

U.S. Department of Labor

Office of Administrative Law Judges
304A U.S. Post Office and Courthouse
Cincinnati, Ohio 45202



DATE: JUN 18, 1987
CASE NO. 86-CLA-7

IN THE MATTER OF

WILLIAM E. BROCK,
SECRETARY OF LABOR,
U.S. DEPARTMENT OF LABOR

PLAINTIFF

VERSUS

BREMCO INDUSTRIES, INC.

RESPONDENT

APPEARANCES:

Sandra D. Kramer, Esq.
Office of the Solicitor
United States Department of Labor
Cleveland, Ohio
For the Plaintiff

Mark R. Riegel, Esq.
Dagger, Johnston, Ogilvie, Charles,
Hampson and Deffenbaugh and Miller
Lancaster, Ohio
For the Respondent

BEFORE:

RUDOLF L. JANSEN
Administrative Law Judge

DECISION AND ORDER

This proceeding is before the Administrative Law Judge pursuant to Section 16(e) of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. 216(e), hereinafter referred to as the Act, and Parts 579 and 580 of the Regulations (29 C.F.R. Parts 579 and 580) for hearing and final determination of the issues timely raised by Respondent's exception to the Notice of Civil Money

Penalty assessed against it by the Secretary of Labor. Penalties in the total amount of \$2,000.00 were assessed following an investigation and inspection of Respondent's business by the Wage - Hour Division, Employment Standards Administration, United States Department of Labor. Plaintiff alleges that Respondent employed two minors in violation of Section 12 of the Act and the Regulations issued thereunder.

Respondent timely filed an exception to this determination and the matter was referred to the Office of Administrative Law Judges for a final determination of the violation for which the penalty was imposed, and the appropriateness and reasonableness of the penalty. A hearing was held on June 13, 1986 in Lancaster, Ohio, where both parties presented evidence and provided legal arguments. Both parties submitted post-hearing briefs. This Decision is based upon an analysis of the entire record and the application of the pertinent law. Each exhibit included within the record, although perhaps not specifically mentioned in this Decision, has been carefully reviewed and given thoughtful consideration in arriving at the Decision herein.

ISSUE

Whether Bremco Industries, Inc., did "employ" or "suffer or permit to work" two minors in violation of 29 U.S.C.A. Section 212(c).

FINDINGS OF FACT

Bremco Industries, Inc., (hereinafter referred to as Bremco) is an Ohio Corporation located in Bremen, Ohio. (Tr.103) Bremco manufactures aboveground equipment for the oil and gas industry which is sold to authorized distributors primarily throughout the Appalachian states and also the Southwestern states. (Tr. 108) At the time of the accident, Bremco employed approximately one-hundred seventy-five individuals. (Tr. 105,106) Jack Allen Howell is the President and principle owner of Bremco.

Steven Charles Mohler has been employed since October 1967 as a field service technician with Bremco. (Tr. 21) In that position, he services Bremco equipment in the field, explains the operation of the equipment to customers, fixes components which may have been damaged in shipment, and retrofits units in the field where customers are dissatisfied with the units shipped.(Tr. 21, 22) He spends approximately sixty percent of his time conversing with customers concerning the operation of their equipment. The other forty percent is spent in actual repair work. (Tr. 22) Ordinarily, Steve Mohler makes his field calls by himself. (Tr. 23) His immediate supervisor does not usually accompany him on his service calls. (Tr. 23)

Kyle Clover Mohler was born on May 24, 1974 and is the son of Steve Mohler. Troy Mohler was born on October 30, 1973 and is the nephew of Steve Mohler, Prior to July 9, 1984, Kyle Mohler accompanied his father to the plant on approximately a dozen occasions. (Tr. 26) He also accompanied his father on field trips on approximately three occasions. (Tr. 26) Steve Mohler took his son with him for company and to expose him to different environments and people. (Tr. 28) Steve Mohler was divorced at the time of the accident and pursuant to the divorce decree, he had very liberal

visitation rights with his son. (Tr. 24) Prior to July 9, 1984, Troy Mohler also accompanied Steve Mohler on one other occasion on a field trip. (Tr. 28) On these prior trips, the boys would sit in the truck until the business was completed.(Tr. 28) The management of Bremco was not aware that the boys had accompanied Steve Mohler on any field trips. (Tr. 29, 30) Steve Mohler never advised his supervisor that he had planned to take the boys with him on any trips. (Tr. 30)

On July 9, 1984, Steve Mohler, the two youngsters, and another field service employee, Armand Romano, made a call to service propane tanks at a location in Buckhannon, West Virginia.(Tr. 31, 32) The job required the servicing of ten propane tanks of which nine were located in the vicinity of Buckhannon, West Virginia while the tenth tank was located in the area of Clarksburg, West Virginia. They started working on the tanks at approximately 10 a.m., and would not finish until approximately 8p.m. which was the time of the accident. (Tr. 57)

Steve Mohler and Armand Romano were servicing the last tanks when it began to get late in the day. (Tr. 34) At about that time. Steve Mohler asked the boys if they would assist in removing some bolts. (Tr. 34, 35) The boys worked on all three of the last tanks to be serviced. (Tr. 42) It took the boys approximately twenty minutes to take the bolts off of each tank.(Tr. 43) The boys assisted in removing approximately forty-eight half-inch bolts from the cover of each unit. (Tr. 35) Of the nine previous tanks that had been serviced, none of those tanks had been hooked-up. (Tr.,36) However, the tenth tank which was being worked on by the boys had been hooked-up by the owner.(Tr. 37) Steve Mohler began to cut a six-inch hole in the backside of the last tank with an acetylene torch not realizing that it was hooked-up. Gas vapors entrapped in the tank caused it to explode injuring both boys. (Tr. 37)

Steve Mohler did not ask the management of Bremco for permission to take the boys with him on field trips because he was fearful that they could deny him that right. (Tr. 47) On one other occasion, Kyle Mohler swept the floor for a brief period of tile in the warehouse. (Tr. 29, 49) He received no compensation for this activity. (Tr. 50) Kyle Mohler also verified that-he had not performed services for his father when he accompanied him into the field excepting on the one occasion when the accident occurred. (Tr. 63) At no time did Steve Mohler approach any company managers of Bremco and request permission to have his son accompany him on a service call or delivery trip. Tr. 90, 94, 97, 100, 104) Company management had no knowledge that Steve Mohler was taking either his son or his nephew with him on field trips. (Tr. 90, 94, 97,100, 104) Prior to the accident on July 9, 1984, there was not a written company policy concerning individuals accompanying service personnel on field trips. (Tr. 91, 92, 93, 102, 106,108) Subsequent to the accident, the company policy was codified in a written statement. (Tr. 108)

LAW AND DISCUSSION

The Child Labor provisions of the Fair Labor Standards Act, as amended, at 29 U.S.C.A. Section 212(c) provide that:

No employer shall employ any oppressive child labor in commerce or in the production of goods for commerce or in any enterprise engaged in commerce or in the production

of goods for commerce.

The Act defines "employ" as meaning "includes to suffer or permit to work." 29 U.S.C.A. Section 203(g). The Regulations also contain a lengthy statement as to the Secretary's interpretation of the term "employ." 29 C.F.R. Section 570.113. That Regulation provides in part as follows:

... The words 'suffer or permit to work' include those who suffer by a failure to hinder and those who permit by acquiescence in addition to those who employ by oral or written contract. A typical illustration of employment of oppressive child labor by suffering or permitting an under-aged minor to work is that of an employer who knows that his employee is utilizing the services of such a minor as a helper or substitute in performing his employer's work. If the employer acquiesces in the practice or fails to exercise his power to hinder it, he is himself suffering or permitting the employer to work and is, therefore, employing him, within the meaning of the Act.

The Secretary contends that Bremco suffered or permitted Kyle Mohler and Troy Mohler to work and, therefore, employed the two in violation of Regulation 3 which is found at 29 C.F.R. Section 570.31 et seq. The Respondent, on the other hand, argues that at no time did Bremco suffer or permit either of the boys to work on behalf of the company. The burden of proof in establishing violations alleged under the Act is upon the Secretary of Labor. 29 C.F.R. Section 580.21(a).

Plaintiff argues that Bremco management knew or should have known that Steve Mohler was accompanied on several work trips by his son, Kyle, and nephew, Troy Mohler, and that such knowledge and a failure to hinder this practice establishes an employer-employee relationship with the minors. Respondent argues that Bremco exercised no control over and had no opportunity for profit or loss with the minors. Further, Respondent argues there was no sense of permanency to the relationship and no investment in equipment was made by the minors. Therefore, Respondent concludes Bremco did not "suffer or permit to work" as intended by the statute.

The parties are in agreement that the Act defines "employ" in the broadest possible terms as "to suffer or permit to work." The courts have decided on a case by case basis whether the relationship involved was that of employer and employee. The specific language of the Act precludes deciding the issue upon the basis of whether the traditional attributes of master and servant are present. Walling v. American Needlecrafts, Inc., 139F.2d 60 (6th Cir. 1943). It is upon the basis of the circumstances of the whole activity which determine the relationship. Rutherford Food Corp. v. McComb, 331 U. S. 722, 730, 67 S.Ct. 1473, 1477, 91 L.Ed. 1772 (1947). That same case provided an "economic reality" test which the Supreme Court later followed and in which all of the circumstances including the pervasive control exercised by the employer over the work of those individuals who were sought to be treated as employees. Goldberg v. Whitaker House Cooperative, Inc., 366 U.S. 28, 81S.Ct. 933, 6 L.Ed. 2d 100 (1961)

This Circuit has interpreted the Rutherford case as enunciating the proposition that the operation as a whole must be considered in determining whether a person is an employee. Western Union Telegraph Co. v. McComb, 165 F.2d 65 (6th Cir.1947), cert. denied, 333 U. S. 862, 68 S.Ct.

743, 92 L.Ed. 1141(1948). Finally, a person's economic dependence on a purported employer is a factor which must be given careful consideration in determining the existence of an "employ" relationship, but it is the total relationship rather than isolated factors which must be considered and the trier-of-fact must also consider if the person's work is an integral part of the operations of the employer. Dunlap v. Dr. Pepper Pepsi Cola Bottling Co., 529 F.2d298 (6th Cir. 1976. Although there are numerous cases dealing with both helpers who were relatives of employees and those who were non-relatives, for purposes of application of this standard, I see no distinction. The Secretary makes reference to a parental exemption recognized at 29 C.F.R. Section 570.126, but I read that exemption as pertaining to circumstances where it is clear that the father is an employee and the child is employed by both the father and the father's employer. That is not the case here.

Respondent had no control over the minors. Any control exercised by Steve Mohler was that of a father or uncle, not that of a supervisor with power to do so given by the Company. Respondent had no opportunity for profit or loss with the minors. The work performed was of minimal benefit, if any at all. There was no obligation to pay the minors and none was expected. To remove bolts from a tank cover, one need not possess a particular skill nor receive any special training, and none existed in this case. Clearly there was no permanency to the relationship between Bremco and the minors. Kyle and Troy had never performed work for Steve Mohler on a trip before. There is no evidence in the record that this was a regular occurrence or that even the work on July 9, 1984 had been planned. Finally, the minors made no investment in equipment used to remove the bolts and covers.

In reviewing all of the facts of this case, I conclude that the work activity performed by the two boys was strictly an aberration occasioned by the impending darkness and the father's desire to conclude the work activity and return home. There is no evidence whatsoever in this record that Steve Mohler and Armand Romano could not have performed their assigned work without the assistance of the boys and clearly the small contribution of the two boys to the overall job project was de minimus. In the event that the boys had made no contribution whatsoever toward the completion of the work, their elimination would simply have caused a longer workday for the company employees. I am convinced that as Steve Mohler testified, the boys were taken along in order to allow him to spend time with his son. The boys were of no economic benefit to the employer. From this record, I do not believe that Bremco is guilty of failing to hinder the activities of the boys nor did the company silently acquiesce in the conduct of Steve Mohler who invited the boys along. The company was simply unaware. It is clear to me that neither of these two juveniles qualify as employees of Bremco within the meaning of the statute, and I so find.

The Respondent also argues that in order to qualify as an employee under the applicable statute and regulations, the knowledge and consent, either express or implied, is necessary and that consent and knowledge of activity is not present in this case. Batts v. Professional Building, Inc., 276 F. Supp. 356 (D.Ct. W.Va. ; Neal v. Braughton, 111 F. Supp. 775 (D.Ct. Ark. 1953); Burry v. National Trailer Convoy, Inc., 239 F. Supp.85 (1963). a Secretary, on the other hand, contends that the extent of the Respondent's knowledge must be measured in accordance with its duty to inquire into conditions prevailing in its business. Gulf King Shrimp Co. v. Wirtz, 407 F.2d 508 (5th Cir. 1969). I am cognizant o a duty on the part of the Respondent to make inquiries into working conditions pertaining

to an employee's use of child labor. The applicable standard appears to be that if the employer had an opportunity to acquire knowledge of the underaged employment, then an employer can be held responsible under the Act. Gulf King Shrimp Co. v. Wirtz, supra. If Breeco had knowledge of a subordinate's violation of the child labor laws, then it had a duty to terminate the unlawful activity. Brennan v. Correa, 513 F.2d 161 (8th Cir.1975).

In Gulf Ring, the work performed by the minors was done on the premises in a large room where supervisors could easily have seen the minors. The company was aware that it was a common practice for entire families, including minors, to work in this area. Also, the company had been issued prior warnings that minors were working in their employ on the premises and there was an obvious benefit to the company for the work performed was the same as that performed by the adult employees.

In the instant case, the work was performed distant from where management could have observed its occurrence. I am not convinced that Bremco was aware of a practice on the part of Steve Mohler to include minors on service or delivery trips. The record does not disclose that Bremco had ever been warned previously that its employment practices bordered on child labor infractions. The benefit to Bremco of the work Kyle and Troy Mohler performed, that of removing bolts and covers from three tanks, was insignificant. Plaintiff's argument that Bremco should have been alerted to the fact that the minors were performing work and should have inquired into the possibility is simply not persuasive based upon the facts of this case. Therefore, I conclude that since Bremco had neither actual nor constructive knowledge of the minors' work, they are not liable as employers for this additional reason. Since Bremco is not liable for the penalties asserted, no need exists to consider the reasonableness of the penalty amounts asserted.

ORDER

IT IS ORDERED, therefore, that Bremco Industries, Inc., is not liable for the \$2,000.00 in penalty asserted by the Secretary of Labor since no violations of the Fair Labor Standards Act have occurred as the result of the events which took place on July 9, 1984.

RUDOLF L. JANSEN
Administrative Law Judge