

**RBB Corp. t/a Adam Metal Products Co. and Nabil
Aboulhosn. Cases 22-CA-13767 and 22-CA-
13960**

10 February 1987

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS
JOHANSEN AND BABSON

On 10 July 1986 Administrative Law Judge D. Barry Morris issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief in support of the judge's decision.

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 briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order.

ORDER

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

¹ 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.

Gary A. Carlson, Esq., for the General Counsel.
Melvin L. Gelade, Esq. (Apruzzese, McDermott, Mastro & Murphy), of Springfield, New Jersey, for the Respondent.

DECISION

STATEMENT OF THE CASE

D. BARRY MORRIS, Administrative Law Judge. This case was heard before me in Newark, New Jersey, on 30 January 1986. On charges filed on 25 March and 31 July 1985,¹ a complaint was issued on 28 June and amended on 30 September, alleging that RBB Corp. t/a Adam Metal Products Company (Respondent) violated Section 8(a)(1), (3), and (4) of the National Labor Relations Act (Act). Respondent filed an answer denying the commission of the alleged unfair labor practices.

FINDING OF FACT

I. JURISDICTION

Respondent, a corporation with a place of business in Ledgewood, New Jersey, is engaged in the manufacture of metal products, including fluorescent lighting fixture housings. During the 12 months prior to the issuance of the complaint, Respondent sold and shipped from its New Jersey facility goods valued in excess of \$50,000 to consumers located outside the State of New Jersey. Respondent admits that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and I so find. In addition, Local 1158 International Brotherhood of Electrical Workers (Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Issues*

The issues are:

1. Did Respondent discharge its employee, Nabil Aboulhosn, because of his activity on behalf of the Union, in violation of Section 8(a)(3) and (1) of the Act?
2. Did Respondent file a civil lawsuit against Aboulhosn that lacks a reasonable basis in fact and law, in violation of Section 8(a)(4) and (1) of the Act?

B. *The Facts*

1. Events prior to discharge

Aboulhosn was employed as a leadman in the shipping and receiving department of Respondent. He reported to Joseph Sciarillo, the plant manager. At the time of Aboulhosn's discharge in March 1985 approximately 35-40 employees worked for Respondent.

In March 1983 the Union engaged in an organizing campaign at Respondent's plant. Aboulhosn felt that "we didn't really need a union" and he distributed a letter encouraging other employees not to vote for the Union. He was asked by Respondent to be an election observer on behalf of the Company. The Union lost the election.

In March 1984 the Union again began organizing at Respondent's premises, at which time Aboulhosn signed an authorization card for the Union. During that time a rule was posted in the warehouse regarding incoming calls to employees. Aboulhosn did not receive a call, which he was upset about, and he reported this to Sciarillo. Aboulhosn testified that later that day, Ray Bentley, president of Respondent, explained to him the reason why the Company felt that incoming calls had to be curtailed. Aboulhosn further testified that Bentley told him:

[S]omeone told him that this would be another vote for the union, which I said that I did not make the statement and he said to me that if I know you would say something like this. . . . I'll fire you right away.

On 30 May 1984 Aboulhosn's attorney wrote a letter to Bentley in which the attorney referred to Aboulhosn's

¹ All dates refer to 1985 unless otherwise specified

"feeling that because of some of the recent organizational efforts that took place in your plant, he may have 'fallen from grace' and feared that his job is in jeopardy."

On 9 November 1984 Joe Calabro, organizer for the Union, sent a letter to Respondent's employees inquiring whether they were still interested in being represented by the Union. A month later Aboulhosn telephoned Calabro and asked "when he's going to show up to give more cards." Aboulhosn called Calabro again in February 1985 to inquire when he would come to the plant. Calabro replied that he would be at the plant during the first week of March.

Aboulhosn testified that on 11 March he signed a new authorization card at home and he mailed it from home to the Union. He also testified that Calabro gave him several authorization cards for distribution. He testified that he spoke to "four or five employees about the union and I gave them the cards." He stated that he distributed these cards inside the plant during the second week of March, that no supervisors were present, and that he did not want management to know what he was doing. Aboulhosn testified that during the union campaign in 1984 his signing of the card was his only activity on behalf of the Union.

Aboulhosn testified that he was informed of his last pay raise in December 1984, which was effective 1 January 1985. He testified that when Sciarrillo informed him of the pay raise, he asked:

[I]f I am still pro-union, so I said to him that there are a few things in this company that I would like to see . . . improve, and I would rather see them improve without the need for having a union.

2. Discharge

Aboulhosn was discharged on 22 March. He testified that on 21 March he was called into Bentley's office, at which time Bentley, Weir, the controller, and Sciarrillo were present. Bentley told Aboulhosn that he had recently discovered that Aboulhosn had "cost the company over four hundred dollars in telephone bills." Aboulhosn admitted the use of the telephone and offered to reimburse the Company. Bentley asked Aboulhosn how he was going to pay the money and Aboulhosn replied, "[Y]ou have my paycheck." Aboulhosn further testified that, "When I offered to pay back the money Mr. Bentley said it is just like a bank robber being caught in the action and offering to pay the money back." Aboulhosn testified that Sciarrillo was aware of other employees also using the telephone for personal calls and testified that in April 1984 Bentley told him "I had a telephone in my office which I can use and no one around here monitors the phone."

Bentley testified that in late February or early March, Weir made him aware of the fact that certain employees were making excessive personal telephone calls. A week later he received a report from Weir showing the frequent calls to Aboulhosn's home phone number and his wife's phone number. Bentley testified, as follows:

Q. Did Mr. Weir tell you about any other phone numbers that were recurring with frequency on the bills?

A. There didn't appear to be any others that had any frequency other than the normal business calls, like the truckers or customers or anything of that consequence.

Bentley denied that he threatened Aboulhosn in April 1984 concerning his union activity. He also denied that he ever gave Aboulhosn permission to use the Company's phone for personal reasons. He corroborated Aboulhosn's testimony that after being confronted with the number of telephone calls, Aboulhosn offered to reimburse the Company, and said that Bentley "could take it out of his pay." Bentley further testified:

Q. When you terminated Mr. Aboulhosn on March 22nd, did you mention anything with respect to his offer to pay you back the cost of the calls?

A. Well yes, I made a remark to him. . . . I likened it to someone that robbed a bank and got caught on the corner with the money bag and offered to give it back to the cop if he'd let him go, and I said I didn't feel that was fair.

Sciarrillo testified that he was not aware of any union activity in December 1984 and that at the time he informed Aboulhosn of the impending raise he did not ask him whether he was still with the Union. Sciarrillo stated that in March 1985 he saw the union organizers handing out authorization cards. Sciarrillo further testified:

Q. Didn't [Joan] Sperry tell you that Mr. Aboulhosn was out there talking to the union organizer?

A. No.

Q. You asked Ms. Sperry whether Aboulhosn was out there, didn't you?

A. No I did not.

Joan Sperry, who at the time of the hearing was employed by Respondent, was not called as a witness.

3. Conclusions

Aboulhosn appeared to me to be a credible witness. I credit his testimony that Bentley made an antiunion statement to him in April 1984. Although Bentley denied even referring to Aboulhosn's union activities in that conversation, in view of the fact that Aboulhosn was so concerned about the conversation that he contacted his attorney and his attorney wrote to Bentley about the matter, it seems probable that Bentley did make some reference to Aboulhosn's union activity. With respect to Aboulhosn's testimony that Bentley gave him permission to use the telephone for personal calls, Bentley denied that he ever gave such permission. Because the Company had a rule against "use of company telephones for personal business without permission of the supervisor," it is unlikely that Bentley gave Aboulhosn blanket permission to use the telephone for personal reasons. I, therefore, conclude that the General Counsel has not shown by a

preponderance of the evidence that Aboulhosn was given such permission. In addition, although Aboulhosn testified that in December 1984 Sciarrillo asked him whether he was "still pro-union," Sciarrillo denied this. Again, I conclude that the General Counsel has not shown by a preponderance of the evidence that Sciarrillo made such a statement.

In December 1984 and again in February 1985 Aboulhosn contacted the union organizer. There is no evidence in the record that Respondent knew of these telephone calls by Aboulhosn to the Union. Although Aboulhosn signed an authorization card in March 1985, he did it at home and mailed it to the Union. Again, there is no evidence in the record that Respondent knew that he signed an authorization card. Also during March, Aboulhosn distributed four or five authorization cards to fellow employees. He testified that he spoke to the employees inside the plant, that no supervisors were present, and that he did not want management to know what he was doing. There is no evidence in the record that Respondent knew that Aboulhosn handed out these authorization cards.

In order to find a violation of Section 8(a)(1) and (3) of the Act, it is essential that it be shown that Respondent knew of Aboulhosn's union activities. *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21, 23 (1964); *Tri-State Truck Service v. NLRB*, 616 F.2d 65, 69 (3d Cir. 1980). There is no evidence in the record that Respondent knew of Aboulhosn's union activities. On the contrary, Respondent knew that in 1983 Aboulhosn expressed sentiments against the Union and, in fact, Respondent chose him to be the Company's election observer. Aboulhosn testified that his only union activity in March 1984 was signing the authorization card. I have already found that there is no evidence in the record that Respondent knew of Aboulhosn's telephone calls to the union organizer in December 1984 and in February 1985, nor did Respondent know of Aboulhosn's handing out the four or five authorization cards in March 1985. Accordingly, I find that the General Counsel has not made a showing that Respondent knew of Aboulhosn's union activities.

I find that in late February or early March Bentley was informed by the Company's controller that excessive telephone calls were being made. A week later he received a report that showed numerous personal phone calls made by Aboulhosn. When Bentley confronted Aboulhosn with this information, Aboulhosn did not deny making the calls, but instead offered to reimburse the Company by having Respondent deduct the amount due from his paycheck. Counsel for Respondent maintains that under New Jersey law it is unlawful to withhold any portion of an employee's wages for such purpose. The General Counsel does not dispute this contention.²

² The General Counsel's brief states that the applicable statute provides that "no employer may withhold or divert any portion of an employee's wages unless (a) the employer is required or empowered to do so by New Jersey or United States Law; or (b) the amounts withheld or divert-

Based on the above I find that the General Counsel has not shown by a preponderance of the evidence that Respondent violated Section 8(a)(1) and (3) of the Act by discharging Aboulhosn. Moreover, even were it established that protected conduct was a motivating factor in Respondent's decision to discharge Aboulhosn, I believe that Respondent has demonstrated that because of Aboulhosn's excessive use of the telephone for personal reasons the discharge would have "taken place even in the absence of the protected conduct." *Wright Line*, 251 NLRB 1083, 1089 (1980), enf. 662 F. 2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

4. Filing of civil lawsuit

On 22 July Respondent filed a lawsuit in Superior Court of New Jersey alleging that Aboulhosn made "numerous personal telephone calls on company time without authorization." The complaint in the instant proceeding alleges that Respondent violated Section 8(a)(4) of the Act by filing the civil action because it "lacks a reasonable basis in fact or law." The testimony indicates that in April, when Aboulhosn was confronted by Bentley with the telephone report, Aboulhosn did not deny making the telephone calls and, indeed, offered to reimburse the Respondent. The record thus shows that Aboulhosn did make "numerous personal telephone calls" without authorization. Accordingly, the General Counsel has not made a showing that the suit "lacks a reasonable basis in fact or law." Therefore, the allegation must be dismissed. See *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983).

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent has not engaged in the unfair labor practices alleged in the complaint.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommendation³

ORDER

The complaint is dismissed.

ed are for . . . eight situations in which such withholding or diversion is lawful, none of which are applicable . . . to the present case" (Emphasis added)

³ If no exceptions are filed as provided by Sec 192.46 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