

**Globe Wholesale Tobacco Distributors Inc., d/b/a
Globe Wholesale Co. and Ali Lamnii.** Case 29–
CA–093481

May 28, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA
AND HIROZAWA

On August 11, 2014, Administrative Law Judge Raymond P. Green issued the attached decision. The General Counsel filed exceptions and a brief in support. The Respondent filed an answering brief, and the General Counsel filed a reply 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 briefs and has decided to adopt the judge's rulings, findings,¹ and conclusions and to adopt his 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.

Following the judge's decision, the General Counsel filed a motion to reopen or supplement the record to add documents pertaining to a previously filed subpoena duces tecum requesting proof of Charging Party Ali Lamnii's hours. On January 26, 2015, the Board denied the General Counsel's motion. The General Counsel also argued on exception that the judge erred by failing to admit evidence regarding Lamnii's hours. In adopting the judge's dismissal, we do not reach the issue of whether Lamnii was a full-time employee who should have been included in the unit (a charge that was previously dismissed by the Regional Director as time barred). Moreover, we find that the General Counsel failed to meet his burden of demonstrating that the judge abused his discretion by excluding the evidence regarding Lamnii's hours. Even assuming, however, that the evidence the General Counsel sought to introduce would have demonstrated that Lamnii worked sufficient hours to be included in the unit, that evidence would not affect the judge's credibility-based finding that Lamnii was never actually discharged. For the same reason, we do not rely on the judge's finding that Lamnii "never worked a six day per week schedule."

The judge's finding that the Respondent would have violated Sec. 8(a)(1) had it terminated Lamnii for making a claim under the collective-bargaining agreement, although not excepted to, is dictum in light of the finding that Lamnii was not discharged. Accordingly, we do not pass on the judge's additional finding that a "colorable" claim under the contract is required for protection under the Act.

Ashok C. Bokde, Esq., for the General Counsel.
*James S. Frank, Esq. and Donald S. Krueger, Esq. (Epstein
Becker & Green P.C.)*, for the Respondent.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. I heard this case in Brooklyn, New York, on June 23, 2014. The charge and the first amended charge were filed on November 14 and December 12, 2012. These alleged that the Respondent violated Section 8(a)(5), (3), and (1) of the National Labor Relations Act (the Act) by (a) failing to apply a collective-bargaining agreement to the Charging Party, and (b) by discharging him on November 12, 2012, because he attempted to join Local 805, International Brotherhood of Teamsters, AFL–CIO.

On January 29, 2013, the Regional Director dismissed that portion of the charge alleging that the Employer discriminated against Lamnii by refusing to allow him to join the Union and by failing to apply the terms of the union agreement to him. Without determining the merits of Lamnii's claim, the Regional Director dismissed these allegations because he concluded that that they were time barred under Section 10(b) of the Act. Therefore, there is no issue in this case regarding the merits of Lamnii's claim the Respondent failed to apply the terms of a collective-bargaining agreement to him.

On the same date, the Regional Director decided to defer the other allegation inasmuch as the Employer asserted its willingness to have that claim decided by an arbitrator pursuant to the grievance arbitration provisions of the collective-bargaining agreement. The Union also agreed to arbitrate Lamnii's discharge allegation.

At some point, the Union decided not to go forward with Lamnii's grievance and by letter dated September 25, 2013, the parties were notified that the Regional Director would be revoking the deferral of the 8(a)(3) allegations and that the Regional Office would conduct further investigation of Lamnii's contention that the Respondent discharged him in retaliation for his contacting the Union to assist him in getting included in the contract bargaining unit. In this regard, counsel stated that the Union withdrew the grievance because Lamnii refused to provide documentary evidence in support of his claims. Notwithstanding that assertion and in the absence of any testimony by union representatives, the evidence does not indicate to me why the Union withdrew from the arbitration proceeding.

In any event, since the Union, not Lamnii, is a party to the collective-bargaining agreement, the Union's decision to withdraw from arbitration means that notwithstanding the Employer's assertion that this matter should be deferred, there is nothing to defer to since one of the parties to the labor contract is not willing to go along with arbitration. And Lamnii, as a non-party to the contract, is in no position to substitute for the Union in an arbitration proceeding to which he is not contractually bound. Therefore, I reject the Respondent's contention that this case should be deferred to arbitration.

The complaint, which issued on March 27, 2014, alleges that the Respondent discharged Lamnii because he attempted to join Local 805, International Brotherhood of Teamsters and engaged in other concerted activities. The Respondent asserts that Lamnii voluntarily quit his employment and was not discharged.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

FINDINGS AND CONCLUSIONS

I. JURISDICTION

The Respondent admits and I find that it is an employer engaged in interstate commerce within the meaning of Section 2(2), (6), and (7) of the Act. It also is admitted and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The Respondent is engaged in the wholesale distribution of cigarettes, other tobacco products, and candies. The Company's president is Leonard Schwartz and it has had a collective-bargaining relationship with the Union for at least 20-plus years. A collective-bargaining agreement was executed on January 27, 2000, between the Union and the Wholesale Tobacco Association of New York Inc., and its basic terms have been renewed with modifications regarding pay and benefits every 2 or 3 years. The Respondent is a member of this Association and has abided by the terms of these contracts.

The collective-bargaining agreement covers drivers and helpers employed by the respective employer members of the Association excluding part-time employees who are defined as those who are scheduled to work less than 1000 hours per year. In this regard, the companies are entitled to employ only a limited number of part-time employees and in the case of Globe, there was an agreement that it would be allowed one additional part-time, temporary, or casual employee above the cap set forth in the basic agreement with the Association.

It should be noted that a person employed as a part-time driver or part-time helper is not covered by the contract and has no seniority rights and enjoys no coverage under the respective pension and health care plans that have been established to provide such benefits to full-time drivers or helpers.

The Charging Party, Ali Lamnii, has been employed by Globe since 1997. He was initially hired as a part-time helper who later became a driver. As contrasted with the other employees of Globe, who have consistently been scheduled to work 6 days per week, Lamnii has been scheduled to work either 3 or 4 days per week. In the past several years of his employment he has worked 3 days a week and all of the other people have worked 6 days a week. Notwithstanding the fact that he worked only 3 days a week, Lamnii asserts that he should be considered a full-time employee because his total hours exceeded 1000 per year. The Employer asserts that given his schedule and the fact that Lamnii, for at least the last 2 or 3 years of his employment, took 12 or 13 weeks off during each summer, he cannot be considered as anything other than a part-

time employee who therefore was not entitled to have the contractual benefits set forth the collective-bargaining agreement.

If we assume that Lamnii worked a normal 8-hour day, three times a week, then even with taking 11 to 13 weeks off each year, his total hours would be close to but not equal to 1000 hours a year. However, Lamnii testified that his typical work day exceeded 8 hours and therefore his total number of hours would have exceeded 1000 per year. For better or worse, the Respondent utilizes a sign-in sheet for keeping track of hours and does not use either an electronic or mechanical device to accurately record hours worked by each employee. Given the scope for error, it cannot be said that either Lamnii's calculations or the Employer's calculations are either correct or in error. Both sides could reasonably argue the point and an appropriate forum (such as arbitration), could decide that question.

Nevertheless, whether Lamnii should have qualified as a full-time employee, is not an issue that is before me inasmuch as this contention was dismissed by the Regional Director. However, it is enough that he had a colorable claim under the contract. For if he made such a claim and the Employer, in fact, discharged him because he made that claim, then his discharge within the 10(b) period, would be illegal under the Act. See *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822 (1984), upholding the Board's doctrine enunciated in *Interboro Contractors, Inc.*, 157 NLRB 1295 (1966), *enfd.* 388 F.2d 495 (2d Cir. 1967).

Although not certain about the dates, Lamnii testified that since at least 2006 and perhaps from as early as 2004, he has on multiple occasions asked to be covered by the collective-bargaining agreement. He testified that on numerous occasions he asked the Union's shop steward to be put into the Union. He also testified that on various occasions, he spoke to union representatives about this (including the Union's president, Sandy Pope) and that repeatedly over the years, he asked Leonard Schwartz, the owner, to be covered by the contract. This met with no success and Lamnii testified that he essentially was told on many occasions that they would look into the matter and get back to him. The Company's position is that since Lamnii was not a full timer, like the other drivers, he was not eligible to be in the bargaining unit.

According to Lamnii, he spoke to Schwartz on at least two occasions in 2012 about being covered by the contract and that Schwartz replied that work was slow and that he "would be up next." Lamnii states that about a couple of months before his discharge, he again asked Schwartz to be put into the unit and that Schwartz said something to the effect that to do so would cost a lot of money in insurance.

Schwartz testified that on various occasions he told Lamnii that he could be covered by the contract, but only if he became a driver who worked 6 days a week. In this regard, he testified that in February 2012, he offered Lamnii the full-time position that had been vacated by another driver who had just retired. As to this transaction, Lamnii admits that he received this offer but asserts that Schwartz did not follow through. Schwartz testified, in substance, that he offered this job to Lamnii who refused it.

It seems that at some point in October or November 2012, the Company hired Antonio Reyes to be a 6-day-per-week driver and put him into the bargaining unit. Reyes had previously been a driver/salesman for another company and according to Schwartz, he brought his accounts over to the Respondent.

According to Lamnii, about 2 weeks before his “discharge,” he contacted the Union by phone; speaking to an unidentified individual. He states that he told this person that the Company had just put another driver into the unit instead of him. According to Lamnii, this person said that he would get back to him, but he never did. Lamnii, although asserting that he had this phone conversation with a union agent, he did not actually file a grievance with the Union or make a more formal complaint at this time.¹

Lamnii testified that on November 12, Schwartz invited him into the cigar room and asked him about contacting the Union. Lamnii testified that he told Schwartz that he wanted to be in the Union and stated that a driver with less seniority had just been put into the Union. According to Lamnii, Schwartz acknowledged that Reyes had been put into the Union and then said that he would call Lamnii when he had any work. Specifically, when asked what Schwartz said, Lamnii’s testimony was, “Okay, have a good day. Take care. I’ll call you if I have some work.” Lamnii was not told that he was laid off or discharged. Nevertheless, the General Counsel’s position is that by these words, Lamnii was discharged because he reasonably could have believed that he was discharged.

The version given by Schwartz is slightly different. He testified that Lamnii approached him and complained that another driver (Reyes) had been put into the Union. Schwartz states that he explained to Lamnii that Reyes was a driver who worked a 6-day-per-week schedule and that he had brought in some accounts. According to Schwartz, he told Lamnii that he would give Lamnii the next available full-time position that opened up and that he would be put into the Union when that happened. According to Schwartz, Lamnii then left without saying anything and never returned or called. He testified that he did not discharge Lamnii.

III. ANALYSIS

This is the first case that I have experienced where in defense of an alleged 8(a)(3) discharge, the Respondent’s owner asserts that the alleged discriminate was the best, the most honest, and the most loyal employee that he has ever had.

The evidence shows that for many years, the Company has employed a group of drivers who work on a 6-day-per-week schedule and who have been covered by the collective-bargaining agreement with Local 805, International Brotherhood of Teamsters, AFL–CIO. The record also shows that from

¹ Lamnii’s grievance filed with the Union, happened after he left the Company.

the time that Lamnii became a driver, he has never worked a 6-day-per-week schedule and has never been included in the unit. In fact, in the last few years he worked 3 days per week.

Depending on the number of hours that Lamnii had been scheduled to work per week and the number of weeks that he actually worked in each of the past several years, a reasonable argument could be made by both sides as to whether he should have been included in the bargaining unit. But, for better or worse, that issue was barred by Section 10(b) of the Act and it is not within my jurisdiction to determine that question. However, I can say that Lamnii’s contention that he should have been included in the bargaining unit, based on his hours worked per year, was a reasonable and colorable claim under the existing contract. And if he had been discharged because he made that claim, then the Respondent would have violated Section 8(a)(1) of the Act.

In this case, the evidence shows that for at least 6-plus years, Lamnii has complained about not being placed in the bargaining unit. He has addressed these complaints on a frequent basis to union shop stewards, union officials, and to the Employer. So why was this day (November 12) different from all other days.

In my opinion, the credited evidence is insufficient to establish that Lamnii was discharged. I find that during the conversation with Schwartz on November 12, he was told that Reyes (instead of him) was put into the Union because Reyes was, *inter alia*, assigned to drive 6 days per week. Additionally, I conclude that during this conversation, Schwartz told Lamnii (as he had done in the past) that he would offer him the next 6-day-per-week job that came up. Given the context of this conversation, any statement that Schwartz made to the effect that he would call Lamnii if he got some work, should be construed as meaning that if the Company got additional work justifying giving Lamnii a 6-day schedule, it would do so. Contrary to the General Counsel, I do not find that this statement should be construed to mean that Lamnii was being discharged or laid off. Nor do I find that Lamnii could reasonably have construed the statement as meaning that he had been discharged. *Leiser Construction, LLC*, 349 NLRB 413, 415–416 (2007).²

Conclusion

For the reasons stated above, I conclude that the complaint should be dismissed.

² In *Ridgeway Trucking Co.*, 243 NLRB 1048 (1979), the Board stated:

The test for determining “whether [an employer’s] statements constitute an unlawful discharge depends on whether they would reasonably lead the employees to believe that they had been discharged.” and “the fact of a discharge does not depend on the use of formal words of firing. . . . It is sufficient if the words or actions of the employer would logically lead a prudent person to believe his tenure had been terminated.