

Bat-Jac Contracting, Inc. and United Brotherhood of Carpenters and Joiners of America, District Council of Nassau County and Vicinity, Local 1397, AFL-CIO. Cases 29-CA-18456-1, 29-CA-18456-2, and 29-CA-18456-3

February 29, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

The issues for Board review in this proceeding are whether Administrative Law Judge D. Barry Morris correctly found violations of Section 8(a)(1) and (3) of the Act by the Respondent.¹ 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,² and conclusions,³ 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, Bat-Jac Contracting, Inc., Brentwood, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

¹On November 14, 1995, the judge issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed a brief in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

²The 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).

In affirming the judge's finding that the Respondent refused to hire Christopher Fusco because of his membership in the Union, we note that Fusco, whom the judge found to be a credible witness, specifically testified that he disclosed his membership status during his hiring interview with the Respondent's field superintendent.

We find no need to rely on the judge's finding that Respondent's foreman, Michael Menzer, was a supervisor.

³We agree with the judge that the discriminatees, although sent to obtain jobs from the Respondent pursuant to the Union's "salting" program, are statutory employees entitled to protection under the Act. The Supreme Court has recently approved the Board's view of this issue in *NLRB v. Town & Country Electric*, 116 S.Ct. 450 (1995).

Elaine Robinson-Fraction, Esq., for the General Counsel.
Robert M. Ziskin, Esq., of Commack, New York, for the Respondent.
Robert M. Archer, Esq. (Meyer, Suozzi, English & Klein), of Mineola, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

D. BARRY MORRIS, Administrative Law Judge. This case was heard before me in Brooklyn, New York, on August 7, 18 and 21, 1995. On several charges filed on August 11, 1994,¹ a consolidated complaint was issued on September 23, alleging that Bat-Jac Contracting, Inc. (Respondent) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). Respondent filed an answer denying the commission of the alleged unfair labor practices.

The parties were given full opportunity to participate, produce evidence, examine and cross-examine witnesses, argue orally, and file briefs. Briefs were filed by the parties on October 17, 1995.

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 New York corporation with its principal office and place of business in Brentwood, New York, has been engaged in providing services as a contractor in the building and construction industry. Respondent has admitted, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. In addition, it has been admitted, and I find, that United Brotherhood of Carpenters and Joiners of America, District Council of Nassau County and Vicinity, Local 1397, AFL-CIO (the Union or Local 1397) is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

1. Koske

William Koske has been a member of Local 1397 for approximately 14 years. In June 1994, the Union's business agent told Koske that Respondent was hiring employees and told him to try to arrange an interview with Respondent. Koske scheduled an interview and met with Respondent's outside field superintendent, Carl Merz. Koske, who appeared to me to be a credible witness, testified that Merz asked him if he was a "member of a carpenter's union." Koske replied that he was, and Merz told him "he doesn't hire union carpenters."

On September 27 Merz wrote to Koske, as follows:

In accordance with your recent application for employment as a carpenter, please report to our office . . . on Tuesday, October 4, 1994 at 3 p.m. We are prepared to unconditionally offer you employment as a carpenter at such jobsite as may require your services. When you report to our office we will discuss with you the hourly wage rate to be paid . . . Should you be unavailable to report to work on October 5, 1994, please contact the undersigned to schedule another mutually convenient appointment.

¹All dates refer to 1994 unless otherwise specified.

After Koske received the September 27 letter, he spoke to the Union's business agent, Anthony Macagnone, who told Koske not to go to Respondent's office. Koske then telephoned Respondent and said he could not make the appointment on October 4. When asked why he did not apply for the job, Koske testified, "I was working at the time." The Union then faxed a memo to Merz, on Koske's behalf, asking to reschedule the meeting. On October 4, Merz sent Koske the following letter:

As it appears that you were unable to keep the appointment which we scheduled to take place at our office on October 5, 1994 at 4 p.m. we are offering you the opportunity of a second interview to take place on October 12, 1994 at 4 p.m. Should you be unavailable to make this interview, please contact the undersigned directly to arrange another mutually convenient appointment.

Koske met with Merz on October 12 and credibly testified, as follows:

Q. [T]ell us what your conversation was with Carl on that second occasion.

A. He asked me my work experience again, and I told him, and then he asked me if I was working and I said yes, I was. And then he asked me why I came for the interview and I said because you sent me the letter and I thought it was only fair that I went.

Q. And what was said at that point between either you or Carl?

A. I also told him that if he did hire me, I was going to try and organize his men to try and get them to join the union.

Q. [W]hat, if anything, did Carl say?

A. He said that's fine.

2. Fusco

Christopher Fusco has been a member of Local 1397 since 1986. He is recording secretary of the Union. Fusco, who also appeared to me to be a credible witness, testified that he went for a job interview with Respondent during the summer of 1994. He was interviewed by Merz, and Fusco secretly tape recorded the conversation. Fusco credibly testified that during the interview Merz told him, "We're a non-union shop . . . we used to be a union shop but we're not signing up anymore."²

On September 27 Merz sent Fusco a letter similar to the one that he had sent to Koske, in which Merz stated, "We are prepared to unconditionally offer you employment as a carpenter as such jobsite as may require your services." The Union, on behalf of Fusco, faxed Merz, asking him to reschedule the appointment. On October 4 Merz wrote Fusco, as follows:

As it appears that you are unable to keep the appointment which we scheduled to take place at our office on October 4, 1994 at 4 p.m., we are offering you

the opportunity of a second interview to take place on October 13, 1994, at 4 p.m.

Fusco testified that the interview had been rescheduled but that he "couldn't make" the next appointment.

3. Ferrara

Thomas Ferrara, a Local 1397 member, appeared to me to be a credible witness. He testified that the Union's business agent told him to apply for a position with Respondent and that "we decided that we wanted to salt and organize the men." Ferrara was interviewed by Merz in June. Ferrara credibly testified that Merz asked him if "I was a member of a union" and Ferrara responded that he was not. On July 12, Merz telephoned Ferrara and told him to report for work the next day at Buckley Day School. On July 13, Ferrara reported for work at Buckley Day School, where Michael Menzer was the foreman. On July 18, Ferrara came to work wearing a union T-shirt. On seeing the T-shirt, Menzer told Ferrara "nice shirt." During the conversation Ferrara mentioned that he had worked the prior evening at the Nassau Coliseum. Menzer told Ferrara that Ferrara would have to speak with Merz because "they can't have . . . a union man working on a non-union job." Ferrara asked Menzer what he meant when he said that Ferrara would have to speak to Merz. Menzer replied that "he couldn't have me here because the company and myself could get in trouble for . . . a union man being on a non-union job, and that I would have to talk to Carl." Ferrara credibly testified, "I asked him was I going to get fired, and he said, I really don't know, I would have to talk to Carl. I said basically what you are telling me is my job here is done. He said yes."³

Later that day Ferrara had a conversation with Merz. Ferrara credibly testified as follows:

Q. [W]hat did Carl say?

A. He said that he couldn't have me doing both. I couldn't be union and work for him. That I'd have to either choose him or the union. And I basically told him, he really didn't leave me much of a choice because I couldn't see making much of a living working for him.

Q. So what did Carl respond to that?

A. He said, well if you choose the union, then consider today your last day and come get your check.

On September 27, Respondent sent an offer to Ferrara similar to the ones sent to Koske and Fusco. The Union, on behalf of Ferrara, sent a fax to Merz requesting that the meeting be rescheduled. The interview was rescheduled and took place on October 14, at which time Ferrara credibly testified:

Carl said he had a job for me. That he was ready to reinstate me. I told him that I was at the time presently working. He asked me why I bothered to come then. I told him that I was looking for future work. And

²While the tape recording was placed into evidence, most of the conversation is inaudible. However, the tape recording does corroborate the above-quoted statement of Merz.

³Ferrara testified that he recorded the conversation with Menzer. The tape of that conversation was admitted into evidence as G.C. Exh. 10 and the purported transcript of the tape was admitted into evidence as G.C. Exh. 11. I have found the tape to be completely unintelligible. Accordingly, my findings do not rely on G.C. Exh. 10 or G.C. Exh. 11.

he said that if I couldn't start tomorrow . . . why did I waste my time and his time coming out there.

On October 19 Merz wrote to Ferrara, as follows:

With regard to your employment interview of Friday, October 14, 1994 I was surprised to learn that you are in fact currently employed although you took the time to visit with me in connection with an employment interview. As I indicated to you at your interview we will keep your name and address on record and should an appropriate position open with our company we will make an effort to contact you regarding the same. Should you in the future find that you are seeking employment as a carpenter, please be good enough to call me to arrange another appointment to interview with our company.

B. Discussion and Conclusions

1. Supervisory status of Michael Menzer

Michael Menzer was the foreman at the Buckley Day School jobsite. I credit Ferrara's testimony that Menzer assigned work to the employees at the jobsite. Ferrara credibly testified that during the 5 days that he worked at the jobsite he saw Merz at the jobsite only once. On cross-examination Menzer conceded that he assigned work at the jobsite. I find that Menzer was a supervisor and agent of Respondent, within the meaning of the Act. See *Three Sisters Sportswear Co.*, 312 NLRB 853, 864-865 (1993).

2. Interrogation

The complaint alleges that Respondent interrogated employees regarding their membership in the Union and informed employees who applied for jobs that the reason Respondent refused to hire them was because of their union membership. During Koske's interview with Merz in June 1994, Merz asked Koske whether he was a member of a "carpenters' union." When Koske replied in the affirmative, Merz told him that "he doesn't hire union carpenters." Similarly, during Ferrara's interview Merz asked him if he was a member of a union. I find that Merz' statements constitute violations of Section 8(a)(1) of the Act. See *Marsak Leasing*, 313 NLRB 817, 822 (1994).

3. Refusal to hire

When Koske told Merz at the June interview that he was a union member Merz responded that the Company does not hire union carpenters and, accordingly, Respondent refused to hire Koske. Similarly, during Fusco's interview Merz told him "we used to be a union shop, but we're not signing up anymore." I also find that Respondent refused to hire Fusco because he was a union member.

Respondent contends that since Koske and Fusco were acting as "salts" on behalf of the Union, in furtherance of its organizing efforts, such individuals were not bona fide employees within the meaning of the Act. There is no evidence in the record that Koske or Fusco were paid organizers of the Union. In *Corella Electric*, 317 NLRB 22 fn. 1 (1995), the Board rejected respondent's defense that the discriminatee was not an employee within the meaning of Section 2(3) of the Act because the employee received permission

from his union to work for respondent pursuant to its "salting" program. While in the instant proceeding the record does not show the alleged discriminatees were paid organizers of the Union, in *Corella Electric* the Board stated that even full-time paid union organizers are considered employees under Section 2(3) of the Act. Similarly, as the Board stated in *Sunland Construction Co.*, 309 NLRB 1224, 1230 (1992), affd. 4 F.3d 1000 (11th Cir. 1993), "We find no policy reason to disregard present decisional law to find that since a union organizer serves the union as well as the company he is eliminated from the definition of employee under Section 2(3) of the Act." Accordingly, I find that by refusing to hire Koske and Fusco because they were members of the Union, Respondent violated Section 8(a)(1) and (3) of the Act.

4. Discharge of Ferrara

Under *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board requires that the General Counsel make a prima facie showing sufficient to support the inference that protected conduct was a motivating factor in the employer's decision. Once this is established, the burden shifts to the employer to demonstrate that the "same action would have taken place even in the absence of the protected conduct."

Ferrara had been working at the Buckley Day School facility since July 13. On July 18, Ferrara appeared for work wearing a union T-shirt. In a sarcastic tone, Merz said to him "nice shirt." Merz then told Ferrara that Ferrara would have to speak with Merz because they can't have a "union man working on a non-union job." Ferrara had a conversation with Merz at which time Merz told Ferrara that he "couldn't be union and work for him." Merz also stated, "If you choose the union, consider today your last day." Under these facts, I find that the General Counsel has made a prima facie showing sufficient to support the inference that protected conduct was a motivating factor in the Respondent's decision to terminate Ferrara.

Respondent maintains that Ferrara was discharged because he worked for another employer, the Nassau Coliseum, the previous evening and that Respondent could not employ persons who worked at two different jobs. The evidence shows that Ferrara worked for the Nassau Coliseum on Sunday evening, July 17, from 7 p.m. until 12:30 a.m. He reported for work at the Buckley Day School at 7 a.m., July 18. During the 5 days that Ferrara worked at the Buckley Day School, Sunday evening was the only time that he worked at the Nassau Coliseum. There was no evidence in the record that Respondent, in fact, had a rule that an employee could not work at a second job nor was there evidence that other employees were discharged for having a second job. No showing was made that working at another job on Sunday evening from 7 p.m. until 12:30 a.m. interfered with Ferrara's duties the following day. I find that Respondent has not satisfied its burden of demonstrating that the "same action would have taken place even in the absence of the protected conduct."

As discussed earlier, Ferrara applied to Respondent because "we decided that we wanted to salt and organize the men." Respondent contends that Ferrara, therefore, is not a bona fide "employee" within the meaning of the Act. As noted above, the Board has held that such an individual is

an employee within the meaning of Section 2(3) of the Act. See *Corella Electric*, supra at 22, and *Sunland Construction*, supra at 1230.

5. Offers of employment

On September 27, Respondent sent separate letters to Koske, Fusco, and Ferrara stating, "We are prepared to unconditionally offer you employment as a carpenter as such jobsite as may require your services." The letters continued, "should you be unavailable to report to work on October 5, 1994 please contact the undersigned to schedule another mutually convenient appointment." None of the discriminatees accepted the offers. The offers were unconditional and a sufficient amount of time was given to the discriminatees to respond. I find that the offers constituted valid offers of employment. See *Esterline Electronics Corp.*, 290 NLRB 834, 835 (1988).

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

3. By interrogating applicants for employment regarding their union membership and informing applicants that they would not be hired because of their union membership, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. By refusing to hire William Koske and Christopher Fusco because of their union membership, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

5. By discharging Thomas Ferrara because of his union activities, Respondent has engaged in an unfair labor practice within the meaning of Section 8(a)(1) and (3) of the Act.

6. The aforesaid unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find it necessary to order Respondent to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent, having unlawfully refused to hire William Koske and Christopher Fusco, and having unlawfully discharged Thomas Ferrara, I find it necessary to order Respondent to make them whole for any loss of earnings they may have suffered. With respect to Koske and Fusco the backpay period extends from the dates of the refusals to hire until October 4, 1994, the date of Respondent's offer of employment. Ferrara's backpay period extends from the date of his discharge until October 4, 1994. Backpay shall be computed in accordance with the formula approved in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173

(1987).⁴ Inasmuch as I have found that Respondent extended valid offers of employment to the three discriminatees, I am not providing for that remedy in the Order.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁵

ORDER

The Respondent, Bat-Jac Contracting, Inc., Brentwood, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating applicants for employment regarding their union membership and informing them that they would not be hired because of their union membership.

(b) Refusing to hire and discharging employees for activities protected by Section 7 of the Act.

(c) 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 action necessary to effectuate the policies of the Act.

(a) Make whole William Koske, Christopher Fusco, and Thomas Ferrara for any loss of earnings they may have suffered, with interest, in the manner set forth in the remedy section of the decision.

(b) Remove from its files any references to the unlawful discharge of Ferrara and notify him in writing that this has been done and that the discharge will not be used against him in any way.

(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 in Brentwood, New York, copies of the attached notice marked "Appendix."⁶ Copies of the notice on forms provided by the Regional Director for Region 29, after being duly signed by Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and be 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.

⁴Under *New Horizons*, interest is computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

⁵If 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.

⁶If 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.

WE WILL NOT interrogate applicants for employment regarding their union membership and inform them that they will not be hired because of their union membership.

WE WILL NOT refuse to hire and discharge employees for activities protected by Section 7 of the Act.

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 make whole William Koske, Christopher Fusco, and Thomas Ferrara for any loss of earnings they may have suffered, with interest.

WE WILL remove from our files any references to the unlawful discharge of Ferrara and notify him in writing that this has been done and that the discharge will not be used against him in any way.

BAT-JAC CONTRACTING, INC.