

Cobra Construction Company, Inc. and Charles D. Williams. Case 22-CA-19464

December 12, 1994

DECISION AND ORDER

BY MEMBERS STEPHENS, BROWNING, AND COHEN

On July 29, 1994, Administrative Law Judge D. Barry Morris issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed a brief in opposition to the General Counsel's exceptions.

The Board has considered the decision and record in light of the exceptions and briefs 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), enf. 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 excepts, arguing, among other things, that the judge erred by not finding that employees Williams and Benjamin were engaged in protected concerted activity about September 14, 1993, when they asked the Respondent whether they were being paid prevailing wage rates. We agree that Williams and Benjamin were engaged in protected concerted activity by this conduct, which the Respondent concedes, and which the judge appears implicitly to find. We further find, however, that assuming that the General Counsel established a prima facie case that Williams and Benjamin were laid off because of their protected concerted activity, the Respondent established that it would have laid off both employees, in any event, for lack of work.

Stephen J. Holroyd, Esq., for the General Counsel.
Robert T. Lawless, Esq. (Hedinger & Lawless), of Florham Park, New Jersey, for the Respondent.

DECISION

STATEMENT OF THE CASE

D. BARRY MORRIS, Administrative Law Judge. This case was heard before me in Newark, New Jersey, on April 28, 1994. On a charge filed on September 20, 1993,¹ a complaint was issued on October 28, alleging that Cobra Construction Company, Inc. (Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act). Respondent filed an answer denying the commission of the alleged unfair labor practice.

The parties were given full opportunity to participate, produce evidence, examine and cross-examine witnesses,

¹ All dates refer to 1993 unless otherwise specified.

argue orally, and file briefs. Briefs were filed by the General Counsel and by Respondent.

On the entire record of the case, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation with an office and place of business in North Arlington, New Jersey, has been engaged as a general contractor in the construction industry, doing commercial and industrial construction. During the 12-month period preceding the issuance of the complaint Respondent purchased and received at its New Jersey facility goods valued in excess of \$50,000 directly from points located outside the State of New Jersey. Respondent admits, and I so find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

In 1993 Respondent was awarded a contract with the Union City, New Jersey School District to renovate and refurbish five of the district's schools. Charles Williams and Edward Benjamin were hired by Respondent in early August 1993. While they were initially hired to perform demolition work, they soon began doing carpentry work and therefore their wages were increased to \$23.33 per hour.

On September 14 or 15, Williams and Benjamin spoke with the two owners of Respondent, Salvatore DiBlasi and Giorgio Burgagni. They first inquired into their status, asking if they were listed as carpenters on Respondent's payroll. On being informed that they were carpenters they asked if they were being paid at the prevailing wage rate. Williams and Benjamin testified that DiBlasi responded that they were being paid the prevailing wage and offered to retrieve the prevailing wage list from the job trailer to show them. DiBlasi testified that when they asked whether they were being paid the prevailing wage, he responded:

Yes, you are. . . . Check your paystubs. . . . You have the hourly rate on your paystubs . . . and besides that, if you really want to double check that, down at the trailer I have posted in the trailer the prevailing wage rate.

Williams testified that at the end of the conversation Burgagni said "bring their check back. They don't work for us no more." Similarly, Benjamin testified that at the end of the conversation Burgagni said "bring our checks . . . because we are fired. We don't work for them anymore." Both Williams and Benjamin testified that no reason was given for their termination. DiBlasi denied that Burgagni participated in the conversation and specifically denied that Burgagni made any comment about bringing their paychecks or that Williams and Benjamin no longer worked for Respondent.

DiBlasi testified that the conversation took place on September 14 and that Williams and Benjamin were laid off the following day. When asked why the two were laid off, DiBlasi replied "because their work was winding down. . . . They were working on the wall at the Robert Walters

School, and when that portion of the work was ended, that's when we laid them off." The record also shows that two other carpenters, Fiedel and Asberry, were laid off on September 13. Fiedel had been employed by Respondent prior to Williams and Benjamin being hired and it was Fiedel who recommended that the two contact Respondent for employment.

B. Discussion and Conclusions

The record indicates that both Williams and Benjamin were working as carpenters and were being paid the prevailing rate. On September 14 or 15 Williams and Benjamin asked DiBlasi and Burgagni whether they were being paid the prevailing rate. DiBlasi told them that they were being paid the prevailing rate and they could verify that by looking at the sheet, which was located in the trailer. While Williams and Benjamin testified that Burgagni told them at that time that they should take their checks and that they were fired, DiBlasi denied that Burgagni even participated in the conversation. During cross-examination Benjamin conceded that in the affidavit which he provided to the Board he stated that Burgagni "didn't say anything." Accordingly, I credit DiBlasi's testimony that it was the day following the conversation that the two were advised that they were laid off because of lack of work.

One of the elements in determining whether the General Counsel has made a prima facie showing is whether it has been demonstrated that animus exists on the part of Respondent. See *Salem Paint, Inc.*, 257 NLRB 336, 339-340 (1981). No such showing has been made in this record. Williams and Benjamin asked Respondent's owners whether they were being paid at the prevailing rate. DiBlasi responded that they were being paid at the prevailing rate and told them to check their paystubs and also offered that they could look at the prevailing rate schedule which was posted in the trailer. There is no indication in the record that Williams and Benjamin were not being paid the prevailing rate. No reason is given by the General Counsel why the question would have motivated Respondent to terminate the two employees, especially since it appears that the two were being

paid at the prevailing rate. Accordingly, I find that the General Counsel has not made a prima facie showing to support the inference that protected conduct was a motivating factor in the Employer's decision.

Even if I were to have found that the General Counsel did make a prima facie showing, I believe that Respondent has satisfied its burden of demonstrating that the "same action would have taken place even in the absence of the protected conduct." *Wright Line*, 251 NLRB 1083, 1089 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982). Two other employees had already been laid off on September 13, including Fiedel, who had been hired prior to Williams and Benjamin and who had recommended that they apply for employment with Respondent. In addition, the record shows that by September 15, total carpenter hours had declined dramatically. Thus, for the weeks of August 23 and September 1 there were 231 and 248 hours worked, respectively. Total carpenter hours declined to 180 for the week of September 6, 138 for the week of September 13, and 15 for the week of September 20. Accordingly, even had a prima facie showing been made, I believe that Respondent has satisfied its burden under *Wright Line*, *supra*. I conclude, therefore, that the complaint should be dismissed.

CONCLUSIONS OF LAW

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

2. Respondent has not engaged in the unfair labor practice alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²

ORDER

The complaint is dismissed.

²If 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.