

**Overley Electric Company, Inc. and International Brotherhood of Electrical Workers, Local 480, AFL-CIO.** Case 26-CA-16541

December 18, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING  
AND TRUESDALE

On July 18, 1995, Administrative Law Judge Lawrence W. Cullen issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief and limited cross-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<sup>2</sup> and to adopt the recommended Order.

The General Counsel has excepted to the judge's dismissal of the independent 8(a)(1) allegation of the complaint. The General Counsel relies on the judge's finding that Woody Overley, the Respondent's owner, told Vince Coody that he did not like having Union Organizer Wayne Divine on the job and that Coody should discharge Divine. The General Counsel contends that Overley's statements are per se violations of the Act.

We find no merit in the General Counsel's exceptions. At the hearing, the Respondent presented testimony that Overley authorized Coody to hire a laborer, that Coody hired Divine, and that Coody exercised independent judgment in doing so. The General Counsel failed to rebut this evidence. In his decision, the judge specifically found that "Divine was hired by Coody." Therefore, we conclude that the Respondent has satisfied its burden of proving that Coody was a statutory supervisor under Section 2(11) of the Act. Accordingly, Overley's statements to Coody did not

<sup>1</sup> 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. 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 adopting the judge's finding that Union Organizer Wayne Divine was discharged by the Respondent in violation of Sec. 8(a)(3) of the Act, we reject the Respondent's contention that Divine is not an employee within the meaning of the Act. See *NLRB v. Town & Country Electric, Inc.*, 116 S.Ct. 450 (1995), in which the Court endorsed the Board's position that paid union organizers are employees within the meaning of Sec. 2(3) of the Act.

"interfere with, restrain, or coerce employees" within the meaning of Section 8(a)(1).<sup>3</sup>

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Overley Electric Company, Inc., Vicksburg, Mississippi, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

<sup>3</sup> Member Truesdale, unlike his colleagues, would find that Overley's statements to Coody violated Sec. 8(a)(1). In this regard, Member Truesdale finds it unnecessary to decide whether Coody exercised independent judgment in hiring Divine. The Board has declined to find craftsmen to be statutory supervisors merely because they hired and fired their helpers. See, e.g., *Gulf Bottlers, Inc.*, 127 NLRB 850, 859-861 (1960). As the only possible indicator of supervisory status here is Coody's hiring of Divine to help him as a laborer for the job, Member Truesdale would find that Coody has not been shown to be a supervisor. He would, therefore, find that Coody was an employee and that Overley's statements were coercive and unlawful.

*Susan R. Greenberg, Esq.*, for the General Counsel.  
*William I. Gault Jr., Esq. (Phelps Dunbar)*, of Jackson, Mississippi, for the Respondent.  
*Sammy J. Yelverton*, Assistant Business Manager and Organizer, of Jackson, Mississippi, for the Charging Party.

DECISION

STATEMENT OF THE CASE

LAWRENCE W. CULLEN, Administrative Law Judge. This case was heard before me on March 21, 1995, in Jackson, Mississippi, and was held pursuant to a complaint issued by the Acting Regional Director for Region 26 of the National Labor Relations Board (the Board) on January 5, 1995. The complaint is based on a charge filed by International Brotherhood of Electrical Workers Local Union, 480 (the Union or the Charging Party) on December 19, 1994. The complaint alleges that Overley Electric Company, Inc. (the Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by threatening to discharge an employee on or about September 16, 1994, because of his membership in the Union and activities on behalf of the Union. The complaint also alleges that Respondent violated Section 8(a)(1) and (3) of the Act by terminating employee Wayne Divine on or about September 16, 1994, because of his support of the Union and engagement in concerted activities and to discourage employees engaging in these activities. The complaint is joined by the answer of the Respondent filed on January 13, 1995, in which it denies the commission of any violations of the Act and asserts as affirmative defenses the alleged failure of the complaint to state a claim on which relief may be granted, the 6-month statute of limitations for the filing of a charge contained in Section 10(b) of the National Labor Relations Act, alleged "legitimate business reasons" for Respondent's "decision to discharge Wayne Divine," that "Wayne Divine was not a bonafide job applicant or employee," that "Wayne Divine was a paid union organizer and, therefore, not protected by the National Labor Relations

Act,” and that “Wayne Divine was over qualified for the position in which he was employed.”

On the entire record in this proceeding, including my observations of the witnesses who testified and after due consideration of the briefs filed by the General Counsel and the Respondent, I make the following

#### FINDINGS OF FACT

##### I. JURISDICTION

###### A. *The Business of Respondent*

The complaint alleges, Respondent admits, and I find that the Respondent was, and has been at all times material, a corporation with an office and place of business in Greenwood, Mississippi, where it has been engaged in electrical contracting, that during the 12-month period ending December 31, 1994, it purchased and received at its facility goods valued in excess of \$50,000 directly from points outside the State of Mississippi, and that it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

###### B. *The Labor Organization*

The complaint alleges, Respondent admits, and I find that the Union is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

##### II. THE ALLEGED UNFAIR LABOR PRACTICES

###### A. *The Alleged Threat*

No evidence was presented at the hearing concerning this allegation and I will recommend its dismissal.

###### B. *The Discharge of Wayne Divine*

Respondent is an electrical construction business that is owned and operated by Woody Overley. From June 1994 through January 1995, Respondent was an electrical subcontractor for Upchurch Plumbing on a project for the U.S. Corps of Engineers at the Waterways Experiment Station in Vicksburg, Mississippi. The president of Upchurch is the brother-in-law of Woody Overley. Respondent did the electrical connections for equipment installed by Upchurch Plumbing and also did some relighting work in accordance with the design plans. The project was in a building then in use by the Corps of Engineers and the work was scheduled area by area to permit the continued use of the building by the Corps of Engineers while the project was ongoing. Consequently, it was decided that Respondent required only two full-time employees, one electrician and one laborer, and additional employees as needed who were transferred from other projects of Respondent as the need arose.

On September 12, 1994, Overley hired Vince Coody as the full-time electrician to perform the electrical work at this jobsite. Coody was in the second year of a 5-year apprenticeship program conducted by the Union. Coody did not reveal his union affiliation to Overley. Coody testified that he accepted the job in order to organize Respondent’s employees and to gain employment. He testified, “I was also looking for a job, not just to salt it. I was looking to work.” “Salting” is a term for an organizing tactic that has in recent years been

utilized by IBEW organizers and members to gain employment with nonunion employers and then attempt to organize their employees on behalf of the IBEW or a local union thereof. In the instant case, Coody had cleared his employment with Wayne Divine, assistant business manager and organizer for the Union, prior to accepting the position with Respondent. Union members are not permitted to work for nonunion contractors in the absence of permission obtained from the Union.

At the time Overley hired Coody he told Coody to “find someone” to help him as a laborer for the job. Coody telephoned Divine and told him he needed to hire a laborer. Divine told Coody he would fill the position. Divine was hired by Coody and commenced work on Respondent’s project as a laborer on September 15, 1994. Divine testified that he intended to perform the work of a laborer for which he was hired and to organize Respondent’s employees. Divine testified that “salting” is “the systematic placement of union electricians on non-union jobs to try to convert the employees and try to get the contractors signatory to our agreement.” Divine testified that this was his second effort at salting. On his first day of employment, Divine worked as a laborer and helped Coody on the job using Coody’s hand tools in doing so. Divine performed only the work of a laborer as opposed to that of an electrician and did not wear tools on the job.

On September 16, 1994, Coody and Divine also worked as an electrician and laborer, respectively, and were joined on that date by Wayne Lessley and Billy Ray Kinds who were sent from Respondent’s Greenwood, Mississippi headquarters to assist. Coody was paid as an electrician at the rate of \$15.48 per hour whereas Divine and Kinds were classified as laborers and paid \$8.65 per hour. Lessley, who was a second-year apprentice, was classified as an apprentice and paid the same hourly rate of \$8.65. All four employees worked together and Lessley performed the work of an electrician with help from Kinds. Lessley also authorized the purchase of supplies that were charged to Respondent’s account. Lessley also had worked on other projects of Respondent and was paid as an electrician rather than as a laborer. He also drove Respondent’s truck, which contained Respondent’s drill set and other tools of the electrical trade.

On September 16, Divine wore a union T-shirt to work. Shortly before lunch, Lessley told Divine that Woody Overley had arrived at that jobsite and offered to introduce Divine to Overley, which he did. Lessley returned to the area where the employees were working and according to Coody’s un rebutted testimony told Coody and Kinds, “I got out of there. I don’t want to see the fireworks.” Coody testified that “He [Overley] done already told us prior to that he didn’t like unions.”

According to Divine, whose testimony I credit, he introduced himself as an “organizer for Local 480, that Lessley then left and he [Divine] told Overley he was there to organize his employees.” Overley told Divine he was a charter member of the ABC (Associated Builders and Contractors), which is a nonunion contractor’s association. Divine told Overley this meant he was antiunion instead of just nonunion and Overley replied, “That’s right.” Divine testified that he told Overley that the rate of pay on this project was so close to the union rate of pay that it would be easy for Respondent to become a signatory to a contract with the Union and that

during this conversation Overley talked about the numbers of employees in the Union and stated there was a lot of electrical work to be done. Overley testified that during this discussion Divine told him he was a journeyman electrician. Divine denies he made such a statement. Under either circumstance, I find that Divine, at least in some manner, made it known to Overley that he was a journeyman electrician. It is improbable that the assistant business manager of the Union would not be a journeyman electrician.

The following morning Overley telephoned Coody around 6:15 a.m. and said, "What the hell is a IBEW 480 hand doing on my job?" Coody testified that Overley sounded upset and angry and that he told Overley that Divine had told him he was trying to organize and that Overley then said, "I don't like it. I want him off the job." Coody testified he asked, "What am I supposed to tell the man?" and that Overley replied, "You just tell him we don't need him no more." In accordance with Overley's order, Coody discharged Divine that day.

Overley testified that he directed Coody to discharge Divine because he was a journeyman electrician and he was concerned that he would subject him to sanctions under the Davis Bacon Act by performing journeyman electrician work rather than limiting himself to the duties of the laborer classification set out in his subcontract with Upchurch Plumbing the prime contractor on the job. Overley denied that he ordered the discharge of Divine because of his union affiliation. In support of this position, Overley testified concerning a prior incident on another Federal construction job covered by the Davis Bacon Act that sets the wage rates for the jobs and the classifications of employees to be used on construction jobs for Federal projects. According to Overley in this incident he had received a citation because one of his employees classified as a helper had worn tools and been perceived as an electrician by Federal inspectors on the job. In support of this position Respondent called Vice President Robert Upchurch of Upchurch Plumbing and Madeline Grant, a retired GS-7 law clerk, who had conducted preliminary labor reviews with responsibility for giving advice on the effects of the Davis Bacon Act on the project. Upchurch testified concerning the adverse consequences on future government contract opportunities should a contractor be deemed unsatisfactory. Grant testified to her position that if a laborer carries a tool of the trade, he must be paid as an electrician and that she had advised Upchurch and Overley of this at a preproject meeting held in May 1994. As the General Counsel notes in her brief, there is no support for this position in the Davis Bacon law or regulations entered into evidence at the hearing.

Moreover, as also established by the evidence at the hearing, Overley used Wayne Lessley as an apprentice electrician on the project to help Coody although Lessley had previously worked as a journeyman electrician on other of Respondent's projects. Furthermore, when Chris Montpelier who was later employed as a laborer on this job wore tools on a tool belt and Respondent was informally cited for this, no action was taken against Montpelier, but he was rather merely told to put the tools back in the truck.

#### Analysis

I find that the General Counsel has established a prima facie case of a violation of Section 8(a)(1) and (3) of the Act by Respondent by its discharge of employee Wayne Divine.

Initially, I find that Divine was at all times material an "employee" as encompassed in the Act and protected by Section 7 of the Act. Although it is true that Divine is a full-time paid assistant business manager for the Union, he was nonetheless an employee under applicable Board law notwithstanding his status as a paid union organizer. Although it is undisputed that Divine is a "salt" and accepted employment in part to organize Respondent's employees, this did not serve to remove him from the protection of the Act as an employee. There is no evidence nor contention that Divine did not adequately perform his job as a laborer for which he was hired by Coody pursuant to Overley's direction to get a helper. There was no evidence of harassment or any unlawful or improper activities engaged in by Divine.

Thus, Divine's status as an employee entitled to the protections of the Act, notwithstanding his status as a paid union organizer, is supported by Board law that holds that paid union organizers are employees within the meaning of Section 2(3) of the Act. *Sunland Construction Co.*, 309 NLRB 1224, 1230 (1992); *H. B. Zachary Co.*, 289 NLRB 838 (1988), enf. denied 886 F.2d 70 (4th Cir. 1991).

It is recognized that there is disagreement among the Circuit Courts of Appeal on this issue. In *Town & Country Electric*, 34 F.3d 625 (8th Cir. 1994), denying enf. 309 NLRB 1250 (1992), petition for cert. granted 116 S.Ct. 450 (1995), the Supreme Court granted certiorari following the decision of the Eighth Circuit Court of Appeals that a paid union organizer was not a bonafide employee. See *Willmar Elec. Service*, 968 F.2d 1327, 1329-1331 (D.C. Cir. 1992); *NLRB v. Henlopen Mfg. Co.*, 599 F.2d 26, 30 (2d Cir. 1929); and *Escada (USA), Inc. v. NLRB*, 970 F.2d 898 (3d Cir. 1992), in which the District of Columbia and Second and Third Circuits have agreed with the Board's position and *H. B. Zachary*, supra; *Ultrasystems Western Constructions v. NLRB*, 18 F.3d 251, 255 (4th Cir. 1994); *NLRB v. Elias Brothers Big Boy, Inc.*, 327 F.2d 421, 427 (6th Cir. 1964); and *Town & Country*, supra, in which the Fourth, Sixth, and Eight Circuits have held to the contrary.

Having decided that Divine was an employee entitled to the protections of the Act, I now turn to the analysis of the testimony and the elements of the case as guided by *Wright Line*, 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1991), cert. denied 455 U.S. 989 (1982). I credit the testimony of Coody and Divine as set out above over that of Overley concerning the reasons for the discharge of Divine. It is thus clear that the General Counsel has established a prima facie case. Divine made it known to Overley that he was a union organizer intent on organizing Respondent's employees on behalf of the Union and was thus engaged in protected concerted activity including a request of Overley that Respondent become a signatory to a contract with the Union. Overley was motivated solely by his antiunion animus toward the Union in directing Coody to discharge Divine in order to remove a known union organizer from the jobsite. The discharge of Divine had the inevitable effect of discour-

aging union membership. *Downtown Toyota*, 276 NLRB 999, 1014 (1985).

I find that the Respondent has failed to rebut the prima facie case established by the General Counsel by the preponderance of the evidence. Rather, I find the reason asserted by the Respondent for Divine's discharge was pretextual as I do not credit Overley's testimony that he was concerned with Divine's journeyman status as an electrician and possible adverse effect on his rating by the Federal government as an employer under the Davis Bacon Act. As noted by the General Counsel, in addition to Coody's testimony that Overley pointed only to Divine's status as a union organizer as the reason for the discharge, Respondent employed Lessley as an apprentice on the job although Lessley had worked prior to this as an electrician for Respondent on other jobs. Furthermore no action was taken against Montpelier when he did wear tools on the job while employed as a laborer. Moreover it would have been a simple matter to direct Divine not to wear tools or perform electrician's work on the job if this had in fact been Respondent's true concern. I find that the reasons advanced by Respondent for discharging Divine were pretextual. See *Limestone Apparel Corp.*, 255 NLRB 722 (1981). I reject Respondent's asserted affirmative defenses including its Section 10(b) defense for lack of proof.

#### CONCLUSIONS OF LAW

1. The Respondent, Overley Electric Company, Inc., 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. Respondent did not violate the Act by issuing an unlawful threat to its employees.
4. Respondent violated Section 8(a)(1) and (3) of the Act by its discharge of its employee Wayne Divine.
5. The above-unfair labor practice in connection with the business engaged in by Respondent has the effect of burdening commerce within the meaning of Section 2(6) and (7) of the Act.

#### REMEDY

Having found that the Respondent has violated the Act, it shall be ordered to cease and desist from, and to take certain affirmative actions, including the posting of an appropriate notice, designed to effectuate the purposes of the Act, and including the rescission of its unlawful discharge of its employee Wayne Divine and to reinstate Divine to his former position or, if his former position no longer exists, to a substantially equivalent one and to make him whole for all loss of pay and benefits, including seniority and other rights and privileges sustained by him as a result of the unlawful action taken against him. Backpay and benefits shall be with interest as computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Respondent shall also remove from its records all references to the unlawful actions taken against Divine and inform him in writing that this has been done and that such actions shall not be used against him in any other manner in the future. Respondent shall also preserve all necessary records for computing backpay and benefits and make them available to the

Regional Director for Region 26 of the National Labor Relations Board, or his representative.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>1</sup>

#### ORDER

The Respondent, Overley Electric Company, Inc., Greenwood, Mississippi, its officers, agents, and representatives, shall

1. Cease and desist from
  - (a) Discharging its employees because of their engagement in protected concerted activities on behalf of the Union and their fellow employees.
  - (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
2. Take the following affirmative actions necessary to effectuate the policies of the Act.
  - (a) Rescind its unlawful discharge of employee Wayne Divine and offer him full reinstatement to his former position or, if his former position no longer exists, to a substantially equivalent position. Make him whole for all loss of pay and benefits and other rights and privileges, including seniority sustained by him, with interest as prescribed in the remedy section of this decision, as a result of the unlawful action taken against him by Respondent.
  - (b) Remove from its records all reference to the unlawful actions taken against employee Wayne Divine and advise him in writing that this has been done, and that such unlawful acts shall not be used against him in any manner in the future.
  - (c) 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.
  - (d) Post at its facility, copies of the attached notice marked "Appendix."<sup>2</sup> 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 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.

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

The complaint is otherwise dismissed.

<sup>1</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.

<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 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

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.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge our employees because of their support of a union or their engagement in union activities.

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

WE WILL rescind our unlawful discharge of Wayne Divine and offer him full reinstatement to his former position or, if his former position no longer exists, to a substantially equivalent position and WE WILL make him whole for all loss of earnings and benefits and other rights and privileges sustained by him including seniority, because of our unlawful conduct, with interest, as a result of our unlawful discharge of him.

WE WILL remove from our records any reference to the unlawful discharge of Wayne Divine and will inform him in writing that this has been done and that said unlawful conduct will not be used against him in any manner in the future.

Our employees have the right to join and support International Brotherhood of Electrical Workers, Local 480, AFL-CIO or to refrain from doing so.

OVERLEY ELECTRIC COMPANY, INC.