

Dover Stone & Sand Corp. and Robert Hansen
Local 445, International Brotherhood of Teamsters,
Chauffeurs, Warehousemen and Helpers of
America and Robert Hansen. Cases 3-CA-
10711 and 3-CB-3939

22 December 1983

DECISION AND ORDER

BY MEMBERS ZIMMERMAN, HUNTER, AND
 DENNIS

On 22 April 1983 Administrative Law Judge Wallace H. Nations issued the attached decision. The General Counsel filed exceptions and a supporting 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 brief 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 We agree with the judge's finding that Robert Hansen's complaints were not protected under the Act. Hansen's repeated complaints were related to four subjects: the recall by the Respondent in May 1981 of driver Bob Kuchenmeister to do carpentry work prior to the recall of Hansen, who had more seniority than Kuchenmeister; the Respondent's assignment of overtime to all drivers, including Hansen; the condition of the hopper used by drivers for unloading sand and gravel; and the condition of Hansen's truck. As to the recall of Kuchenmeister, the Union informed both the Respondent and Hansen that Kuchenmeister's recall was proper and did not violate the parties' collective-bargaining agreement. As to the assignment of overtime, all drivers, except Hansen, affirmatively requested overtime work through their union steward. As to the condition of the hopper, all drivers used the hopper daily, and only Hansen complained about its condition. Lastly, as to the condition of Hansen's truck, Hansen almost daily brought his truck to the mechanic for repairs around 3:30 p.m., 1 hour before quitting time, and the mechanic made all necessary repairs as soon as possible, although he refused to make certain repairs which did not relate to the safety of the truck, e.g., broken running lights used for nighttime driving which Hansen did not do. Yet Hansen continued to complain about the mechanic's failure to make repairs as quickly as Hansen wished and the mechanic's refusal to make repairs which were unnecessary. The record thus demonstrates that Hansen's complaints were motivated by personal reasons unrelated to a good-faith concern that the safety or other provisions of the collective-bargaining agreement be followed, especially given the Union's both implicit and explicit approval of the Respondent's actions underlying Hansen's complaints. Under the circumstances we find that Hansen's complaints were not made in good faith and thus did not constitute protected activity. Compare *OMC Stern Drive*, 253 NLRB 486 fn. 2 (1980), enfd. 676 F.2d 698 (7th Cir. 1982). In making this finding we do not rely on the fact, as did the judge, that Hansen never filed a grievance over any of his complaints.

DECISION

STATEMENT OF THE CASE

WALLACE H. NATIONS, Administrative Law Judge: Upon charges brought on October 20, 1981, by Robert G. Hansen (Hansen) a complaint issued against Dover Stone & Sand Corporation (the Respondent Employer) and Local 445, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the Respondent Union), alleging that the Respondent Employer unlawfully discharged Hansen and that the Respondent Union arbitrarily refused to process a grievance on Hansen's discharge, all in violation of the Act. A hearing was held on July 19-20, 1982, at Poughkeepsie, New York. A brief in this matter was filed by the General Counsel.

I. THE BUSINESS OF THE RESPONDENT EMPLOYER

Dover Stone & Sand Corporation is engaged at Dover Plains, New York, in the processing, sale, and transportation of gravel, sand, and related products. The Respondent Employer has admitted the jurisdictional allegations of the complaint and I find that the Respondent is an employer within the meaning of the Act and that it will effectuate the policies of the Act to assert jurisdiction in this case.

II. THE LABOR ORGANIZATION

Local 445, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the Union), is a labor organization within the meaning of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Allegations Relating to the Discharge of Hansen

Dover is engaged at its Dover Plains location in the processing and hauling of gravel, sand, and related products. In hauling materials, Dover utilizes dump trailers driven by drivers represented by Local 445. Due to the seasonal nature of its operations, drivers are generally laid off at the end of December and recalled the following April. As provided in the labor agreement between Dover and Local 445, layoffs and recalls are by seniority. Hansen started as a driver with Dover in 1975. By 1981,¹ he was the number four driver for purposes of seniority.

Following the winter layoff, Hansen was recalled to Dover in June. He worked approximately 2 weeks before being laid off for lack of work. According to his testimony, Hansen became ill on the evening of September 3. In the early morning of September 4, Hansen phoned in to Dover and reached its president, Dominick Maccarini. Hansen asked for the union shop steward, Robert Dorn. Hansen informed Dorn that he was stricken with diarrhea and would not be available to drive. On the afternoon of September 4, Maccarini left instructions for Dorn to go to Hansen's house with termination checks

¹ Unless otherwise indicated all dates referred to are in 1981.

and to give them to Hansen if Hansen was not sick. It had been reported to Maccarini that Hansen had been in a local tavern drinking and making disparaging remarks about his work and his job. When Dorn arrived at Hansen's residence, he found Hansen washing his car and gave Hansen the termination checks after Hansen admitted that he had been drinking the night before. These facts were reported to Maccarini. Dorn then told Hansen that he should contact the union local representative, William McConnell.

Hansen ultimately contacted McConnell on September 7, and was informed by McConnell that a meeting would take place at Dover on September 8. Upon arriving at Dover on September 8, McConnell met with Hansen and informed him that he wanted to speak individually with Maccarini for a few minutes before Hansen came into the meeting. At this time, Hansen gave McConnell an emergency room report to verify his earlier illness. McConnell then met with Maccarini who related that he believed on September 3 Hansen had fought with other drivers and had not put his vehicle away for the evening or fueled the vehicle. McConnell suggested that Maccarini chew Hansen out and thereafter all the parties could forget about the incident. Maccarini replied he would not change his mind on the termination.

Maccarini indicated that the immediate reason for Hansen's termination was his belief that Hansen was not truly ill and that his absence on September 4 caused the idling of an expensive piece of equipment for the day. He also candidly admitted that part of the reason for the discharge was his belief that Hansen did not want to work for Dover because of an accumulation of incidents and complaints over a period of time. As it is important to determine whether or not Hansen's actions and complaints were protected under the Act, a discussion of each follows.

1. The Kuchenmeister incident

In 1981, Bob Kuchenmeister was a driver with Dover and held the seventh position on the seniority list. In May 1981, at a time when Hansen was on layoff status, Dover had Kuchenmeister do carpentry work at the plant facility. This work was not bargaining unit work. Upon recall in June, Hansen approached Maccarini to complain about Kuchenmeister's performing carpentry work. He was referred to shop steward Dorn. Hansen also complained about the Kuchenmeister carpentry work to business representative McConnell. McConnell informed Hansen that as long as Kuchenmeister was not doing bargaining unit work there was no problem with his doing carpentry work at the facility. Hansen asked McConnell why he (Hansen) could not do it and was informed that it was because he did not have any carpentry skills. McConnell also checked with his union superior to verify that there was no violation of the contract or its seniority provisions by Kuchenmeister performing carpentry work for Dover. He was informed that there was no problem with it. Hansen, however, continued complaining about the Kuchenmeister carpentry work to the union representatives and to fellow employees. The General Counsel urges that, prior to 1981, carpentry work at the Dover facility was performed by shop stew-

ard Hank Dorn, the number 1 man on the seniority list. He urges that, if Dorn had continued to do carpentry work rather than Kuchenmeister, another driver could have been recalled and the remaining laid-off drivers could advance for recall purposes. However, Dorn testified that the carpentry work was given to him by Dover primarily in the winter to keep him working and that only on one occasion would there have been any overlap between the time that he was to do carpentry work and the time that drivers were needed. Consequently, I can find no merit in the General Counsel's argument that Hansen's complaints about Kuchenmeister's good fortune in finding carpentry work during the layoff period has anything to do with Hansen's ability to get bargaining unit work.

2. Overtime runs

In 1980, Dover's drivers were transporting approximately three round trip loads per day. This resulted in very little overtime pay for the drivers. In 1981, Maccarini went to the shop steward and asked if the drivers would like to work overtime and was given an affirmative answer. Thus, in 1981, Maccarini had the drivers perform four turnarounds per day rather than three resulting in overtime pay on a weekly basis to the drivers of 5 to 7 hours per week. To accomplish the four runs in the daylight hours, as was necessary, the driver would have to give up part of his unpaid one-half hour lunch period. It was contemplated by Maccarini that the drivers would be able to take an abbreviated lunch hour of 15 or 20 minutes while performing one of the runs and not pass up lunch altogether. State law allowed the drivers, even in overtime situations, to take up to 20 minutes for lunch. Although the other drivers at Dover liked the situation because of the extra pay it gave them during the driving season, Hansen did not and complained about the situation continuously. However, he filed no formal grievance with the Union in regard to the overtime procedure.

3. The hopper complaint

Part of the job requirement at Dover was that drivers back up to a sand and gravel hopper for loading. Although the other drivers performed this duty without any problems, Hansen repeatedly complained about it. At one point in the summer of 1981, Hansen flatly refused to do this and stopped operating his truck and attempted to leave the premises. Shop steward Dorn and Maccarini talked him out of leaving, although he was given a warning.

4. Equipment complaints

The evidence reflects that Hansen complained continuously about the condition of his truck. Shop steward Dorn testified that those things about which Hansen complained which were legitimate safety concerns were fixed almost immediately or shortly thereafter. The Company's mechanic testified that Hansen would bring his truck in almost on a daily basis around 3:30 p.m. though quitting time was 4:30 p.m. One of his major complaints was with broken running lights utilized for nighttime op-

erations. As the trucks did not operate at night, these lights were not necessary for the safety of the operation of the truck. The mechanic also testified that during the summer of 1981, because he would not respond to one of Hansen's complaints quickly enough, Hansen became very angry and they nearly came to blows. The mechanic and shop steward Dorn also observed Hansen arguing with and cursing at owner Maccarini some 2 weeks later, with Hansen telling Maccarini that he did not know what he was doing. Dorn also testified that Hansen made derogatory comments about Maccarini to anyone who would listen.

The complaints listed are the primary complaints noted by Hansen and discussed in the record. During 1981, Hansen did not file any grievance with the Union with respect to any of the matters about which he had a complaint. The evidence reflects that, in the years preceding 1981, Hansen had also continually complained about one thing or another. However, during the 1981 work season, Hansen's complaints became more numerous. The General Counsel urges that Hansen's complaints, which formed the basis or at least the background for his termination, were protected because they arose out of the labor agreement or were otherwise protected concerted activity. I disagree.

To the extent that Hansen's complaints about Kuchenmeister arose out of a misinterpretation of the seniority provisions of the contract, perhaps Hansen's complaints would have been protected had they ceased when he learned that he was incorrect. However, Hansen was still complaining about the Kuchenmeister incident as of the time of the hearing. Hansen's complaints with respect to equipment, which might have foundation in the contract, did not appear to me to be directed to safety so much as being something about which to complain. The same is true with respect to the overtime situation. In none of these incidents did Hansen attempt to invoke the grievance provisions of the contract and pursue his complaints. With respect to whether any of the complaints constituted protected concerted activity, it must be noted that Hansen acted alone in all of his complaint activity. The review of the record as a whole makes it clear to me that Hansen was acting solely in his own behalf with respect to each and every complaint mentioned in the record. I find that the welfare of his fellow employees had absolutely no bearing on the matters about which he complained.

Maccarini testified, and I fully credit his testimony, that he believed Hansen was unhappy in his work at Dover and that, having previously warned Hansen about his performance, the incident of September 4 justified his discharge. I find that Maccarini's belief that Hansen was dissatisfied with his job was legitimate because Hansen's complaints did not have any real basis in the pertinent labor agreement, because he did not follow up his complaints by utilizing the grievance procedures contained in that agreement, and because his complaints were solely on his own behalf, were constant, and were about virtually every feature of his job. The fact that Hansen's discharge was based, in part, on this belief does not call for a remedy as I find that under all the circumstances Hansen's complaints and actions were not protected under

the Act. Therefore, I also find that the Respondent, Dover Stone & Sand Corp., did not, by its discharge of Hansen, commit an unfair labor practice within the meaning of the Act.

B. Allegations with Respect to the Union's Failure to Provide Fair Representation

It is the position of the General Counsel that the Respondent Union violated its duty of fair representation to Hansen by not processing a grievance about his discharge to the fullest extent allowed in the labor agreement. On September 4, the local business representative, McConnell, was informed by a call from Maccarini that Hansen had not come in to work that day, that his truck was sitting in the yard, and that Maccarini was quite upset. Maccarini also explained that Hansen had complained the day before about something, that there was trouble at the plant the night before, and that Hansen had left early and had not fueled up. Maccarini also said that he had had it with Hansen and that he wanted to fire him. McConnell urged him not to do that and to talk to him first. Maccarini told McConnell that he was going to take a check to Hansen and that if he were not sick that he would be fired. Maccarini was advised by McConnell to take Dorn because the Union would not take an employer's word against a driver's.

Although McConnell offered to find another driver for Hansen's idle truck, Maccarini told him that as of the time they were talking it would be afternoon before a driver would become available and it was not worth paying a driver for a full day when he could only work a partial day.

A meeting was set up between McConnell, Dorn, Hansen, and Maccarini for September 8 to discuss the discharge. When McConnell arrived at Dover, he discussed what had happened with Hansen and advised Hansen that he wanted to talk with Maccarini alone first before everyone met. McConnell began his conversation with Maccarini and during the conversation Dorn and Hansen walked in. According to McConnell, Hansen sat down and began to complain about overtime, his lunch break, and Kuchenmeister, and the meeting "blew up." After the meeting, having determined no fight with other drivers had actually taken place, McConnell gave this information to Maccarini and again urged him not to discharge Hansen. Maccarini informed McConnell that he was very upset about the truck being parked and losing the income for the day. McConnell testified that Maccarini was still upset about the way that Hansen had left the plant the night before. Maccarini also pointed out that McConnell had talked him out of firing Hansen on various other occasions and he was not going to be talked out of it on this one.

Under the Local's standard procedure, McConnell has the authority upon investigation to determine whether or not a grievance should be processed further. Hansen and his wife met with shop steward Dorn, McConnell, and McConnell's superior, the Local's secretary-treasurer, Raymond Ebert, on September 16. McConnell offered that he thought that Maccarini had cause for discharging Hansen. Hansen presented his case and Ebert informed

Hansen that he would look into it and get back to him. Hansen received a letter from Ebert on September 18, stating that Ebert agreed that Hansen was properly discharged. Following this letter, Hansen filed a letter with Elmore Schueler, president of Local 445, and received a letter of return stating that the president would investigate the facts of the matter. No further communication was received by Hansen from Schueler. Thereafter, the Local found Hansen other employment.

Having heretofore determined that the Respondent Company was justified in discharging Hansen, I believe that the Respondent Local did all that it was required to do in order to fairly represent Hansen. The Local's representative McConnell made bona fide efforts to dissuade Dover from terminating Hansen and after investigating the facts decided it would not be fruitful to pursue the matter to arbitration. Instead it offered to find Hansen other employment and subsequently did so. I find that by its actions in this matter, the Respondent Union did not violate Section 8(b)(1)(A) of the Act.

Upon the foregoing findings of fact and the entire record in this case, I make the following

CONCLUSIONS OF LAW

1. Dover Stone & Sand Corp. is an employer within the meaning of Section 2(2) of the Act and is engaged in

commerce within the meaning of Section 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 Dover Stone & Sand Corp. did not engage in unfair labor practices within the meaning of Section 8(a)(3) or (1) of the Act by discharging Robert Hansen.

4. The Respondent Union by its actions in representation of Robert Hansen did not engage in unfair labor practices within the meaning of Section 8(b)(1)(A) 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

ORDER²

It is hereby ordered that the consolidated complaint be and the same hereby is dismissed.

² If no exceptions are filed as provided by Sec. 102.46 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.