

United Parcel Service and Charles E. Lewis. Case
7-CA-16589

30 April 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS
ZIMMERMAN AND HUNTER

On 9 June 1980 Administrative Law Judge John M. Dyer issued the attached Order Granting Motion to Dismiss Complaint and Charge in this proceeding. The judge found that the Board should defer to the decision of the Joint Area Committee State Panel upholding the Respondent's discharge of the Charging Party. The General Counsel filed a request for review and the Respondent filed a response.

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 request for review and response and has decided to affirm the judge's rulings, findings, conclusions, and order dismissing the complaint.

The complaint alleges that the Respondent violated Section 8(a)(1) of the National Labor Relations Act by terminating Charles E. Lewis, the Charging Party, because he had filed grievances under the collective-bargaining agreement between the Respondent and Local 34, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Following a hearing, the judge found that Lewis' claim that he was terminated because of his grievance filing had been litigated before an arbitration panel, the Joint Area Committee State Panel, pursuant to the grievance provisions of the collective-bargaining agreement. The judge further found that the State Panel had determined that Lewis' claim was insubstantial and his grievance without merit. Concluding that the State Panel's decision was not repugnant to the Act and that deferral was therefore appropriate under the standards for deferral set forth in *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), the judge ordered the complaint dismissed.

We affirm. Although the Board recently modified the standards for deferral in *Olin Corp.*, 268 NLRB 573 (1984) (Member Zimmerman dissenting in part), nothing in that decision would alter the result reached by the judge here under the pre-existing standards for deferral. As we find that the judge correctly determined that the unfair labor practice alleged here was litigated and decided in the arbitration proceeding and that the decision of

the State Panel was not repugnant to the Act, we affirm his dismissal of the complaint.¹

ORDER

The order of the administrative law judge dismissing the complaint is affirmed.

¹ The General Counsel, in his request for review, urged that the judge had erred in giving weight to the testimony of the union co-chairman of the State Panel that the panel discussed Lewis' claim that he was being harassed and his job put in jeopardy because of his grievance filing and found there was no substantiating evidence for the claim. Since the five-line decision of the State Panel makes no mention of the claimed unfair labor practice, the General Counsel urged that deferral was inappropriate and that the panel co-chairman's testimony that the unfair labor practice claim was actually considered and rejected on the merits should not be given weight. Alternatively, the General Counsel contended that, even if the co-chairman's testimony was properly considered, it was not sufficiently clear to warrant deferral because the co-chairman's prehearing affidavit made no mention of the unfair labor practice issue and his explanation that he had refreshed his recollection by listening to a tape of the arbitration hearing and reviewing his notes was allegedly unpersuasive. We find that the failure of the State Panel's decision to mention the unfair labor practice claim was not conclusive and that the administrative law judge did not err in crediting and giving weight to the panel co-chairman's testimony. See *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951).

In the absence of any other challenge to the judge's findings, we adopt his remaining findings pro forma.

ORDER GRANTING MOTION TO DISMISS COMPLAINT AND CHARGE

Respondent moved for dismissal of the complaint and charge in this matter on the basis that the Charging Party, Charles E. Lewis, had processed a grievance and received a negative decision from State Panel of the UPS Joint Area Committee, which acted under the standards enunciated in *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955).

The General Counsel opposed the motion at the trial on the basis that:

1. Under *Suburban Motor Freight*, 247 NLRB 146 (1980), the written decision of the arbitrator or panel must reflect that the statutory question was considered.
2. The testimony of the UPS Joint Area Committee co-chairman, Robert Coy of Detroit Teamsters Local 243, was contradictory and not sufficient to show that the panel considered the evidence concerning the statutory question in reaching its decision.
3. The panel was not a neutral, unbiased body and only a majority of the six members was needed for a decision.

Respondent and the General Counsel filed briefs during a "sine die" recess.

The General Counsel elaborated on these three points again urging that the language of the decision or award determines whether the decision merits deferral and that without specific reference to the statutory question there can be no deferral. He stated that, if the decision makes no such reference, it is repugnant to the Act and testimony concerning panel deliberations must be disregarded. The panel makeup he attacked on the basis that UPS representatives acted in a partisan manner rather than impartially.

There is no disagreement on the essential fact that Lewis had filed seven grievances, including the final one, since May 24, 1978, against UPS in the Battle Creek, Michigan area where he worked.

There was also agreement that he had been terminated twice previously for not following orders and had been reinstated by UPS Joint Area Committee panel decisions with a suspension and warnings.

In January 1979, Lewis filed a grievance that his route was too long (more than 10 hours' work) and, in attempting to settle it, a supervisor rode with him for 5 consecutive days observing the work and his work habits. At a meeting of the company and union representatives, the Company said the route was not too long but Lewis' work habits were not efficient, and it was agreed that the supervisor would ride with him that day to instruct him on efficient work methods. During the first part of the trip, Lewis claimed he was ill and the supervisor started to return to company headquarters. On the way Lewis asked to be taken to a doctor. The supervisor stopped the truck saying he would call for an ambulance. Lewis left the truck and walked approximately a half mile to UPS headquarters ignoring a request to get back in the truck. Lewis then got into his car and went to the company doctor, who advised him to see his own physician. Lewis returned to UPS headquarters, changed his clothes, and left without punching out. Respondent claims Lewis was told that, if he left the premises on this latter occasion, he was voluntarily quitting. Lewis said he did not recall such a statement.

Lewis was terminated and filed a grievance, which was not resolved at the local level and was sent to the UPS Joint Area Committee State Panel. The panel consisted of three union representatives and three UPS representatives, none from the Battle Creek area. During the hearing Lewis and his union representative, Erreger, spoke of Lewis' feeling that he was being harassed by the Company for filing grievances. Co-Chairman Coy, and apparently other panel members, questioned Lewis about his statement and asked for particulars. At the conclusion of the hearing, Lewis said that he had been fully and fairly represented and had presented all of his evidence.

Coy said that in panel executive session the union representatives argued with UPS representatives concerning the harassment claim but finally agreed there was nothing to substantiate Lewis' feelings and they then discussed the other aspects of the case and decided to deny the grievance. The full text of the decision as composed by Coy with some assistance from other panel members is:

Based on the facts and evidence presented, the grievant was in fact offered medical attention, including an ambulance, which he refused. By his own testimony, he left the package car on his volition. Therefore, the claim of the Union is denied and the voluntary quit shall stand.

Under the *Spielberg* standards, the decision of the panel was binding and final and the parties so understood and agreed. As to the fairness and regularity of the pro-

ceedings, the General Counsel's brief states that the panel seems to be inherently biased, basing this on Coy's testimony that the UPS representatives acted as advocates. The General Counsel could have added Coy's testimony that the union representatives argued on Lewis' behalf since they did not want to see him discharged. The fact that triers of fact do take positions and may argue them does not indict the panel as biased. In any event, the Board in *United Parcel Service*, 232 NLRB 1114 (1977), considered the makeup of the Atlantic Area Parcel Grievance Committee, which had UPS and 21 Teamsters locals as participants. In this case, UPS and 51 Teamsters locals are bound under the Central Conference of Teamsters UPS Area Agreement. The makeup of the UPS Joint Area Committee to consider grievances by panels seems to be the same. There appears to be no essential differences and, noting the manner in which the grievance session was held and Lewis' agreement on the fairness, I find that the proceedings were fair and regular.

The General Counsel argues that the award is repugnant to Board standards because it does not state explicitly that the panel decided the statutory issue. The argument is based mainly on the following quotation from *Suburban Motor Freight* (247 NLRB at 147):

In accord with the rule formerly stated in *Airco Industrial Gases*, we will give no deference to an arbitration award which bears no indication that the arbitrator ruled on the statutory issue of discrimination in determining the propriety of an employer's disciplinary actions.

In *Airco Industrial Gases*, 195 NLRB 676 (1972), the Board noted that the arbitrator wrote an elaborate opinion which contained no reference to the unfair labor practice issue. The Board also noted that the introduction of a single grievance was not representative of the dischargee's 200 grievances filed in 2 years and that the subject was touched only tangentially in the proceeding.

Yourga Trucking, 197 NLRB 928 (1972), establishes that the burden of proof to show *Spielberg* standards is on the party asserting that the Board should defer to the arbitration award. The Board noted that such party would have ready access to "documentary proof, or to the testimony of competent witnesses, to establish the scope of the issue submitted to the arbitrator."

In *General Warehouse Corp.*, 247 NLRB 1073 (1980), the Board, in a short form opinion, affirmed Administrative Law Judge Bernard Ness' decision in not deferring to an arbitrator's award on the basis that there was no evidence the arbitrator considered the evidence concerning protected activities which had been presented to him, and that he made no mention of it in his decision.

In the present case, the decision is a terse five-line statement denying the grievance. Coy, who was the union co-chairman of the panel, confirmed the testimony of Lewis and Erreger that the issue of harassment was raised in the hearing by them and that panel members questioned Lewis concerning his harassment allegation. Coy further testified that, after the panel went into executive session to consider the grievance, they discussed

whether Lewis had been harassed or his job put in jeopardy due to his filing of grievances. He testified that following some discussion there was agreement that there was no substantiating evidence of harassment, but only Lewis' statement that he felt harassed. Having disposed of that issue, the panel then considered the rest of the case, and it was agreed that Lewis had voluntarily quit and a statement of the award was drawn up.

The General Counsel urges that Coy's testimony concerning the panel deliberations should not be credited because his affidavit appeared to vary from his testimony. Coy explained that he had not reviewed the tape recording of the proceedings at the time he gave his affidavit but that he had reviewed his notes, the affidavit, and the tape before he testified in this proceeding and that his testimony was correct regarding the panel's consideration of the harassment issue. The General Counsel's argument is not persuasive, and I find no reason to discount Coy's testimony as to what took place during the panel deliberations.

Noting that the panel decisions appear to be extremely short conclusionary statements, and recalling the Board's statement in *Yourga*, it would seem proper to consider Coy's testimony of the panel deliberations. Accordingly, I find that the panel had presented to it, and that it did consider, all of Lewis' and Erreger's evidence relating to Lewis' claim of harassment for filing grievances and found it insubstantial and decided on the remaining evidence that the grievance lacked merit. So finding, I hold that the UPS Joint Area Committee State Panel award is not repugnant to the Act and the Board should defer to that decision and that the complaint and charge in this case should be dismissed.

So Ordered.¹

¹ The parties are referred to Sec. 102.27 of the Board's Rules and Regulations, which provides that a party must seek review of an order dismissing a case on a motion within 10 days of the date of the order of dismissal and provide copies to the other parties.