Able Bus, Inc. *and* **Alfonse Maiella.** Case 29-CA-10879

24 April 1986

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS DENNIS AND JOHANSEN

On 20 November 1985 Administrative Law Judge Raymond P. Green issued the attached decision. The General Counsel filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings,[1] findings,[2] and conclusions[3] and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

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[1] We grant the General Counsel's renewed motion to correct the transcript on p 66 to reflect that the Charging Party attended a union meeting on 28 September 1983

[2] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd 188 F 2d 362 (3d Cir 1951) We have carefully examined the record and find no basis for reversing the findings

[3] The judge did not mention Maiella's testimony that he participated in union meetings on 28 September and 3 and 5 October 1983, shortly before his 14 October discharge Maiella testified that the meetings were attended by in-unit relatives of the Respondent's president and that he spoke against the Respondent's policy regarding drivers' responsibility for bus radios and housekeeping and in favor of a seniority-pick system of route assignments

In agreeing with the judge that the Respondent did not violate Sec 8(a)(3) and (1) by discharging Maiella, we find that, even if this testimony is credited, the General Counsel has not proved by a preponderance of the evidence that Maiella's protected activity was the motivation for the Respondent's decision to dismiss him

Allison C. Fairbanks, Esq., for the General Counsel.
Kevin Patrick McGovern, Esq., of Brooklyn, New York, for the Respondent.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. The hearing in this case opened before me on 1 April 1985. The charge was filed on 17 November 1983 and the complaint issued on 16 December 1983. The complaint alleges in substance that on 14 October 1983, the Respondent discharged Alfonse Maiella because of his activities in Local 91, United Crafts and Industrial Workers Union.

Based on the entire record in this case, the arguments of counsel and particularly the demeanor of the witnesses, I make the following

FINDINGS OF FACT

A. *Jurisdiction*

At the hearing, the Respondent amended its answer to admit paragraphs 3 and 4 of the complaint. Therefore I find that the Respondent, a New York corporation, is engaged in the business of providing schoolbus transportation services for the New York City Board of Education. During the past year the Respondent derived gross revenues in excess of $250,000, and purchased goods and supplies valued in excess of $50,000 directly from points located outside the State of New York. Therefore, it is concluded that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

B. *The Deferral to Arbitration Issue*

At the opening of the hearing the Respondent requested that I defer this matter to arbitration pursuant to the grievance arbitration provisions of its contract with Local 91, which represents Charging Party Maiella. On 1 May 1985, having considered briefs from all parties on the deferral issue, I issued an Order, a copy of which is attached marked Appendix A.

C. *Operative Facts*

The Company has recognized and bargained with Local 91, United Crafts and Industrial Union since the Company's incorporation in 1979. A similar representational relationship had been maintained with the Union by predecessor bus companies also owned by Michael Romanelli. The collective-bargaining agreement defined the bargaining unit as consisting of all busdrivers and matrons. Maiella, since his employment in 1976, has been employed as a busdriver and has been included as part of the collective-bargaining unit. It is noted that a number of Romanelli's family are also employed as persons encompassed within the bargaining unit.

The Company, pursuant to a contract with the Board of Education, provides schoolbus service for handicapped children. In this regard the buses driven by Maiella and the other drivers have most of their seats removed so that wheelchairs can be hooked up and transported securely within the buses. On such buses, the Company also sends a matron, ordinarily a woman, who provides assistance to the children, as needed.

In June 1983 the Union scheduled an election for shop stewards. Maiella and the matron who worked with him, Margaret Walton, ran against the incumbents, Al Gambella and Frank Vite. They ran respectively for the position of shop steward and assistant shop steward. In the course of running for election, Maiella held two meetings in a lot near the bus depot to set forth his campaign positions. Essentially he campaigned on three issues to wit: (1) that drivers should be allowed to pick their runs

based on seniority; (2) that drivers should not be required to clean up their buses or do other cleanup work; and (3) that drivers should not be required to be responsible for taking care of the CB radios after working hours and be required to replace them if stolen. As members of the bargaining unit, a number of Michael Romanelli's relatives were present when Maiella campaigned.

As to Al Gambella and Frank Vite, the evidence shows that they did not actively campaign to retain their offices. Nevertheless, on 28 June 1983 the election was held and Maiella and Margaret Walton lost by rather large margins.[1]

On 29 June the day after the election, all drivers and matrons were laid off for the summer, as is customary. On 9 September 1983, a week before the resumption of work, Michael Romanelli called Maiella into the office and allegedly offered him his choice of "four rotten runs" from which to pick his assignment. Maiella testified that Romanelli said, "Here is the garbage, pick one."

As noted above, the buses are designed so that most of the seats have been removed. The matrons are supposed to sit in one of three seats in the back of the bus which are fixed to the floor and which generally (but not always) have seatbelts. It appears, however, that over a period of time, some of the matrons have used boxes or folding chairs in order to sit near the drivers in the front of the buses rather than where they are supposed to sit. This practice is inherently dangerous and one of the matrons suffered an injury when a bus stopped short. As a result, the Company posted a notice announcing to its employees that makeshift seating arrangements would no longer be allowed.

On the evening of 2 October 1983 Michael Romanelli told Shop Steward Al Gambella that on the following day he would make a road inspection to make sure the drivers and matrons were complying with the posted procedure regarding the seats. As a consequence, on the morning of 3 October, Gambella told most of the drivers of the anticipated inspection. He did not, however, see Maiella that morning. Walton was riding on a seat (equiped with a seatbelt) which had been strapped to a hook on the side of the bus, and was located behind the driver, rather than in the back. When Romanelli stopped the bus and inspected it, he ordered the chair removed and also removed an emblem in the shape of a shamrock which had been placed by Maiella on the dashboard of the bus. When Maiella finished his route, he was told by Michael Romanelli that he was fired. However, on the intervention of Assistant Shop Steward Frank Vite, Romanelli changed his mind and converted Maiella's discharge to a 1-week suspension.[2]

On the last working day before his suspension was to begin, Maiella was ordered by Romanelli to take a Thomas Sweat around his route so that Sweat could learn the stops and replace Maiella during the coming week. Maiella and Walton testified that at the first stop they noticed that Sweat was behaving as if he was drunk. They testified that when Sweat continued to act drunk, Maiella ordered him off the bus at one of the school stops. Sweat testified however, that he was not drunk and was shocked when Maiella ordered him off the bus. Respondent's manager, Mistretta, and Michael Romanelli's son, Anthony, testified that when Sweat walked back to the garage, he did not appear to be drunk. Vite testified that, at the time of the incident, he asked Sweat if anything was wrong and Sweat did not respond Vite testified, however, that when Sweat got off Maiella's bus, he asked for directions back to the garage, and Vite asserts that Sweat appeared to be normal in demeanor at that point.

As a result of the incident between Maiella and Sweat, the former was discharged. According to Maiella, on 20 October he asked Michael Romanelli for his job back and was told, "You want to be shop steward. I'm going to put it up your ass, you shot your load and I'm going to beat you in Court." Maiella states that when he told Romanelli that he had only a year to go to get his pension, Romanelli said, "I'm not going to put up with this any longer, you shot your load. Do you realize . . . you could have gotten me in trouble with the black organizations, NAACP and CORE." (Sweat is black.)

Puglia also testified that in November 1983 he had a chance meeting with Michael Romanelli during which Romanelli told him that he had fired Maiella because "he was giving me too much trouble and he was involved in the Union." As noted above in footnote 1, I place little or no weight on Puglia's testimony.

Discussion

The General Counsel argues that the Company discharged Maiella because he campaigned to be a union shop steward. According to the General Counsel's theory, Michael Romanelli fired Maiella because he anticipated that if elected, Maiella would be a vigorous shop steward and, more particularly, would stop Romanelli from assigning work as he wished. To my mind the problem with this theory is that the shop steward election occurred more than 3 months before Maiella was discharged and therefore was somewhat remote in time. Second, Maiella and Walton were soundly defeated in the election and therefore I do not believe that they reasonably could have been viewed as a threat to either management or to the incumbent union officers. Third, the evidence shows that there was a significant interven-

[1] The General Counsel presented a witness, William Puglia, who testified that on a few occasions prior to the 28 June election, Michael Romanelli told him that if Puglia, did not vote for "my man I'm going to get rid of you " However, in Puglia's pretrial affidavit (given in November 1983), he stated that at no time did any company representative or supervisor attempt to influence him to vote against Maiella I also note that Puglia was discharged by the Company in September 1983 and whether justified or not, expressed a strong degree of personal antipathy toward Michael Romanelli Accordingly, I do not credit Puglia's testimony I reach this conclusion notwithstanding the fact that Michael Romanelli did not testify in this case I note in this latter regard that at the time of this hearing, Michael Romanelli was not available, having suffered a heart attack In this regard, I note that even in the absence of unrebutted testimony, I am not required to credit the testimony of a witness whose evidence is suspect on other grounds *NLRB v Container Corp*, 649 F 2d 1213, 1216 (6th Cir 1981), *SMI of Worcester*, 271 NLRB 1508, 1519 (1984), *Operative Plasterers Local 394 (Burnham Bros)*, 207 NLRB 147 (1973)

[2] Walton also was suspended for a week

ing event between Maiella's union activity and his ultimate discharge on 14 October.

The record shows that Maiella and his matron, Walton, were guilty of breaching a company safety rule on 3 October. What is worse, at least from the Company's perspective, is that through Shop Steward Gambella, Michael Romanelli had made an effort to notify employees that he was going to inspect the buses on 3 October to ensure that the matrons were sitting where they were supposed to sit. Thus, even if some drivers and matrons had ignored this rule in the past, Romanelli put these employees on notice that the rule had to be obeyed in the future. Whether Maiella and Walton received notice of this inspection is, to my mind, essentially irrelevant for purposes of this case because the question to be determined here is not their motivation but the motivation of Romanelli Thus, when Romanelli stopped their bus on 3 October and discovered that they were not following the rule, he had objective reasons for believing that they were deliberately flouting the rule. As a result, he discharged Maiella on that day. Indeed, it was only through the intercession of Assistant Shop Steward Frank Vite, that Romanelli relented and agreed to change Maiella's discharge to a 1-week suspension. (Walton also was suspended.)

There is no doubt in my mind that the 3 October discharge of Maiella was not motivated by Respondent's desire to retaliate against Maiella's involvement in union activities. Rather, I conclude that this discharge (later converted to a suspension) came about as a result of management's good-faith belief that Maiella breached a safety rule. In fact, as the complaint in this case does not allege either the 3 October discharge or the subsequent suspension as violating the Act, I can only assume that the General Counsel concedes that these disciplinary actions were for good cause and were not motivated by illegal reasons.

Although the General Counsel argues that the subsequent discharge of Maiella on 14 October was illegally motivated, it is my opinion that such a contention is farfetched. If Romanelli was so resolved to find an excuse to discharge Maiella because of the remote possibility that Maiella might become the shop steward, Romanelli was presented with the perfect excuse on 3 October. Yet, although Romanelli's first reaction to Maiella's breach of company rules was to discharge him, Romanelli relented and changed the discharge to a suspension. Moreover, Romanelli changed his mind when one of Maiella's union opponents (Vite) requested that the Company be more lenient toward Maiella.

The ultimate discharge of Maiella came about when he was supposed to begin his term of suspension and was supposed to show his bus route to the newly hired Sweat. There is no real dispute that during the drive on 10 October, Maiella ordered Sweat off the bus. What is in dispute is whether Sweat was intoxicated.

Both Maiella and Walton testified that very soon after Sweat got on the bus he acted in such a manner to demonstrate that he was drunk and out of control. On the other hand Sweat denied that he was drunk or under the influence of any drugs. He testified that when Maiella ordered him off the bus, he was so shocked as to be speechless. The Company also presented other witnesses, including Assistant Shop Steward Vite, who testified that they observed Sweat either on the bus or soon thereafter and that he did not appear to be drunk. In effect, the Respondent asserts that Maiella, in an attempt to subvert his suspension, ordered his replacement off the bus. Maiella, for his part, argues that Sweat was drunk and that his action of ordering Sweat off the bus was reasonable and proper [3]

To me, the scenario that the General Cousel postulates is so highly improbable as to be incredible. To begin with, I have no doubt that Maiella's suspension on 3 October was for good cause and not because of his union activity. Also there is no dispute that on 10 October, Maiella ordered his intended temporary replacement off the bus. Given these facts, it seems to me that in order for me to find a violation of the Act, I must conclude that the Employer placed a person on Maiella's bus who it knew to be drunk (or to be a good actor), in the expectation that Maiella, instead of ignoring that person, would react in such a way to create an incident which would give the employer a good excuse to fire him. Thus to succeed, such a scheme would require not only that the "drunken" Sweat be placed on the bus, but that Maiella do something in response. To my mind, the construction of such an elaborate scheme is completely bizarre and totally implausible. I therefore conclude that Sweat was not drunk and that Maiella acted improperly in ordering him off the bus. I also conclude that by discharging Maiella, the Respondent was not motivated by Maiella's union activities.[4]

CONCLUSIONS OF LAW

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

2. The Respondent has not violated the Act in any manner, as alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

It is ordered that the complaint be dismissed in its entirety.

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[3] Although not binding on me, I note that a New York State administrative law judge, after a hearing on Maiella's entitlement to unemployment insurance benefits, held that Sweat was not drunk and that Maiella acted improperly when he ordered Sweat off the bus

The Board has held that decisions in state unemployment cases are not binding on NLRB cases *Western Publishing Co*, 263 NLRB 1110 fn 1 (1984)

[4] As such, I do not credit Maiella's assertion that on 20 October, Romanelli stated that he would not reinstate Maiella because he wanted to be shop steward

[5] If no exceptions are filed as provided by Sec 102 46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec 102 48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes

APPENDIX A

The hearing in this case opened before me on April 1, 1985. At the opening of the hearing, the Respondent asserted, inter alia, that this case should be deferred to the contract arbitration procedures in accordance with the Board's decision in *Collyer Insulated Wire*, 192 NLRB 837 (1971).

In view of the Board's recent decisions concerning deferral to aritration, I decided to adjourn this case and to invite briefs on this question. Also, at the hearing I asked a representative of United Crafts and Industrial Workers Local 91 (which is not a party to this case), to advise me, in writing, whether the Union would be willing to submit the Charging Party's grievance to arbitration. I set the time for filing briefs as April 22, 1985.

With respect to the deferral issue, the facts are as follows:

The Respondent and the Union are parties to a collective-bargaining agreement which runs from September 15, 1982, to September 14, 1985. This contract contains a grievance-arbitration procedure, providing for final and binding arbitration for all "complaints, disputes and grievances arising between the parties to this Agreement." Arbitrators, under the contract, are selected by the New York Board of Mediation.

Maiella, an employee covered by the collective-bargaining agreement, was discharged on or about November 14, 1983. On November 15, 1983, the Union filed with the New York State Mediation Board a 20-day notice to arbitrate Maiella's discharge. On November 17, 1983, Maiella filed the instant unfair labor practice charge.

On December 13, 1983, the Union withdrew its request for arbitration. In a letter to the Mediation Board, Union Counsel Stewart Altman stated: "The grievant has advised that he prefers to litigate his grievance before the National Labor Relations Board." On December 16, 1983, the Regional Director issued the instant complaint and notice of hearing, alleging that Respondent's discharge of Maiella violated Section 8(a)(1) and (3) of the Act. The hearing was initially scheduled for April 30, 1984, but was postponed on various occasions for reasons unknown to me.

On December 4, 1984, the Respondent filed its own 20-day notice to arbitrate concerning the Maiella discharge. The issue, as presented by the Company, was "whether the discharge of Alfonse Maiella was for just cause or not, or was it in retaliation for Maiella's activities, if any, on behalf of the Union and what shall the remedy be if any" Upon receiving the foregoing notice of arbitration, the Regional Director, on December 13, 1984, notified all parties that he was deferring the unfair labor practice proceedings.

On December 14, 1984, Altman on behalf of the Union wrote a letter to the Regional Office indicating, in substance, that because the Union was in receipt of conflicting evidence concerning Maiella's discharge, "it is Local 91's position that deferral is not appropriate under these conditions."

On January 2, 1985, the Regional Director notified Maiella and the Respondent that the Region had been notified that the Union did not wish to proceed to arbitration on Maiella's behalf, and that there was no showing that the Union's refusal to arbitrate was either unlawful or motivated solely by a desire to avoid deferral. Accordingly, for the foregoing reasons, the Regional Director notified the parties that he would no longer defer to arbitration and would proceed with the unfair labor practice case.

On January 7, 1985, the Company's attorney, McGovern, wrote to the Regional Director in response to the Regional Director's notice of January 2. In pertinent part, he stated that he was informed by the Union's attorney, Altman, that it was Maiella and not the Union who was unwilling to go to arbitration. Thereafter on January 8, 1985, Altman wrote to McGovern as follows: "in accordance with our discussion, please be advised that the Union has been instructed by the grievant, Al Maiella, not to proceed to arbitration."[1]

It appears from the record herein that as of early January 1985 the Respondent was willing to proceed with the unfair labor practice proceeding provided the Union agreed not to attempt to relitigate the matter by later submitting the case to arbitration. However, as noted above, at the opening of the hearing before me, the Respondent formally requested that the unfair labor practice case be deferred to arbitration.

By letter dated April 17, 1985, the Union advised me as to its position regarding arbitration of Maiella's case. Altman's letter read as follows:

> It is the Union's position that this case be removed from deferral and processing of the case be resumed on the grounds that the Union does not wish to proceed to Arbitration.
>
> The main reason that the Union will not proceed to Arbitration is that the Union is in receipt of conflicting evidence surrounding the facts and circumstances of this incident from the shop steward and other members of the bargaining unit. This evidence conflicts with evidence received from Alfonse Maiella, grievant. The Union was thus placed in a conflict of interest and in an untenable position and will, therefore, not proceed to Arbitration.

In *United Beef Co.*, 272 NLRB 66 (1984), the Board deferred to arbitration a case very similar to the instant case. In that case one Roberto Rodriguez was discharged on July 13, 1983. On the same day, the union, pursuant to its collective-bargaining agreement, submitted a demand for arbitration and the dispute was scheduled to be heard on July 28. However, the arbitration hearing was postponed and Rodriguez filed an unfair labor practice charge on October 4. On November 4 the Regional Director decided to defer further processing of the unfair labor practice case under *Dubo Mfg. Corp.*, 142 NLRB 431 (1963). Thereafter, on November 22, the Union's counsel advised the Regional Director that the union would not take Rodriguez' case to arbitration and on December 29 the Regional Director issued a complaint

[1] At the hearing, on April 1, 1985, the General Counsel stated that Maiella was willing to have his discharge submitted to arbitration at this time

and notice of hearing. On February 10, 1984, the Respondent notified the Regional Office and the union that it was willing to arbitrate the dispute and on June 8, 1984, it sent a letter to the industry arbitrator asking that an arbitration hearing be scheduled.

The General Counsel in *United Beef* argued among other things, that deferral was not appropriate because the charge was filed by an individual, and because the union was not a party to the case it could not be compelled to arbitrate the grievance.[2] Notwithstanding the fact that the union had already notified the Board's Regional Office of its decision not to take the matter to arbitration, the Board deferred. However, in so doing, it retained jurisdiction for the limited purpose of further consideration if either "(a) the dispute has not, with reasonable promptness after the issuance of this Decision and Order, either been resolved by amicable settlement in the grievance procedure or submitted promptly to arbitration, or (b) the grievance or arbitration procedures have not been fair and regular or have reached a result which is repugnant to the Act."

Although in many ways the facts of the instant case parallel those in *United Beef*, it is my opinion that the two cases are distinguishable. In *United Beef* the Board deferred the case to arbitration but retained jurisdiction in the event the matter was not promptly submitted to arbitration. Thus, I can only assume that if the union persisted in its refusal to go to arbitration, the Board would hear and decide the case on its merits as the decision to arbitrate was not in the power of the charging party. In the present case, the Union has also indicated its unwillingness to go to arbitration. At the hearing on April 1, 1985, the General Counsel asserted that Maiella was willing to go to arbitration. As a representative of the Union, (Vincent Giannini), was present in the room, I invited the Union to advise me by April 22 whether it was willing to take Maiella's case to arbitration. I also postponed the case until May 2 and gave all parties the opportunity to file briefs on this question. Thus, one of the practical effects of these actions was to defer the case pending prompt notification by the Union whether the matter would be submitted to arbitration. Subsequently, I have been notified by the Union that it is unwilling to proceed to arbitration on the question of Maiella's discharge. As I have no means of compelling the Union to arbitrate the dispute in question, it seems to me that any further deferral to the arbitration process would be a fruitless gesture act and would only serve to further delay a determination of this case on its merits.[3] For even if I did defer this case, I would still have to retain jurisdiction to give the Union (which is not a party in this case), one more chance to change its mind about arbitrating Maiella's grievance.

Accordingly, I decline to defer this case to arbitration, and:

IT IS ORDERED that the hearing in this matter be rescheduled for May 20, 1985, at 10 a.m. at 16 Court Street, Brooklyn, New York.

[2] As the charging party as an individual is not a party to the collective-bargaining agreement, he would not have any right to invoke the arbitration procedures himself

[3] I do not read either *United Beef* supra or *General Dynamics Corp* 271 NLRB 187 (1984), as requiring the dismissal of an individual employee's charge when a Union, which is not a paarty to the unfair labor practice proceeding, refuses to go to arbitration