

**Robert J. Moore, d/b/a B & D Custom Cabinets  
and Joseph D. Soja. Case 8-CA-24367**

March 23, 1993

**DECISION AND ORDER**

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT  
AND RAUDABAUGH

On January 13, 1993, Administrative Law Judge Donald R. Holley issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief and a motion to strike portions of the Respondent's exceptions.

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<sup>1</sup> and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

**ORDER**

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Robert J. Moore, d/b/a B & D Custom Cabinets, Maumee, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

<sup>1</sup> We find merit in the General Counsel's motion, and have accordingly declined to consider those portions of the Respondent's exceptions that refer to facts not in evidence.

*Paul C. Lund, Esq.*, for the General Counsel.  
*Robert J. Moore*, pro se, of Maumee, Ohio, for the Respondent.

**DECISION**

**STATEMENT OF THE CASE**

DONALD R. HOLLEY, Administrative Law Judge. Upon a charge filed in the captioned case on February 25, 1992,<sup>1</sup> by Joseph D. Soja, an individual, the Regional Director for Region 8 of the National Labor Relations Board issued a complaint on April 9 which alleged, in substance, that Robert J. Moore, d/b/a B & D Customer Cabinets (Respondent) violated Section 8(a)(1) of the National Labor Relations Act on or about February 10 by discharging employees Todd A. Duquette, Todd L. Chamberlain, and Joseph D. Soja because they engaged in protected concerted activity. Respondent filed an answer denying it had engaged in the unfair labor practices alleged in the complaint.

The case was heard in Toledo, Ohio, on October 14. All parties appeared and were afforded full opportunity to participate. On the entire record, including careful consideration

<sup>1</sup> All dates herein are 1992 unless otherwise indicated.

of posthearing briefs filed by the parties, and from my observation of the demeanor of the witnesses who appeared to give testimony, I make the following

**FINDINGS OF FACT**

**I. JURISDICTION**

Respondent, a sole proprietorship owned by Robert J. Moore, doing business as B & D Custom Cabinets, is engaged in the manufacture and installation of cabinets at its facility located in Maumee, Ohio. During the 12-month period ending February 15, 1992, it provided services valued in excess of \$50,000 for Scott Construction, Tuttle Construction, Inc., Riverside Hospital, and Firelands Hospital, which are located in the State of Ohio and are enterprises directly engaged in interstate commerce.

Oon the above facts, which are admitted, I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

**II. THE ALLEGED UNFAIR LABOR PRACTICES**

The operative facts in this case are not in dispute.

The record reveals that Respondent fabricates and installs wooden cabinets. Robert Moore is the owner of the business; his wife, Debra, is the bookkeeper; and David Dodd is the shop supervisor.

During the period immediately preceding Wednesday, February 12, 1992, employees Todd A. Duquette, Todd L. Chamberlain, and Joseph D. Soja discussed their concern that Respondent was not paying them properly, particularly for work performed on jobs on which they, by law, were to be paid stated prevailing rates. Duquette and Soja both testified that their concerns led them to contact union officials as well as contractors for whom Respondent had performed work to ascertain which jobs required the payment of a prevailing rate to carpenters.

On Tuesday evening, February 11, the three named employees and employee John Gorney met at Soja's home.<sup>2</sup> The employees decided they were going to confront Moore about their concerns the following day.

The named employees arrived at Respondent's shop at approximately 7:45 a.m. on Wednesday, February 12. They informed Supervisor David Dodd that they wanted to talk to Moore before starting work. Dodd telephoned Moore, and he arrived at the shop at around 8 a.m. and met with the employees. Duquette did most of the talking and he explained to Moore that the employees felt that Respondent owed them money for work they had performed on prevailing rate jobs but had not received. Additionally Duquette, or one of the other employees, voiced concern that Respondent might be going out of business and that the employees wanted some guarantee that they would be paid by noon each Friday and that their checks would be good. The above employee concerns and related matters were discussed until about noon. At that time, Duquette, Soja, and Chamberlain left the shop, indicating they would return at 4 p.m. to see what Moore had

<sup>2</sup> Employees Chamberlain and Gorney recalled the meeting was at Soja's home and that Gorney attended, while Soja testified he thought the meeting had been held at Dale's Cafe and that Gorney did not attend. Chamberlain and Gorney were the more impressive witnesses, and I credit their testimony.

been able to accomplish. Employee Gorney elected to remain at the shop and work.

Employees Duquette, Soja, and Chamberlain returned to the shop at 4 p.m. Soja testified the following occurred (Tr. 26):

When we walked in, we came in the side entrance of the building which is—it's more like just a thorough way between the shop and the office. Like a storage area.

And Moore came out of the office, his face was really red and you could tell he was pretty well pumped up. You know, I mean he was expecting our return, I'm sure.

He breezed right past us and didn't say a word and walked out in to the shop. He turned back around, came back and at that point Todd Chamberlain asked him, said, what's going on.

He goes, you guys are done, man. You walked out. You guys withheld labor for money. He goes, you're done. Todd goes, so what's that mean, are you going to, you know, fight our unemployment, too, and he said, Bingo.

Soja indicated that after telling them they "were done," Moore gave them checks which partially reimbursed them for amounts due them.

Several weeks after the described mid-February events, employee Chamberlain was rehired by Moore. He actually commenced work on February 24 and he remained employed by Respondent at the time of the hearing.

During the investigation of the instant case, and, subsequently, when responding to the complaint, Respondent owner Moore, in letters to Regional personnel, recited roughly the same factual situation described by employees during the hearing. (See G.C. Exhs. 2 and 3.)

When Moore, the owner of Respondent, appeared as a witness, his description of events during the morning of February 12, 1992, paralleled the description of events given by employees Duquette and Soja. He recalled that just before Duquette, Soja, and Chamberlain left the facility, he understood they wanted their prevailing wage monies or an agreement that they would get them, and they wanted something from the bank saying their paychecks would be good at noon on Friday. He indicated he also understood they did not want to work until their demands had been satisfied. Moore agreed that the employees said nothing about quitting when they left the facility, and he admitted he told them when they returned at 4 p.m. that he considered them to have quit their employment because they refused to work on February 12, 1992.

During his testimony, Moore described a conversation he had with the project manager on Scott Construction's Wyondotte Memorial Hospital job during the afternoon on February 12. He testified that the project manager, Ron Wetstone, called to tell him someone named Todd had called to say that B & D did not show up that day because the cabinets to be installed had not been built. Moore testified the cabinets had been built and were in the shop, and he told Wetstone that was the situation and invited him to come to the facility and verify the truthfulness of his claim. Moore did not indicate which Todd might have called Scott Construction, and he failed to indicate that he took any action as a result of the event.

## Analysis and Conclusions

The applicable legal principles governing employees' concerted activity in general are set forth in *Meyers Industries*, 268 NLRB 493, 497 (1984), where the Board stated:

In general to find an employee's activity to be "concerted," we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself. Once the activity is found to be concerted, an 8(a)(1) violation will be found if, in addition, the employer knew of the concerted nature of the employee's activity, the concerted activity was protected by the Act, and the adverse employment action at issue (e.g., discharge) was motivated by the employee's protected concerted activity.

Clearly, the facts recited above establish that Respondent's employees engaged in concerted activity when they jointly voiced their complaints regarding their pay and Respondent's ability to continue to pay them on February 12. There can be no doubt that Respondent was aware of the concerted nature of the employee's activity, as the complaints and ultimatums were voiced to Respondent's owner, Moore. As the complaints related to the wages, hours and conditions of employment of the employees, the voicing of the complaints and the employees' concerted refusal to work until their complaints were remedied constituted conduct which is protected by the Act. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 17 (1962). Finally, as Moore told Duquette, Soja, and Chamberlain they were no longer employed by Respondent because they "withheld labor for money," it is clear that the named employees were terminated on February 12, 1992, because they engage in protected concerted activity.

In sum, I find that General Counsel, by adducing the facts summarized, supra, clearly established that employees Duquette, Soja, and Chamberlain's participation in protected activity was a "motivating factor" in Respondent's decision to terminate them on February 12, 1992. While Respondent contends in its posthearing brief that it was entitled to consider them to have quit on February 12 because they left the facility without permission and subjected Respondent to customer complaints, a similar contention was made and rejected by the U.S. Supreme Court in *Washington Aluminum Co.*, supra at 13-17. I thus conclude that Respondent has failed to satisfy its evidentiary burden under *Wright Line*, 251 NLRB 1083 (1980), by showing that Duquette, Soja, and Chamberlain would have been terminated on February 12, 1992, even in the absence of their participation in protected concerted activity. For the reasons stated, I find, as alleged, that by terminating the employment of employees Duquette, Soja and Chamberlain on February 12, 1992, because they engaged in protected concerted activity, Respondent violated Section 8(a)(1) of the Act. I further find, as alleged, that Respondent, through the February 12 actions of Moore, engaged in independent violation of Section 8(a)(1) by telling employees they were terminated because they had engaged in protected concerted activities.

## CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By telling employees on February 12, 1992, that they were terminated for engaging in protected concerted activities, Respondent violated Section 8(a)(1) of the Act.

3. By terminating the employment of employees Todd A. DuQuette, Todd L. Chamberlain, and Joseph D. Soja on February 12, 1992, because they engaged in protected concerted activities, Respondent violated Section 8(a)(1) of the Act.

4. The unfair labor practices recited above have a close, intimate, and substantial effect on the free flow of commerce within the meaning of Section 2(6) and (7) of the Act.

#### THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent unlawfully discharged Todd A. DuQuette, Todd L. Chamberlain, and Joseph D. Soja, and that it reinstated Todd L. Chamberlain to his former job on February 24, 1992, Respondent will be ordered to offer Todd DuQuette and Joseph D. Soja immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions of employment, without prejudice to their seniority or any other rights and privileges previously enjoyed, and make whole employees DuQuette, Chamberlain, and Soja for any loss of earnings and other benefits suffered as a result of their terminations, less net interim earnings, in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

I shall also recommend that Respondent be ordered to expunge from its record any reference to the unlawful terminations of employees DuQuette, Chamberlain and Soja, and inform them that such will not be used as a basis for further personnel action concerning them.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>3</sup>

#### ORDER

The Respondent, Robert J. Moore, d/b/a B & D Custom Cabinets, Maumee, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercing employees by telling them they are terminated for engaging in protected concerted activities.

(b) Discharging its employees for engaging in protected concerted activities for the purposes of collective bargaining or other mutual aid or protection.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer employees Todd A. DuQuette and Joseph D. Soja immediate reinstatement to their former or substantially equivalent positions of employment without prejudice to their

<sup>3</sup>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.

seniority or other rights, and make them and employee Todd L. Chamberlain whole for losses they suffered as a result of their unlawful terminations as set forth in the remedy section of this decision.

(b) Expunge from its records and files any reference to the discharges of the employees named above and notify them in writing this has been done and evidence relating to their unlawful discharges shall not be used against them in the future.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to determine the payments which will make whole the employees named above for the discrimination practiced against them.

(d) Post at its facility at Maumee, Ohio, copies of the attached notice marked "Appendix."<sup>4</sup> Copies of the notice, on forms provided by the Regional Director for Region 8, shall be signed by an authorized representative of Respondent and posted immediately after their receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

<sup>4</sup>If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

#### APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT coerce employees by telling them they are terminated for engaging in protected activities.

WE WILL NOT discharge our employees for engaging in protected concerted activities for the purposes of collective bargaining or other mutual aid or protection.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer employees Todd A. DuQuette and Joseph D. Soja immediate reinstatement to their former or substantially equivalent positions of employment without prejudice to their seniority or other rights, and make them and employee Todd L. Chamberlain whole for losses they suffered as a result of their unlawful terminations.

WE WILL expunge from our records and files any reference to the discharges of the employees named above and notify

them in writing this has been done and evidence relating to their unlawful discharges shall not be used against them in the future.

ROBERT J. MOORE, D/B/A B & D CUSTOM  
CABINETS