

Norris Electric Corporation and International Brotherhood of Electrical Workers, Local Union 760. Cases 10-CA-29976 and 10-CA-30231

November 7, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On July 30, 1997, Administrative Law Judge William N. Cates issued the attached bench decision and certification. The General Counsel filed exceptions and a supporting brief.

The National Labor Relations Board has considered the decision and record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, 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, Norris Electric Corporation, Louisville, Tennessee, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Elaine Robinson-Fraction, Esq., for the General Counsel.
Stephen Norris, President, for the Respondent.

BENCH DECISION AND CERTIFICATION

WILLIAM N. CATES, Administrative Law Judge. I heard this case in trial proceedings conducted in Knoxville, Tennessee, on July 11, 1997. At the conclusion of trial proceedings, and after hearing oral argument by Government counsel and the Company president, I issued a bench decision pursuant to Section 102.35(a)(10) of the National Labor Relations Board's Rules and Regulations, setting forth findings of fact and conclusions of law.

For the reasons stated by me on the record at the close of the trial, I found Norris Electric Corporation (Company) violated Section 8(a)(1) of the National Labor Relations Act (the Act) when in December 1996 its supervisor and agent instructed an employee not to discuss the union or the employees' union membership at one of its jobsites. I concluded the Company did not violate the Act when on or about December 1996 it failed to hire job applicants Danny Allison and Ricky Brooks.¹ Accordingly, I dismissed that portion of the complaint.

¹Government counsel failed to demonstrate that the applications here were filed during hiring stages, that the Company hired any employees at critical times here or that the Company declined to hire in order to avoid hiring the applicants here. See, e.g., *J. E. Merit Constructors*, 302 NLRB 301 at 303 (1991), where initial proof requirements for this type case under *Wright Line*, 251 NLRB 1083 (1980), are set forth. In a most recent similar case the Board found an employer to have violated the Act by failing to hire union applicants but it did so after concluding the employer had "hired other

I certify the accuracy of the portion of the trial transcript (pp. 93-106 inclusive) containing my decision, and attach a copy of that portion of the transcript, as corrected,² as "Appendix A."

CONCLUSIONS OF LAW

1. The Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act; that it violated the Act in the particulars and for the reasons stated at trial and summarized above; and that its violations have affected and, unless permanently enjoined, will continue to affect commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Brotherhood of Electrical Workers, Local Union 760 (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

REMEDY

Having found the Company has engaged in certain unfair labor practices, I find it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

I recommend the Company be ordered, within 14 days after service by Region 10 of the Board, to post an appropriate notice to its employees, copies of which are attached hereto as "Appendix B" for a period of 60 consecutive days in order that employees may be apprised of their rights under the Act and the Company's obligation to remedy its unfair labor practices.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³

ORDER

The Respondent, Norris Electric Corporation, Louisville, Tennessee, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Instructing employees they are not to discuss the union or employees' union membership at its jobsites.

(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 action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its Louisville, Tennessee facility copies of the attached notice marked "Appendix B."⁴ Copies of the notice, on forms pro-

applicants for permanent positions" while rejecting union applicants. *Starcon, Inc.*, 323 NLRB 977 (1997).

²I have corrected the transcript by making physical inserts, cross-outs, and other obvious devices to conform to my intended words, without regard to what I may have actually said in the passages in question.

³If 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.

⁴If 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."

vided by the Regional Director for Region 10 after being signed by the Company's authorized representative shall be posted by the Company 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 Company to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings the Company has gone out of business or closed the facility involved in these proceedings, the Company shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Company at any time since December 12, 1996.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Company has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

APPENDIX A

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far enough afield on that. Before I go to the next concern I have, Mr. Norris, do you wish to be heard on any of the questions that I have asked General Counsel?

MR. NORRIS: No, sir.
(Pause.)

JUDGE CATES: Do either of you wish to say anything further before I render a decision? If not, this is my decision.

BENCH DECISION BY JUDGE CATES

JUDGE CATES: First let me thank the two representatives for their presentation of the case, their attention to detail. It is always a pleasure to hear a case where the parties' representatives are cooperative and present whatever they wish to present in an very orderly and timely fashion and both of you have done that and it has made my job very easy. If you will think back over the testimony that has been presented, I have asked few if any questions because you two asked the questions and covered the material and I appreciate that.

One thing that I have not done that perhaps I ought to take 30 seconds and do now, is generally at the conclusion of all the evidence I ask the parties if they would like to settle it short of my rendering a decision and I do not know if that is the case here or not. So let me go off the record for a moment and ask you that off the record.

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JUDGE CATES: Off the record.
(Discussion off the record.)

JUDGE CATES: On the record. The parties took an opportunity to explore settlement and they were not successful in doing so, so I shall render my decision.

I find that the charge in Case 10-CA-29976 was filed and served on or about February 14, 1997. It was thereafter amended on or about May 27, 1997 and I find the charge in Case 10-CA-30231 was filed on May 27, 1997 and I find that each of those charges were properly served on the company herein.

I find that the company herein is a Tennessee corporation with a office and place of business located in Louisville, Tennessee, where it is engaged in the electrical contracting business in the building and constructing industry providing electrical contracting and related services at various job sites located throughout the State of Tennessee. That part of the jurisdictional information was not disputed.

I find that during a representative period, which is 12 months before the Complaint issued herein, that the company in the course and conduct of its operations in Louisville, Tennessee provided services in excess of \$50,000 directly to customers located inside the State of Tennessee including TRW, which is located in Knoxville, Tennessee.

I base that on the testimony of Carol Clenney, spelled C-L-E-N-N-E-Y, in which she identified documents showing TRW

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purchased services from Norris Electric Corporation in the amount of approximately \$57,168.30. Further, I credit her testimony relating to the business that TRW did during that relevant period with companies located outside the State of Tennessee in that it shipped from its Knoxville, Tennessee facility products valued in excess of \$50,000. I therefore find that the company, at all times material herein, has been and is, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I find that the union, International Brotherhood of Electrical Workers Local Union 760 is a labor organization within the meaning of Section 2(5) of the Act. I based that on the testimony of the organizer for the union, Mr. Hill, wherein he testified that the union processes grievances on behalf of employees that belong to the union, that the union negotiates collective bargaining agreements on behalf of the employees it represents and that employees are members of its organization.

I find that Steve Norris is the president and chief executive officer of the company and that based on his own acknowledgment that he hires and fires and disciplines employees, I find that he is a supervisor and agent of the company within the meaning of Section 2(11) and 2(13) of the Act.

I find as alleged in paragraph 9 of the Complaint, that at some pertinent time in December that Mr. Ronald Shepherd, after being hired on or about December 12 or 13, 1996, was told, among

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other things, by Mr. Norris that Mr. Norris needed a dependable work force, that the union was a sore subject at TRW, that he did not want him to bring it up, that he didn't any organizing on the job and, as such, I find those comments of Mr. Norris, which are unrefuted on this record, constitutes a violation of Section 8(a)(1) of the Act as alleged in the Complaint in the paragraph 9 that Mr. Norris instructed an employee that he was not to discuss the union of the employee's union membership at his TRW job site.

Then I come to that portion of the Complaint that is set forth at paragraphs 10, 11 and 13 of the Complaint, which alleges that on or about December 13, 1996, the company failed and refused to hire Danny Allison and Ricky Brooks and that it did so because they joined, supported or assisted the union.

For the Government to prevail to the extent of a prima facie case, the Government must establish that the individuals in question made application for employment with the company. As to that element, it is unrefuted that Mr. Allison and Mr. Brooks went to the company's offices and sought to and did in fact fill out applications for employment with the company. It is further unrefuted that they were interviewed by Mr. Norris with respect to employment or potential employment with the company.

Secondly, the second element that the Government needs or

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needed, at this point, to establish was that the applicant's were affiliated with the union or had and/or expressed union sentiments that would make the company aware of their union activities or sentiments. There are number of factors that would go to the General Counsel's establishing that element of her case.

Number one it is unrefuted that at least one of the applicants, one of the two applicants in question, wore a hat that indicated a preference for the union. Further one of the applicants indicated on his application, as a reference, one of the officials at the local union. Also there is the testimony that is unrefuted on this record that after speaking about a job in Kentucky, in the State of Kentucky, that was a union job, Mr. Norris commented how unions had messed up maintenance work in the State of Tennessee and had hurt the electrical work everywhere. So I find that element one, the individuals made application, number 2 that the company knew of their affiliation with or sentiments toward the union.

The third element that the Government needed to establish is animus. That is, did the company, Mr. Norris in particular, harbor animus, ill-will, or whatever you may wish to term it against individuals affiliated with the union.

First I shall address the evidence that would establish animus or anti-union sentiment on the part of this company and

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in particular, Mr. Norris. Mr. Norris' comments, which I have already outlined, that he made to Mr. Shepherd certainly indicate animus toward the union. Don't go down there and talk about the union or try to organize or whatever at the TRW project.

Additionally there is Mr. Norris' comments, which I find were made, that unions had messed up the maintenance work in the State of Tennessee and hurt the electrical trade and profession in general. So I find there is evidence of animus on the part of Mr. Norris toward unions in general and toward the union activities of employees or potential employees specifically.

There are a few factors which I shall note that mitigate in the other direction that Norris, although making the comments that he did, still had some degree of connections with the union that would indicate a lack of animus. And those items are that, and this is based on the testimony of Mr. Hill, I believe it was. Hill said that before the events that are critical herein came about, that Mr. Norris came by the union hall and asked if the union could supply him qualified workers. He wanted to know about the wage package benefits. In fact, Mr. Norris said that was the way he recognized Mr.—

I mean Mr. Hill said that was the way he recognized Mr. Norris sitting in the courtroom that he had been by his union hall.

So that is some evidence that would demonstrate that Mr. Norris did not allow the union sentiments of employees to affect or impact on his decisions with respect to the company.

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Also, there is the fact that Mr. Norris hired Mr. Shepherd even though I am convinced based on the evidence that was presented here, that Mr. Norris knew of Mr. Shepherd's affiliation, sentiments toward or connection with the union. Having weighed all those factors together I find the General Counsel has met her burden of animus in the number of elements she must establish in order to make a prima facie case of an unlawful refusal to hire.

Then I come to the element in the case that the company relied upon the animus in failing to hire either Mr. Allison or Mr. Brooks or both of them. And there is where the case gets a little bit troubling for me. I am persuaded that Mr. Norris did not particularly want anyone working on the TRW job, or perhaps any other job, that was pro-union, but specifically on the TRW job. But the element that is missing in this case is the element that applications were filed while the company was hiring individuals, employees if you like the term better. It is not unlawful for an employer to refuse to hire anyone when no job openings exist into which the employer could hire the individuals or employees. What evidence is there that the company needed to hire but didn't. The evidence in that respect is that the company made a journey down to the union hall, whenever that was, to ask if the union would supply qualified personnel to the company. The company ran an advertisement in the local newspaper, it is unrefuted that the

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advertisements that were received in evidence pertain to this particular company even though I am not sure the company itself is identified in the advertisement. But I believe it was Mr. Hill who testified that when you called that number in the advertisement you got Norris Electric. So that is evidence that the company was at least considering hiring individuals if not needing to hire individuals. The only person that the record establishes was hired at or after the time Mr. Allison and Mr. Brooks made application is Mr. Shepherd. Any Mr. Shepherd was affiliated with the union. So you can't draw a great deal of refusing to hire for unlawful reasons motive from the hiring of Mr. Shepherd.

The problem I have with the case is simply this. There is no showing that anyone was hired on or after Mr. Allison and Mr. Brooks made application. In point of fact, Mr. Allison nor Mr. Brooks was able to say with any certainty when they actually made application. However, based on Goth's testimony taken in conjunction with other considerations I am persuaded that it took place in either December of '96 or January of '97. And I make a finding to that effect, that they sought employment either in December of '96 or January of '97. Again, the problem that I have in finding a violation is a lack of any credible evidence that the company

hired anyone at or after Mr. Allison and Mr. Brooks make application.

But that does not quite put the matter to rest because I

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then need to look to see whether there is any evidence that would support a conclusion that this company ceased hiring in order to avoid hiring Mr. Brooks or Mr. Allison. Because if the company stopped hiring altogether in order to avoid hiring those two individuals that it believed would attempt to organize, then that is unlawful under the Act. But here again, there is no conclusive evidence to that effect because: (a) no records were presented in evidence that would show the employee complement for January of '97, February of '97, March of '97 or which would show the company had this number of employees and it increased that number, or at least, the make-up of the workforce, even if it stayed the same, changed from one person to another. There is not a preponderance of evidence that would persuade me that the company declined to hire at all in order to avoid hiring Mr. Allison or Mr. Brooks.

So in summary, I am persuaded that every element of the case is made except that the company was hiring at the time the applications were made or thereafter. I am further persuaded there is no showing on this record sufficient for me to base a finding on that the company quit hiring because they were trying to avoid hiring these two individuals. There is no evidence that would show that TRW complained to Norris that they were not servicing the contract, or that they did not finish the contract, that they had to void the

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contract because they were not performing the work, that the work was being done slower or was not being completed on time which might tend to indicate that they did not have enough people to complete the job during the time they were required to complete it. There isn't anything on which I can draw a conclusion that the company avoided hiring or did not hire these two individuals for unlawful reasons.

Let me go further in case, on review there is any finding contrary to what I am making here which is that I am going to dismiss the Complaint as it pertains to the company's failing and refusing to hire Mr. Allison and Mr. Brooks on and after December 13th or anytime in December, I do not mean to limit it to that particular day, on the basis there was no showing the company was hiring anyone at that point, or that they hired anyone thereafter, or that they did not hire in order to avoid hiring these two individuals. I am concluding the General Counsel failed to establish a prima facie case. If the evidence you did put in should somehow be found to constitute a prima facie case, I find the record is absolutely void of any rebuttal evidence or any meeting of the burden on the part of the company that they had business justifiable reason for not hiring the two individuals. In

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other words the company presented no defense, in essence, with respect to its declining to hire Mr. Brooks and Mr. Allison. So what I am saying is that there is this critical element, which I believe to be critical that is missing in this case. And that is that the applications were filed at a time when the

company was hiring. There is no showing that anyone was hired, on or after Mr. Allison and Mr. Brooks made application to be employed.

I am further finding that there is no evidence upon which I could base a finding that the company did not hire anyone at all in order to avoid hiring Mr. Brooks and Mr. Allison.

The elements that I have outlined, that I believe to be essential are outlined in, among other cases, J. E. Merit, M-E-R-I-T, Constructors, 302 NLRB 301 at 303-304. I have further relied on a case named Starcon, S-T-A-R-C-O-N, Inc. which is reported at 323 NLRB Number 168. I cite that case to you for two things. The company has raised "salting" during the course either of its opening statement or somewhere in the trial perhaps with the questions that Mr. Norris put to Mr. Hill—What if this were salting? Do you know the definition of salting? That "salting" consideration is absolutely no defense to the company, because in the case I just made reference to, Starcon, at slip opinion, page 6, it states, "an employer who refused to hire applicants because of their union affiliation violates Section 8(a)(3) of the Act.

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This is true even when the applicants are union members ('salts s-a-l-t-s'), intent on organizing the other employees of that particular company.'

So the fact that they may have been "salts" or to use your terminology, Mr. Norris, "set-ups" is not relief to you. In Starcon the Board found a violations of the Act and said in the remedial part of that decision that questions concerning the number of jobs, either regular or temporary that would have been available during the period of the discriminatory conduct, would be left to the compliance stage of the procedure. And I could do the same here if I found that applications were made at a time when the company was hiring. The Board makes reference to or adopts the judge's decision that makes reference to the fact Starcon hired applicants during the critical period therein. So I am persuaded that even as late as the Starcon decision, which was decided June 13, 1997, that cases that are factually in line with the one here, the Government must establish the element, that company was in fact hiring and demonstrate that they actually hired someone.

I am fully convinced that you have to get part the element of showing they hired someone on and after the critical

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time, or you must at least show that the employer ceased hiring anyone in order to avoid hiring what it considered to be unacceptable applicants and the unacceptable nature being that they were union individuals.

So in summary, and perhaps I have gone longer that [I] should, I find, as I have indicated, that the charge was filed, the company is an employer within the meaning of the Act. The union is a labor organization within the meaning of the Act. Mr. Norris is supervisor and agent of the company within the meaning of the Act. That Mr. Norris unlawfully and in violation of the Act instructed an employee not to discuss the union or the employee's union membership at his TRW job site. In order to remedy that I will order, Mr. Norris, that you post a notice at your company stating that you will not engage in such conduct and I will attach a copy of that no-

tice to my certification of this decision. However, I am dismissing the allegation that the company refused to hire Mr. Allison and Mr. Brooks because of their union affiliation and sentiments.

Now, in order to take exceptions to this decision, rely on the Board's rules and regulations and their procedure for doing so, but I am required to certify my decision in writing and I will do that and serve it on the parties. I will do so only after the court reporter has provided me a copy of the transcript and I will cite to you the pages of the transcript that constitute my decision. And then it is my understanding

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that the appeal period runs from the date of the certification of my decision for a specified period. The remedy that I have found and that I will order involves the posting of a notice at your facility and I will prepare a copy of that notice and it will be attached to the certification that I will provide of this decision. And again, it has been a pleasure to be in Knoxville, Tennessee and I thank the participants for their being here and this case is closed.

(Whereupon, at 3:00 p.m., the hearing was closed.)

APPENDIX B

**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 instruct our employees not to discuss the Union or the employees' union membership at any of our jobsites.

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

NORRIS ELECTRIC CORPORATION