

International Union of Operating Engineers, AFL–CIO, Local 382 (Bechtel Constructors Corporation) and Jimmy Ferguson. Case 26–CB–2808

September 30, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND OVIATT

On April 29, 1992, Administrative Law Judge Bruce C. Nasdor issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel 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,¹ and conclusions and to adopt the recommended Order as modified.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, International Union of Operating Engineers, AFL–CIO, Local 382, Little Rock, Arkansas, its officers, agents, and representatives, shall take the action set forth in the Order as modified.

Insert the following as paragraph 2(d) and reletter the subsequent paragraph.

“(d) Sign and return to the Regional Director sufficient copies of the notice for posting by Bechtel Construction Corp., if willing, at all places where notices to employees are customarily posted.”

¹ The Respondent 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.

The Respondent also excepted to the judge's finding that it was motivated to lay off Jimmy Ferguson because he was a traveler. The Respondent contends that Ferguson became a member of the Respondent in October 1990 and therefore was not a traveler at the time of the layoff. Although the record reflects that Ferguson did become a member of the Respondent in October 1990, this has no bearing on the judge's reasoning that, in effect, the Respondent was treating Ferguson as a traveler.

Bruce E. Buchanan, Esq., for the General Counsel.
W. E. Wright, Representative and *Andrew Clements*, President and Business Manager for the Respondent Union.

DECISION

STATEMENT OF THE CASE

BRUCE C. NASDOR, Administrative Law Judge. This case was tried at Little Rock, Arkansas, on August 19 and 20, 1991.¹ The original charge in this proceeding was filed by Ferguson on April 3, 1991, and a first amended charge was filed on May 10, 1991. A complaint and notice of hearing issued on May 10.

The complaint alleges that the Respondent Union caused or attempted to cause Bechtel, to lay off Jimmy Ferguson on February 19, in violation of Section 8(b)(2) of the Act. The complaint further alleges that Respondent violated Section 8(b)(1)(A) of the Act by restraining and coercing Ferguson on February 20, and by threatening to invoke a union bylaw to engage in said restraint and coercion.

On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of counsel for the General Counsel's brief, and Respondent's letter, I make the following

FINDINGS OF FACT

I. JURISDICTION

Bechtel Constructors Corporation, with a office and place of business in Russellville, Arkansas, has been engaged in the maintenance of powerplants.

During the preceding 12 months, Bechtel, in the course and conduct of its business operations performed services valued in excess of \$50,000 in States other than the State of Arkansas.

During the preceding 12 months, Bechtel purchased and received at its facility, products, goods and materials valued in excess of \$50,000 directly from points outside the State of Arkansas. Bechtel is now, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent Union is now, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

II. FACTS

The Union is located in Little Rock, Arkansas, with its president and business manager, Andrew Clements. Bill Wright is a business representative and Ellen Wilson is the union secretary and dispatcher. Bill Williams was the business manager for approximately 33 years, when he retired in 1986, and presently holds the title of business manager emeritus.

The Union operates a hiring hall where it refers operating engineers to various employers. Wilson is the individual who performs the function of dispatching the operating engineers and refers individuals based upon an out-of-work list which is kept on index cards.

The Charging Party, Jimmy Ferguson, is a crane operator and has been for approximately 18 years. He joined the International Union of Operating Engineers in Fort Worth, Texas, in January 1982. He was a member at that time of Local 819. In December 1989, Ferguson moved to Arkansas,

¹ All dates are in 1991, unless otherwise indicated.

and went to Respondent's union hall placing his name on the out-of-work list. He continued to be a member of Local 819 and as such, Clements considered him a traveler because he was a member of another local, although seeking work through Respondent.

In early 1990, Bechtel entered into an agreement, called General Presidents Project Maintenance Agreement, with Respondent and with other unions. Pursuant to the terms of the agreement, the Respondent Union is the sole and exclusive source for referring operating engineers to be employed by Bechtel at the Arkansas Nuclear One facility, in Russellville, Arkansas. Pursuant to the agreement the Union began to refer individuals to Bechtel on January 28, 1990. At that time, Phillip Henderson reported to Bechtel, and on the following day, Paul Cooper reported in and both of these men became foreman for Bechtel.

On September 13, 1990, Ferguson was referred and reported to work for Bechtel as the eighth operating engineer on the project. On October 1, 1990, Earl Williams and Frank Evins were the last two operating engineers to report to work at the Bechtel project.

On December 14, 1990, Bechtel announced that it was laying off all of the operating engineers except Henderson and Cooper, who were foremen, but that the rank and file employees, including Ferguson, would be called back by name in early 1991.

In late January 1991, Bechtel commenced to recall operating engineers by requesting them through the Union. Between January 16 and 24, Bechtel specifically requested by name, employees Kirkpatrick, Hindman, Childres, Statler, and Evins. Kirkpatrick reported to Bechtel on January 24, Hindman on January 31, and Childres on February 7. On January 31, Bechtel Supervisor Lou Bouger contacted Respondent secretary Wilson, and requested Jimmy Ferguson and Earl Williams be referred back to the job on February 14. Ferguson and Williams reported on February 14, along with Statler and Evins.

A short time after February 14, Bechtel determined that they had called back too many of the operating engineers. Cooper testified that his superior, Bill Satko informed him that they would have to lay off two of the operating engineers and asked who they could lay off. According to Cooper, he responded that it didn't matter to him and that he would not give him any names, rather he would contact the business agent.

On February 18 and 19, Cooper called Clements concerning the layoff. According to Cooper's testimony he informed Clements of the need to layoff two employees and Clements asked which two. Cooper responded that Childres was requesting to be laid off so Clements said, "Get Childres," and then asked about the next one. Clements and Cooper then discussed who was the last employee to arrive at the jobsite and Cooper said he understood that it was Ferguson and Williams, to which Clements replied that he should get one of them. Cooper then stated it didn't make any difference to him which one was laid off, and Clements replied he had some, "long boom" work to be available and that Ferguson was a "long boom" hand. This work involves the use of cranes with booms for lifting attachments of 300 to 400 feet. Cooper testified that Clements was not really the one who had made the decision to lay off Ferguson and he

did not remember who made this decision, that it could have been Cooper himself.

In Cooper's affidavit he stated, inter alia, that he was not absolutely positive but he believed Clements told him that Ferguson was the last one sent out and should be let go. Furthermore, according to Cooper's affidavit, Clements also mentioned that he could use Ferguson on the long boom work.

Clements also testified that Cooper asked who should be laid off, to which Clements replied it was normally "the last one up there." Cooper allegedly replied that Ferguson and Williams were the last ones, but that Childres wanted to be laid off. Clements asked whether Williams or Ferguson was last and Cooper replied that it was Ferguson. Clements testified further that he had gotten inquiries concerning long boom operators so that it would not be any problem to get Ferguson work. Clements testified that he was not positive if it was Cooper who made the decision to layoff Ferguson. He agreed that his affidavit was correct in which he stated it was Cooper who did make the decision. At that point Clements retracted his testimony concerning the long boom work and he testified that he spoke to either Operating Engineers Local 369 Business Agent J. D. Maples, or Richardson, or he may have heard it secondhand. Moreover, according to Clements, he did not know if the call had come from the Memphis Local, regarding the long boom work, before February 19, the date of his conversation with Cooper.

Clements' affidavit reflects that he spoke to Maples with respect to a need for long boom crane operators before his conversation with Cooper. Assistant business agent with operating engineers Local 369 in Memphis, Tennessee, J. D. Maples, testified that 2 or 3 weeks prior to April 19 he contacted Respondent and spoke with Wilson the dispatcher. During this conversation, according to Maples, he requested to use Ferguson on the MAPCO Refinery Project, and Wilson agreed. Maples testified he didn't speak with Clements at that time because Clements was not in the office.

Cooper, after his conversation with Clements, reported back to Satko that Childres and Ferguson would be the two men to be laid off, and his reason for stating this was because Clements had told him that they were the two individuals to lay off.

On February 19, Ferguson reported to work and was told by Earl Williams that he and Childres were going to be laid off. Shortly thereafter, a Bechtel management individual met with Ferguson and Childres informing them of their layoff.

Clements averred that Ferguson was the last man on the job. This is contrary to the stipulation by the parties in which it is stated that Ferguson reported to work on February 14, with Williams, Statler, and Evins. Ferguson was not the last employee requested by Bechtel because, according to the stipulation, both Ferguson and Williams were requested on January 31.

Clements alleged that Ferguson was the last man on the job, and that this information was reflected on his out-of-work card, that is the day and time of the calls to Ferguson and Williams from the Union. After a review of the out-of-work cards of Ferguson and Williams, Clements conceded neither of the cards reflected the time and date of the Union's calls to them. Clements took the position that he was not the dispatcher and he's not as familiar with this procedure as is the dispatcher. Clements then stated that it was

the referral slips of Ferguson and Williams, which reflect that Ferguson was the last man on the job. The referral slips reflect that Williams signed his on February 11, and Ferguson signed the same document on February 12. Both documents reflect that each was scheduled to report on February 14 at 7:30 a.m. Clements testified that an employee may not be referred to a jobsite without signing the referral slip. This was revealed to be inaccurate and incorrect by the introduction of Hindman's and Mallett's referral slips, which neither individual had signed.

Dispatcher Wilson testified that the referral slips are utilized to verify that the individual was sent by the Union to the jobsite, and further utilized as a dues-checkoff authorization. She testified that the individuals must sign the referral slip before going to the jobsite and then they are to take the document to the site. Moreover, she testified it did not matter when the individual signed the document, and that it did not affect the individual's seniority in any way but that seniority was based upon when the individual reported to the job, rather than when they signed the referral slip. Perusal of the referral slips demonstrates the accuracy of Wilson's testimony in that Evins signed his checkoff authorization on January 29 and reported to work on February 14, while Statler signed his on January 31, and reported to work on February 14. In between January 29 and February 14, Hindman and Childres signed their checkoff authorizations and reported to work on January 31 and February 7. Wilson testified she kept a document for each job location of all individuals referred to the jobsite. The document lists reporting dates rather than the dates the individuals signed the authorizations.

Immediately after he was laid off, Ferguson went to the union hall where he met Clements. According to Ferguson he told Clements he had been laid off and had heard there was some "long boom" work available. Clements responded that no such work was available and Ferguson inquired, "Did you lay me off?" Clements stated he did not, but then stated, "Maybe he did and maybe he didn't, he was not saying." Clements did not testify with regard to this particular conversation.

Ferguson testified that later that day he received a telephone call from Bill Wright. According to Ferguson Wright stated that he, Ferguson, had gotten a raw deal and that if he, Wright, had been at the union hall when the layoffs were made it would not have happened. Wright asked Ferguson to return to the union hall the next day where they could meet with Clements and get the matter straightened out. Wright did not testify during the course of the hearing.

On February 20, Ferguson returned to the union hall and spoke with Clements. Wright was not present at the hall at that time. According to Ferguson, Clements asked what he wanted, and Ferguson responded that he wanted his job. Clements advised Ferguson that he was not getting his job back and that he was only interested in what was good for himself. Ferguson asked Clements if he had gotten laid off and Clements replied "No, Cooper had laid him off." Ferguson then stated he felt he had been discriminated against from the start citing a job where he believed he should have been called rather than Lassiter, at which point, according to Ferguson, Clements became angry and raised his voice. Ferguson testified that Clements stated, "Well my God, that man (Lassiter) is on the Executive Board." Ferguson asked what that had to do with anything and Clements stated,

"You're not going to come up here from 819 and run this Local, and if you don't like the deal you got here you can go to the Labor Board."

During his testimony Clements made no reference to this conversation.

Later during the week of February 19, Ferguson returned to the union hall and requested that Wright supply him with a copy of the constitution and bylaws. This request was in the presence of Wilson and Clements. Later that day Ferguson spoke with Wright on the telephone, at which time Wright said Clements had chewed him out and asked him why he was giving those copies to the enemy.

Sometime between late February and April 3, the date Ferguson filed the charge, he had another conversation with Wright in which Wright told him that if he did not go through the internal remedies set forth in the Union's bylaws, but instead [he] went to the Labor Board, he would be fined and the Union would seek reimbursement of expenses incurred in any legal proceedings. In this conversation Ferguson alleged that Wright specifically discussed the Union's bylaw which states that a member may be fined and assessed costs, if he files an action with an administrative agency before exhausting his internal rights and remedies.

Ferguson testified with respect to several other telephone conversations he had with Wright during April and May. During one conversation, Wright allegedly informed him that the legal actions before the Board would be a matter of public record and every union hall in the United States would have access to this information and his name would be "mud" across the country. In a later conversation Wright allegedly informed Ferguson that he could personally be sued through the Landrum-Griffen Act for bringing charges because of his frivolous lawsuit. In May, during another conversation, Ferguson alleges that Wright asked him if there was any way they could resolve the complaint. Ferguson replied that if Clements would pay him backpay and apologize he would drop the Board action. Wright responded he might be able to get the apology, but that he was quite sure there would be no monetary settlement, to which Ferguson responded he would not settle on that basis. Wright then told Ferguson, according to the testimony of Ferguson, that he (Wright) was pretty sure that he could get Ferguson a job with good pay, benefits, and permanency with a crane rental company which the Union hoped to sign up in Hot Springs. Ferguson stated he could not settle on those terms either.

Ferguson testified that he called Cooper at his home on March 20. A conversation ensued wherein Ferguson asked Cooper why he had been laid off, and Cooper replied it was Clements decision. Cooper told Ferguson that Clements gave two reasons for his layoff. One was that Earl Williams was retained because he is the brother of Bill Williams, business manager emeritus of Respondent Union, and also that some "long boom" work was available for Ferguson. Cooper also testified concerning this conversation stating he had been honest with Ferguson concerning the reason for his layoff and his conversation with Clements. According to Cooper, he did not know whether he informed Ferguson that Clements had made this decision, and he did not know whether he informed Ferguson that Clements had made this decision. He denied discussing Earl Williams, or the fact that Earl Williams was the brother of Bill Williams and that this played a large part in getting Ferguson laid off.

The text of the taped conversation reflects that Cooper did not want the responsibility of choosing whom to lay off. Moreover, that Clements chose to pick Ferguson for layoff because of the availability of the "long boom" work. Furthermore, that Earl Williams brother, "had a whole lot to do with Earl staying out there."

Conclusion and Analysis

The record amply demonstrates that the Respondent Union engaged in a violation of Section 8(b)(2) of the Act by causing Bechtel to lay off Ferguson. Throughout the record, a pattern emerges that Respondent was motivated by the fact that Ferguson was "a traveler," and Clements considered him "the enemy." Furthermore, I am convinced the Ferguson was chosen for a layoff, while Earl Williams was retained because Clements favored the brother of the business manager emeritus, Bill Williams.

I believe beyond any doubt that Wright told Ferguson that he (Ferguson) had gotten "a raw deal," when chosen for layoff. Moreover, the fact the Clements referred to Lassiter as a member of Respondent's executive board, as a basis for referring Lassiter out² before Ferguson, fits the pattern revealing Respondent's discriminatory motivation.

Wright offered Ferguson a permanent job with good pay and benefits if Ferguson dropped his charges with the Board. This more than suggests that Respondent knew exactly that it was violating the Act.

Clements testimony that Ferguson was the last man on the job contradicts the stipulation that states Ferguson was one of four employees who was recalled on February 14. Moreover, Clements conceded his ignorance of the hiring hall mechanics, stating, in effect that this was Wilson's (the dispatcher) domain.

Wilson acknowledged that the date the referral slip is signed does not impact with the employees' seniority on the job. Several referral slips show this to be true, there is no relationship between the dates signed and seniority on the job. Therefore, if Ferguson was the last one to sign his referral slip, it is of no significance as to his seniority or who was the last person on the job.

I found Ferguson to be an impressive witness and I fully credit his version of the events and facts as they occurred. His testimony was exacting, unambiguous, and scrupulous in its detail.

In my opinion, Clements made the sole decision to have Ferguson laid off. The availability of "long boom" work at the time of Ferguson's layoff was a fiction. I credit the testimony of Maples in this regard, and discredit Clements.

In the conversation between Ferguson and Clements on February 20, Clements referenced Ferguson's traveler status by stating that he was not going to come up from Local 819 and run Local 382. Furthermore, Clements' references to Lassiter's executive board status and job favor referral treatment reveal Respondent's motivations. Both statements violate Section 8(b)(1)(A) of the Act.

In my opinion, Respondent further violated Section 8(b)(1)(A) of the Act through the threat to invoke its bylaw.³ Ferguson's unrefuted testimony was that Wright attempted to

²The El Dorado job.

³Counsel for the General Counsel's motion in his brief, to correct the typographical error in the complaint is granted.

use this bylaw, which states that a member may be fined and assessed costs if he files an action with an administrative agency before exhausting internal rights and remedies, to restrain and coerce Ferguson. See *NLRB v. Shipbuilders*, 391 U.S. 418 (1968). There is no evidence that Wright referred to the 4-month proviso.

CONCLUSIONS OF LAW

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

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

3. Respondent caused Bechtel to lay off Jimmy Ferguson on February 19, 1991, in violation of Section 8(b)(2) of the Act, causing Bechtel to discriminate against an employee in violation of Section 8(a)(3) of the Act.

4. Respondent's references on February 20, 1991, to Ferguson's traveler status and its references to favoritism in referring out union officers violates Section 8(b)(1)(A) of the Act.

5. Respondent violated Section 8(b)(1)(A) of the Act by restraint and coercion through the threat to invoke its bylaw.

6. The unfair labor practices found above, occurring in connection with the interstate operations of Bechtel, are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has violated Section 8(b)(1)(A) and (2) of the Act, I shall recommend that it cease and desist therefrom, and take certain affirmative action necessary to effectuate the policies of the Act.

I recommend that the Union's hiring hall and referral procedures be available to Ferguson on an equal and non-discriminatory basis with union members, travelers, job applicants, and registrants.

I further recommend that Ferguson be made whole for any loss of earnings as the result of Respondent causing his layoff. Backpay and interest shall be computed in accordance with current Board policy.

Other nonwage benefits and entitlements, including accrued hours and seniority shall be restored to Ferguson.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴

ORDER

The Respondent, International Union of Operating Engineers, AFL-CIO, Local 382, Little Rock, Arkansas, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Causing or attempting to cause Bechtel or any other employer to lay off Jimmy Ferguson or any other employee in violation of Section 8(b)(2) of the Act.

(b) Coercing or restraining employees by suggesting traveler status can affect their employment.

⁴If 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.

(c) Telling employees that union officers receive favored treatment for referrals or during layoffs.

(d) Using its bylaws as a threat to impede an employees' right to access to Board processes.

(e) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

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

(a) Make its hiring hall and referral procedures available to Ferguson on an equal and nondiscriminatory basis with union members, travelers, job applicants, and registrants.

(b) Make Ferguson whole for any loss of earnings as a result of Respondent causing his layoff. Backpay and interest to be computed in accordance with current Board policy. Other nonwage benefits and entitlements, including what should have been his accrued hours and seniority shall be restored to Ferguson.

(c) Post at its business office, union hall, and all places where it customarily posts notices to members copies of the attached notice marked "Appendix."⁵ Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members 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.

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

⁵ 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 MEMBERS
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.

WE WILL NOT cause or attempt to cause Bechtel or any other employer to layoff Jimmy Ferguson or any other employee because they are travelers or because they do not hold any position as union officers.

WE WILL NOT coerce or restrain employees by suggesting their traveler status can affect their employment.

WE WILL NOT tell employees that union officers received favored treatment for referrals or during layoffs.

WE WILL NOT use our bylaws as a threat to impede employees' right to access to National Labor Relations Board processes.

WE WILL NOT in any like or related manner restrain or coerce members the exercise of their rights guaranteed them in Section 7 of the Act.

WE WILL make our hiring hall and referral procedures available to Ferguson on an equal and nondiscriminatory basis with union members, travelers, job applicants, and registrants.

WE WILL make Ferguson whole for any loss of earnings as a result of our causing his layoff. WE WILL pay him backpay and interest which we will compute in accordance with current Board policy. WE WILL restore to Ferguson other nonwage benefits and entitlements, including what should have been his accrued hours and seniority.

OPERATING ENGINEERS LOCAL 382 (BECHTEL
CONSTRUCTORS)