

**Vanport Sand and Gravel, Inc. and Construction  
General Laborers and Material Handlers Local  
Union 964 a/w Laborers International Union of  
North America, AFL-CIO. Case 6-CA-15341**

15 August 1983

**DECISION AND ORDER REMANDING  
PROCEEDING TO THE  
ADMINISTRATIVE LAW JUDGE**

**BY MEMBERS JENKINS, ZIMMERMAN, AND  
HUNTER**

On 13 December 1982 Administrative Law Judge Peter E. Donnelly issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief and Respondent filed cross-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 briefs and has decided to reverse the Administrative Law Judge's finding that leadman Phillip Fabich was a supervisor and his dismissal of complaint allegations that Fabich was discharged in violation of Section 8(a)(3) and (1) of the Act. For the reasons stated below, we find that Fabich was a statutory employee, and accordingly we shall remand this proceeding to the Administrative Law Judge for consideration of the merits of the complaint allegations.

Respondent is engaged in the processing of sand and gravel at a plant in Edinburg, Pennsylvania. The plant is managed by Vice President Dale Schoeni, and the work at the jobsite is performed by a work complement of four employees, including a dredge operator, a hi-lift operator, an oiler, and a dumpster operator. At all times material prior to his discharge, Fabich worked as a hi-lift operator and performed additional duties as a leadman. It is these latter duties as leadman which are alleged to establish Fabich's status as supervisor.

In his Decision, the Administrative Law Judge examined Fabich's leadman responsibilities, and concluded that Fabich exercised sufficient indicia of supervisory authority to warrant a finding of supervisory status under Section 2(11) of the Act. In so concluding, the Administrative Law Judge cited specific aspects of Fabich's leadman responsibilities. First, he relied on Fabich's authority to assign work based on employee skills and to assign overtime, notably in connection with repairs, and to see that the repairs were completed. Second, he noted

that Fabich had the authority to grant time off on a daily basis or for vacations. Third, Fabich had authority to use Respondent's credit in making purchases. Fourth, Fabich was generally responsible for the production process, and made gradation tests on the sand and gravel in order to ascertain that the product met customer specifications. Finally, the Administrative Law Judge pointed out that Fabich was responsible for plant operations in the absence of Schoeni, who is typically absent for all but 15 to 30 minutes of the workday.

We find merit in the General Counsel's exceptions that the record does not support the finding that Fabich was a supervisor. There is no evidence that Fabich exercised independent discretion on any regular basis or to any significant degree in performing his leadman duties. Regarding work assignments, the record indicates that the work is automated and routine and that the employees hold established job classifications: Phillip Fabich was hi-lift operator; Thomas Mitchell is dredge operator; Stephen Fabich is oiler; and Leroy McFall is dumpster operator. When one employee is absent, another may replace him, such as the oiler substituting for the dredge operator. Rather than being a matter of discretion, however, such reassignments by Fabich appear to have been based on employee skills and the performance of functions necessary for plant operations. Overtime assignments for equipment repairs likewise provide for little discretion, particularly as it appears that Respondent's established policy is to make the repairs prior to the next workday. Fabich consulted directly with Schoeni regarding major breakdowns, and on an infrequent basis, approximately twice a month, assigned overtime repair work without prior consultation. These assignments, however, usually were based on seniority, except on occasions where tasks were assigned according to the ability to get the work done.

Regarding the granting of time-off requests, the record indicates that typically Schoeni retains final authority to grant requests for vacation extensions. However, to the extent that Fabich may have granted such requests independently, or allowed employees to leave work early for personal reasons, such approvals were very infrequent, and occurred approximately twice a year. Further, Fabich's ability to make purchases on Respondent's credit does not indicate supervisory status because all employees were able to make necessary purchases in this manner.

Finally, Fabich's general responsibility for plant operations, particularly in the absence of Vice President Schoeni during the bulk of the workday, does not mandate that *ipso facto* he be rendered a

supervisor. As indicated above, the work of the plant is automated and routine, and the record indicates that, although Schoeni usually spends less than half an hour at the plant, and the rest of the day at an office one-fifth mile from the plant, he occasionally spends the entire day at the plant should circumstances warrant it. The record fully supports the General Counsel's contention that the plant employees are familiar with their usual assignments and need no instruction or continuous supervision regarding their duties. This conclusion is further supported by undisputed evidence that Fabich spent only approximately 5 to 10 minutes a day on his leadman duties, with the remainder of his time devoted to his responsibilities as a hi-lift operator loading trucks and moving materials around the plant.

More generally, the record clearly shows that Fabich had none of the other indicia of supervisory responsibility set forth in Section 2(11) of the Act. He did not hire, transfer, suspend, lay off, recall, promote, discharge, reward, or discipline<sup>1</sup> other employees, adjust their grievances, or effectively recommend such action. On the contrary, it appears that Fabich was regarded by Respondent essentially as a unit employee whose terms of employment were controlled by the applicable bargaining agreement. He was paid on an hourly basis at the same rate as the most highly paid unit employee<sup>2</sup> and he used a timecard. All of his benefits, including vacation coverage, were as set forth in that bargaining agreement. Further, Fabich had served as shop steward for a number of years prior to his discharge, had helped negotiate the current bargaining agreement, and was represented by the Union in grievance discussions prior to his discharge.

Based on the foregoing, it appears that Fabich was Respondent's most senior and experienced employee, his leadman functions were circumscribed by Schoeni's specific instructions and Respondent's more general established policies, and he exercised limited discretion in the performance of his leadman duties. At most, the evidence that he occasionally exercised additional authority, such as granting employees time off, showed that it was on an irregular or sporadic basis and these activities are insufficient to establish supervisory status under the Act. Consequently, we reverse the Administrative Law Judge's finding that Fabich was a supervisor

<sup>1</sup> Fabich's statement to an employee on one occasion that Schoeni was upset because that employee was always late for work is not a form of independent discipline, but was merely a restatement of views earlier expressed by Schoeni.

<sup>2</sup> Fabich was paid the same rate as dredge operator Mitchell, \$7.98 per hour. The record indicates that this premium over the normal rate of \$7.53 per hour for a hi-lift operator was due to his leadman duties.

under Section 2(11) of the Act. Accordingly, we shall remand the case for a consideration of the merits of the unfair labor practice allegations in the complaint, as requested by the General Counsel.

## ORDER

It is hereby ordered that this case be remanded to the Administrative Law Judge and that he shall prepare and serve on the parties a Supplemental Decision containing credibility determinations, findings of fact, conclusions of law, and recommendations to the Board, and that, following service of such Supplemental Decision on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations, Series 8, as amended, shall be applicable.

## DECISION

### STATEMENT OF THE CASE

PETER E. DONNELLY, Administrative Law Judge: The original charge herein was filed on March 5, 1982, by Construction General Laborers and Material Handlers Local Union 964 a/w Laborers International Union of North America, AFL-CIO, herein called the Union or the Charging Party. An amended charge was filed on April 29, 1982. A complaint thereon was issued on April 29, 1982, alleging that Vanport Sand and Gravel, Inc., herein called Respondent or the Employer, violated Section 8(a)(3) of the Act by discharging Phillip M. Fabich for having engaged in union activity and protected concerted activity. An answer thereto was timely filed by Respondent. Pursuant to notice a hearing was held before the Administrative Law Judge in Pittsburgh, Pennsylvania, on October 4, 1982. Briefs have been timely filed by Respondent and the General Counsel which have been duly considered.

### FINDINGS OF FACT

#### I. JURISDICTION

Respondent is engaged in the production and sale of sand and gravel aggregates with its principal office and sole facility located in Edinburg, Pennsylvania. During the 12-month period ending March 31, 1982, Respondent purchased and received at its Edinburg, Pennsylvania, facility goods and services valued in excess of \$50,000 directly from points outside the Commonwealth of Pennsylvania. The complaint alleges, Respondent in its answer admits, and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

#### II. LABOR ORGANIZATION

The complaint alleges, Respondent at the hearing admitted, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

### III. THE ALLEGED UNFAIR LABOR PRACTICES

#### A. Facts

Respondent is engaged in the processing of sand and gravel at a jobsite in Edinburg, Pennsylvania. It is essentially a dredging operation which brings up sand and gravel to conveyors which move it to the shore. From the shore it is moved by conveyor to the plant where it is processed and separated into various grades of sand and gravel and sold.

Corporate responsibility for the jobsite resides with Dale E. Schoeni, vice president, who also holds the position of executive vice president of Vanport Sand and Gravel, Inc., and Alliance Land, Inc., which are separate corporate entities.

The work at the jobsite is performed by four employees. Among these are Thomas Mitchell, dredge operator, Stephen Fabich, oiler,<sup>1</sup> and Leroy McFall, dumpster operator. The supervisory status of the fourth employee, Phillip Fabich, is in issue.

With respect to Phillip Fabich's duties, it appears that he was hired by Respondent in June 1971 as a laborer and was promoted to hi-lift operator in or about 1972. In 1974, Schoeni promoted Fabich to the position of leadman with the authority, as Schoeni testified, to "kind of run the place." At that time Fabich was given a wage increase over his wage rate as hi-lift operator to the higher rate of the dredge operator.<sup>2</sup>

In describing Fabich's duties, Schoeni testified, "He was in charge of the hi-lift, the loading trucks, moving material in the yard. He was in charge of making the material to specifications, of directing the men in their different jobs. He was in charge of the timecards, seeing that they were properly marked; in charge of maintenance, the general operations of the plant." Fabich reports directly to Schoeni.<sup>3</sup>

During the workday, while Fabich was at the jobsite, Schoeni would be at the office some one-fifth of a mile away. Normally Schoeni spent only 15 to 30 minutes a day at the jobsite.

It appears that Fabich in addition to his work as a hi-lift operator has the authority, on a day-to-day basis, to assign work to the other employees and to reassign them from one job to another.<sup>4</sup> While the record indicates that the production operation is automated and routine, breakdowns do occur. In some infrequent instances, particularly when the breakdown is major, Fabich consults with Schoeni about the repair and the amount of overtime necessary to accomplish the repair work. At other times when breakdowns occur, about twice a month, Fabich undertakes on his own to do the repairs, working

whatever overtime is necessary to get the job done to keep the plant operating. While the selection of employees to work such overtime normally follows seniority order, Fabich sometimes assigns tasks according to ability to get the work done. Fabich also has the responsibility of checking the repair work to see that it has been done properly.

Fabich is also entrusted by Schoeni with keys to the plant gates, gas pump, building, and garage, and is responsible for unlocking the plant in the morning.

Fabich has the authority to make purchases on behalf of the Employer, and has done so in amounts of several hundred dollars.

With respect to the matter of timecards, it appears that Fabich himself punches in but does not punch out, rather writing in the time that he leaves. As to the timecards of the other employees, Fabich writes the employees' names on the cards, and then indicates for the weekly pay period, on a daily basis, whatever wage rate classifications the employees have worked when employees work out of their normal classifications. When overtime was worked, Fabich noted the total number of hours worked on the timecards.

As to the granting of time off, Fabich testified that he had, on his own authority, extended days of vacation time to employees, although normally this was cleared with Schoeni. On a daily basis when an employee requested time off to attend to personal needs, the request were made to Fabich who had the authority to release the employees.

In addition to his other duties, Fabich was responsible for inspecting sand and gravel to ensure that it met customer specifications. In this connection, he ran tests known as "gradations," and the materials were processed to provide the customer with whatever grade was requested.

However, as to other particularities, Fabich was like the other production employees in that he did production work himself as hi-lift operator. Moreover, he did not have the authority to promote, to grant wage increases to, or to discharge other employees.

#### B. Discussion and Analysis

The criteria for determining whether an employee is a supervisor within the meaning of the Act are set out in Section 2(11) of the Act which defines the term supervisor.<sup>5</sup> Under the provisions of Section 2(3) of the Act supervisors are excluded from the coverage and hence the protection afforded by the Act.

Applied to the instant case, this means that, if Fabich were a supervisor, his discharge did not violate the Act. A careful review of the entire record convinces me that Fabich was a supervisor within the meaning of the Act.

<sup>1</sup> Stephen Fabich is the brother of Phillip Fabich, the alleged discriminatee.

<sup>2</sup> The most recent contract between Respondent and the Union provides a wage rate of \$7.53 per hour for the hi-lift operator and the top rate of \$7.98 per hour for the dredge operator, which Fabich receives. During the winter months, when the dredge was not operating, Fabich was the only employee paid the top rate.

<sup>3</sup> Fabich is also a member of the Union, shop steward at the plant, and negotiator-signatory to the most recent contract between Respondent and the Union.

<sup>4</sup> For example, in the absence of the dredge operator, Fabich would assign the oiler as a replacement.

<sup>5</sup> Sec. 2(11) of the Act reads:

The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Clearly Fabich does not exercise all the criteria set out in Section 11 of the Act. He does not, as noted above, have the authority to promote, to discharge, or to reward as with wage increases. However, he does exercise sufficient of these indicia to constitute him a supervisor.

First, he does have the authority, which he exercises, to assign employees to perform work according to his own evaluation of their skills and to reassign them, particularly in the repair of breakdowns. He makes work assignments on a daily basis. Fabich also has the authority to assign overtime work, notably in connection with repairs, and has the responsibility to see to it that the repair work is properly done.

Fabich also grants time off on a daily basis and has occasionally given time off for vacations. In addition, Fabich has the authority to pledge the credit of the Company in making purchases, sometimes in amounts of several hundred dollars.

With respect to the production process itself, Fabich is responsible to see that the product conforms to the specifications of the customer and in so doing makes gradation tests on the sand and gravel.

Another compelling factor in concluding that Fabich is a supervisor is that he is responsible for the entire op-

eration in Schoeni's absence. If we are to assume that Fabich is not a supervisor, then we must conclude that the plant operates without supervision for all but the 15 to 30 minutes daily when Schoeni is at the facility. This concept strains credulity. The more rational conclusion, fully supported by this record, is that Fabich is a supervisor within the meaning of the Act. *Plumbing & Industrial Supply Co.*, 237 NLRB 1124, 1128, 1129 (1978).

In these circumstances, even assuming Fabich was discharged as the General Counsel alleges, for having filed grievances concerning his accrued vacation time, his discharge would not violate the Act since he is a supervisor to whom the protection of the Act does not extend and, accordingly, I deem it unnecessary to reach the question of whether or not Fabich was discriminated against for having engaged in union or protected concerted activity. Accordingly, I shall recommend that the complaint herein be dismissed.

#### CONCLUSION OF LAW

Respondent has not engaged in any conduct violative of the Act.

[Recommended Order for dismissal omitted from publication.]