

**The Dillon Company and William P. Kelley. Case
9-CA-18570**

23 April 1984

DECISION AND ORDER

**BY CHAIRMAN DOTSON AND MEMBERS
HUNTER AND DENNIS**

On 13 May 1983 Administrative Law Judge Thomas R. Wilks issued the attached decision. The General Counsel filed exceptions and a supporting brief, and 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, and conclusions¹ and to adopt the recommended Order.

ORDER

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

¹ Member Dennis finds it unnecessary to adopt the judge's conclusion that Kelley and Fleisch did not suffer from any discrimination because she agrees with the judge that the General Counsel failed to prove by a preponderance of the evidence that the Respondent possessed sufficient control over the work of the two individuals to qualify as their employer.

DECISION

STATEMENT OF THE CASE

THOMAS R. WILKS, Administrative Law Judge. Pursuant to an unfair labor practice charge filed by William P. Kelley, an individual, against the Dillon Company, herein called Respondent, and a complaint issued by the Regional Director for Region 9, and an answer filed by Respondent, a hearing was held before me in Cincinnati, Ohio, on February 28, 1983, wherein unfair labor practice issues were litigated. Briefs were filed by both parties on or about March 24, 1983. The issue in this case is whether Respondent was the employer of William Kelley and Leroy Fleisch who were, as alleged in the complaint, on loan to it from Lara Construction Company; and whether Respondent discharged those employees because of the concerted activity of refusing overtime work assignments in reliance on a collective-bargaining agreement.

On the entire record in this case, which includes uncontradicted testimony, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

At all times material herein, Respondent, an Ohio corporation, has been engaged in the manufacture of modular housing units at its Akron, Ohio facility and in constructing a condominium complex in Cincinnati, Ohio. During the past 12 months, a representative period, Respondent, in the course and conduct of its operations, described above, purchased and received at its Akron, Ohio facility products, goods, and materials valued in excess of \$50,000 directly from points outside the State of Ohio.

It admitted, and I find, that Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

It is admitted, and I find, that Local No. 372 of the International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO, herein called the Union, is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

In the summer of 1982 both Respondent and Lara Construction Company (herein Lara) were involved in the construction of a federally funded (HUD) high-rise dwelling complex for the elderly in Cincinnati, Ohio, referred to herein as the HUD job. Respondent and Lara contracted to perform certain concrete work. Respondent installed the steel reinforcement and Lara poured cement onto the steel reinforcement and thereafter "finished" the cement. Respondent employed members of the Union, known as rod workers, to install, fix, and connect steel rods and mesh for that steel reinforcement. Respondent also contracted for certain "pre-cast" concrete installation on the HUD job. The HUD job therefore involved rod work and erection of pre-cast slabs, both of which are performed by members of different locals. Sites with mixed work normally employ "composite crews" with members of different local unions on such crew. Dillon used a composite crew at the HUD job for the pre-cast installation. The record indicates that Lara maintained a cement finisher on the HUD site, but no rod workers and, of course, no rod worker foreman. Contemporaneously, Lara had other construction work elsewhere, for which it had employed Kelley and Fleisch as rod workers, as well as other employees. They were also members of the Union with whom Respondent and Lara maintained a contractual relationship and were bound by the same contract. The proximity of the HUD site and other Lara sites or sites is not revealed.

On some date in July or about July 4, Lara owner and chief manager Jack Lawson informed Kelley and Fleisch that work had slowed down and that he was "loaning"

them to Dillon for rod work at the HUD job.¹ Lawson explained, "I want to keep you guys working but I don't have it, so I'll let you guys work for Dillon so when we do get some work I can have you back instead of you guys going down to the [union] Hall and getting another job." Lawson explained to them further that he wanted them back because he valued the quality of their work. He also stated, "I'm going to loan you to Dillon and you'll be on my payroll."

The first day that Kelley and Fleisch reported to the HUD jobsite, they met with Lawson and Dillon Job Superintendent Pete Fish. At that time Lawson told Kelley and Fleisch that he would not pay them for any overtime and that they should not accept any overtime from Dillon unless Dillon agreed to pay for it. Fish, however, agreed to pay for the overtime. At some undisclosed time on that first day at the HUD job, Kelley and Fleisch were told by Fish that they were to take orders from Fish who was to be their supervisor on the HUD job. Fleisch testified that Fish approached him on the job and stated, "Now I'll tell you, you might be working for Lara but when you're on this job you're employed by me, I'll tell you what to do."

General Counsel witness Joseph Weeks testified that during the times material herein he was employed by Dillon as the foreman at the HUD job and that he supervised the placing of rods and mesh and that Fleisch and Kelley worked under his supervision. He testified that Fleisch and Kelley were very good workers and explained:

Well, that's what made them exceptional [the ability to work without being "watched constantly"]. All you had to do was tell them what to do and a lot of times you didn't even have to do that. On these pours, you know, they were like typical. After they got into the first week, it was just like they had little memory banks or computers, you know, I really didn't have to say much to them. They already knew what to do and they went ahead and performed their work.

While working at the HUD job, Kelley and Fleisch received paychecks made out by Lara, to which were attached Lara paystubs. There is no evidence as to how their pay was processed. Presumably, they received their checks at the HUD site but that is not clear, nor is it established who distributed the checks to them. They did have occasion to work overtime, but there was no separate check made out to them. They received a single Lara paycheck.

General Counsel witness John Burton, the union steward on the HUD job and chairman of the union vacation committee, testified that the fringe benefit fund payments due under the collective-bargaining agreement for both Fleisch and Kelley on the Dillon job had not been paid, although Dillon has made the required payments for the

¹ On direct examination, both witnesses testified that Lawson said that they were "loaned." On cross-examination, Fleisch denied that Lawson said they were "loaned." I credit the more certain, consistent, and responsive witness Kelley. Where there are any other inconsistencies between them, I credit Kelley.

Dillon employees. Burton testified that the Union is seeking payment from Lara for Fleisch's and Kelley's time at the HUD job, and considers the payments to be due from Lara.

Foreman Weeks testified that it was his understanding that Fleisch and Kelley were "on loan" from another employer and that Fish had told him, in reference to Fleisch and Kelley, that he had obtained "two free men." Fish had continually spoken to Weeks about Dillon's expenditures on the HUD job, but did not otherwise explain to Weeks the characterization "free," nor did he explain anything further about the employment status of Fleisch and Kelley.

No further evidence was adduced as to the existence, or the substance, of an agreement between Dillon and Lara as to the employment status of Fleisch and Kelley on the HUD jobsite, or the manner of their compensation or any other facet of the employer-employee relationship.

On July 19, Fleisch and Kelley were requested by Fish to work an additional one-half hour in order to finish the completion of preparations for the pouring of cement scheduled for the next morning. Accordingly, they worked that extra one-half hour. On July 20, Fish met with several employees, including Fleisch and Kelley, and requested that they work overtime that day. Fish suggested that the employees had malingered during the overtime period on July 19. Kelley and Fleisch were affronted and denied the charge. Fish appeared to have become upset and walked away before he received any response to the overtime request. Thereafter, upon mutual discussion, Fleisch and Kelley decided not to work overtime. They founded their decision on their understanding that overtime is voluntary according to the collective-bargaining agreement and areawide industry practice.² They decided that, if Fish had such a low opinion of their work efforts, they would not work overtime. At the normal end of shift time, Fleisch and Kelley walked off the job and waved to Fish as they departed. Before they had left they told Foreman Weeks that they could not work overtime because they were physically tired.

On July 21, after they had reported for work, Fleisch and Kelley were confronted by Fish who angrily demanded to know why they had not worked overtime on July 20. They responded that 8 hours constituted a normal day's work and that they were not required to work overtime. Fish retorted: "Well, when I have overtime available I expect you to work it and if you don't want to work it I'll get two guys who will." Fish told them that he did not wish to see them back on the job. They completed that workday, and Fish have them their paychecks. It was not a scheduled payday. It is the industry practice that, when employees receive a paycheck on a nonpayday, that their services are considered terminated.

The next day, Thursday, July 22, Fleisch and Kelley returned to another Lara construction site where, with-

² Credible evidence was adduced to establish that such understanding is, in fact, correct.

out interruption, they continued to work for Lara until that job ended on or about August 1. The rod work on the HUD job lasted for about 11 days after July 21. Job Steward Burton, who was employed on precast installation on a composite crew at the HUD site, was laid off on August 13. Some undescribed construction work continued at the HUD jobsite to an undetermined date thereafter.

Conclusions

The General Counsel contends that Fleish and Kelley were, from early July to July 21, employees of Dillon who were discriminated against, i.e., discharged because of their concerted activities, i.e., concertedly refusing overtime work and concertedly asserting a contractually protected right. Citing *Adams Delivery Service*, 237 NLRB 1411 (1978).

Respondent is silent as to the issue of whether or not Fleish and Kelley had engaged in protected concerted activities on July 21. Respondent contends that Kelley and Fleish were not its employees and were not shown to have been discharged, i.e., they were employees of Lara throughout, and continued to be such on July 22 and thereafter. Respondent argues that Fleish and Kelley were loaned to Dillon because Lara's workload at another jobsite was low, and that such condition terminated on July 22 and they returned to Lara's other jobsite.

The General Counsel has alleged that Fleish and Kelley were employees of Dillon and that they were discriminated against. Both of these allegations were denied. The General Counsel therefore had the burden of proving these allegations.

I conclude that the General Counsel did not sustain the burden of proof as to these allegations, and it is therefore unnecessary to resolve the question of whether the conduct of Fleish and Kelley on July 21 was protected under the Act. The General Counsel has not proven that Dillon was their employer. Certainly, Lara did not sever the employer-employee relationship when it loaned the services of its employees to Dillon. It loaned those services to Dillon because its work at another site was low. Kelley and Fleish were utilized at another Lara jobsite on July 22. It is not clear whether that site was the same one from which they came, but it is clear that work was available on July 22. Thus it can reasonably be inferred that the condition of the loan of services ceased. The evidence indicates that Fleish and Kelley were paid by Lara throughout. The Union held Lara responsible for their fringe benefits. They were instructed by Lara not to work overtime unless Dillon explicitly agreed to compensate them for it. The necessary resulting inference is that Lara had undertaken to continue paying them for nonovertime work. Their paychecks were Lara paychecks. There is no evidence that Dillon had any participation in their payroll processing, nor that Dillon even distributed their regular paychecks to them. The General Counsel argues that it must be assumed that an arrangement existed between Lara and Dillon whereby Dillon assumed cost of their services because it is "ludicrous to believe that a small construction company would absorb these substantial wages in order to avoid

laying them off." There is no evidence on which to premise this assumption. There is no evidence as to the size of Lara. There is evidence that Fleish and Kelley were highly prized workers. Fish, who continually spoke of his expenditures to Weeks, referred to them, i.e., their services, as "free." Thus, although it is reasonable that Lara may have received some kind of quid pro quo, it cannot be necessarily assumed that the quid pro quo was dollar-for-dollar reimbursement.

The General Counsel argues that the right of control over these employees was vested in Dillon and cites Board precedent to the effect that such factor is controlling. *Columbus Green Cabs*, 214 NLRB 751 (1974); *German School*, 260 NLRB 1250 (1982); *Castaways Hotel*, 250 NLRB 626 (1980); *CPG Products Corp.*, 249 NLRB 1164 (1980); *Tri-State Transport*, 245 NLRB 1030 (1979). However, in all cases cited by the General Counsel, the Board examined in detail all facts of the alleged employer-employee relationship. In this case, the General Counsel adduced evidence only as to the supervision of Fleish and Kelley on the HUD job. On the facts in this record, argument might well be made that Fish and Weeks were acting as supervisory agents of Lara who took over some of Dillon's contracted work. In any event, the control over the activities of the alleged employees is not as extensive as it might seem, despite the generalized testimony adduced.

The jobsite to which Fleish and Kelley were sent was determined by Lara. Conditions on acceptance of overtime work were set by Lara. Although ostensibly supervised by Weeks and/or Fish, they were merely directed to the locus of their work, and they exercised their own self-initiative from that point forward. As Foreman Weeks testified, they really needed no supervision. There is no evidence that Dillon exercised any responsibility with respect to their discipline or work evaluation. Their pay, fringe benefits, and other conditions of employment were determined by a labor agreement to which both Dillon and Lara were bound. Dillon could not even require them to perform overtime work. At most, the General Counsel has adduced evidence that two persons paid by another employer performed work on the HUD job pointed out to them by Dillon personnel. This is insufficient to establish that Dillon was the employer of those two persons. It cannot be determined from the evidence adduced by the General Counsel whether Dillon was the sole employer, whether Lara was the sole employer, whether Dillon and Lara were joint employers, or whether Dillon and Lara were engaged in a joint venture with respect to the HUD rod work.

If Lara were the sole employer, then no discharge was effectuated. If Dillon and Lara were joint employers, then it was incumbent on the General Counsel to demonstrate, in light of their continued employment, that some form of discrimination in employment conditions occurred. There is insufficient evidence on which to conclude that Fleish and Kelley suffered any adversity. They worked as rod workers in the Cincinnati area on July 21 and continued thereafter to work as rod workers in the Cincinnati area. No detriment was demonstrated by the fact that their jobsites changed. The evidence does

not establish that they would have had any lengthier employment as rod workers at the HUD job than at the other Lara jobsite. Rod worked ceased at both sites about the same time. There is no evidence that one or the other site was more arduous, dangerous, or inaccessible, or more subject to overtime compensation. Thus, even if Dillon could be construed to be a joint employer, the General Counsel has failed to prove that Fleisch and

Kelley suffered any discrimination because of their concerted activities of July 21.³

ORDER

Because of the foregoing conclusions, I recommend that the complaint be dismissed in its entirety.

³ 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.