

**Belfance Electric, Inc. and International Brotherhood of Electrical Workers, Local 166, AFL-CIO.** Case 3-CA-18853

December 13, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS COHEN  
AND TRUESDALE

On June 22, 1995, Administrative Law Judge Raymond P. Green issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed a brief answering the General Counsel's exceptions.

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,<sup>1</sup> and conclusions and to adopt the recommended Order.<sup>2</sup>

ORDER

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

<sup>1</sup>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.

<sup>2</sup>In light of the General Counsel's exception, we will strike Appendix A from the judge's decision—apparent excerpts from the International Brotherhood of Electrical Workers' "salting manual." This material was not submitted in evidence, and it is not otherwise appropriately part of the record in the circumstances of this case.

*Alfred E. Norek, Esq.*, for the General Counsel.  
*William E. Lorman, Esq.*, for the Respondent.  
*Robert Shutter Jr.*, for the Charging Party.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. This case was tried in Albany, New York, on May 8, 1995. The charge was filed on September 22, 1994, and the complaint was issued on October 20, 1994. The complaint alleges that the Respondent refused to hire the employees listed below because they were members of the Union.

Mike Basso	Thomas Letendre
Henry Crobok	Dave Saunders
Maurice Goyette	Robert Shutter
Mike Herrington	Steve Zadrozny
Allen Herzog	

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

FINDINGS OF FACT

I. JURISDICTION

The company is a New York corporation, engaged in the business of electrical contracting and it has its principal place of business in Amsterdam, New York. The complaint alleges and the answer admits that during the past 12 months, the Company provided services valued in excess of \$50,000 to other enterprises directly engaged in interstate commerce, including Northland Associates, Inc. Based thereon, I find that the Company meets the Board's indirect outflow standards for asserting jurisdiction and that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. At the hearing, the Company admitted and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The locus of the transactions involved in this case are in Amsterdam, New York, where a Super K-Mart was being constructed. The original electrical subcontractor for this project was a company called Radac. At some point in July 1994, because Radac could not obtain enough manpower, Valley Electric was engaged by the General Contractor to do some electrical work as the construction was reaching completion. Valley Electric was owned by two men, David Belfance and Joseph LePlant, and they employed a crew of around 12 people to do electrical work at the site.

In August 1994, the two partners of Valley decided to split up and Belfance Electric was formed. Its first job was doing electrical work at the Super K-Mart site and it commenced operations at the site (and as a company) on August 5, 1995. As part of the split, Belfance Electric hired some of the employees previously employed by Valley, these being, David Mead, Ed Dunscombe, Bob Hoyt, Kevin Bagdan, Orlando Intelisano, Randy Hirschfield, Ken Zyzes, and Robert Zyzes. Other employees of Valley remained with that company and it continued to work at the site also. Of the group of employees hired by Belfance, Robert and Ken Zyzes are members of the Union and Bagdan is a member of the IUE. This, however, may not have been known to the Employer.

On Saturday, August 6, 1994, Robert Shutter, a union organizer, came to the jobsite with the group of eight other people who are alleged to have been unlawfully refused employment. The group included Maurice Goyette who was an assistant business agent. The other men were members of Local 166, all of whom were journeymen, with the exception of Mike Basso, who was at the time, a fourth year apprentice. In any event, Shutter, acting as spokesman for the group, eventually wound up speaking with Dave Belfance. According to Shutter, he asked for employment for himself and the other men, and was told by Belfance to write down, on a piece of paper, the names, phone numbers, and past experience of the men. There was no discussion about what if any jobs were available; nor was there any discussion about pay rates or about any other terms of employment. (Except that Shutter states that he said that he wanted to work at nights and on weekends.) Before leaving the site, the paper

(G.C. Exh. 2) was filled out and left with Dave Belfance. There is no dispute that Belfance never contacted any of the people on this list for jobs. There is also no dispute that these individuals were complete strangers to Belfance prior to their appearance at the jobsite on August 6.

Shutter testified that he and the other members went to the jobsite on August 6, seeking employment and brought their tools ready to start immediately. He also states that the group went to the site pursuant to the IBEW's salting program, which has been previously described by me in Sullivan Electric Company and Consolidated Electrical Service Inc., JD(NY)-11-95. Since Local 166 as part of the IBEW has adopted the salting program and resolutions, I am attaching hereto as Appendix A (omitted from publication), portions of the IBEW's salting manual.<sup>1</sup>

On Saturday, August 6, the Company had eight people on the job, including the two Zyzes brothers, who as noted above, were members of Local 166. On August 8, 1994, the Company hired Tom Billington, essentially as an electrician's helper at \$20 per hour. This person was Belfance's uncle.

According to Ken Zyzes, on or about Monday, August 8, he asked Belfance if he needed anyone else to work. He states that when Belfance said yes, Zyzes recommended Howard McDonald, who was a coworker with Zyzes at General Electric. Belfance agreed to hire McDonald based on Zyzes' recommendation and he started work, as an electrician, on August 9 at \$20 per hour. Belfance testified that he had spoke to Zyzes about this person before August 6 and had agreed to put him to work when he was available. He states that he decided to hire McDonald because he trusted Zyzes who had previously recommended the hire of his brother and Bagdan, both of whom turned out to be good workers.

On August 15, the Company hired David DeForest who is a cousin-in-law of Belfance. He was hired as a helper and was paid off the books. DeForest worked 4 days through August 18.

On August 16, the Company hired Mark Nightingale and Richard Davis and listed them as subcontractors. Belfance testified that he engaged these two men because they both worked for Mark Nightingale's father who is an electrical contractor in Amsterdam with whom he has had business dealings. Mark Nightingale worked until August 26 and Davis worked until August 31.

On August 18, Vincent Daly was essentially hired off the street. He was hired as an electrician and agreed to work for \$12 per hour. He worked 11 days until September 1, 1994. In this regard, Daly was the only electrician who came in as a total stranger to Belfance. (Although this record does not contain the wage rates normally paid for IBEW electricians, I suspect that they are far higher than \$12 per hour.)

Mark Brady was hired on August 23 as an electrician at \$15 per hour. Belfance testified that Brady was hired solely to put in the controls for the fire extinguishing system (a job that apparently requires some degree of specialization even for a journeyman), and that he came recommended by David

Mead who knew him. Brady worked 10 days up until September 6, 1994.

On August 25, Floyd Lepper was hired and, on August 29, Ken Gilligan was hired. Belfance states that Lepper is a member of his church and that he is an electrical contractor. He states that Gilligan, who is a college student, came along with Lepper and that he worked as a helper at \$10 per hour. Lepper worked 6 days and his last day was on September 7, 1994. Gilligan's last day was on September 6, 1994.

The largest number of people that the Company had working for it was on August 30 when there were 12 people on the Super K-Mart site. By September 2, 1994, the number was down to seven and, by September 6, only Mead and Hoyt remained at work. The Company's involvement at this site ended on September 30, 1994. At the current time, Belfance is the only person employed by the Company, with Mead and Hoyt on temporary layoff status. Belfance indicated that he expects to obtain some work in the near future whereupon Belfance Electric will resume operations.

#### Analysis

The General Counsel's case is based on the fact that (1) on August 6, 1994, a group of nine union members showed up at the jobsite asking for employment; (2) they left their names, phone numbers, and prior job experience; (3) they were not interviewed or hired; (4) and other people were hired thereafter.

Whether or not this evidence is sufficient to make out a prima facie case, the Employer, in my opinion, has presented sufficient evidence in accordance with *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), to rebut any contention of illegal motivation in relation to his refusal to hire Local 166 members.

The Employer had just commenced operations as a business on August 5, 1995, and employed a group of people to do electrical work at the K-Mart site. When the union people showed up on Saturday, August 6, Belfance, as a new company, had been working at the site for just 1 day. The evidence shows that despite Shutter's assertion that his group was ready to start work that day, there is no evidence that Belfance could have hired this group of electricians at that time.

It is true that after August 6, 1994, Belfance hired new employees for relatively short periods of time until September 1994. But with the exception of Vincent Daly, all of these people either were relatives, neighbors, friends, or people with whom Belfance had previous business dealings. The only person that Belfance hired who came in "off the street" was Daly who agreed to work as an electrician at \$12 per hour.

In my opinion, the evidence is insufficient to show that Belfance made his hiring decisions based on union-related considerations. Rather, the evidence shows that the people he decided to hire were friends, relatives, and business acquaintances instead of another group of people who were complete strangers to him. Such a motivation is hardly irrational and is, in my opinion, consistent with human nature.

<sup>1</sup> Shutter acknowledged that Local 166 adopted a "salting" resolution that permits the Local's members to accept jobs at nonunion contractors on condition that they must engage in union organizing activity and also that they must leave the company's employ immediately upon notification by the Union.

CONCLUSION OF LAW

The Company has not violated the Act in any manner encompassed by the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>2</sup>

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<sup>2</sup>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

ORDER

The complaint is dismissed.

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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."