalf of Sayre because he was in dire circumstances and desperate to secure the higher rate.

The Company allegedly responded to the Union's request by explaining there was no way this could be done since all such jobs were taken and work was slow. According to Chessari, Aguirre then told him to lay off Sayre and send him back to the union hall where Aguirre would try to get him a better paying job. Aguirre testified flatly that he never told the Company to lay off or terminate Sayre. There is a clear conflict in the testimony between Aguirre and Chessari as to whether Aguirre told the Company to lay off Sayre. Aguirre testified strongly denying any such statement.

**Credibility of Witnesses**

I was not impressed with the demeanor of Chessari while he was on the witness stand. He was vague in many of his answers and he gave his testimony in a glib fashion. I do not credit him.

On the other hand, I credit the testimony of Aguirre, who impressed me as being a forthright and truthful witness. I accept as true Aguirre's testimony that he did not tell Chessari to lay off Sayre. It is not disputed that Aguirre told the Company to send Sayre back to the union hall where he would try to get him a better paying job.

Whatever the exact words used by Chessari and Aguirre, the internal evidence in the record demonstrates that the Union made a sincere effort to help Sayre. The record is replete with statements made to Sayre by both the union dispatcher, Patterson, and Aguirre advising Sayre to hold on to his apprentice job temporarily until a better job opened up for him. Aguirre told Sayre that "a half a loaf is better than none." From the evidence in the record it seems

unlikely that under the circumstances the Union would seek Sayre's layoff.

#### Additional Findings Concerning the Layoff

The Company's general manager, James Christensen, testified that Chessari came into his office and said the Union had called and Sayre was not happy with the wages he was making at Capel Klang.

Christensen testified as follows:

So I called Cal Parrott and told him about it and I said we cannot pay a new man \$6 an hour and that's all we can do. Cal said that we have to pay him \$6 or let him go. And I said that is your decision to make, but we're not going to pay him \$6 an hour.

The decision to let Sayre go was made by Parrott. It should be noted that Parrott was not called as a witness although he made the final decision and ostensibly was peculiarly in possession of the facts. From this omission I draw the inference that if he had been called his testimony would have been adverse to the General Counsel's case.

I further find that Sayre's testimony that he was told by Parrott that the Company had to lay him off so he could return to the union hall to get another job is illogical and not supported by the record. The fact is there were no other jobs available at the time the incidents involved in this proceeding took place. I discredited his testimony because of his demeanor on the witness stand and the further fact that he was obviously angry at the Union. His testimony was not affected by the testimony of Chessari.

<sup>1</sup> 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.

#### Concluding Findings

The substantial evidence on the record considered as a whole makes it clear that it was the decision of the Company to lay off Sayre. This decision was not prompted by the Union. Chessari testified that he had nothing to do with the layoff. General Manager Christensen left the final decision to Parrott, whose usual duties included the right to hire and fire employees.

It should also be pointed out that Sayre testified that he did not want to continue working as an apprentice at \$3 per hour.

#### CONCLUSIONS OF LAW

The General Counsel did not sustain his burden of proving that Sayre was laid off at the request of the Union for reasons violative of the Act.

I find and conclude that the Union was not guilty of any unfair labor practices affecting commerce within the meaning of Section 8(b)(1) and (2) and Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact and conclusions of law, and the entire record herein, and pursuant to Section 10(b) of the Act, I hereby issue the following recommendation:

#### ORDER <sup>1</sup>

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

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.