

**Dorey Electric Company and International Brotherhood of Electrical Workers, Local Union 666, AFL-CIO.** Case 5-CA-22435

September 17, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS  
DEVANEY AND RAUDABAUGH

On May 17, 1993, Administrative Law Judge James L. Rose issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs and the Respondent filed answering briefs.

The National Labor Relations Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings,<sup>1</sup> findings,<sup>2</sup> and conclusions and to adopt the recommended Order.<sup>3</sup>

ORDER

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

<sup>1</sup>The General Counsel and the Charging Party filed motions to strike material submitted by the Respondent to the judge after the hearing. The judge did not rule on those motions. We grant the motions to strike, but we note that striking the material does not affect our decision because, in fact, the filed material is not included as part of the record before us and because the judge did not rely on those materials in his decision.

<sup>2</sup>The General Counsel and the Charging Party have 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 judge's findings.

<sup>3</sup>The Respondent's brief in response to the General Counsel's exceptions makes reference to an attached Equal Access to Justice Act request. The request, however, was not included with the brief filed with the Board. Thus, the request is not properly before us.

*Angela S. Anderson, Esq.*, for the General Counsel.  
*Douglas Nabham* and *M. Peebles Harrison, Esqs.*, of Richmond, Virginia, for the Respondent.  
*Charles B. Sweeney*, of Richmond, Virginia, and *Steven Stump*, of Cincinnati, Ohio, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge. This matter was tried before me on January 26, 27, and 28, 1993, at Richmond, Virginia, on the General Counsel's complaint which alleged that the Respondent refused to hire certain named individuals because of their membership in the Charging Party in violation of Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. § 151 *et seq.*

This was based on a charge filed on December 16, 1991;<sup>1</sup> thus the General Counsel acknowledges that by operation of Section 10(b), any refusal by the Respondent to hire members of the Charging Party prior to June 16 cannot be considered, except as background evidence.

The Respondent admitted that the named individuals applied for jobs and were not hired. However, the Respondent denied that its refusal to hire them was based on their membership in the Charging Party or that it even knew they were union members.

Following the close of the hearing the parties submitted briefs and other documents, all of which have been considered. On the record<sup>2</sup> as a whole, including briefs and arguments of counsel, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is engaged in the construction industry as an electrical contractor, with its principal office at Norfolk, Virginia, but doing business in several States. The Respondent annually receives directly from points outside the Commonwealth of Virginia materials valued in excess of \$50,000. The Respondent admits, and I find, that it is an employer engaged in interstate commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

On the record evidence, I find that the Charging Party, International Brotherhood of Electrical Workers, Local Union 666, AFL-CIO (the Union), represents employees of employers engaged in interstate commerce and is therefore a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background Facts*

The Respondent is a large multistate electrical contractor which does business as a "merit shop," a euphemism for operating nonunion. In January 1991, the Respondent began a large project referred to in the record as the Richmond Newspaper job.

As explained by Doyle Deaton, the Respondent's project superintendent of this job, and a witness whom I found to be generally credible, in the early spring he began hiring electricians, helpers, and laborers to supplement the Respondent's cadre of employees and, from his testimony and company records, hiring continued throughout 1991, until the project was completed. Deaton testified that he, and the employees, worked four 10-hour days on the project, which left him free to interview prospective employees on Friday of the weeks when hiring was to be done. Deaton's procedure was to have his office staff take applications from anyone interested in a job and to tell the applicant to come in Friday for

<sup>1</sup>All dates are in 1991, unless otherwise indicated.

<sup>2</sup>The General Counsel's motion to correct the record is granted: the key to craft codes are to be part of G.C. Exh. 2; "Jerry" Krouse is corrected to "Sherry"; and "Ryan" Electric is corrected to "Varina." In addition, there are many errors in the transcript which are obvious and do not affect the substance of the testimony. They are therefore ignored.

an interview, if there was to be hiring that week. If an applicant was not hired, he (or she) would have to repeat the process, including filing out an application, in order to be considered in a subsequent round of hiring. Deaton said he used this procedure, rather than referring to previously filed applications, because his experience indicated such was more efficient. Trying to call prospective employees, he found, was time consuming and often fruitless.

Thus, rather than attempting to call those who had applications on file, the Respondent ran newspaper ads and would take applications from those who inquired about a job. The General Counsel seems to argue that this procedure was meant to discriminate against the union members, but the evidence shows that all applicants were treated the same. Conversely, the Respondent argues that where an application was filed during a week when the Respondent did not hire, there could be no discrimination because there was no job available, citing *Falcone Electric Corp.*, 308 NLRB 1042 (1992). The application of *Falcone* here need not be decided, because I conclude that the General Counsel failed to establish company knowledge of union membership of the alleged discriminatees.

In hiring, Deaton principally relied on the recommendations of foremen and where possible hired former employees of the Respondent. On one occasion he hired four employees who worked for another electrical contractor as an accommodation to that contractor and to keep these individuals employed. However, it appears that by far the majority of the 90 or so employees on the Richmond Newspaper job were hired through the application/interview process, which, because of changing workload and turnover, lasted throughout the project. Deaton testified that he interviewed between 200 and 250 job applicants and hired 80 to 85.

Deaton further testified that as a matter of policy, he would not hire a journeyman electrician for a helper or laborer job. In his experience, when a journeyman is hired at lower job than his skill, he will quit as soon as he finds a journeyman position somewhere else.<sup>3</sup>

## B. Analysis and Concluding Findings

### 1. General

Each of the 11 alleged discriminatees was a member of the Union, filed one or more applications, and was interviewed, but none was hired. On the other hand, so far as can be determined from the record, no applicant who was hired was a union member (a fact which is supported by admissions of counsel for the Respondent). These facts raise the suspicion that the Respondent sought to exclude members of the Union, and the General Counsel so alleged.

However, to establish a violation of the Act, the General Counsel has the burden of proving the relevant factors by direct evidence, or reasonable inference. *Wright Line*, 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981). Proof of suspicious circumstances is not enough.

<sup>3</sup>This policy was called into question with the hiring of Robert Johnson on October 1. Johnson had a journeyman's card and testified that he was experienced in the work done by the Respondent. Deaton testified that he did not think Johnson was qualified as a journeyman and hired him as a helper. I found Deaton credible and do not consider this conflict significant.

The General Counsel argues that Respondent's intent to discriminate against members of the Union can be imputed from the fact that it refused to hire union members and hired only nonmembers. Therefore, one factor which must be proven is the Respondent's knowledge that the named discriminatees were in the Union and that the Respondent knew that those applicants who were hired were not union members. To prove the disparity of treatment alleged (and found in *Fluor Daniel, Inc.*, 304 NLRB 970 (1991), on which the General Counsel relies) the General Counsel must prove both that those applicants not hired were known members of the Union and those hired were known not to be members.

On this threshold issue, I conclude the General Counsel failed to sustain the burden of proof. Except as to Thomas A. Bresco, Ronald Jackson, and Corbin Poh, the evidence of record simply cannot support an inference that the Respondent (or Deaton) knew the applicants named in the complaint were members of the Union whereas applicants hired were not. Bresco and Jackson were named in a charge filed by the Union on May 9 (which was dismissed). Bresco put his union status on his applications, as did Poh on a resume attached to his application. During a confrontation in the Respondent's office on June 14, Jackson asked if his not being hired was because of his union membership. But nothing on the applications of the others indicated union membership. Nor was the Union or union membership mentioned during Deaton's interview of any alleged discriminatee.

Citing *Fluor Daniel*, supra, the General Counsel contends that the Respondent's knowledge that each alleged discriminatee was a union member can be inferred from his or her application. Because union members were rejected and nonmembers were hired, it can be inferred that such was not mere conscience. Thus, it can further be inferred that the reason for this disparity of treatment was their union membership and, therefore, the Respondent violated Section 8(a)(3) of the Act.

In *Fluor Daniel*, supra, work for known union employers and high wages were two factors noted by the administrative law judge and the Board in concluding knowledge of the applicants' union membership. However, it is doubtful whether such alone would have been sufficient to sustain the General Counsel's burden of proof. In *Fluor Daniel*, most of the applicants stated they were volunteer union organizers, were members of the union, and/or listed the union's business agent as a reference. Further, 46 of the 48 discriminatees filed applications en masse under circumstances which would make the situation unforgettable. Finally, the respondent defended on grounds that as union organizers they were not bona fide employee applicants, thus implicitly admitting it knew they were union members.

Finally, in *Fluor Daniel* the respondent's managers admitted they knew which area contractors were union and which were not. Such is not the case here. Deaton creditably testified that he came to the Richmond Newspaper project from North Carolina and did not know the local contractors.

Nevertheless, the General Counsel argues that union membership can be inferred from the applications because each named individual listed employers "who were known to be union" and stated wages which were high enough that it could be surmised that the employer had a contract with the Union. Such has been rejected by the Board as sufficient to

support the General Counsel's burden of proof in a case such as this. *Tyger Construction Co.*, 296 NLRB 29, 37 (1989). In *Tyger*, the administrative law judge pointed out that in the southeastern part of the country, where (as here) most States have "right-to-work" laws, the fact that one may work for a "union employer" is not conclusive of union membership.

On the other hand, because the Union here obviously had no problem with its members working for nonunion employees, such as the Respondent, the fact that an applicant's employment history included work for known nonunion contractors would not disprove union membership. Therefore it cannot be inferred that those who listed nonunion previous employers on their applications were necessarily not union members—even if Deaton knew which local contractors were union and which were not.

The General Counsel argues that such knowledge can be imputed to Deaton because Curtis Williams, who was a part-time personnel director for the Respondent and participated to some extent in the interviewing, was very knowledgeable about the electrical industry in Richmond. I decline to make such an inference because it rests on the assumption that Deaton wanted to know which applicants might be union members, which itself is an element of the General Counsel's case. That is, if Deaton aimed not to hire union people, then he might reasonably inquire as to which were union contractors. But if he did not care whether an applicant belonged to the Union, then there would be no particular reason for him to seek out this information. To infer, against Deaton's contrary testimony, that he must have asked who were the union contractors would require first concluding that he was embarked on the unfair labor practice alleged.

Although relatively high wages might suggest the work was for a union employer, application of the "Davis-Bacon Act" is well known in the construction industry. On certain projects this law requires an employer to pay the prevailing wage, which is usually the union scale, regardless of whether the employees are union members. Thus a high previous wage is not really proof of union membership. But if it was, I note that three applicants who were hired listed previous wages in the \$13- to \$20-per-hour range—which the testimony suggests was union scale. Finally, although the Respondent's journeyman wage was generally less, some were paid \$18.75 per hour and the Respondent was nonunion. Wage rates on an application do not prove much.

In sum, a work history may raise a suspicion that the applicant is or is not a union member. But such falls short of being sufficient evidence on which to base a conclusion that the General Counsel's burden of proof has been met.

No Board case has held that simply listing union contractors as previous employers or relatively high wages and/or having completed a union-sponsored apprenticeship course is sufficient to establish prima facie that the employer knew the applicant was a union member. In *Tyger* it was held that work history showing union employers was not enough. *Tyger* was distinguished in *Fluor Daniel* because there were many additional factors proving that the applicants were union members. And in *VOS Electric*, 309 NLRB 745 (1992), the General Counsel established company knowledge of union membership as to those who so stated on their applications, or who stated they had been trained in a union-sponsored program, but not as to those who simply named union contractors as previous employers.

At most, some of the applicants here listed union contractors among their previous employers (as did other applicants) and some stated they had been trained in the "Richmond Joint Apprenticeship." There is no indication in the documents available to Deaton, however, that this was in any way affiliated with the Union, or implied union membership.

I therefore conclude that the General Counsel did not prove, even prima facie, that the Respondent or Deaton knew that Terry Pettiford, Harold G. Ross, James T. Stafford, Henry A. Redford, Thomas Carr, Sherry P. Krouse, Jimmy Pollard, or David A. Williams was a member of the Union.

As to Bresco, Jackson, and Poh, there is no allegation or argument that they were in any way discriminated against for having engaged in protected activity other than being a member of the class which the Respondent sought to exclude from employment. If, as I conclude, the Respondent cannot be held to have based its hiring decisions on union membership, the mere fact that the Respondent knew these three were members does not prove an unfair labor practice.

There is no evidence of animus toward the Union by Deaton or the Respondent nor any statements by any management personnel which would suggest that the Respondent sought to discriminate against union members in general. Deaton credibly testified that he did not care whether a prospective employee was a union member or not. This tends to be supported by the fact one applicant who was not hired put on his application, "I hate the union." If Deaton sought to insure a nonunion work force, it is reasonable to surmise this applicant would have been hired.

Along with no evidence of union animus, there is no evidence of how the Respondent would gain by refusing to hire 11 union members in an employee complement of 90.

The Respondent received about 250 applications for jobs on the Richmond Newspaper project, only a handful of which were submitted by members of the Union. If there were jobs available when an application was received, the applicant was interviewed. Most, however, were not hired. On this record I conclude they were all given the same consideration.

Nor is there evidence that the Respondent sought to discriminate specifically against Bresco, Jackson, or Poh because of their union membership. Indeed, the Respondent offered persuasive reasons for not hiring Bresco and Jackson. There is little evidence concerning Poh, who, at the time of the hearing, was in prison.

## 2. Thomas A. Bresco

Bresco stated his union membership on his several applications and wore a union T-shirt to an interview. Knowledge of his union membership is unquestioned and undenied.

Bresco filed his first application in January, but the Respondent was not then hiring journeymen. He called and submitted additional information and in March applied for a helper's job, but nothing came of this. Then in April he was told the Respondent was accepting applications for journeymen and on April 19 submitted another application. He was interviewed by Deaton, asked about his previous employment, and was offered a job. Along with others (3 or 4 according to Bresco, 11 according to Deaton) he filed out tax forms and gave a urine sample for drug analysis.

However, neither he nor the others were in fact called to work. Deaton creditably testified that the material these indi-

viduals would have been using did not come in, so he had to cancel their employment offers.

Though Bresco testified that he had conversations with William Van Divinder, branch manager of the Respondent's Richmond office, in April, it is unclear whether this was before April 19. It is also unclear when Bresco again applied. However, the General Counsel alleges that he was first discriminated against when he was not hired on June 23 and two helpers (Joseph G. Bradfield and Randall K. Foster) were. (This was his earliest application within the 10(b) period, though he had submitted others previously.)

In any event, by June, Bresco had become a fixture at the Respondent's office and had, in the words of Deaton, made himself a nuisance. Such could reasonably explain why Deaton would not be favorably disposed to Bresco over other applicants. Clearly the Respondent was not required to hire Bresco just because he was a union member. The Respondent's only obligation was not to treat him disparately because he was. I conclude the evidence is insufficient that the Respondent failed to hire Bresco because of his union membership.

In fact, the Respondent hired Bresco in April. There is no evidence that such was not a bona fide offer, which was subsequently withdrawn because material did not arrive. Had the Respondent intended to discriminate against Bresco because of his union membership it is unlikely that he would have been offered the job in April. Indeed, the earlier charge, which presumably included this event, was dismissed.

I believe that the Respondent gave serious consideration to employing Bresco but when, after time, he made himself a pest, other applicants prevailed. There is no evidence that any individual hired when in competition with Bresco was not competent or as potentially qualified as Bresco. In short, I conclude that the General Counsel did not make out a case of discrimination against Bresco.

### 3. Ronald L. Jackson

Jackson first applied for a job in January, was not hired, and reapplied in April and thought he was hired, because he was given a drug test; however, as with Bresco, the job did not materialize. (As with Bresco this was apparently an event alleged in the dismissed earlier charge.) When Jackson applied on June 14, he was told he had to fill out another application, which resulted in his being abusive to Becky Tyree, the Respondent's then secretary.

Jackson admitted yelling at Tyree when told he would have to fill out another application, but he testified that in his opinion such should not have prevented his being hired, because "if you're yelling because you're right, you could probably get the job."

Although Jackson was considered along with the other applicants, I conclude that where there was a choice between him and another, which was always the case, the Respondent did not exhibit proscribed discrimination in not selecting Jackson. Again, there is no evidence of union animus or that anyone hired in competition with Jackson was not at least as qualified as he.

### 4. Corbin Poh

Although the Respondent offered no evidence of why Poh was not hired, because I conclude that the General Counsel did not establish prima facie that this refusal was unlawful, none was required.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>4</sup>

#### ORDER

This case is dismissed in its entirety.

<sup>4</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.