

Foodtown Supermarkets, Inc. and Local 539, Meat Cutters, United Food and Commercial Workers of America, AFL-CIO. Case 7-CA-18674

25 January 1984

DECISION AND ORDER

BY MEMBERS ZIMMERMAN, HUNTER, AND DENNIS

On 4 May 1983 Administrative Law Judge William A. Gershuny issued the attached decision. The General Counsel and Charging Party filed exceptions and supporting briefs, and the Respondent filed an answering 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 affirm the judge's rulings, findings,¹ and conclusions² and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

¹ The General Counsel and Charging Party have excepted to some of the judge's credibility findings. 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 the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. The judge did not credit Smith generally. We, therefore, find it unnecessary to rely on his discussion concerning the absence of a charge or complaint allegation as additional grounds for discrediting Smith's testimony that on 6 November 1980 Adler threatened to discharge Smith if he proceeded to arbitrate a previous suspension.

² In the absence of proper exceptions to the judge's failure to defer, Members Hunter and Dennis do not reach the deferral issue.

DECISION

STATEMENT OF THE CASE

William A. Gershuny, Administrative Law Judge: A hearing was held in Detroit, Michigan, on complaint issued July 7, 1982, based on a November 12, 1980 discharge of a meatcutter, Craig Smith, allegedly for prosecuting a grievance over an earlier 3-day suspension. Previously, on January 12, 1981, the Regional Director deferred to pending arbitration proceedings under *Dubo Mfg. Corp.*, 142 NLRB 431 (1963). On June 15, 1981, an arbitrator reduced the discipline from discharge to a 3-month suspension, with backpay only for time lost in excess of 3 months, based on findings that Smith called Company President Adler a "son of a bitch" during the course of a discussion of the grievance and his work history. Contending that the unfair labor practice issue was

not considered by the arbitrator and that the result was repugnant to the Act, the Regional Director thereafter issued this complaint on July 7, 1982.

Respondent Foodtown Supermarkets, Inc., contends, inter alia, that the discharge was not motivated by unlawful considerations and that the Board should defer to the arbitrator's decision.

Based on the record evidence, including my observation of witness demeanor, but excluding any consideration of the findings and conclusions of the arbitrator, I conclude that Smith was discharged solely and exclusively for the reason that he called the company president a son of a bitch, that Smith's grievance activity played no role whatever in the discharge decision, that Smith would have been discharged for his use of profanity regardless of the pendency of a grievance, and that the complaint must be dismissed. Accordingly, there is no occasion to reach the deferral issue.

FINDINGS OF FACT AND CONCLUSION OF LAW

I. JURISDICTION

The complaint alleges, the answer admits, and I find that Respondent is an employer subject to the Act.

II. LABOR ORGANIZATION INVOLVED

The complaint alleges, the answer admits, and I find that Meat Cutters Local 539 is a labor organization within the meaning of the Act.

III. UNFAIR LABOR PRACTICE

A. The Facts

Respondent operates five food supermarkets in the Detroit area, employing approximately 23 meatcutters. All of its employees, including the meatcutters, have been represented by the Union for more than 30 years. Admittedly, its relationship with the Union has been good; there never has been a strike; there has been no refusal on Respondent's part to entertain grievances or to proceed to arbitration, although until 1980 all grievances were disposed of informally at the first or second step of the contract grievance procedure; and no employee has been discharged or disciplined for pursuing a grievance.

Smith was hired by Respondent 10 years ago as an apprentice meatcutter. Admittedly, there had existed long before 1980, when he was discharged, a personality conflict between Smith and Company President Adler. Admittedly also, Smith's work record over the years was "absolutely awful." Between 1977 and 1980, Smith was disciplined 11 times: 9 were related to absenteeism and for which he was issued 7 written warnings and suspended twice; 1 was based on the theft of meat (grinding higher priced chuck, labeling it as lower priced round meat and purchasing it for himself at the lower price) for which he received a written warning; and 1 was based on customer complaints and for which he took a voluntary reduction from meat department manager to meatcutter and received a written warning. Noteworthy is the fact that until the September 26, 1980, 3-day suspension without pay for absenteeism, Smith filed no grievance.

ance over any of the discipline he had received (although admittedly he had pursued one or two other grievances over nondisciplinary issues). And, finally, in late 1980 it was learned that Smith was operating a commercial meat-cutting business out of his barn.

The 3-day suspension, out of which the present controversy grows, was unresolved at steps one and two and proceeded to a step 3 meeting between Smith, two union business agents, and Adler on November 6, 1980. The General Counsel contends that Adler's statements at this meeting reveal the true motive for Smith's discharge 6 days later on November 12, 1980. The credible evidence is that Adler rejected the Union's demand for backpay, because the suspension was justified in light of the many warnings issued previously for absenteeism; that Adler, referring to Smith's earlier theft of meat, said, "I should have blown him out of the water a long time ago"; and that the Union said the grievance would be taken to arbitration. In fact, the grievance was dropped by the Union, which never requested arbitration. Prior to the step 3 meeting, Adler had offered to settle the grievance by permitting Smith to work 2 double-time days.

One week after the step 3 meeting, Adler telephoned each meat department to report that an advertising error in the price of Thanksgiving turkeys would be corrected the following day. As to the store at which Smith worked, Adler spoke with Assistant Store Manager Ostrander and asked to speak with the meat department manager. When informed that it was his day off and only a meat wrapper was working, Adler asked where Smith was. When informed that Smith had been given permission to leave early, Adler became angry because this was the busiest holiday season and because one of Smith's continuing problems was absenteeism. It also occurred to Adler that Smith had left the meat department unattended by a meatcutter so as to pursue his own personal meat-cutting business. He accused Ostrander of "running a country club" and hung up. Ostrander, noting that Smith had not yet left the store, called Adler and put Smith on the telephone. Adler informed him of the pricing error; asked him what he was doing going home at a holiday time; reminded Smith of his prior disciplinary record, his suspension, and his demand for backpay; stated that all this costs a lot of money; told him that they should stop fighting and go to work and work together; and asked if Smith was going to "jam" the grievance "up our ass." Smith replied, "You're damn right, you son of a bitch." Asked by Adler if Smith was calling him a son of a bitch, Smith replied, "Damn right, you son of a bitch." Adler told him that he could not work there and call him a "son of a bitch" and that he was fired. Smith stated, "You tell Ostrander the same thing you told me, that I'm fired," and handed the telephone to Ostrander. Ostrander, who was in the office when the call was placed, 2-3 feet from Smith, heard Smith call Adler a "son of a bitch."

Adler telephoned union business agent Johnson to inform him of the discharge, but the two began to quarrel and Adler did not give him the reason for the discharge at that time. Shortly before the arbitration hearing, the Union was advised that Smith was discharged for calling Adler a "son of a bitch."

Throughout, I have credited the testimony of Adler and Ostrander over that of Smith and the two business agents. Both Adler and Ostrander, based on my observation of their demeanor on the stand, clearly appeared to me to be candid and convincing and truthful. Adler's admission that he was angered and incensed by Smith's irregular work habits and not by the fact that Smith was pursuing a grievance for 3 days' pay rings true, given Smith's history of discipline and Adler's amicable union relationship over many years. It is also noted that no evidence was offered to show that other employees called Adler similar names to his face without being subjected to discipline. Smith, on the other hand, was considerably less than candid, and, based on my observation of his demeanor on the stand, appeared to be holding back the more accurate account of relevant events. Moreover, his testimony was contradicted in significant part by Ostrander and the union agents as well. As to the business agents, it can be said that they were particularly vague in their recollection of events, even to the point of contradicting each other. Finally it must be said that testimony that threats were made by Adler at the step 3 meeting to discharge Smith if the 3-day suspension were taken to arbitration is totally incredible for the reasons that no unfair labor practice charge was filed and counsel for the General Counsel neither alleged nor suggested that Adler engaged in any unlawful conduct at that meeting. It can be expected that, if in fact such a threat to discharge were made on November 6, 1980, the General Counsel surely would have alleged a separate violation when it became known, 6 days later, that the grievant was discharged. No charge was filed and no allegation made because, in fact, no threat was made by Adler.

B. Discussion

The General Counsel's contention that the true motive for Smith's November 12 discharge was his pursuit of a grievance is wholly misplaced for two reasons: one, it ignores the essential distinction between a discharge based on independent conduct during the course of a grievance discussion and one based on pursuit of that grievance; the other, it ignores 30 years of amicable labor relations at the stores and Smith's long history of discipline. Each is an essential ingredient in the decision-making process where the General Counsel's case is bottomed solely on circumstantial evidence. The long history of amicable relations and dispute resolution on the part of Respondent and, more particularly, its president, Edwin Adler, dispels any inference that the true motive for the discharge was Smith's pursuit of a grievance and not his calling Adler a "son of a bitch." Neither this Act nor any other federal labor law protects an employee from insubordinate conduct of the type engaged in by Smith. Nor is an employer statutorily barred from becoming outraged by an employee's habitual absenteeism. Absenteeism and employee theft, it can be noted, are national problems of epidemic proportions. Adler's refusal to settle the 3-day suspension grievance at step 3, thus forcing the Union to take it to arbitration if it wished to pursue the issue further, was a perfectly reasonable one given Smith's poor work history.

Having seen and heard the witnesses, I am unable to detect even the faintest suggestion that Smith's grievance activity played any role whatever in Adler's decision to discharge him. I conclude, therefore, that Smith was discharged solely and exclusively for the reason that he called the Company president a "son of a bitch"; that Smith's grievance activity played no role whatever in that discharge decision; and that Smith would have been discharged for his profanity on November 12, regardless of any grievance activity on his part.

On the foregoing findings of fact and conclusion of law and on the entire record, I issue the following recommended

ORDER¹

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

¹ 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.