

E. G. Clemente Contracting Corp. and Eric Forbes.
Case 29-CA-17207

November 16, 1994

DECISION AND ORDER

BY MEMBERS DEVANEY, BROWNING, AND COHEN

On June 20, 1994, Administrative Law Judge Howard Edelman issued the attached decision. The Respondent 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 conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, E. G. Clemente Contracting Corp., Staten Island, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

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

We adopt the judge's finding (to which there are no exceptions) that Charging Party Eric Forbes began his employment with the Respondent in 1990, subsequent to the Respondent's entering into the 1990-1993 collective-bargaining agreement. In so doing, we find it unnecessary to pass on the rest of the judge's discussion in the fifth paragraph of his findings of fact.

Emily Do Sa, Esq., for the General Counsel.
Michael Salgo, Esq., for the Respondent.

DECISION

STATEMENT OF THE CASE

HOWARD EDELMAN, Administrative Law Judge. This case was tried before me on January 11, 1994, in Brooklyn, New York.

On March 9, 1993, Eric Forbes, an individual, filed a charge against E. G. Clemente Contracting Corp. (Respondent), alleging that he was discharged because of his membership in, and activities on behalf of, Building, Concrete, Excavating & Common Laborers' Union, Local No. 731 of Greater New York and Vicinity, Laborers' International Union of North America, AFL-CIO (the Union). On April 23, 1994, a complaint issued alleging the discriminatory discharge set forth in the charge filed above.

Briefs were submitted by counsel for the General Counsel and counsel for Respondent. Based on my consideration of

the briefs, the entire record, and the demeanor of the witnesses, I make the following

FINDINGS OF FACT

Respondent is a New York corporation with its office and place of business located in Staten Island, New York. Respondent is engaged in the repair and restoration of water mains. Respondent annually performs the services described above, for in excess of \$50,000 for various entities located in the State of New York, which enterprises are directly engaged in interstate commerce and meet at least one Board standard for the assertion of jurisdiction, exclusive of indirect inflow or indirect inflow. Respondent admits and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

It is admitted and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

It is also admitted and I find that since 1990, the Union has been the collective-bargaining representative of Respondent's employees, and has since 1990 been a party to a collective-bargaining agreement with the Union.

Forbes began his employment with Respondent sometime in 1990, probably after Respondent entered into its collective-bargaining agreement with the Union. This is probably true because Forbes was kept out of the Union by Respondent, although he asked Respondent at various times up to 1992 to notify the Union of his employ and make him a member, Respondent did not do so.

Sometime in June or July 1992, Forbes contacted the Union and notified it of his employment. Forbes became a member of the Union at this time and Respondent was required to make back payments to the various funds set forth in the parties' collective-bargaining agreement, which amounted to over \$20,000. Respondent's owner, Emil Gary Clemente, subsequently informed Forbes that he was displeased by Forbes' action. Emil Gary Clemente did not testify in this trial. Thus, Forbes', who I found to be a credible witness, testimony is un rebutted and credited.

On the morning of January 5, it was raining very hard. Forbes, who had worked on a particular jobsite located on Amboy Road, Staten Island, on January 4, reported to the same jobsite on January 5 at about 7:30 a.m. He observed workers who had been working on other jobsites on January 4 presently working on his jobsite. Jeffery Clemente, an admitted supervisor within the meaning of the Act was in charge of the Amboy road crew, told Forbes that he would not be allowed to work today, because of the difficult conditions which required his most experienced workers. An argument between Forbes and Clemente ensued over the right of Forbes to work the Amboy jobsite. At some point during this argument Forbes told Clemente that he was going to complain to the Union, and following this statement, Clemente told Forbes that he was discharged. Such testimony is consistent with Forbes' direct testimony and with admissions of Clemente during cross-examination and in his Board affidavit.

Clemente testified in his direct testimony that he merely told Forbes to go home for the day and come back the next day. However, such testimony is contradicted by his admission during cross-examination and his Board affidavit, described above. Therefore, I do not credit his direct testimony.

Following his discharge by Clemente, Forbes called Respondent's office to notify it of his discharge. Forbes first spoke with Michael Coppotelli, who I find to be a supervisor within the meaning of the Act, in view of his admission that he has authority to responsibly recommend hiring and firing of employees. Forbes informed Coppotelli of his discharge and of the facts which led to it. Coppotelli told Forbes that "just wait a day to cool off, then come back to work," "if you speak to Jeff [Clemente] I'm sure that he would hire you."

Several days later, Forbes returned to Respondent's office, presumably to pick up his pay and spoke with Vincent Timponelli, Respondent plant manager and an admitted supervisor within the meaning of the Act. Forbes told Timponelli what had happened and Timponelli told Forbes "that all he would have to do was go to the job, see the supervisor [Jeffrey Clemente] and I'm sure he [Forbes] could get the job back again." Timponelli then testified that all employees who were terminated for arguments on the job had been ultimately reinstated. I regard such testimony as gratuitous and not believable. In any event there is no evidence that Respondent ever offered such reinstatement to Forbes.

Conclusions

It is alleged that Respondent terminated Forbes because he threatened to file a grievance concerning Respondent's refusal to let him work the Amboy jobsite on January 5, 1993.

In determining whether an employer terminates an employee in violation of Section 8(a)(1) and (3), General Counsel has the burden of establishing that Forbes' union activities were a motivating factor in such discharge. Once such factor is established, the burden shifts to Respondent to establish that the same action would have taken place notwithstanding such union activity. *Wright Line*, 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 398 (1983).

It is clear that Respondent had prior union animus toward Forbes in view of his 1992 complaint to the Union concerning his nonmembership. Such complaint cost Respondent \$20,000 in back payments to the Union's funds plus future payments on behalf of Forbes. Respondent owner Emil Clemente expressed his displeasure with Forbes' action personally to Forbes. I conclude that such statement in response to Forbes' filing what must be considered a grievance concerning his nonmembership in the Union is clear evidence of union animus. *Kuhlman, Inc.* 305 NLRB 481, 483 (1991).

It is also clear that discharging an employee because he threatens to file a grievance with the Union is a violation of Section 8(a)(1) and (3). *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984). In the instant case, Jeff Clemente effectively admitted that is exactly why he terminated Forbes. Thus, Respondent failed to establish that such action would have taken place notwithstanding Forbes' union activity. Accordingly, I find Respondent discharged Forbes in violation of Section 8(a)(1) and (3).

Respondent has also failed to establish that it effectively conveyed an unconditional offer of reinstatement to Forbes.

CONCLUSIONS OF LAW

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

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

3. By discharging and thereafter refusing to reinstate its employee, Forbes, Respondent violated Section 8(a)(1) and (3) of the Act.

4. The aforesaid unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent engaged in an unfair labor practice, I shall recommend that it be ordered to cease and desist therefrom and take certain affirmative action to effectuate the policies of the Act.

I recommend that Respondent be required to offer unconditionally to Forbes full reinstatement to his prior job and, if such job no longer exists, to a substantially equivalent job, without prejudice to his seniority or any other rights or privileges previously enjoyed, and to make Forbes whole for any loss of earnings or other benefits suffered as a result such unlawful discharge with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), less taxes which should be withheld.

Provisions should also be made for the position of an appropriate notice to employees.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹

ORDER

The Respondent, E. G. Clemente Contracting Corp., Staten Island, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging its employees because of their union activities on behalf of Building, Concrete, Excavating and Common Laborers' Union, Local No. 731 of Greater New York and Vicinity, Laborers' International Union of North America, AFL-CIO or for engaging in other concerted activities protected by the Act.

(b) In any like or related manner interfering with, 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) Offer to Eric Forbes immediate and full reinstatement to his former job or, if such job no longer exists, to some substantially equivalent position, without prejudice to his seniority, or other rights or privileges previously enjoyed.

(b) Make Forbes whole for any loss of earnings and other benefits suffered as a result of his unlawful discharge with interest in the manner set forth in the remedy provision of this decision.

(c) Expunge from its records any reference to the unlawful discharge of Forbes and provide written notice to him that

¹If 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.

this has been done and that the discharge will not be used against him in any way.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its place of business in Staten Island, New York, copies of the attached notice marked "Appendix."² Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees 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.

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

² 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 EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT discharge employees because of their union activities on behalf of Building, Concrete, Excavating & Common Laborers' Union, Local No. 731 of Greater New York and Vicinity, Laborers' International Union of North America, AFL-CIO or any other labor organization or because they engage in protected, concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Eric Forbes immediate and full reinstatement to his former job or, if such job no longer exists, to a substantially equivalent position without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make the above-named employee whole for any loss of earnings and other benefits suffered as a result of his unlawful discharge, with interest.

WE WILL notify the above-named employee in writing that we have expunged from our records any reference to his unlawful discharge and that the discharge will not be used against him in any way.

E. G. CLEMENTE CONTRACTING CORP.