H. O. Kline Transportation, Inc. ***and*** **Thomas J. Ventura.** Case 4-CA-9722

November 16, 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On June 11, 1979, Administrative Law Judge James L. Rose issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, the Charging Party filed a brief in support of the General Counsel's exceptions, and the Respondent filed a brief in opposition to the General Counsel's exceptions.

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, 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.

DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge: This matter was heard before me in Philadelphia, Pennsylvania, on May 7, 1979. In essence, the General Counsel's complaint alleges that on October 13, 1978,[1] Joseph F. Kline, vice president of the Respondent, threatened with physical assault Thomas J. Ventura, the Charging Party, because he had engaged in protected activity and thereafter in fact assaulted him,[2] both in violation of Section 8(a)(1) of the National Labor Relations Act, as amended, 29 U.S.C. §151, *et seq.*

The Respondent generally denied that it has committed any unfair labor practices, although admitting that a physical altercation occurred between Kline and Ventura on October 13.

Upon the record as a whole, including my observation of the witnesses, briefs and arguments of counsel, I hereby make the following:

FINDINGS OF FACT AMD CONCLUSIONS OF LAW

I. JURISDICTION

H. O. Kline Transportation, Inc., is a class three common carrier, meaning that its gross volume of business is less than one-half million dollars a year. It does business in a four-state area including Delaware, New Jersey, Pennsylvania, and Maryland and is operated by a father and two sons.

During the year preceding issuance of the complaint herein the Respondent received more than $50,000 for transporting goods and materials across state lines. 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.

II. THE LABOR ORGANIZATION INVOLVED

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 326 (herein the Union), is admitted to be, and I find is, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

For a number of years the Union has represented a unit of the Respondent's drivers and warehousemen. The Respondent and the Union have been parties to a series of collective-bargaining agreements including the one which was in effect during the material time of the events herein.

Ventura has been the shop steward since February 1976, and as such he has been involved in meeting with the owners of the Respondent—H. O. Kline and his sons Bernard and Joseph. Ventura has discussed various matters of dispute arising under the contract and has formally processed grievances.

According to Ventura, and generally undisputed by the Respondent, on October 5, H. O. Kline was observed unloading a truck as was Bernard on October 12. Then in the late afternoon on October 13, when Ventura returned to the Company's premises from making a delivery, Joseph told him to finish unloading a truck, which Ventura claims Joseph had been doing.

Joseph denied that he did any unloading on October 13, but does admit that when Ventura returned he was, in fact, standing on the dock with papers in his hands.

In any event, according to Ventura he talked to Joseph about the events of October 5 and 12 as well as his contention that Kline was doing bargaining unit work

[1] All dates are in 1978 unless otherwise indicated.

[2] Ventura claims that as a result of the assault he has been totally disabled from gainful employment, a claim which the Respondent disputes. The General Counsel contends that Ventura's disability resulting from an unlawful assault would require a backpay remedy. But because the nature and extent of the disability, if any, will involve medical testimony and, presumably, the amount of backpay would be affected by any workmen's compensation payments, the parties stipulated that the backpay issues should be deferred to a compliance proceeding. While Ventura's entitlement to workmen's compensation has not been litigated, the compensation insurance carrier has apparently begun making some kind of disability payments.

that day. For management to do such work is a breach of contract.[3]

Ventura contends that when he told Joseph Kline that the Company had been breaching the contract, when he or the other owners did bargaining unit work, that Kline got upset and said, "If I fucked up the Company he would fuck me up."

After this Ventura went to the drivers' room, filled out a report, called his wife, punched his timecard, and proceeded to leave. On leaving he passed Kline who asked "if everything was okay." Ventura said yes, except that he did not appreciate Kline's threat. A few words were exchanged, then, according to Ventura, Kline picked him up, "slammed" him against the wall, and hit and kicked him. And after a few minutes Kline told Ventura to "get the hell off the premises."[4]

Kline contends that from the time Ventura returned to the dock in the afternoon until the physical altercation, a period of about 45 minutes, on three occasions Ventura brought up the subject of supervisors doing bargaining unit work, and kept "picking" at him. And according to Kline, Ventura followed him around the dock in an abrasive manner, badgering him about being on the dock and like. Kline testified that he told Ventura that if he wanted to file a grievance to do so but otherwise "to get off my back," and that he was "screwing up the Company." (Kline denies making the statement attributed to him by Ventura quoted above.)

In general agreement with Ventura, Kline contends that when Ventura came out of the drivers' office he said something about not liking to be threatened. Then, as Kline turned to walk away, "the man came after me." Kline shoved Ventura away because, he stated, he was afraid for his own physical safety—that Ventura has a reputation for aggressiveness and is known to have a permit to carry a gun. In any event, they scuffled a bit and in a few seconds the fight was over.

Finally, Kline contends that Ventura did not look injured as a result of the fight nor did he make any comment then about being injured.

Mary Ellen Shevchuck is a billing clerk for the Respondent who comes to work at or about 4:45 to 5 p.m. While she denied observing the beginning of the fight, she did see Kline and Ventura scuffling, at first thinking they were playing and then concluding that they were in fact fighting. The other secretary went to the door and said, "Joe, Tommy, stop, stop it."[5]

[3] Indeed, subsequent to the events here, these alleged breaches of contract were resolved through the grievance procedure. The parties agreed that 1 day of pay for an employee would be paid for October 12, inasmuch as there was a member of the bargaining unit on layoff status on that day, but since no bargaining unit people were on layoff on October 5, the grievance as to that day was without merit. Apparently, Ventura's contention with regard to October 13 was not processed as a grievance.

[4] There is no allegation that Ventura was discharged. He is still considered an employee but has not worked since October 13 because of the injuries he claims to have suffered.

[5] Ventura contends that one secretary screamed, "Stop it Joe, stop it," which, of course, implies that Kline was the aggressor. On this point I credit Shevchuck over Ventura. Inasmuch as she was not participating in the fight, her observation of the events would figure to be more accurate. Further, she is generally a disinterested witness and has little stake in the outcome of this matter, whereas Ventura's interest in a favorable result here is potentially beneficial also to his workmen's compensation claim. Finally, Shevchuck's demeanor was more positive than Ventura's.

B. *Analysis and Concluding Findings*

The principal event upon which the General Counsel bases his complaint is, pure and simply, a fight between the two individuals who undisputably did not get along[6] and both of whom are aggressive. Even if Kline struck the first blow, which appears to be the case although not totally free from doubt, such is not necessarily an unfair labor practice. Certainly to threaten an employee with physical assault because he has engaged in protected activity, such as processing grievances, is a violation of Section 8(a)(1). *Jones Motor Company, a Division of Allegheny Corporation*, 202 NLRB 123 (1973). So is an actual assault. *Greyhound Taxi Co., Inc.*, 234 NLRB 865 (1978). But the fact that a management official scuffles with a union steward does not of itself prove a violation of the Act.

It does appear from the testimony of both Ventura and Kline that Ventura had advanced his contention that managers were violating the contract by doing bargaining unit work. He was privileged to do this whether he was a union steward or not. Ventura had a right upon observing these events as he perceived them, to tell Kline and, on receiving a negative answer, he certainly was privileged to file a grievance. But he was not necessarily privileged to spend 45 minutes off-and-on "badgering" Kline. And I find that this is precisely what Ventura did. Such was Kline's generally credible testimony, undenied by Ventura. Even so, I do not believe that such behavior caused Kline to threaten Ventura or be the aggressor in the fight.

It is noted that both Ventura and Kline recounted the facts in what appeared to be the most favorable to their particular cause. Nevertheless, I found Kline more straightforward and credible than Ventura. For instance, it appeared that Kline was willing to make admissions on material matters which were not in his interest. He did not deny that he was first to make physical contact.

I do not believe, as Ventura would have me, that he was blameless—that Kline attacked him unprovoked. Nor do I believe Ventura's version of the fight—that Kline "picked me up and sort of slammed me against the wall." It may be that Kline's act of pushing Ventura was the first touch, but such does not exonerate Ventura. Indeed, I believe he provoked the confrontation. From Ventura's testimony that just prior to the fight Kline asked him if "everything was okay" does not suggest a disposition on Kline's part to start a fight.

I do not find persuasive the General Counsel's argument that by not discharging Ventura for having assaulted Kline, which would have been permissible under the contract, the Respondent thereby admitted that Ventura did not hit Kline. A company does not have to discharge someone every time cause is given. There are here already two matters in litigation involving this fight, and to have discharged Ventura would just invite another. Finally, the issue is not whether Ventura assaulted Kline,

[6] Undenied is the testimony of Union Business Agent Michael J. Ciabattoni that the Klines had complained about Ventura as shop steward and had asked be be removed because "they felt he was very petty."

but whether Kline's actions against Ventura were caused by Ventura's protected activity.

The General Counsel contends that I should infer Kline started the fight from the fact that he is bigger than Ventura and served in the Army in Vietnam. I am not persuaded that these facts prove that Kline was the aggressor, particularly in view of Ventura's undenied aggressiveness.

Ventura was not blameless, nor of course was Kline. But given the apparent personalities of the parties involved and their relationship one with the other, I can not conclude that Kline started the fight because Ventura sought to exercise the rights guaranteed employees under Section 7 of the Act.

As to the alleged threat, even if it occurred, the statement from Kline to Ventura that "he would fuck me up" really does not mean much. The General Counsel contends that this was in the context of Ventura discussing the grievances and therefore amounted to a threat of physical violence in violation of Section 8(a)(1). First, I do not believe that Kline made the statement in the words attributed to him. That is, I credit his denial. Secondly, what was said was said during the give-and-take of Ventura badgering Kline, and did not imply a threat of physical violence in violation of the Act.

Accordingly, I conclude the General Counsel has failed to prove by a preponderance of the credible evidence that the Respondent threatened physical assault, or in fact physically assaulted Ventura in violation of the Act. I will recommend that the complaint be dismissed in its entirety.

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

ORDER[7]

The complaint is hereby dismissed in its entirety.

[7] 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.