

Amalgamated Machine, Instrument and Metal Local 485, International Union of Electrical, Radio and Machine Workers, AFL-CIO and Angel Roman. Cases 29-CA-2075 and 29-CA-2651

September 27, 1972

DECISION AND ORDER

BY CHAIRMAN MILLER AND MEMBERS FANNING AND JENKINS

On May 31, 1972, Administrative Law Judge¹ Paul E. Weil issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and the Respondent filed a brief in support of the said Decision and a brief in answer to the 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,² and conclusions³ 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 The title of "Trial Examiner" was changed to "Administrative Law Judge" effective August 19, 1972.

² The Administrative Law Judge incorrectly stated that Roman was at one time employed by Fedders. We note that the record does not support this finding, but it is immaterial to our consideration of the issues herein.

³ In adopting the Administrative Law Judge's Decision, we find it unnecessary to pass on, or adopt, his gratuitous statements regarding union and political elections, or Congressional intentions in passing Sec. 8(a) of the Act.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

PAUL E. WEIL, Trial Examiner: On July 21, 1970, Angel Roman filed a charge with the Regional Director for Region 29 of the National Labor Relations Board, hereinafter called the Board, alleging that Local 485, International Union of Electrical Workers, AFL-CIO, violated Section 8(a)(3) and (1) of the Act by discharging Roman. On June 30, 1971, the said Regional Director, on behalf of the Board's General Counsel, issued a complaint alleging that

Amalgamated Machine, Instrument and Metal Local 485, International Union of Electrical, Radio and Machine Workers, AFL-CIO, hereinafter called Respondent, violated Section 8(a)(1) of the Act by the discharge of Roman because of a petition he had filed protesting the conduct of an intraunion election. Respondent timely filed its answer denying the commission of any unfair labor practices. After the hearing was postponed five times, Roman filed a second charge, Case 29-CA-2651, alleging that Respondent physically assaulted Roman and engaged in other acts of interference, restraint, and coercion, and on December 22, 1971; the said Regional Director issued an order consolidating the two cases, a consolidated amended complaint, and a notice of hearing. This complaint alleged violations of Section 8(a)(1) by the discharge of Roman, and by a physical assault on Roman by Eugenio DeJesus, Respondent's vice president. By its duly filed answer, Respondent again denied the commission of any unfair labor practices. The matter came on for hearing before me on January 18, 1972. All parties were represented at the hearing and had an opportunity to call, examine, and cross-examine witnesses, and to adduce relevant and material evidence. The hearing proceeded on January 18, 19, and 24, on which date I dismissed the complaint on the motion of Respondent on the ground that the conduct of Respondent did not constitute a violation of the Act. Timely exceptions were taken and on March 17, 1972, the Board, by its Associate Executive Secretary, issued an order remanding the proceeding to me to complete the hearing and prepare and issue an appropriate decision. The Board's order gave no guidance as to the legal issue involved.

On April 18 and 19 the hearing was continued and completed. All parties had an opportunity to argue on the record, and the General Counsel did so, and to file briefs. A brief has been received from Respondent. Upon the entire record in the case and in consideration of the brief, I make the following:

FINDINGS OF FACT

I BUSINESS OF RESPONDENT

Respondent is a labor organization affiliated with and chartered by International Union of Electrical, Radio and Machine Workers, AFL-CIO. Respondent maintains its principal place of business in Brooklyn, New York, where it is engaged in the representation of its members in collective bargaining. Respondent annually receives dues, fees, fines, and other contributions from its members in excess of \$50,000, of which dues and fees in excess of \$50,000 are remitted to International Union of Electrical, Radio and Machine Workers, AFL-CIO, located in Washington, D. C.

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

II THE STATUS OF THE CHARGING PARTY

At all times material hereto, Angel Roman was a business agent employed by Respondent for the purposes of organizing the unorganized, and representing employees of employers other than Respondent. Roman is an employee of Respondent within the meaning of Section 2(3) of the Act.

III THE ALLEGED UNFAIR LABOR PRACTICES

Background

Respondent represents employees in various shops located in and around New York City and Brooklyn. Prior to 1967, it represented the employees of the Fedders Company, which at that time was located in Maspeth, Long Island, and had an employee complement of 400 to 500. In 1967 the Fedders plant was merged with two other plants and moved to Edison, New Jersey. Each of the other two plants were represented by other labor organizations. Apparently in an attempt to retain representation rights among Fedders' employees, Respondent dispatched Hamilton Archer, a business agent who was responsible for "servicing" the employees at Fedders when it was in Maspeth, Long Island, along with another business agent, Mike Nigris, in an attempt to organize the employees at Fedders who were not members of Respondent. A large number of the employees at the newly constituted plant were Spanish-speaking; neither Archer nor Nigris spoke Spanish, and accordingly requested that a Spanish-speaking business agent be assigned to assist in the organization. As a result of their request, Angel Roman, who had been employed by Respondent for a period of time in the plant and was at that time employed in a shop represented by Respondent, was hired as a business agent to assist Respondent's organizing campaign in New Jersey. In the early summer of 1968 Roman was withdrawn from the Fedders campaign but continued as a business agent for Respondent. He was assigned to service some 20 shops whose employees were represented by Respondent and was additionally assigned organizational work among the unorganized in and around Brooklyn. Roman continued in this assignment until September 1969 at which time under circumstances that will be explicated below he was reassigned solely for organizing purposes and was no longer assigned to represent employees in shops already under contract with Respondent.

It appears that the membership of Respondent consists predominantly of three ethnic groups; Italians, Spanish-speaking persons (largely Puerto Ricans), and Negroes. In 1969 Roman together with other Spanish-speaking persons employed or represented by Respondent determined to attempt to increase the control of Respondent by the Spanish-speaking group. Their activities were viewed with some alarm by the other ethnic groups in the local. The result was that in September 1969 Hamilton Archer announced that he was going to run in the union election, which was to be conducted in February 1970, for the position of business manager of the local, a position which had theretofore not been filled. About the same time, Joe Salguero, who was then vice president of Respondent and a paid business agent, announced that he would run for business manager and so did Roman. When Archer announced that he would run, the officers of Respondent went into an inner office for a meeting. When they came out of the meeting, Salguero announced to the business agents then present, who included Roman and Archer, that Charles Fay, the union president, had appointed Archer acting business manager of the local until the election was conducted. Salguero announced that he had concurred in the appointment but would run against Archer in the forthcoming election.

Shortly after the appointment of Archer as business manager, Roman was reassigned solely to organizing work. At this time he was told by Fay that he should not go from shop to shop visiting any shop represented by the local and that if he did so the Union would take disciplinary action against him. At this time there were four business agents other than officers: Hamilton Archer, Ernie Biggs, Eladio Hernandez, and Roman. The officers were Fay, the president; Salguero, the vice president; Nigris, the financial secretary; Cliff Cameron, who in the past had been business manager and was now on the payroll as a consultant; Lou Cutroneo; and Thelma Luckie, an officer but not a staff member of the Union.

At the mid-September meeting Roman, Salguero, and Hernandez were accused by Fay of formulating a Puerto Rican slate and Fay angrily told them that no one was going to formulate a slate to run in the election without the permission of the officers. At this time Roman had already distributed materials in a campaign to elect Salguero as business manager of the local.¹

At the December meeting at which nominations were received for the February election, it appears that Roman and Hernandez were rejected by the chair as nominees for office on the ground that they were business agents. The ballot finally contained one candidate for each of the offices; Santiago (Charlie) Torres for president; Eugenio DeJesus for vice president; Michael Nigris for financial secretary; Hamilton Archer for business manager; Leo Cutroneo for recording and corresponding secretary; and Thelma Luckie for treasurer.²

After the election Roman determined to contest the validity of the election through the Department of Labor. As a preliminary thereto, he formulated and had a petition signed by eight union members seeking an investigation of the charges on which they contended that the election was invalid. The petition was signed by Roman, Salguero, and Hernandez and by six other persons who were members of the Union but not employees thereof. The petition was filed in March 1970.³

On March 20, 1970, Hamilton Archer, by letter, discharged Roman on the ground that Respondent was operating with a substantial financial deficit.

The General Counsel contends that the discharge of Roman resulted from his filing of the petition and that this constitutes a violation of Section 8(a)(1) of the Act.

On December 3, 1971, at a dinner sponsored by the Hispanic Labor Committee, Eugenio DeJesus and Angel Roman engaged in an altercation in which according to the testimony at the hearing each of the two men assaulted the other. The General Counsel contends that this violates Section 8(a)(1) of the Act.

At the hearing the General Counsel amended this complaint to include an allegation that a confrontation between DeJesus and Augustin Soto, an employee in a shop repre-

¹ Salguero until this time was the only officer the Union had ever had who was of Spanish-speaking descent.

² Strangely enough, the entire slate who appeared on the ballot were elected.

³ On August 10, 1970, the Department of Labor filed a complaint in the United States District Court for the Eastern District of New York alleging that the election of business manager conducted by the Respondent was null and void and praying for a direction of a new election.

sented by Respondent and a follower of Roman, constituted coercion and restraint of employees in violation of Section 8(a)(1) of the Act.

Discussion and Conclusions

The General Counsel contends that the discharge of Roman violated Section 8(a)(1) of the Act. He has three separate theories for this contention. The main theory, predicated on what he calls the *Jill Severn* case,⁴ is based on the rationale that Roman by protesting together with employees of shops represented for collective-bargaining purposes by Respondent the election practices of the local in support of his own candidacy and that of other candidates was cloaked with the same protection that these employees represented by Respondent would have. Accordingly, Roman's discharge for engaging in such activities violate Section 8(a)(1) of the Act. The second theory is based on the *Better Monkey Grip* and *Dal-Tex Optical Company* cases.⁵ Under this theory the General Counsel analogizes Roman's position with the position of a supervisor who has allied himself with employees for the purpose of assisting them in the exercise of their rights protected under Section 7 and the General Counsel would argue that by this alliance Roman achieved the same protection that the employees had, as under the cited cases supervisors achieved this protection.

Finally, under the decisions in *Phoenix Mutual Life Insurance Company* and *Dobbs Houses, Inc.* The General Counsel would argue that the discharge of Roman as the leader of the employees in their attempt to take part in the affairs of their union constitutes an unprivileged restraint on the protected rights of the employees represented by the Union in violation of Section 8(a)(1).

The General Counsel analogizes the movement to take the election before the Department of Labor to the support by a supervisor of employees by testimony before the Board and applying the rule in *Dal-Tex* finds that this is an 8(a)(1) equivalent to the 8(a)(4) violation found in that case.

The Respondent contends that Roman was fired purely and simply because due to the loss of the Fedders plant which was granted its own charter so that its employees no longer would remain members of the Respondent, it was necessary to cut down on the expenditures by Respondent and accordingly to reduce the number of business agents. Respondent contends that Roman was the least senior business agent and accordingly was necessarily the first that should have been cut.

After election of the officers in February 1970, the composition of Respondent's staff changed considerably. Fay and Salguero, who had been president and vice president of Respondent, respectively, and were also business agents, not only lost their elective positions but did not continue as business agents. Hernandez either resigned or was discharged. Santiago (Charlie) Torres who became president and Eugenio DeJesus who became vice president in their turn became business agents.⁶

Clearly Roman was not the least senior of the business agents at the time of his discharge since both Torres and DeJesus were hired after him. However, it is clear that it is customary with the Respondent that its executive officers, that is to say the president and vice president, become business agents; it would appear that under the old adage "to the victor belongs the spoils," they thus achieved a right for priority in consideration for this job. The records of Respondent clearly reveal that the membership of the Respondent dropped drastically with the loss of the Fedders unit. It is no part of my function to substitute my business judgment for that of Respondent. It appears that the number of business agents was increased by at least three as a result of the Fedders' campaign. The Fedders' campaign having been completed and the unit lost to Respondent, the reduction of the total number of business agents to that employed by Respondent prior to the Fedders' campaign does not give rise to an inference that Respondent's decision to reduce the number of business agents was discriminatorily motivated. In the absence of anything in the nature of an admission on the part of Respondent, I am thus faced with the necessity to determine whether an inference should be drawn that Respondent acted unlawfully in the face of the contrary and equally cogent inference that Respondent acted within the law for good business reasons.

There can be no question that the campaign engaged in by Roman against the present incumbents of the Union was hard fought and bitter and at least as far as the Department of Labor is concerned it appears to have concluded that there was reasonable cause to believe that the election of Hamilton Archer was not conducted in accordance with the International constitution but that brings us no closer to a determination that the discharge was motivated by a desire on the part of Respondent to avenge itself for Roman's making common cause with employees to take over the Union or to demonstrate to the members of the Union Respondent's willingness to retaliate against dissidence to the elected officers.

The General Counsel argues that Roman, Salguero, and Hernandez, solely motivated by their desire to achieve better representation of the Spanish-speaking union members, entered into the course of conduct which led to Roman's discharge. They appeared to have been successful in their goal; Respondent's president, Torres, and vice president, DeJesus, are both in the Spanish-speaking community and both concurred in Roman's discharge. The General Counsel relies on the statements made through the campaign by Archer and his supporters that Roman was ineffectual and divisive and should be discharged. Respondents point out that during the period in excess of a year that Roman was working part time as an organizer and during the 6-month period that he worked full time as an organizer no plants were organized; no new units were added to the roster of the plants represented by the Respondent whereas since Roman's discharge the Respondent has achieved bargaining rights at four additional plants. It may be that Roman was ineffectual or it may be that he spent more time politicking than organizing to the detriment of his function. It is not possi-

⁴ *Washington State Service Employees State Council No 18, etc.*, 188 NLRB No 141.

⁵ *Better Monkey Grip*, 115 NLRB 1170, enf. 243 F.2d 836 (C.A. 5), *Dal-Tex Optical Company, Inc.*, 131 NLRB 715, enf. 310 F.2d 58 (C.A. 5)

⁶ There is some question what their position was prior to the election. They

apparently did the same work as the business agents but were not carried on the Respondent's rolls in that capacity. For at least some part of the period between the close of the Fedders' campaign and their election as officers, they returned to the shops from which they had been originally drawn.

ble to gainsay Respondent's assertion that a greater membership was necessary to justify a larger payroll. I cannot conclude that the inference which the General Counsel asks me to draw can override the facts upon which Respondent's defense is based. Accordingly, without getting to the General Counsel's somewhat esoteric theory of the violation, I find that he has not carried his burden of supporting his theory with convincing substantial evidence on the record as a whole and I shall therefore recommend that the complaint, insofar as it alleges that the discharge of Roman violates Section 8(a)(1) of the Act, be dismissed.

The Alleged Coercion of Employees

The General Counsel contends that on two separate occasions Respondent violated 8(a)(1) by a physical assault on Roman by Vice President DeJesus on December 3, 1971, and by an attempted assault on Agustin Soto by DeJesus in the late fall of 1970. The latter incident, former in time, as reported by Soto, resulted from information that came to Soto at a union meeting which Soto did not attend. DeJesus stated that he was a parasite and a traitor like Angel Roman. Soto, who was a union member working in one of the shops, thereafter saw DeJesus in the shop, accosted him, and told him that DeJesus should call a union meeting so that Soto could defend himself. According to Soto's testimony, DeJesus pushed him and made as if to strike him. DeJesus' version was that in going through the shop he came across Soto who picked an argument with him and invited him outside to fight. No blows were struck. According to Soto, a number of fellow employees held off DeJesus. According to DeJesus, no such thing took place but Soto invited DeJesus outside to fight.

The incident involving Roman took place at a dinner given by a Spanish-speaking group of labor representatives. Apparently all parties had been drinking heavily. After the dinner some of the group went to a suite of rooms where they rehashed the events of the evening and congratulated each other on a successful banquet. During the course of the conversations, according to Roman, DeJesus came up to him and struck him twice without provocation. According to DeJesus, he was standing near Roman and Roman shoved him and DeJesus shoved him back. It is difficult to credit either story but it is a fair presumption that some incident took place between Roman and DeJesus. Unquestionably, there were hard feelings between the two men resulting from the campaign and from Roman's continuing attempt to set aside the union election at which DeJesus was elected vice president. There is no evidence that any employee represented by Respondent was present when the altercation took place.⁷

The General Counsel argues that the assault against Roman was an additional attempt to interfere with his rights to join with the employees represented by the Union and that the event involving DeJesus and Soto stems from the same clause and is part of the same pattern. With regard to the Roman incident, I see no violation. I find, above, that Roman's discharge was not violative. Accordingly, he was not an employee of Respondent nor was he a member of Respondent at this time. No employee or member of the Respondent appears to have been nearby and it is difficult to see how any employee, either of Respondent or represented by Respondent, could have been interfered with, coerced, or restrained by the assault if such there were.

With regard to the Soto incident, I do not credit Soto in his testimony that his own attitude throughout was peaceful. On the contrary, I believe that he started an argument with DeJesus during the course of which one or the other suggested to his opponent that they step outside and settle it with fists. According to the testimony of Pedro Hernandez, who was the chief shop steward in that plant and was accompanying DeJesus, and whom I credit, the pugilistic suggestion came from Soto rather than from DeJesus. The General Counsel has not carried his burden of proving the facts upon which his allegation is predicated. Accordingly, I do not reach the legal issue involved.

Union elections are frequently hard fought and like political election frequently generate more heat than light. Perhaps in the potimum society the participants in such elections would proceed together in brotherly affection when the issue was resolved. However, I do not believe that we have yet achieved the optimum society. In my opinion, the effects on employees of the actions complained of the General Counsel in this case are not the effects on employees that Congress had in mind when it passed Section 8(a) of the Act. Section 8(b) attempts to protect employees who are members of labor organizations or have relations with labor organizations from restraint and coercion by such organizations but the General Counsel's reasoning herein, if adopted by the Board, would put the Board in a position of policing every manifestation of ill feeling between the winners and the losers in union elections. With no more of a mandate than Congress has seen fit to give the Board in this regard, I conclude that it is not within the intention of Congress that Section 8(a) should be used for this purpose.

Having found that none of the unfair labor practices alleged to have been committed are supported by the record, I shall recommend that the complaint be dismissed in its entirety.

⁷ It appears that at least two employees were present at the banquet. There is no evidence that they accompanied the society officers to the suite where the altercation took place.