

Alberts, Inc., Alcove Division and Central States Joint Board, Retail and Department Store Division, Amalgamated Clothing Workers of America, AFL-CIO. Case 7-CA-12608

November 19, 1976

DECISION AND ORDER

BY MEMBERS FANNING, PENELLO, AND WALTHER

On June 17, 1976, Administrative Law Judge Joel A. Harmatz issued the attached Decision in this proceeding. Thereafter, the Charging Party filed exceptions and a supporting brief, and the Respondent filed a brief in opposition to exceptions of the Charging Party.

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 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 Charging Party 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). We have carefully examined the record and find no basis for reversing his findings.

DECISION

STATEMENT OF THE CASE

JOEL A. HARMATZ, Administrative Law Judge: This case was heard in Detroit, Michigan, on May 11, 1976, upon an unfair labor practice charge filed on December 18, 1975, and a complaint issued on February 11, 1976, alleging that Respondent violated Section 8(a)(1) of the Act, by a statement on the part of Respondent's personnel director, Martin Felder, to a discharged employee, Sheila Parker, that he would not investigate or discuss Parker's discharge because

she had boycotted Respondent's store. In its duly filed answer, Respondent denied that any unfair labor practices were committed. After close of the hearing, briefs were filed by the Charging Party and the Respondent.

Upon the entire record in this proceeding, including consideration of the posthearing briefs, and observation of the witnesses while testifying, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent Alberts, Inc., is a Delaware corporation, engaged in the retail sale and distribution of women's clothing and related products, at various stores located in the States of Michigan, Illinois, and Indiana, including those located at the Northland Shopping Center, Southfield, Michigan, the sole facilities involved in this proceeding. Alcove Division is an operating division of Alberts, Inc. During the calendar year ending December 31, 1975, a representative period, Respondent in the course of said operations sold and distributed from its stores located in the State of Michigan goods from which it derived gross revenues in excess of \$500,000, and purchased and caused to be delivered to its operations in Michigan goods and materials valued in excess at \$50,000, which were transported and delivered directly from points outside the State of Michigan.

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

II THE LABOR ORGANIZATION INVOLVED

The complaint alleges, the answer admits, and I find that Central States Joint Board, Retail and Department Store Division, Amalgamated Clothing Workers of America, AFL-CIO, is and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICE

A. The Issue

This proceeding turns in its entirety upon a conflict in testimony between two witnesses, who attest to conflicting accounts of a single telephone conversation which, according to the General Counsel, included a statement by Respondent's personnel director, Martin Felder, that he would not inform Sheila Parker, a lawfully terminated former employee of Respondent, of the reasons for her discharge because she participated in picketing and other related activity, urging a boycott of Respondent's stores. On the strength of Parker's testimony the General Counsel claims that Respondent violated Section 8(a)(1) of the Act.

B. Concluding Findings

For several years, the Union has been engaged in an effort to organize Respondent's retail stores in the Detroit

area.¹ Pursuant thereto, over the last 2 years, pickets have appeared frequently at Respondent's facilities, including those at the Northland Mall, which are involved in this proceeding.²

Sheila Parker is a former employee of the Alcove store at Northland. She had been employed by Respondent for only about a month prior to her discharge, which occurred at the close of work on Saturday, December 13, 1975.³ According to Parker, Howard Ball, a supervisor, terminated her at that time, citing a personality conflict and her low sales as the basis for his action. The General Counsel does not contest the legitimacy of Parker's termination.⁴

On December 14, Parker telephoned Ball, asking if she could have her job back. Ball responded by indicating that he would check with his management team, and urged Parker to call him back on Monday, December 15. On the morning of December 15, Parker called Ball, who indicated that the management team decided against her reinstatement. Parker then asked Ball if there was any reason for her discharge, other than those previously related. The latter then suggested that Parker contact Personnel Director Felder. Parker immediately telephoned Felder, identified herself, advising that she had been fired, and requesting information as to the reasons for her discharge.⁵ The conversation ended with Felder agreeing to look into the matter and requesting that Parker again call him in a couple of days.

That same day, December 15, Parker about 11 a.m. joined the Union's picket line in front of the Alcove store at Northland. She continued to picket until 8:30 that evening, carrying a sign, asserting that Respondent is "unfair

to organized labor." She also distributed handbills, which among other things urged customers to boycott Respondent's stores. Respondent conceded that the picketing and handbilling involved, as well as Parker's participation therein, constituted activity protected by Section 7 of the Act.

Respondent's knowledge of Parker's participation in such activity is not disputed. Felder concedes that Ball reported that Parker was on the picket line on December 15, and that he (Felder), personally observed her participation therein on that date.⁶

The complaint in this proceeding turns on the conflicting version of a phone conversation between Felder and Parker on Wednesday, December 17. Thus, it was on this occasion that Parker advised Felder that she was calling him back to find out why she was fired. According to Parker, Felder simply said "that he couldn't do anything for me after I was boycotting his store," and that she simply said "okay," and hung up. Parker testified that Felder did not give her the reasons for the discharge.

According to Felder, he informed Parker that the reasons for her discharge were those given by Ball and that, when Parker asked what those reasons were, Felder specifically cited her refusal to follow orders, and her requesting time off for personal problems during the busiest time of the year. At this point, according to Felder, Parker became angry calling Ball "a lousy manager." Felder claims to have responded by indicating "you have a lot of reasons to get mad at us when you are in front of the store telling people not to shop at Alberts." After this, Felder states that Parker calmed down and asked if she was not entitled to written notice prior to discharge. Felder explained that she was not entitled to such notice because she was terminated within her 30-day probationary period. Parker again got mad, according to Felder, stating "you are all full of shit," and then hung up.

Having had the opportunity to observe Parker and Felder while testifying, and having weighed the evidence adduced through them, I consider Felder to be the more credible witness.⁷ Additionally, his account receives more convincing support from the probabilities. It is far more likely that the disputed December 17 phone conversation was marked by the acrimony and emotional outbreaks appearing in Felder's account. Parker's cut and dried description thereof was not convincing and suggested that Parker was less than candid in relating her own contribution to a heated conversation. Indeed, I consider it a distinct possibility that, in her anger, Parker's recollection as to just what was said might have been confused.

Having discredited Parker, and being of the opinion that Felder's reference to the boycott, as it appears in his version of the telephonic conversation, did not violate Section

¹ See *Alberts, Inc.*, 213 NLRB 686 (1974)

² At the Northland Mall, Respondent operates two stores engaged in the sale of women's apparel. One trades under the "Alberts" name and is a general merchandising operation, which is larger than the second, an "Alcove" store, which is more in the nature of a boutique

³ All dates refer to 1975 unless otherwise indicated

⁴ In its brief, the Charging Party urges that I find that the discharge of Parker violated Sec 8(a)(3) and (1) of the Act. In this connection, at the hearing counsel for the General Counsel stated, "there was a discriminatory discharge allegation as part of this charge originally [which] was considered by the region and considering all the evidence the Regional Director decided that there was no merit to that allegation." Counsel for the Charging Party, though present, made no challenge to that statement, and, indeed, at no time during the hearing did he mention that the validity of Parker's discharge was in issue. To hold that this belated effort to adjudicate the validity of the discharge is meritorious would entail findings on an incomplete record, without prior notice, and countenance a blatant disregard of ordinary concepts of fairness, while at the same time disregarding the established procedures governing the General Counsel's authority over the issuance of complaints. See, e.g., Sec 102.19 of the Rules and Regulations of the National Labor Relations Board

⁵ Felder relates that Parker stated that she wasn't "sure" as to the reasons for her termination, and that Parker denied that Ball had provided such information. According to Parker, she told Felder that she did not feel that the reasons given by Ball were justified. I credit Felder's testimony as the more probable, particularly in the light of my strong disbelief of Parker's assertion that she believed that her discharge related to an earlier threat by Store Manager Janis, who had observed Parker talking to pickets prior to her discharge. According to Parker, Janis told her that Ball would discharge her if she was seen talking to pickets. This threatening remark, though a far more direct impairment of Sec 7 rights than that on which the complaint is predicated, was not alleged, and came out in testimony only on my examination, well after completion of direct examination by the General Counsel and Charging Party. This aspect of Parker's testimony impressed me as deliberately contrived to lend a semblance of reasonableness to her posture during the postdischarge communications with Respondent

⁶ Parker was the only employee of Respondent or former employee who participated in the picketing of the Northland stores

⁷ In support of his position on credibility, the General Counsel points to *Alberts, Inc.*, 213 NLRB 686 (1974), urging that I make particular reference to a certain page in that Decision. Having considered that decision in its entirety, I find nothing therein which is of sufficient persuasiveness to override my clear impressions as to the verity of witnesses appearing before me and my conclusions with respect thereto on the entire record in this proceeding. I note that Felder was not specifically discredited as to any aspect of his testimony in the earlier case

8(a)(1) of the Act, I shall recommend dismissal of the complaint in its entirety.

CONCLUSIONS OF LAW

1. Alberts, Inc., Alcove Division, is, and at all times material herein has been an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. Central States Joint Board, Retail and Department Store Division, Amalgamated Clothing Workers of America, AFL-CIO, is, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has not engaged in any unfair labor practices herein.

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

ORDER ⁸

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

⁸ 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.