

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

February 22, 1977

ORDER REMANDING PROCEEDING TO ADMINISTRATIVE LAW JUDGE

BY CHAIRMAN MURPHY AND MEMBERS JENKINS AND WALTHER

On October 1, 1976, Administrative Law Judge Bernard J. Seff issued the attached 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 Administrative Law Judge concluded that Respondent, Warehouse Union Local No. 860, did not seek to have Charging Party Sayre laid off by his employer, Capel Klang, and therefore did not violate Section 8(b)(1)(A) and 8(b)(2) as alleged in the complaint. The Administrative Law Judge's conclusion was based on factual findings resulting from credibility resolutions. The General Counsel has excepted to these credibility resolutions on the ground that the Administrative Law Judge failed to consider the entire record.

In his Decision, the Administrative Law Judge noted that Respondent's president, Henry Aguirre, telephoned Capel Klang and spoke to its warehouse supervisor, John Chessari, about Sayre, the day prior to Sayre's layoff. Aguirre testified that he never told Capel Klang to lay off Sayre. Chessari testified that Aguirre referred to laying off Sayre if Capel Klang did not want to give Sayre more money. The Administrative Law Judge did not resolve this conflict in testimony. Rather, he concluded that Aguirre had testified credibly on this incident but he did not mention the testimony by Chessari. The Board is satisfied that the Administrative Law Judge's failure to mention and consider Chessari's testimony was not a tacit credibility resolution but rather was an inadvertent error as the Board notes that the Administrative Law Judge later in his Decision indicated that "Nowhere in this record is there an explicit statement acknowledging that the

Union called Capel Klang and told them to discharge, lay off or terminate Sayre."¹ This statement clearly takes no consideration of Chessari's testimony for, even if that testimony is ultimately discredited, it is apparent it is still "in [the] record."

Additionally, the Administrative Law Judge discredited Sayre's testimony that he was told by Foreman Parrott that the Company had to lay him (Sayre) off so that he could get another job. The Administrative Law Judge found that it was illogical for the Company to have said this at a time when no other journeyman/warehouseman jobs were available. We note, however, that Sayre's testimony of this conversation may be affected by the testimony of Chessari and what disposition the Administrative Law Judge makes of that testimony.

Thus, as the Board considers the Administrative Law Judge's credibility resolutions presently inadequate, this proceeding is remanded to Administrative Law Judge Bernard J. Seff to reevaluate the record evidence in order to make credibility resolutions, findings of fact, and conclusions of law consistent with the entire record, and to issue a supplemental decision thereon.²

It is hereby ordered that this proceeding be, and it hereby is, remanded to Administrative Law Judge Bernard J. Seff for the purpose of reevaluating the evidence and making credibility resolutions concerning the telephone conversation between Henry Aguirre and John Chessari on March 11, 1976, and the conversation between Cal Parrott and Lawrence Sayre just prior to Sayre's layoff.

IT IS FURTHER ORDERED that the Administrative Law Judge shall prepare and serve on the parties a Supplemental Decision containing credibility resolutions, findings of fact upon the entire record, conclusions of law, and recommendations; and that, following service of the Supplemental Decision on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations, Series 8, as amended, shall be applicable.

MEMBER WALTHER, dissenting:

Contrary to my colleagues, I find no need for the Administrative Law Judge to reevaluate the record herein. Consequently, I would not remand this proceeding to the Administrative Law Judge and would consider the merits of the exceptions to his Decision. As set forth below, I would also find that Respondent did not violate the Act.

The facts are set forth in the majority opinion and I shall not repeat them here. My colleagues are

that can be drawn from such testimony, if credited, is that the Union's alleged actions in calling Capel Klang were taken merely in enforcement of the parties' collective-bargaining agreement, considering all of the surrounding circumstances here. That is not to say that we are ruling out such a conclusion, but only that other conclusions might be drawn as well.

¹ ALJD III, B, par. 8.

² Contrary to our dissenting colleague, we are not prepared to decide the merits herein without first having the Administrative Law Judge consider all the issues, including credibility, in light of Chessari's testimony described above. Unlike the dissent, we are not willing to find that the only conclusion

concerned with the obvious failure by the Administrative Law Judge to consider the testimony of Chessari which may, in their view, constitute the basis for the Administrative Law Judge's finding a violation. Of course, I share their concern over the failure by the Administrative Law Judge to consider all the testimony. In my view, however, even when Chessari's testimony is considered and fully credited, it does not form the basis for finding that a violation was committed.

As noted by the majority, Warehouse Supervisor Chessari testified that Respondent's president, Aguirre, referred to laying off Sayre in a telephone conversation with Chessari if *Capel Klang* (the Employer) *could not give Sayre* more money. A day prior to the phone call, Sayre had inquired at a union meeting as to why he was making trainee wages of \$3 per hour rather than the contract rate of \$6 per hour. Clearly, the relayed inquiry by Respondent Union and its urging that Sayre be paid more was an attempt at enforcing its contract with *Capel Klang*. If *Capel Klang* could not pay the journeyman rate it was contractually bound to pay, it was to refer Sayre back to the Union which would then attempt to find him other employment. The conclusion urged by the General Counsel, that Aguirre's phone call was made for the purpose of urging Sayre's layoff, is unwarranted. Certainly, if Respondent intended only that Sayre be laid off, it would not have also sought his continued employment at the journeyman's rate.

Thus, if the testimony of Chessari is considered and credited, it discloses a phone call from a union to an employer urging compliance with a contract. This does not constitute a violation of the Act. I therefore see no purpose in remanding the proceeding to the Administrative Law Judge. I would consider the merits and, for the reason set forth above, would dismiss the complaint.

DECISION

STATEMENT OF THE CASE

BERNARD J. SEFF, Administrative Law Judge: This case was heard before me in San Francisco, California, on August 10, 1976.¹ The charge was filed by Lawrence Sayre, an individual, and the complaint was issued on May 24. It alleges that the Respondent violated Sections 8(b)(1)(A) and (2) and 2(6) and (7) of the Act. The filing of briefs was waived and the case concluded with oral argument presented by both sides.

Upon the entire record, including my observation of the witnesses and after due consideration of the record, I make the following:

¹ All dates referred to in this Decision took place in 1976 unless otherwise specified.

FINDINGS OF FACT

I. JURISDICTION

Capel Klang Company, herein called the Employer, is a division of Leisure-Group, Inc., a Delaware corporation with a facility in South San Francisco, California, where it is engaged in the wholesale distribution of gardening equipment and supplies. During the past calendar year, the Employer, in the course and conduct of its business operations, purchased and received goods, materials, and supplies valued in excess of \$50,000 directly from suppliers located outside the State of California. During the past calendar year, the Employer sold and shipped goods and materials valued in excess of \$50,000 directly to customers located outside the State of California.

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

II. THE LABOR ORGANIZATION INVOLVED

Warehouse Union Local No. 860, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Sequence of Events*

Lawrence Sayre was employed by *Capel Klang* in mid-January and continued in the Company's employ until March 12, 1976. Sayre is a member of Warehouse Union Local No. 860 and is an experienced warehouseman. He was formerly employed in 1975 by a plastics concern, BWI Company. Because the wages were low and working conditions not good, Sayre and two other fellow employees called upon the business agent of Local 860, Robert Patterson, and asked him to organize BWI. Although the record is not clear on this point, apparently Sayre lost his job after some months and was then referred to the Joseph Magnin Co. by Patterson. He earned the journeyman's rate as a warehouseman while working for Magnin, which was approximately \$6.50 an hour. Sayre worked for Magnin until about December 17, 1975, when he was laid off because the Christmas business had been completed. He was out of work for some time until approximately the middle of January 1976. Sayre made repeated efforts, by telephoning as much as three times a day to Patterson at the union office in an attempt to secure other employment.

The period between January and August is known as the worst time to expect to get a job as a warehouseman. Patterson testified that the status of work in the warehouse industry was very poor because the California state tax on inventory starts in February or March, and employers do not put much merchandise into warehouses. Work begins to pick up again about August, and from August through December it is very good.

Sayre was in very frequent contact with the union office, and he kept asking Patterson if it wasn't possible to get him a job, because he had a special problem due to the fact that his wife was pregnant and Sayre did not have either any workmen's compensation due him nor did he have any coverage under health and welfare. Patterson told him that he would not be eligible to receive health and welfare coverage from Capel Klang until he had been employed for 1 year.

Due to his efforts with Patterson and Henry Aguirre, who is the president of Local 860, Sayre repeatedly requested employment both by making telephone calls to the union office and also by making two personal visits to the office. Sayre told Patterson that he was desperate for work. Patterson explained repeatedly that work was very slow in the industry in January and remained poor really until August. Finally, Patterson told Sayre that, although there were no jobs as regular warehousemen available, he could send him to Capel Klang, where he would be interviewed for a job as an apprentice.

Patterson told Sayre that he would not be happy as an apprentice where the pay was only \$3 an hour. Sayre again said he was desperately in need of work. Patterson told him if he wanted to go out for an interview and if he wanted the job to go down and try the job at Capel Klang temporarily. Patterson testified that he told Sayre he knew he was a good warehouseman and did not deserve working for the kind of wages being paid for the job as apprentice, but he had nothing else at that time to offer him. Patterson pointed out to Sayre that he never sent a journeyman out on a job as an apprentice because the job only paid \$3 an hour to start. Every 3 months he would receive an increase of approximately 50 cents an hour. Primarily, the job was one where the Union sent inexperienced students and college boys who go through the program and later become attorneys or doctors or other kinds of professional people.

The record shows that Sayre was discontented with the rate of pay, but his primary concern in the early days of his employment was the fact that he had no way to pay for the cost of taking care of the delivery of his child. His wife's pregnancy was something that was on his mind constantly. He was very anxious that he be given some employment where one of the benefits would include health and welfare payments that would make it possible to carry the cost of his child's birth. While the record is not entirely clear as to how frequently Sayre called Patterson, it is clear that he called very often and on some occasions called as much as three times a day. These calls were made primarily for the purpose of Sayre's getting a job as a journeyman warehouseman so that he could make \$6.08 an hour rather than the \$3 he was earning while employed by Capel Klang. Whenever Sayre spoke to either Patterson or Aguirre, he kept asking if Patterson could find him a job as a journeyman. Patterson would reiterate the fact that the conditions in the industry were very bad at that time, but he did tell Sayre he would do the very best he could for him.

B. The Events of the Meeting of March 10, 1976

A big meeting was scheduled to take place at the Towne House in San Francisco for the purpose of settling on demands the Union was then making for a new master

contract. At the outset it was made clear to the approximately 900 individuals who were present at this meeting that the purpose of the meeting was to discuss proposals then before the multiemployer bargaining group and that it was not for the purpose of airing any individual grievances. After approximately 45 minutes, during which contract proposals were discussed from the podium by Patterson, and the secretary-treasurer of the Union, a Mr. O'Reilly, and Aguirre, the meeting was then thrown open for questions from the floor. The first person to raise his hand for permission to speak to the group was Sayre. As soon as he started what he had to say, he remarked that he thought it was manifestly unfair for him, being a journeyman warehouseman, to have been sent out on a job that paid \$3 an hour instead of the then going rate which was \$6 an hour. He also said the Company could afford to pay him the \$6 rate because they were investing money in the purchase of new equipment, such as forklifts, etc. Supervisor Chessari, who is also a member of the Union, was present at the meeting and heard Sayre's statements critical of the Company.

When O'Reilly heard about the story of Sayre's employment, he asked who had dispatched him to the job. Patterson said that he had dispatched him and Patterson was requested to make an explanation to the members as to how this referral took place. Patterson explained that Sayre kept in almost constant touch with him by telephone, requesting work and explaining the desperation of his situation, that his wife was pregnant, that he had no unemployment compensation coming to him, and that he had no insurance protection to cover the cost of the delivery of his child. After the meeting was over, Sayre went up to where Patterson was speaking to a number of people and said that he wanted to make an apology for the "cheap shot" he had directed against Patterson because he knew that Patterson was embarrassed to be denigrated in front of 900 union members when the announcement was made that he had dispatched Sayre to a \$3-an-hour job. Patterson testified that he was very angry and that the damage had been done to him because Sayre had paid full union dues and had been sent out on an apprentice job. Patterson then turned his back on Sayre. Some short time later Sayre approached Aguirre and explained to Aguirre that he was sorry he had made the remark he made about Patterson, that it was a cheap shot, and that he could understand why Patterson was angry with him. Aguirre spoke in a very cordial manner and assured Sayre that by the next day Patterson would have gotten over his anger and it was not something that Sayre had to worry about.

It is at this point in the record that it is not clear precisely as to what later developed on the next day, March 11. The General Counsel contends that Union President Aguirre called Capel Klang on March 11 and ordered that Sayre be discharged. On March 12 Sayre was laid off. The only serious issue in this case was centered around what had been said by the Union and what had been said by the Company to Sayre. Aguirre testified credibly that he wanted to see if he could help Sayre get into the \$6-an-hour wage group. Aguirre testified that he told Chessari: "All I said look, do me a favor. This guy is hurting, he's married, his wife is going to have a baby, if there's a chance that you

can put him on the regular payroll as an experienced warehouseman, if you could put him on there I would really appreciate it.”

Chessari was asked what was the response:

A. They said Henry we can't. We're all filled up.

* * * * *

Q. You testified that you didn't use the term "terminate" Mr. Sayre.

A. I never told the company to terminate him. All I told the company was if they could possibly put him on the higher rate and they should talk to Mr. Sayre and see if he wanted to stay for the \$3 an hour. If not, to send him to me and then I would see if I could get him another job.

Q. Did you ever use the term layoff?

A. I never used the term layoff at any time.

Among the other items that were offered into evidence were typed copies of a taped series of phone calls made by Sayre to the Union. One of these conversations took place between Sayre and Aguirre.

Aguirre read from the tape as follows:

Well they figured if you were going to hassle with \$3 an hour, they weren't going to keep you . . .

Sayre testified on direct examination that Cal Parrott, the Company's foreman who had the authority to hire and fire employees, came up to him and said:

"Well, Larry, I've got some good news and I've got some bad news." He told me that the union had called and they were going to find me a better job or something very similar that they had, paying at union scales and that I would be able to make it pretty comfortably. The bad news he told me was that the company had to lay me off, so I could get that other job.

Nowhere in this record is there an explicit statement acknowledging that the Union called Capel Klang and told them to discharge, lay off, or terminate Sayre. I do not credit the explanation given by Sayre of the conversation he had with Parrott. It strains credulity to believe that Parrott would tell Sayre he was laying him off because he wanted to make it possible for Sayre to go and get the other job. The record is perfectly clear that, throughout the many conversations that Sayre had with Patterson and the few he had with Aguirre, the Union constantly maintained that it had no other jobs available except the job as an apprentice and that Patterson felt he was overqualified for that position. Furthermore, it was clearly understood by the Union that Sayre was making a plea of desperation that he be given some kind of job because of the problem he had concerning securing hospital coverage for his wife. From the overwhelming testimony in the record to the effect that there were no jobs available, it does not add up logically that the Company would tell Sayre that they had to lay him off so he

could go and get another job when there were no other journeyman jobs available at that time.

It is not exactly clear as to why Sayre was discharged at this time, but it is important to remember that Chessari, the plant superintendent, was present in the union hall when Sayre made his attack upon the Company for paying him only \$3 an hour when they were expending sums of money to purchase new equipment. Furthermore, there is testimony in the record that Sayre was told by Aguirre and also by Patterson that he should hold on as long as possible because something would surely open up at a later date and they hoped that they would be able to place him in a job at the regular journeyman warehouseman rate, which at this time had been raised to \$6.50 an hour. In addition the tape which was read by Aguirre of his conversation with Sayre contains the statement by Aguirre, "Well, they figured if you were going to hassle with \$3 an hour they weren't going to keep you."

During cross-examination by the General Counsel, Sayre testified that he told Aguirre he did not want to work at that place of employment for \$3 an hour. "That was the reason he was phoning me every day to get out of there." Aguirre testified that he told Sayre to hang on, that half a loaf is better than nothing and "I figured that something else would come along and we could put him to work for something better."

Paragraph VI of the complaint states:

On or about March 12, 1976, Respondent caused or attempted to cause the Employer to lay off Lawrence Sayre because of his protected concerted activities, and/or because of unfair, arbitrary, and invidious reasons unrelated to any legitimate Union considerations.

No evidence was adduced at the hearing in support of the above-quoted allegation. The General Counsel certainly did not prove on the basis of the testimony that was adduced that Sayre was laid off or discharged because of any actions on the part of the Union. In a word, the General Counsel did not sustain his burden of proving by substantial probative evidence that Sayre was laid off at the behest of the Union for reasons violative of the Act. Parrott was not called as a witness by the General Counsel.

CONCLUSIONS OF LAW

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)A) 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(c) of the Act, I hereby issue the following recommendation:

ORDER ²

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

² In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted By Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."