

**Broadway, Inc., d/b/a K-Bar-B Youth Ranch and  
Gail Padgett.** Case 15-CA-14035

March 6, 1998

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS LIEBMAN  
AND BRAME

On August 21, 1997, Administrative Law Judge William N. Cates issued the attached bench decision. The General Counsel filed exceptions and a supporting brief, 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,<sup>1</sup> and conclusions<sup>2</sup> and to adopt the recommended Order.

ORDER

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

BENCH DECISION

STATEMENT OF THE CASE

WILLIAM N. CATES, Administrative Law Judge. I heard this case in trial proceedings conducted in New Orleans, Louisiana on July 28, 29, and 30, 1997. At the conclusion of trial proceedings, and after hearing oral argument by Government Counsel and Company Counsel, I issued a Bench Decision pursuant to Section 102.35 (a)(10) of the National Labor Relations Board's Rules and Regulations, setting forth findings of fact and conclusions of law, including my ultimate conclusion that the complaint lacked merit and should be dismissed.

For the reasons (including credibility determinations) stated by me on the record at the close of the trial, I found Broadway, Inc., d/b/a K-Bar-B Youth Ranch (Company) did not violate the National Labor Relations Act, as amended, (Act) when on or about May 27, 1997 it terminated its employees William Pellegrin, Jennifer Pellegrin, and Tia Waterman and suspended its employee Aimee Rojas. Accordingly I dismissed the complaint.

<sup>1</sup> The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 363 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

<sup>2</sup> We agree with the judge that the General Counsel has failed to show, as alleged, that the Respondent discharged and suspended the discriminatees because of a belief, albeit mistaken, that they were engaged in protected concerted activity. We find it unnecessary to rely on the judge's alternative rationale that, even if the sick-out were found to be protected concerted activity, the employees' conduct was indefensible.

I certify the substantial accuracy of the portion of the trial transcript (pages 463-474, inclusive) containing my Decision, and I attach a copy of that portion of the transcript, as corrected,<sup>1</sup> as an "Appendix" hereto.

Exceptions may now be filed in accordance with Section 102.46 of the Board's Rules and Regulations, but if they are not timely or properly filed, Section 102.48 provides that my Bench Decision shall automatically become the Board's decision and order.

CONCLUSIONS OF LAW

The Company is an employer engaged in commerce within the meaning of Section 2(2)(6) and (7) of the Act, and it has not violated the Act in any manner alleged in the complaint.

ORDER<sup>2</sup>

The complaint is dismissed.

APPENDIX

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JUDGE CATES: **On the record.**

First, let me say that it has been a pleasure to be in New Orleans, Louisiana. I always enjoy coming here.

Let me express my appreciation to counsel for the presentation of the case. Both of you are a credit to the side you represent.

And let me state that I admire greatly each of you who are involved in the childcare business. I can think of no more honorable or greater profession than to care for children who might otherwise be without care. I'm convinced it takes a special type person to perform such work, and I admire each of you for your devotion and dedication to children of the type that are cared for at the facility such as the one involved herein and others that perform a like work.

It is in that light that sometimes tough cases make tough decisions, but I deeply admire those of you who devote your life to maintaining the health and care and hopefully the happiness of children of this nature.

I find as follows:

I find that the charge in this case was filed on August 26,

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1996, and was properly served on the parties herein thereafter.

I find that the Company herein, Broadway, Inc., d/b/a K-Bar-B Youth Ranch, is engaged in the operation of a group home for children that are in the protective custody of the State of Louisiana.

<sup>1</sup> I have corrected the transcript by making physical inserts, cross-outs, and other obvious devices to conform to my intended words, without regard to what I may have actually said in the passages in question.

<sup>2</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.

I further find that the Company in conducting its business during the 12-month period preceding October 31, 1996, derived gross revenues in excess of \$100,000, and during that same time frame, provided services valued in excess of \$50,000 for the State of Louisiana, which State is directly engaged in interstate commerce.

I further find that the Company herein during that same period purchased and received at its facility goods valued in excess of \$2,000 directly from points outside the state of Louisiana.

Based on that admitted information, I find that the Company herein is an employer engaged in commerce within the meaning of Section 2(2)(6) and (7) of the Act.

I further find that Mary Speed held the position at the Company of executive director and that she was a supervisor and agent of the Company within the meaning of Section 2(11) and 2(13) of the Act at all times material herein.

I base that finding not only upon the admission of the parties, but also upon the fact that Mary Speed was the individual who fired the three individuals and suspended the

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fourth one that are named in the complaint, and as such, she has performed functions and duties that place her in the category of a supervisor within the meaning of the Act, and the actions that she testified to herself that she took with respect to staff and with respect to employees certainly place her as an agent of the company within the meaning of Section 2 (13) of the Act.

I allowed the General Counsel to amend out paragraph 9 of the complaint, which stated alternative to the pleadings set forth above in paragraph 6 about May 23 1996 that certain of Respondent's employees, William Pellegrin, Jennifer Pellegrin, Tia Waterman, and Aimee Rojas, employed at its facility, ceased work concertedly and engaged in a strike.

The Government amended out that paragraph of the complaint and makes no contention that the parties actually engaged in a strike. That leaves the allegations of the complaint to be as set forth in paragraphs 6, 7, and 8 of the complaint which are that the Company mistakenly believed that since on or about May 23, 1996, that certain of its employees, William Pellegrin, Jennifer Pellegrin, Tia Waterman and Aimee Rojas, ceased work concertedly and engaged in a strike.

I'm also considering, although the General Counsel did not amend that paragraph out of the complaint, I'm considering that the allegations that they ceased work concertedly and engaged in a strike, I'm not addressing that in my decision, because the strike part is not before me.

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What is before me is that on or about May 27, 1996, the Company terminated its employees, William Pellegrin, Jennifer Pellegrin, Tia Waterman, and Aimee Rojas because the Respondent mistakenly believed that the named employees engaged in the conduct described above in paragraph 6, and to discourage employees from engaging in these and the other concerted activities.

I hope I'm making myself clear that I'm referring back to paragraph 6, that whatever the employees did, the Company believed that it amounted to either a strike or concerted work

stoppage, but because the Government withdrew the strike part, I'm not relying on that part.

Now, what is the evidence and what are the conclusions to be drawn therefrom? I heard testimony from at least three of the named individuals, and they gave testimony as to why they did not report for work on May 23, 1996. I also heard testimony from the Charging Party in this case, Gail Padgett, as to the conditions of her health on May 22 and May 23, 1996.

I only mention Ms. Padgett somewhat in passing because, although she's the Charging Party, the evidence indicates, by her own testimony, that she was a supervisor and is not covered by the Act and engaged in—or at least the Government does not contend that she engaged in any act that would be a violation of the Act to discharge her.

Each of the three individuals who gave testimony as to why

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they did not report for work on May 23, 1996, gave health reasons for doing so. Let me start with Ms. Padgett, because I think it's important to this case.

Ms. Padgett said that on the evening hours of May 22, she went home because she was suffering from a migraine headache. I credit her testimony that she had pain in the head. As to whether we classify it as a migraine or a debilitating headache or any of the other professional and medical terms that were attributed to it herein, I believe Ms. Padgett that she was suffering from a headache and went home for that reason.

The other individuals, Mr. William Pellegrin, testified that he had a stomach virus and had suffered from that the greater part of the week before Wednesday, May 22, 1996. I credit his testimony that he had a stomach virus and that he went home for that reason.

I do so in light of the fact and notwithstanding the fact that he testified he did not throw up at work but threw up before and after. I don't find anything in that to detract from his testimony.

Aimee Rojas, as I recall her testimony, stated that she had had a very rough day and that she wasn't feeling very well at all, and she wasn't going to come in the next day.

Tia Waterman said that on the night of May 22, that she was going to go home and take some medication, which I believe she said was nonprescription medication for sinus problems, and that

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she didn't anticipate being in the next day.

I credit each of these individuals, Aimee Rojas, William Pellegrin, and Tia Waterman, that they were ill, sick, and that they went home sick, and that they notified the employer that they were sick and would not be at work the next day. And those notifications came somewhere between the hours of perhaps eleven o'clock in the evening and one o'clock the early morning hours of May 23, 1996.

I'm not going to go behind their medical statements that—or the statements about their medical condition that they were sick and that each notified the employer they were sick.

Was there a conspiracy to call in sick in order to bring about a disruption of the employer's work, with an eye to—

ward resolving any grievance or dispute that they had with the Company? There is no question that, based on the credited testimony of William Pellegrin and—I keep forgetting—Ms. Padgett and others, that there was a concern expressed on the evening of May 22 that certain employees had not received overtime that they contended they were entitled to.

And apparently the Company did not seriously dispute that they were entitled to this additional overtime, because Ms. Padgett went to the proper representative of the Company and asked about the overtime, and was told that it was too late to get it on that particular paycheck that the employees had received that evening, but they would receive a corrected

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paycheck on the next two-week pay that would be forthcoming.

There are a lot of things that happened on the night of May 22 which I'm not fully convinced were inextricably intertwined to each other. Was there a conspiracy to call in sick and engage in a work stoppage to protest the overtime? I'm persuaded there was not, for this reason among others.

I credit the testimony of the individuals, with the exception of Jennifer Pellegrin who did not testify, that they were sick and that that's the reason they didn't go to work. Therefore, they were not protesting overtime; they were simply sick, ill, unable to report to work.

The reason among others that I don't question but rather credit their testimony that they were sick is I'm fully convinced that this is a very stressful form of work and that if someone said they had a headache after working 16 hours in this environment, I don't think that there's anything unbelievable that they would contend they had a headache.

For someone to say they had a stomach virus while working around children, I don't find anything unbelievable about a person saying, I got an upset stomach. It's not unreasonable to believe that children suffer from this and that it can be transmitted to adults.

I don't question that in Southern Louisiana's weather, that someone would testify, I've got sinus problems. I don't find anything that's unbelievable about that.

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So I find that they were not withholding their services to protest the failure to adequately or properly pay the overtime that the employees perceived and perhaps the Company acknowledged they were entitled to.

But that does not solve the issue or resolve the matter here. These individuals called in late at night, late somewhere between 11:00 p.m. and 1:00 a.m., saying, We won't be in. And the Company is, in order to maintain its license, required to keep a three-to-one ratio with the children entrusted to this Company's care.

Therefore, when the responsible people learned the next day that they were short four employees and a supervisor because of illness, it certainly put the facility at a disadvantage if they're going to comply with state requirements for maintaining their license vis-a-vis maintaining a three-to-one ratio, that is, one care provider for every three children.

Then the question comes, as the Government contends: Did the Company mistakenly believe that the employees were engaged in a concerted work stoppage in order to pro-

test work-related grievances and discharged the employees for that reason?

To get to that point, you have to answer certain questions, and the first is: Did the Company believe or perceive that the employees in question were engaged in concerted activity? And I think the answer to that part of the equation is a resounding yes.

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Ms. Speed was informed that on the evening of May 22, there had been laughing and partying and going after Cokes in the facility at about eleven o'clock, and then shortly thereafter, the care provider in this case, the Company, received word from these individuals that they're sick and not coming in to work, and that there had been some discussion among them about calling in sick.

So I don't have any problem in concluding, based on that evidence and other, that the care provider knew or at least perceived or believed, whichever one you want to put in there—and I'll use the complaint language, "perceived"—that the employees had engaged in concert or were acting in concert.

The next question then becomes: Did the Company believe or perceive that the concerted activity was activity protected by the Act? And I'm persuaded the answer to that question is no. The director of the facility, Ms. Speed, testified that she believed they were engaging in a sick-out and that was the only reason; she had no other motive for taking action against them.

But she believed that they had acted in concert. Was she wrongfully motivated under the Act? I find that the Company, based on the credited testimony of Speed, that she relied solely on the fact that they had all called in sick, that the Company was not wrongfully motivated in the action that it took.

I base that on the fact that she had information that the employees in question were conducting themselves in a manner

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that perhaps was inconsistent with the reasons they had called in.

Then I come to the point that the Company's stated reason for discharging the three individuals and suspending the other, the Government contends, is different from what was stated in their termination notices, and further that the Company did not follow its normal procedure in that it discharged these individuals statedly for not following the proper procedure for call-in.

While there was unrefuted evidence on this record that others had violated that call-in policy and had not been terminated, therefore the Government would ask that I draw a conclusion from that contrary to Director Speed's stated motive for discharging the individuals.

I reject the Government's request in that respect, because I do not see a great inconsistency between what was told verbally and what was produced in writing to the individuals. And, furthermore, even if she discharged individuals for individually being sick and they were, in fact, sick, such does not violate the Act.

So I find that the Government has failed to establish one of the four elements that are necessary, and that is motivation. There was certainly adverse action, but it was not, based on the credited testimony of Speed, unlawfully motivated.

But even if the sick-out was concerted activity protected

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by the Act, in that if the work stoppage herein constituted conduct protected by the Act, i.e., that the employees withheld their services via sick-out to protest their treatment regarding the improper overtime payment, I would find further, if that were the case, that the conduct of the individuals involved is indefensible in the light of the facts herein, which is that this is a company that provides care to children who are at risk and the individuals gave notification late at night, near midnight, on May 22 that they would not be coming to work the next day.

I find such, if it could be concluded that their conduct was concerted protected activity, would be of a nature that would be indefensible and would be an exception to the Company discharging individuals for engaging in concerted protected activity.

If those at risk herein were other than children, might be persuaded otherwise, but not where children who are already at risk are placed in the potential of being further at risk, either to themselves or others. If it were concluded that the employees herein were engaging in concerted protected activity and/or that the Company perceived they were engaging

in concerted activity that is protected by the Act, I'd find that the employees could easily have pursued their acknowledged overtime problems in a manner that did not place children in potential and/or imminent danger.

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And for the reasons previously stated, I shall dismiss the complaint allegation that the Company on or about May 27, 1996, terminated its employees William Pellegrin, Jennifer Pellegrin, Tia Waterman, and suspended its employee Aimee Rojas, and in dismissing that portion of the complaint, I shall go further and dismiss the complaint in its entirety.

I advise the parties that I will, once the court reporter has provided me with a transcript of these proceedings, I will certify those pages of the transcript that constitute my decision, and I will serve that on all the parties, and it is my understanding that any appeal period runs from that point in time.

But please be advised that you are to consult the Board's rules and regulations with respect to taking exceptions and not rely on my understanding of the rules and regulations. I try to certify the decision as reasonably soon after I receive it as I can do so. However, at the present, because of a shortage of Judges and because of vacation time, we are doing a bit more traveling, each of the Judges, not just myself.

Again, let me state that it has been pleasant to be in New Orleans, and this trial is closed.

**(Whereupon, at 3:08 p.m., the hearing in the above-entitled matter was concluded.)**