

Alamo Cement Company d/b/a San Antonio Portland Cement Company and United Cement, Lime and Gypsum Workers International Union, AFL-CIO. Case 23-CA-8753

14 April 1984

DECISION AND ORDER

**BY CHAIRMAN DOTSON AND MEMBERS
ZIMMERMAN AND HUNTER**

On 21 April 1983 Administrative Law Judge Leonard M. Wagman issued the attached decision. The General Counsel filed exceptions and a supporting 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 brief and has decided to affirm the judge's rulings, findings,¹ and conclusions² and to adopt the recommended Order.

ORDER

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

¹ 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), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² The General Counsel excepted to the judge's conclusion that Enrique Zapata and Sergio Zapata, both employed as foremen by the Respondent, had no apparent personal interest in the outcome of this case. We have considered the record and conclude that even though they are both foremen there is nothing in the record to indicate that either had a personal interest in the outcome of this case sufficient to warrant reversing the judge's credibility findings. The General Counsel also excepted to the judge's failure to consider the threat of court action in the employee warning record issued by the Respondent. It is clear that the judge considered the threat and concluded that there was no evidence that the Respondent had ground for believing that the threat of court action included the filing of an unfair labor practice charge with the Board. (See fn. 7 of the judge's decision.)

DECISION

STATEMENT OF THE CASE

LEONARD M. WAGMAN, Administrative Law Judge. Upon a charge filed by United Cement, Lime and Gypsum Workers International Union, AFL-CIO, the Union, the Regional Director for Region 23 of the National Labor Relations Board, the Board, issued a complaint on March 4, 1982, alleging that Respondent Alamo Cement Company d/b/a San Antonio Portland Cement Company, the Company, violated Section 8(a)(4) and (1) of the National Labor Relations Act by discharging em-

ployee Jesus A. Contreras Jr. because he had testified as a discriminatee and witness in a prior Board unfair labor practice proceeding¹ involving the Company as a party respondent, and because Contreras announced his intent to file unfair labor practice charges against the Company with the Board if his supervisor did not cease harassing him at work. The Company, by its timely answer, denied commission of the alleged unfair labor practices. In this decision, I have recommended dismissal of the complaint.

From the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel and the Company, respectively, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

The Company, a Texas corporation, maintains its principal office and place of business in San Antonio, Texas, where it engages in the processing and manufacturing of cement. The Company, in the course and conduct of its business operations, annually purchases and receives goods and materials valued in excess of \$50,000 directly from points and places located outside the State of Texas. The Company admitted the foregoing data from which I find, as the Company also admitted, that at all times material, the Company has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The complaint alleges, the Company admits, and I find that the Union is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

The complaint alleges, the answer admits, and I find that:

Employee Jesus A. Contreras, Jr., subpoenaed as a witness by counsel for the General Counsel, testified as a discriminatee in the prior unfair labor practice proceeding involving, *inter alia* specific allegations of Section 8(a)(1) (*Weingarten*) and Section 8(a)(4) violations of the Act and wherein Respondent [the Company] and the Union were parties and which proceeding, pending issuance of Board decision and order, was heard before Administrative Law Judge James T. Barker, with decision issued May 21, 1980. *San Antonio Portland Cement Company*, Cases 23-CA-7182, 23-CA-7281, 23-CA-7360, 23-CA-7415 and 23-CA-7648 [JD-(SF)-155-80].²

¹ *San Antonio Portland Cement Co.*, Cases 23-CA-7182, 23-CA-7281, 23-CA-7360, 23-CA-7415, and 23-CA-7648.

² I also find from the administrative law judge's decision that the hearing in those cases opened on September 24, 1979, and closed on September 26, 1979.

The Company employed Jesus A. Contreras Jr. from April 1960 until December 11, 1981.³ At the time of his discharge on the latter date, Contreras was employed on the 11 p.m. to 7 a.m. shift, as a crane operator, at the Company's San Antonio plant. Contreras began performing as a crane operator in April 1981. However, his promotion into that job was not formalized by the Company until October 17. Along with this promotion, Contreras received a 28-cent hourly wage increase.⁴

Beginning in the latter part of November 1981, Contreras perceived that his foreman, Enrique Zapata, was checking his work more closely. Whenever Foreman Enrique Zapata observed that Contreras was not on his crane, he would inquire as to what Contreras was doing. If Contreras was going on a break, the foreman would direct him to return to the crane and get to work. However, there was no showing that these incidents were accompanied by any remarks or references to Contreras' participation in the prior Board proceeding involving the Company.

On the night of November 30, at approximately 11:20, Contreras came down from his crane for a lunchbreak. At 12:45 a.m., Foreman Enrique Zapata saw that Contreras was not in his crane. Enrique Zapata instructed Contreras to return to work. Contreras answered, telling Foreman Zapata not to concern himself about Contreras' work. Despite Zapata's instruction, Contreras did not return to his crane.⁵

On December 1, at 11:20 a.m., Contreras went to the home of Company Foreman Sergio E. Zapata, who is Enrique Zapata's son. Contreras was met at the door by Sergio's wife. At Contreras' request, she awakened Sergio Zapata and told him of Contreras' presence. When Sergio Zapata appeared at the door, Contreras demanded a discussion concerning Enrique Zapata, Plant Manager William Dimick, and other persons at the plant. At Contreras' insistence, the discussion was held in his automobile.

The ensuing conversation, which lasted 30 to 45 minutes, began with Contreras' complaints about Enrique Zapata. Contreras asked Sergio to talk to his father and "tell him to get off [Contreras'] back because he [Contreras] didn't like people telling him what to do." When Sergio suggested that Contreras talk to Enrique Zapata, Contreras insisted that Enrique would listen to his son Sergio and would not listen to Contreras. Contreras then warned:

I don't want to cause trouble, but I have people that will back me up that will cause trouble for him if he doesn't leave me alone.

As Contreras and Sergio drove to a store to purchase beer, Contreras repeated his desire to be free of Enrique Zapata's close attention at the plant. Contreras reiterated his earlier warning saying:

Look, I have known your father for too many years and he has worked at the company for such a long time. I would hate to see him lose his job over something like this. And I want you to get him off my back or I am going to get him in trouble.

After leaving the store, Contreras and Sergio Zapata drove first to Contreras' home and then returned to Sergio's home. Contreras again said he did not want to cause "trouble" for Enrique Zapata, but insisted that he would do so unless Enrique ceased pressuring him. Contreras emphasized his sentiments by hitting the steering wheel as he spoke. At no time during his remarks to Sergio Zapata did Contreras ever state that he intended to go to the National Labor Relations Board.⁶

Enrique Zapata testified that his son reported to him that Contreras had threatened to go to the Board regarding his complaints against Enrique Zapata. However, Enrique Zapata, whose command of English seemed limited, was uncertain as to the content of his son's report. I also considered the likelihood that Sergio Zapata would have had a better recollection than Enrique of what Contreras had said to him on the morning of December 1 because of his direct involvement.

There is some testimony and evidence in the record that Contreras' remarks to Sergio Zapata included a threat to go to court against Enrique Zapata. However, Sergio's testimony did not include such a threat. Upon considering the materiality of such a remark in this case, I determined that it was unnecessary to make a finding on the question of whether Contreras' remarks included a threat of court action.

By December 2, news of Contreras' remarks had reached his plant management. On the night of December 1, Sergio Zapata reported Contreras' remarks to Enrique Zapata. The next morning, Personnel Manager Manuel Galindo received word of the incident from Enrique Zapata. Later, that same day, Sergio gave an oral account to Galindo, who wrote it in a report and informed Plant Manager William Dimick of the incident. Upon hearing Galindo's report, Plant Manager Dimick declared his intention to terminate Contreras if the report proved to be true.

³ Unless otherwise stated, all dates hereafter refer to the year 1981.

⁴ Contreras' employment record also showed that in January, when the Company employed him as a kiln helper, he had received a 61-cent hourly wage increase.

⁵ I have based my findings regarding the incident on the night of November 30 on the testimony of Contreras and Enrique Zapata. However, where an issue of credibility arose because of contradiction or inconsistency, I credit Zapata. Contreras' testimony regarding this incident was drawn from him on cross-examination. Although he appeared to answer most questions candidly, on occasion he seemed reluctant to provide an answer which might cast doubt on the propriety of his remarks to Foreman Zapata. I have also taken into account the fact that Contreras is personally interested in the outcome of this proceeding. In contrast, I noted that Enrique Zapata has no apparent personal interest in the outcome of this case, and that while testifying regarding this incident, he seemed to be giving his best recollection in a candid and straightforward manner.

⁶ My findings are based on the detailed testimony given by Sergio Zapata who impressed me as a candid witness. I also noted that unlike Contreras, Sergio Zapata has no interest in this proceeding and that he appeared to be sincerely searching his memory for details of his encounter with Contreras. In contrast, Contreras provided only a sketch of the encounter which he testified took only about 10 minutes. After listening to Sergio Zapata's account, I concluded that Contreras' estimate was unlikely. I also noted that Contreras twice changed his testimony regarding his remarks to Mrs. Zapata on the morning of December 1, a factor which cast doubt on his reliability.

On December 11, Plant Manager Dimick met with Contreras and Personnel Manager Galindo in the plant manager's office. Galindo gave to Dimick the original of his report regarding Contreras' conduct on the night of November 30 and his remarks to Sergio Zapata on the morning of December 1. Galindo also furnished a copy to Contreras. Dimick immediately read the report aloud and asked Contreras if its assertions were true. Contreras agreed that they were. When Dimick asked Contreras for an explanation, the latter answered, "[W]ell I really didn't mean it as a threat Mr. Dimick." At this, Dimick announced that he was discharging Contreras forthwith.

B. Analysis and Conclusions

The General Counsel contended that the Company violated Section 8(a)(4) and (1) of the Act because it terminated Jesus A. Contreras Jr. in reprisal for his testimony at a prior unfair labor practice proceeding and because he told Sergio Zapata that he intended to file an unfair labor practice charge with the Board. It is clear that such conduct by an employer is violative of those sections of the Act. E.g., *Borden Inc.*, 248 NLRB 1228, 1232 (1980). However, I agree with the Company's contention that the General Counsel has failed to substantiate those allegations here.

The evidence before me shows no connection between Contreras' participation as a witness in *San Antonio Portland Cement Co.*, Cases 23-CA-7182, 23-CA-7281, 23-CA-7360, 23-CA-7415, and 23-CA-7648, and his treatment at the Company's hands in 1981. The hearing in the earlier cases opened on September 24, 1979, and closed on September 26, 1979. The administrative law judge in that case issued his decision on May 21, 1980. Yet, the record before me is bare of any evidence of hostility by Plant Manager William Dimick, Personnel Manager Manuel Galindo, or Foreman Enrique Zapata growing out of Contreras' participation in the earlier Board unfair labor practice proceeding. Absent was any showing that Foreman Enrique Zapata singled Contreras out for close attention, or that Contreras' conduct at the plant on November 30 did not warrant the foreman's attention. On the contrary, the Company's records show that Contreras received a salary increase as a kiln helper on January 1, and later a promotion to crane operator at an en-

hanced wage, which became official on October 16, 8 weeks before his discharge. Further, there is no showing that in considering Contreras' discharge the Company gave any thought to his participation in the earlier Board unfair labor practice proceeding.

Nor does the record sustain the General Counsel's contention that Contreras' discharge was motivated by his stated intention to file an unfair labor practice charge with the Board. Thus, credited testimony shows that Contreras' threat of reprisal did not include any mention of the Board or its processes. Further, there was no evidence that the Company interpreted Contreras' remarks as containing any threat to resort to the Board to remedy his complaint against Foreman Enrique Zapata.⁷

In sum, I find that the General Counsel has not established the violation of Section 8(a)(4) and (1) alleged in the complaint. *Dittler Bros. Printing Co.*, 258 NLRB 357, 362 (1981). Accordingly, I shall recommend dismissal of the complaint in its entirety.

CONCLUSIONS OF LAW

1. Respondent Alamo Cement Company d/b/a San Antonio Portland Cement Company is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Respondent has not, as alleged in the complaint, engaged in unfair labor practices within the meaning of Section 8(a)(4) and (1) of the Act.

On the foregoing findings of fact and conclusions of law and as the entire record, I issue the following recommended⁸

ORDER

The complaint is dismissed in its entirety.

⁷ Assuming that Contreras' remarks had included a reference to court action, such a threat would not have provided ground for sustaining the General Counsel's contentions. For there was no evidence that the Company understood, or had ground for believing that such reference included the filing of an unfair labor practice charge with the Board.

⁸ 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.