Gyrodyne Company of America, Inc. *and* International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW. Case 29–CA–57

October 8, 1970

SUPPLEMENTAL DECISION

BY CHAIRMAN MILLER AND MEMBERS FANNING AND BROWN

On March 12, 1968, the National Labor Relations Board issued a Decision and Order[1] in the above-entitled proceeding in which it adopted the findings, conclusions, and recommendations of Trial Examiner Arthur E. Reyman as contained in his Trial Examiner's Decision of January 21, 1966. The Board therein accepted the Trial Examiner's credibility resolutions, found that certain individuals with knowledge of employee union activity were not supervisors within the meaning of Section 2(11) of the National Labor Relations Act, as amended, and concluded that Respondent had not engaged in conduct in violation of Section 8(a)(1) and (3) of the Act as alleged. Subsequently, the Charging Party filed with the United States Court of Appeals for the District of Columbia Circuit a petition for review of the Board's Order dismissing the complaint.

Thereafter, on November 5, 1969, the court handed down its opinion[2] in which it stated that certain of Respondent's records, subpenaed by the General Counsel but not produced by Respondent, appear clearly relevant to the issues in the case. The court noted that while the Trial Examiner had originally stated that he would draw adverse inferences from Respondent's failure to produce, he later stated that "I make nothing of the fact that the Company refused to respond to the subpoena." The court was of the opinion that if adverse inferences from Respondent's failure to produce were not to be drawn, the failure to draw such adverse inferences should be explained. Accordingly, the court remanded this case to the Board to either (1) explain the failure to draw the requested inferences, (2) draw the inferences and explain the consequences, or (3) require production of the records.

On February 2, 1970, the Board issued a notice to show cause why it should not draw an adverse inference from the Respondent's failure to produce the subpoenaed records and, if it should draw such adverse inference, why it should not reverse its original decision dismissing the complaint. Thereafter, the General Counsel, the Respondent, and the Charging Party filed memoranda in response to the notice to show cause, and the Charging Party filed a brief in reply to the Respondent's response.

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

The Board, having reexamined the Decision and Order, the court's Decision, as well as the entire record including the parties' responses to the Notice to Show Cause, adheres to its original Decision and Order herein. In doing so, we conclude that under the circumstances noted hereafter it was unnecessary to draw adverse inferences and that the failure to draw the requested inferences was not prejudicial.

We agree with the court that the subpenaed material appears clearly relevant. Usually, the failure to produce such material gives rise to an inference that it would be unfavorable or adverse to the party failing to produce it, and also has persuasive value in discounting the credibility of the party failing to produce. However, the failure to produce is a fact to be considered in view of all of the circumstances of the case. Had Respondent's oral testimony been unreliable or untrustworthy, the subpenaed materials would have assumed more importance.[3]

The issue of the subpenaed materials was, to say the least, vigorously litigated. When the issue of the relevant subpenaed records first arose, the General Counsel questioned the Respondent's assistant personnel manager in general terms about their existence and whereabouts. The record reveals that some of the subpenaed records were available and in the hearing room After the Trial Examiner suggested that the General Counsel call for the production of the records, if relevant, the matter was temporarily dropped. Later, both the General Counsel and the Trial Examiner asked Respondent's witness to produce the payroll record for the "blade department" pursuant to item 1 of the subpena. However, item 1 of the subpena does not mention the "blade department," but merely requests payroll and personnel records for 75 listed employees and supervisors. When the Respondent's attorney attempted to call this discrepancy to the attention of the Trial Examiner,[4]

[1] 170 NLRB No 25
[2] 419 F 2d 686

[3] *Mid-States Sportswear, Inc.*, 168 NLRB No 74, *Crow Gravel Co*, 168 NLRB No 141

[4] During the time the Trial Examiner was calling for production of the records, he changed the request to include all the material subpenaed in item 1, but the Respondent's attorney still believed that the request was only for the "blade department"

the Trial Examiner noted that production of the records had been refused, that he would draw his own inferences therefrom. Later, when the Charging Party called for the personnel records of a specific individual, Respondent produced the file, stated that it would not allow a "free-for-all inspection" by the oppostition, but allowed the Trial Examiner to inspect it. After examining the file, the Trial Examiner stated that he thought "that the anticipation of finding things in here which you hope to find is unwarranted. . . ." The Trial Examiner suggested that the Charging Party and General Counsel question from a summary blue card form in the personnel files of each discriminatee, stating that he was reluctant to "just turn the file over for a general fishing expedition for whatever may appear in here," and further advising that the proper forum for enforcement of the subpoena was in the District Court. Thereafter, the Charging Party asked for the personnel folder of each alleged discriminatee, and the Respondent offered the "blue card" but refused to furnish any other portions of the personnel records. Both the General Counsel and the Charging Party rejected the offer of the blue cards.

As the court noted, payroll and personnel records were relevant in seeking to show reasons for the discharges. However, the General Counsel's Exhibit 11 compiled from the records of the Respondent, substantially complied with the General Counsel's request for the Company's reasons for discharge. That exhibit on its face showed termination and reasons therefor for all terminations taking place between January 1, 1964, through October 31, 1964 Moreover, it is clear from credited testimony that the reasons for terminations, as stated on that exhibit, were compiled from company and personnel records. In addition, Respondent offered to supply the summary blue card form from all personnel records from which the General Counsel or the Charging Party could have begun interrogation of Respondent's witnesses had they desired to take advantage of the offer. In this regard, the blue card summary for each employee could have been compared as to job description, rates of pay, supervisory authority, and other matters, and responsibility for failure to do so cannot now be attributed to Respondent. Finally, no one has suggested exactly what inference can be reasonably drawn from Respondent's failure to supply the complete personnel folder,particularly in view of the fact that the Employer's reasons for discharge are stated on the General Counsel's Exhibit 11. Nor have the General Counsel or Charging Party indicated what material would be relevant within those files. Consequently, we are unable to infer that the personnel files will establish that the discharges were because of union activity, the infarence apparently implied by the Union.

At one point in the hearing, the General Counsel asked Respondent's Assistant Personnel Manager if the Company maintained manuals and charts with regards to lines of authority, but withdrew the question before it was answered. When asked by the Charging Party, the Respondent produced an organizational chart, which was identified as an exhibit of the Charging Party. The exhibit was further identified as a current chart covering the structure of the "fabrication" department, which apparently included many of the departments in which the alleged discriminatees involved herein worked. It was explained that the chart was current and that only a current chart was maintained. The Charging Party did not introduce the chart in evidence nor elicit any meaningful testimony regarding supervisory status from it. Rather, after having an opportunity to examine the chart, the Charging Party refrained from questioning about the chart. Still, the Charging Party requests us to infer that the Company's leadmen were supervisors or agents of the Company within the meaning of the Act, because the Company refused to furnish requested documents. From the record, and under the circumstances, we believe the Company substantially complied with the Charging Party's request to this aspect of the General Counsel's subpena. There was no refusal to furnish the chart the Charging Party identified, but failed to offer, as an exhibit.

Regarding a list of employees rehired, the record shows and the testimony was credited, that none of the laid off or discharged employees were subsequently rehired. There was also credited testimony that further terminations had taken place subsequent to the alleged discriminatory discharges which were not even alleged as discriminatory. And the record discloses that the total number of employees dropped substantially from the time of the alleged discriminatory layoffs until the time of the hearing.

Although it is true that the Board generally views suspiciously a failure to produce relevant documents and material witnesses, and will draw adverse inferences from such failure in appropriate circumstances, we deem it unwarranted to draw those inferences here where the Employer's witnesses are credited, where the General Counsel and the Charging Party refused some documents produced, and where the Employer did produce many of the documents requested. Indeed, at one point, the General Counsel asked if the Respondent had a list of employees transferred, and on obtaining an affirmative response, the matter was dropped.

Even assuming, *arguendo,* adverse inferences were to be drawn from the Respondent's failure to produce, we nevertheless do not believe that such inferences

as could be drawn would produce a sufficient evidentiary base for reversing our Decision herein, particularly in view of the Trial Examiner's credibility findings which were based on evidence subsequently adduced by the Employer.

Moreover, the General Counsel had adequate opportunity to seek enforcement of his subpena in court. He did not do so, but proceeded with the presentation of his case, often through secondary evidence even after being advised on numerous occasions that the forum for enforcement was with the courts. Our determination here does not mean that we condone all the actions of the Respondent or that we will not in other circumstances draw adverse inferences from failure to produce relevant materials subject to a lawful subpoena. We do conclude that under the circumstances of this case, there was no failure to draw adverse inferences which was prejudicial to any party. We adhere to our original Decision and Order.