

**D.G. Real Estate, Inc., d/b/a Dick Gore Real Estate  
and Northwest Indiana District Council of Car-  
penters.** Case 25-CA-22132-1

September 30, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS  
DEVANEY AND RAUDABAUGH

On May 28, 1993, Administrative Law Judge Claude R. Wolfe issued the attached decision. The Charging Party Union filed exceptions and a supporting brief, and the Respondent filed a cross-exception and a brief in opposition to the Union's exceptions. The Union filed an answering brief in opposition to the Respondent's cross-exception.

The National Labor Relations Board has considered the decision and the attached record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings and conclusions and to adopt the recommended Order.

In adopting the judge's finding that the Respondent was not responsible for the threats to union members by its job coordinator, Ralph Gobin, we agree with the judge, for the reasons stated by him, that Gobin was not a supervisor or general agent of the Respondent. We also agree with the judge's finding that Gobin lacked apparent authority to make the threats at issue in this case on behalf of the Respondent. In this regard, we find no merit to the Union's contention that the Respondent had placed Gobin in a position where he had apparent authority to deal for it with the Union. Thus, the Union notes that Gobin was present at the construction site on an almost daily basis, that the Respondent's president, Dick Gore, introduced Gobin to picketers as the Respondent's real estate agent, and that Gobin accompanied Dick Gore to a union meeting.

In determining apparent authority, the Board applies the standard endorsed in *Dentech Corp.*, 294 NLRB 924, 925 (1989), quoting from *Service Employees Local 87 (West Bay Maintenance)*, 291 NLRB 82 (1988):<sup>1</sup>

Apparent authority is created through a manifestation by the principal to a third party that supplies a reasonable basis for the latter to believe that the principal has authorized the alleged agent to do the acts in question. *NLRB v. Donkin's Inn*, 532 F.2d 138, 141 (9th Cir. 1976); *Alliance Rubber Co.*, 286 NLRB 645, 646 fn. 4 (1987). Thus, either the principal must intend to cause the third person to believe that the agent is authorized to act for him, or the principal should realize that this conduct is likely to create such a belief. Re-

statement 2d, *Agency* § 27 (1958, Comment). Two conditions, therefore, must be satisfied before apparent authority is deemed created: (1) there must be some manifestation by the principal to a third party, and (2) the third party must believe that the extent of the authority granted to the agent encompasses the contemplated activity. *Id.* at § 8.

The burden of proving any type of agency relationship is on the party asserting the relationship.<sup>2</sup>

Applying these principles to this case, we find that the General Counsel did not meet his burden of establishing that Gobin had apparent authority to act on behalf of the Respondent at the time of the incident. Although the Respondent's president, Dick Gore, introduced Gobin to union picketers as the Respondent's real estate agent and had Gobin attend a union meeting with him, we find that these limited and ambiguous actions fell far short of providing any reasonable basis for union members to believe that Gobin was authorized to deal with the Union on behalf of the Respondent.<sup>3</sup> Accordingly, we find, like the judge, that Gobin did not possess apparent authority to deal with the Union on behalf of the Respondent at the time of the alleged violation. Therefore, the Respondent did not violate Section 8(a)(1) of the Act.<sup>4</sup>

ORDER

The recommended order of the Administrative Law Judge is adopted and the complaint is dismissed.

<sup>2</sup> *Millard Processing Services*, 304 NLRB 770, 771 (1991) (Member Raudabaugh dissenting on the application of the test to the facts of the case), citing *Sunset Line & Twine Co.*, 79 NLRB 1487, 1508 (1948).

<sup>3</sup> Contrary to the Union's contention, we do not find that the mere presence of Gobin at the jobsite on an almost daily basis, by itself, or in combination with the Respondent's other actions, placed Gobin in the position of having apparent authority to deal with the Union on the Respondent's behalf. Gobin was present at the jobsite to perform his duties coordinating subcontractors.

Member Raudabaugh agrees with his colleagues that Gobin had no actual or apparent authority to act for the Respondent during the incident in question, and that he was therefore not then acting as the Respondent's agent. Accordingly, Member Raudabaugh finds it unnecessary to pass on the judge's finding that Gobin was a "piece-work" employee rather than an independent contractor. In either case, the Respondent was not liable for his conduct during the incident in question.

<sup>4</sup> Because we find that Gobin was not acting as an agent of the Respondent at the time of the incident, we find it unnecessary to pass on whether Sec. 8(a)(1) would have been violated if Gobin had, in fact, been an agent of the Respondent.

*Merrie Thompson, Esq.*, for the General Counsel.  
*Kenneth A. Jenero, Esq.*, for the Respondent.  
*Paul T. Berkowitz, Esq.*, for the Charging Party.

<sup>1</sup> See also *Allegany Aggregates*, 311 NLRB 1165 (1993).

## DECISION

## STATEMENT OF THE CASE

CLAUDE R. WOLFE, Administrative Law Judge. This case was litigated before me at Portage, Indiana, on March 26, 1983, pursuant to charges filed by the Union on September 2, 1992, and complaint<sup>1</sup> issued November 12, 1992, alleging that Respondent has violated Section 8(a)(1) of the National Labor Relations Act (the Act) by the conduct of its supervisor and agent, Ralph Deon Gobin, on about August 30, 1992, in brandishing a rifle and threatening to shoot employees and picketers because of their union and concerted activities. Respondent denies it has violated the Act.

The issues raised by the pleadings and the evidence are two. The first is whether Gobin was a supervisor and/or an agent of Respondent when the conduct occurred. The second is whether his conduct violated the Act. Upon the entire record, and after considering the demeanor of the witnesses and the posttrial briefs of the parties, I make the following

## FINDINGS OF FACT

## I. JURISDICTION

The complaint alleges, Respondent admits, and I find that at all times material to this proceeding Respondent, a corporation with an office and place of business in Portage, Indiana, and various jobsites in the Portage area, has been engaged in the retail sale of homes and real estate, and in the construction industry as a general contractor in the construction of such homes, and during the 12-month period ending September 1, 1992, in conducting its business operations described above in subparagraph 2(a), derived gross revenues in excess of \$500,000 and purchased and received at its facility goods valued in excess of \$50,000 from other enterprises, including Wolohan Lumber, located within the State of Indiana, each of which other enterprises had received goods directly from points outside the State of Indiana. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

## II. LABOR ORGANIZATION

The Union is a labor organization within the meaning of Section 2(5) of the Act.

## III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Facts*

During the summer of 1992,<sup>2</sup> Respondent was constructing houses on a piece of land divided into 56 units and named Bel Air VII. After preliminary development of the site by laying out and cutting roads and installing sewers, water lines, and other utilities, Respondent subcontracted the actual construction of the homes to independent contractors. Respondent then hired Ralph Deon Gobin as a coordinator to, as the title implies, coordinate the scheduling of the subcontractors so that they arrive at the site to perform their par-

ticular function in the proper sequence and at the proper time, and to ensure the subcontractors build according to the preestablished plans and specifications.

From late May to mid-September, the Union conducted area standards picketing of the Bel Air VII site. Gobin and his wife lived in a house which he built at his own expense<sup>3</sup> in that development at the end of Tulip Avenue which runs in a straight line from the entrance to the site where the picketing was going on until it dead ends in front of Gobin's house which fronts on Joann Street. When Gobin returned from a fishing trip on June 27, he discovered someone had used black paint spray to write "rat bastard" in large letters on his garage door.<sup>4</sup> Removal of the graffiti and repainting of the door by Ferguson Decorating, Inc., a company with no apparent connection to Respondent or Gobin, cost \$235. When the defacement of the garage door was brought to the attention of James Hornak, the Union's business representative present at the picket site, the Union either, as Hornak states, offered to send some men to paint the door or, as Gobin recalls, said they would take care of the repair. In any event, Gobin had it painted, sent the bill to the Union, and has not been repaid by the Union. The defacement of the garage door frightened Gobin's wife, a victim of multiple sclerosis, to the point of hysteria.

On Sunday, August 30, about 3 p.m., Gobin returned to his home from a veterans' function after drinking beer for some 3 hours. As later events will show, he was intoxicated. As he drove through the picket line enroute to his house, one of the pickets called him a rat bastard. Reaching home, he called the police and reported this incident at 3:16 p.m. Thereafter he sat in his porch swing. The police stopped by briefly in response to his call, and left after advising they could do nothing about the name calling. Several minutes later, three of the pickets, Victoria Hedger, Curt Yeager, and Mike Gajewski, who were members of a union committee set up to organize residential carpenters, decided to walk down Tulip Avenue to Joann Street, turn to the right, and talk to several people constructing a house on Joann Street three or four lots away from Gobin's house about the advantages of union membership. As they got within a hundred feet or so of Gobin's house, he raised a rifle above his head, not pointing it at them, and warned them. Hedger states Gobin said he was going to shoot them if they got too close. Yeager recalls Gobin saying he would shoot them if they came on his property. According to Gajewski, he heard Gobin say things, he doesn't remember exactly what, but Gobin said to leave him alone and if they didn't leave someone was going to get hurt. Gobin testified that he said, "Don't come any closer to my house. If you do, whichever one of you want to go first? Whichever one, come on." Considering the intoxicated condition of Gobin when he issued his warning, which casts some doubt on his recollection, together with the various versions offered by the three union people and the uncontested fact he did have a rifle in his hand and brandished it in the air in such a fashion the pickets started calling him Cochise, I am persuaded that, whatever the exact words were, Gobin

<sup>3</sup> Gobin is a partner in a construction company not affiliated with Respondent.

<sup>4</sup> I am persuaded this painting was the work of a union sympathizer, probably a picket, inasmuch as they several times called Gobin a rat (or rat bastard) as he passed them, and one of them even wore a rat suit.

<sup>1</sup> Case 25-CA-22112-2 previously consolidated with this case for purposes of trial has been severed from this proceeding and settled. Accordingly, those portions of the formal documents in this proceeding which apply only to Case 25-CA-22112-2 are not in evidence.

<sup>2</sup> All dates are 1992.

by his words and actions conveyed a threat to repel the three with his rifle if they entered his property. This message persuaded Yeager and Gajewski to retreat to the picket line. Of sterner stuff or foolhardy, I shall not guess which, Hedger proceeded to her goal without further incident, talked to the working employees as planned, and returned to the picket line.

Gobin had called the police on his portable telephone when the three employees began their walk in his general direction. He states he did so because he did not know what they were going to do and because his house had previously been vandalized. After the pickets returned to their starting point, Gobin drove down to the picket line and had started to talk to Hornak when the police arrived. Gobin was then given sobriety tests, failed them, and was arrested at 3:39 p.m. and charged with public intoxication. The police confiscated his Winchester 308 rifle which had three live rounds in its magazine. Several months later he pleaded guilty to the charge and was placed on probation.

### B. Contentions and Conclusions

The General Counsel contends the conduct of Gobin on August 30 violated Section 8(a)(1) of the Act because Gobin was then a supervisor and general agent of Respondent who was therefore responsible for his conduct. The Union agrees. Respondent denies Gobin was anything more than an independent contractor or was clothed by Respondent with any authority sufficient to render Respondent responsible for his acts.

Respondent has no employees other than Gobin on the Bel Air VII site, and there is no evidence he supervised any of Respondent's employees elsewhere. The only evidence that Gobin ever exercised any supervisory authority<sup>5</sup> over anyone flows from the testimony of Douglas Woods, who credibly states that on a few occasions while he was employed by Gore Companies at Bel Air VII, the respondent in Case 25-CA-22112-2 which has been settled and severed from this proceeding and a subcontractor at Bel Air VII, Gobin instructed him to move some materials, perform some construction tasks, and, on one occasion, work overtime. Woods concedes however that he acquiesced to Gobin's direction because Todd Gore, the president of Gore Companies, instructed him to do so after Woods questioned Todd Gore concerning Gobin's authority over him. This would indicate that Gobin possessed some supervisory authority on behalf of Gore Companies, but it does not show Respondent gave Gobin such authority. With respect to Woods' testimony that Gobin said he was a supervisor, it is not credited, but even if credited it has no probative weight because it is beyond question that an individual may not by his own ipse dixit make himself an agent of another. There is no charge against Gore Companies or Todd Gore before me, nor is there any

<sup>5</sup>Sec. 2(11) of the Act provides: "(11) The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

showing Todd Gore was acting for Respondent when he told Woods to follow Gobin's instructions.

With respect to the argument that Dick Gore held Gobin out as a general agent of Respondent by having Gobin accompany him to speak with the Union's representative, all the record shows is that when Dick Gore asked Gobin to go with him to the picket line Dick Gore did so because Gobin was a union member, and there referred to Gobin as a real estate agent. I am persuaded that Dick Gore probably had some idea the presence of Gobin, a union member, might contribute to an amiable relationship between Respondent and the picketing union. Nothing in this conduct warrants a finding of supervisory or general agent status for Gobin, nor does the fact he later accompanied Dick Gore to a meeting with the Union, in which Gobin has not been shown to have been an active participant rather than a mere observer. The notion advanced by General Counsel that the circumstance that Gobin and Respondent used the same attorney is significant in assessing Gobin's status is rejected.

With respect to the supervisory issue, the few incidents to which Woods refers are, at best, isolated and infrequent incidents of supervision which do not prove Gobin was a supervisor.<sup>6</sup> Moreover, the Board has agreed on several occasions that it has a duty to employees to be alert not to construe supervisory status too broadly because the employee who is deemed a supervisor is denied employee rights which the Act is intended to protect.<sup>7</sup> There simply is not enough evidence before me to establish gobin was or is a statutory supervisor of Respondent.

Respondent's argument that Gobin was an independent contractor at the time of the incident in question is also without merit. In determining this issue I have noted the Board's teaching in *Operating Engineers Local 701 (Lease Co.)*, 276 NLRB 597, 600-601 (1985) that:

In determining whether individuals are employees or independent contractors under the National Labor Relations Act, the Board is required to apply common law agency principles. See *NLRB v. United Insurance Co.*, 390 U.S. 254 (1968). Under this approach, "there is no shorthand formula or magic phrase that can be applied to find the answer, but all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Id.* at 258. The predominant consideration is whether the employer reserves not only the right to control the results of the work in question, but also the manner and means by which those results are accomplished. Other relevant factors are set forth in Restatement 2d, *Agency*. [Footnote omitted.]

Gobin is a journeyman carpenter and a union member, but does not currently work as a carpenter. He now has three areas of employment. He is a real estate agent for Dick Gore Real Estate, is a one-third owner in a general construction firm in which Respondent, its officers, and its owner have no financial interest, and currently works for Respondent, who calls him a job coordinator and an independent contractor. There is no written agreement between Gobin and Re-

<sup>6</sup>*Bay Area-Los Angeles Express*, 275 NLRB 1063, 1073 (1985).

<sup>7</sup>*Chicago Metallic Corp.*, 273 NLRB 1677, 1680 (1985); *Bay Area-Los Angeles Express*, supra; *RAHCO, Inc.*, 265 NLRB 235, 248 (1982).

spondent. Their oral arrangement is that Gobin receives \$1000 when a house whose construction he has coordinated is sold. He receives no fringe benefits, pays his own expenses, and has no income tax, social security, or other withholdings from the \$1000 received. George Richard (Dick) Gore, Respondent's president, personally engaged all the subcontractors for his development at Bel Air VII after the various building plans and specifications and preliminary ground work had been prepared by him and his staff, not including Gobin. Thereafter, Gobin was charged with making sure the subcontractors perform their duties in a construction sequence consistent with the preestablished plans and specifications to which they must adhere while so performing. Gobin, who is skilled in the construction of homes, has authority to detect and call the attention of these subcontractors to deviations from the plans and specifications that such deviations may be corrected. He is the only coordinator employed by Respondent on the Bel Air VII development.

The failure to pay on a regular salary basis, to deduct taxes and social security payments from commission checks, or to reimburse an employee for job related expenses have been held to be indications of independent contractor status.<sup>8</sup> It has also been held that "oral agreements, providing for individual services which are readily terminable, are inconsistent with independent contractor status."<sup>9</sup> Gobin has no guarantee of continued employment as a coordinator so far as this record shows, and his employment appears to depend upon the judgment of Dick Gore who is free to terminate Gobin at will, barring some intervening state statute or precedent. These pro and con considerations are, however, not decisive factors in the instant case. The controlling factor concerning his alleged status as an independent contractor is his inability to vary the plans and specifications to which subcontractors must adhere. The governing items were given to Gobin for scheduling and, if necessary, enforcement, but Gobin has no independent discretion concerning how he conducts his coordinating duties. All it amounts to is routine notification to subcontractors when the construction of a house has reached the stage where their contribution is required, which is determined by the established order of construction, i.e. floors, walls, roof, etc., and the house plans agreed upon between Richard Gore and the purchaser, and monitoring of the subcontractor's progress to guarantee compliance with the plans. Gobin, in his function as a coordinator, acts as an experienced employee who is not a supervisor but is entrusted with this mission of advising subcontractors it is time for them to perform their portion of the construction in accord with the established plans and specifications prepared by Gobin's superior, or to rectify deviations therefrom. Compare *Knogo Corp.*, 265 NLRB 935, 936-237 (1982) (Iris Gonzalez). Gobin is obviously an agent of Respondent for the purpose of notifying subcontractors to commence work in a timely fashion consistent with the preestablished work sequence controlled by the building specifications and plans approved by Respondent or to correct construction errors. These admonitions to subcontractors are statements of requirements rather than mere suggestions, and therefore must be complied with. This is not, however, enough to establish Respondent

is vicariously liable for statements Gobin might make to employees, as distinguished from subcontractors. *Mack's Supermarkets*, 288 NLRB 1082, 1087 (1988). Gobin was controlled in his conduct by Respondent's plans and specifications and cannot be said to have had any right to vary their enforcement. The results were accomplished consistent with Respondent's set plans with the manner and means of that accomplishment left in the control of the subcontractors. All Gobin could do was bring variations from Respondent's plans and specifications to the attention of the subcontractors and report them to Respondent's president Gore where the authority to enforce the subcontracting agreements resided. Gobin was simply an employee on a piecework basis and not an independent contractor, and his agency status was limited to his dealings with subcontractors and not their employees.

Gobin was not a supervisor, independent contractor, or a general agent of Respondent, but, according to the General Counsel and the Union, he had sufficient apparent authority to lead the pickets to believe he was speaking and acting for Respondent on August 30. In *Star Color Plate Service*, 279 NLRB 576 (1986), the Board noted "Under the doctrine of apparent authority, the test for determining whether an employee is an agent is whether, under all circumstances, [other] employees would reasonably believe the employee in question was reflecting company policy and speaking and acting for management," citing *Community Cash Stores*, 238 NLRB 265 (1978), and further explained in *Communications Workers Local 9431 (Pacific Bell)*, 304 NLRB 446 (1991), that apparent authority is the result of an express or implied manifestation by a principal to a third party that another is his or her agent. There is no indication Respondent engaged in any antiunion conduct or displayed antiunion animus at any level warranting even a suspicion Respondent instigated or condoned a level of behavior equivalent to that of Gobin or, indeed, any lesser conduct because Respondent opposed the picketing or union activity in general, nor is there any evidence Dick Gore led anyone to believe Gobin was his agent for anything but the coordinating work described herein.

Here, we have an intoxicated man standing on his own porch in his bare feet on a Sunday, waving a rifle in the air, and threatening to defend his property against trespass. I cannot believe that any rational person could seriously believe, considering the reasonably peaceable relations between the pickets and Respondent but for some verbal harassment and the defacement of Gobin's garage door which could reasonably be considered conduct by a union sympathizer although not necessarily a picket, this bizarre conduct of Gobin reflected Respondent's policy or that he was speaking and/or acting for management.

Gobin was not acting as an agent of Respondent when he threatened the three union members on Sunday, August 30, and they had no valid reason to believe he was. If the Board should conclude otherwise, there remains the question of whether his conduct violated the Act. The time-honored test<sup>10</sup> is whether the conduct in question, objectively viewed, reasonably tended to interfere with, restrain, or coerce employees in the exercise of rights guaranteed them in Section 7 of the Act. Hedger, Yeager, and Gajewski, although not Respondent's employees, were employees within the mean-

<sup>8</sup> *Joyce Sportswear Co.*, 226 NLRB 1231, 1234 (1976).

<sup>9</sup> *Bricklayers Local 6 (Key Waterproofing)*, 268 NLRB 879, 882 (1984).

<sup>10</sup> See, e.g., *G. H. Hess, Inc.*, 82 NLRB 463 fn. 3 (1949).

ing of the Act.<sup>11</sup> When they set out as members of a union committee to interview other employees and attempt to interest them in union membership, they were engaged in protected union activity and protected concerted activity. The question therefore is whether Gobin's conduct had the required tendency to interfere, restrain, or coerce, and therefore violated the Act. Gobin's words and actions clearly reasonably tended to restrain and coerce the three from entering his premises, but those words and actions were not directed at their protected activity or their progress any place but onto his property. That two of the three abandoned their journey because Gobin said and did what he did or that one did not is not dispositive of the issue. It is settled that employees' subjective reactions to conduct does not determine its lawfulness.<sup>12</sup>

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<sup>11</sup> See, e.g., *Little Rock Crate & Basket Co.*, 227 NLRB 1406 (1977).

<sup>12</sup> See, e.g., *Van Leer Containers v. NLRB*, 943 F.2d 786 (7th Cir. 1991).

Gobin's words and actions, inexcusable as they were, had no reasonable tendency, objectively viewed, to interfere with, restrain, or coerce the three in the exercise of their right to traverse the public streets to their destination where their intent was to promote prounion sympathies.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>13</sup>

#### ORDER

The complaint is dismissed.

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<sup>13</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.