

Emery Air Freight, Inc. and Manny Vega. Case 2-CA-18235

26 August 1983

DECISION AND ORDERBY CHAIRMAN DOTSON AND MEMBERS
JENKINS AND HUNTER

On 3 February 1983 Administrative Law Judge Julius Cohn issued the attached Decision in this proceeding. Thereafter, Respondent 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 Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,¹ 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 Respondent, Emery Air Freight, Inc., New York, New York, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

¹ Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions 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 his findings.

In sec. II, A, par. 8, of his Decision, the Administrative Law Judge found that, "Moreover, it appears from the uncontradicted testimony of Vega and from Wimpy himself, that the latter had also been the subject of disciplinary action by Respondent, and at the time of the hearing had been demoted to a lesser position at the airport." The record clearly establishes, according to the testimony of Wimpy, that Wimpy had been the subject of an investigation conducted by Respondent into the circumstances surrounding Wimpy's failure to pick up timely three parcels. The investigation did not, however, result in any action being taken by Respondent against Wimpy. The transfer of Wimpy to the airport was the result of a more senior individual bidding for and bumping Wimpy out of his former position. We hereby correct these errors.

Also, in the same paragraph of his Decision, the Administrative Law Judge found that, "Again Vega stated, and it was not denied, that Wimpy told him he was not going to testify, that if he was subpoenaed, he would deny everything because he had a family and had problems with the Company as it is." The record reveals that Wimpy did deny making the statement as testified to by Vega. We hereby correct this error.

Notwithstanding these errors, we conclude that, inasmuch as the Administrative Law Judge's resolutions of credibility also were grounded upon the demeanor of the witnesses, and in light of the entire record, there is no basis for reversing his credibility findings in the circumstances of this case.

DECISION**STATEMENT OF THE CASE**

JULIUS COHN, Administrative Law Judge: This proceeding was heard at New York, New York, on June 3, 1982. Upon a charge filed July 24 and served July 27, 1981, by Manny Vega, an individual, the Regional Director for Region 2 issued a complaint on September 4, 1981, alleging that Emery Air Freight, Inc., herein called Respondent or the Company, violated Section 8(a)(1) of the Act by informing Manny Vega, through an agent, that he would be harassed until he resigned if he, Vega, filed charges with the National Labor Relations Board. Respondent filed an answer duly denying the commission of the unfair labor practices.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. The General Counsel submitted a letter brief which has been carefully considered. Upon the entire record in the case, and from my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT**I. JURISDICTION**

Respondent, a Delaware corporation, has an office and place of business in New York, New York, and is engaged in the interstate and intrastate transportation of freight and related services. During the past calendar year, Respondent, in the course of its operations, has derived revenues in excess of \$50,000 for the transportation of freight and commodities from the State of New York directly to points outside the State of New York. The complaint alleges, Respondent admits, and I find that the Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES**A. The Facts**

The Charging Party, Manny Vega, had been since 1978, and still is, employed by Respondent as messenger at its office located at 97 Trinity Place in New York City. During the period relevant to this proceeding, Howard Wimpy was the fleet agent at that location. At the hearing it was stipulated by the parties that, for the purpose of this proceeding, Wimpy was an agent of Respondent.¹

For a number of weeks prior to June 18, 1981, Vega had received a probationary promotion to work as a clerk at J. F. Kennedy Airport. Although the probationary period had been extended, it appears that Vega did not perform satisfactorily, in the view of Respondent, and he had been offered the opportunity to return to

¹ Local 851, International Brotherhood of Teamsters, with whom Respondent has a collective-bargaining relationship, was permitted to intervene, by counsel, in this hearing for the limited purpose of participating in any litigation which may arise with respect to the supervisory or agency status of Wimpy. In view of the stipulation which is limited to this matter only, the intervention became moot.

Trinity Place as a messenger, his former position, which he accepted. Accordingly on June 18, 1981, he resumed his position at that location.

On the morning of that date, Vega states he approached Wimpy in his office and told him that he thought the Company was taking advantage of him and he felt he should take the matter to the Labor Board. Wimpy replied that he was a fool, that to do such a thing would only have the Company harass him until he resigned. Vega repeated that he felt he should do it, and Wimpy again said he was a fool. At that point Vega left. That evening, after punching out, Vega again approached Wimpy's office and the latter asked if he intended to go through with it, to file charges. Vega said he did and Wimpy responded that he was foolish because in the years he had been there he had seen people harassed until they resigned.

On June 19 Vega filed charges against both Respondent and the Union. Again, according to Vega, when he approached Wimpy to see about his work assignments, Wimpy asked him if he had gone through with it, and Vega said that he had. Vega states that Wimpy hesitated, and then told him that, since his career was over, now that he had done it, he should stick to his guns.

Wimpy, testifying on behalf of Respondent, denied that the statements attributed to him by Vega. He did state however that, about 3 days after Vega's return to the messenger job in New York City, Vega mentioned that he had filed with the NLRB a claim against the Union and the Company, regarding the discriminatory manner in which he was demoted to a messenger from the clerical job. Wimpy testified that he might have responded by saying good luck with it.

Actually the above is the sum of the testimony with respect to the substance of the issues herein. While on surface the matter involved may seem to constitute a tempest in a teacup, at the core of the issue is the question of free and uninhibited access to the processes of the Board, a path which the Board itself has always guarded with great caution. Therefore, it is particularly necessary to resolve this conflict in credibility, which may be possible through an examination of the peripheral facts.

It appears that Vega and Wimpy were most often on the friendliest of terms; they engaged in conversations on a variety of matters which interested them, and both seemed to be a cut in intelligence above the positions they occupied with Respondent. A clue emerges from the proceedings and the timing of the hearing itself. Both sides limited themselves to one witness. Since Respondent had to be aware that it planned to use Wimpy as its sole witness, it was curious that at the opening of the hearing he was not present, and it appeared he could not be located. In any event, Respondent's counsel said that he had been found and would appear the following day. During his cross-examination by the General Counsel, Wimpy apparently contradicted himself on this point of his appearance. He stated that the first time he learned he was to appear at the hearing was the night before his appearance on the second day of the hearing. At a latter point in his testimony, Wimpy stated he had been informed, and indeed had met with management people, the night before the hearing opened, which was 2 days

before his actual appearance. He said he was told that he would probably be subpoenaed and, if not, it was not necessary for him to appear. At another point he said that no one asked him to come to the hearing on Thursday (the first day of the hearing). In fact, Wimpy was not subpoenaed when he appeared. I do not find it credible that Respondent or its counsel would have told its sole witness that he may not have to appear on the first day in a matter, which by its very nature could be foreseen to involve a short hearing. Nor do I credit his statement that, if it was necessary for him to appear, he would be subpoenaed. It is more likely that, if such was the situation, a subpoena would have been served.

I conclude that Wimpy was indeed a reluctant witness, and one in whom Respondent did not place too much faith. Moreover, it appears, from the uncontradicted testimony of Vega and from Wimpy himself, that the latter had also been the subject of disciplinary action by Respondent, and at the time of the hearing had been demoted to a lesser position at the airport. Again Vega stated, and it was not denied, that Wimpy told him he was not going to testify, that if he was subpoenaed, he would deny everything because he had a family and had problems with the Company as it was. In these circumstances, I credit the testimony of Vega who conducted himself in a forthright manner² and, on the other hand, I discredit the denials of Wimpy, who may very well have succumbed to the exigencies of his personal situation.

B. Conclusions

Having credited the testimony of Vega, I find that Wimpy had told him he would be a fool to go to the Labor Board and file a charge and that the Company would harass him until he resigned. Wimpy further embellished this by telling him the same evening that he had seen people harassed until they resigned. Finally, several days later, when Vega reported to Wimpy that he had actually filed the charges, Wimpy said that his career was over.

It having been stipulated that Respondent would take responsibility for the utterances of Wimpy, I find that it violated Section 8(a)(1) of the Act by, in effect, threatening Vega with loss of employment should he go through with his intentions to file a charge with the Labor Board. In this connection, clearly harassing an employee until he resigns is tantamount to discharge. Moreover, Respondent further violated Section 8(a)(1) of the Act by threatening retaliation to an employee engaged in a protected activity, that is, filing a charge with the National

² Respondent sought to discredit Vega on the basis of the complaint allegation which alleged that the unlawful conduct occurred on June 10, a date on which Vega was still employed at JFK. However, the affidavit submitted to the Board when he filed his charge merely stated that the conduct occurred during the second week in June. The General Counsel explained that the June 10 date was selected arbitrarily and thereafter in the course of trial preparation, the exact date was properly pinpointed and the complaint amended accordingly. In addition, Respondent asserted that Vega had cashed a payroll check which was erroneously drawn for more money than the amount to which he was entitled. Vega testified, without contradiction that indeed he had cashed the check, but only after Wimpy instructed him to do so, stating that it would be straightened out later.

Labor Relations Board, and further impeded the processes of the Act by limiting access to the Board itself.³

III. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section II, above, occurring in connection with the operations of Respondent described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

IV. THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

CONCLUSIONS OF LAW

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

2. By threatening an employee with harassment should he file unfair labor practice charges with the National Labor Relations Board, Respondent violated Section 8(a)(1) of the Act.

3. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

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

ORDER⁴

The Respondent, Emery Air Freight Inc., New York, New York, its officers, agents, successors, and assigns, shall:

³ *Overseas Motors*, 260 NLRB 810 (1982).

⁴ 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.

1. Cease and desist from:

(a) Threatening employees with harassment until they resign should they file charges with the National Labor Relations Board.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed them by the Act.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

(a) Post at its Trinity Place, New York, facility copies of the attached notice marked "Appendix."⁵ Copies of said notice, on forms provided by the Regional Director for Region 2, after being duly signed by Respondent's representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 2, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

⁵ In the event that this 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."

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

WE WILL NOT threaten to harass employees until they resign if they attempt to file unfair labor practice charges with the National Labor Relations Board.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed in Section 7 of the Act.

EMERY AIR FREIGHT, INC.