

Local 1049, International Brotherhood of Electrical Workers, AFL-CIO and Tower Landscaping.
Case 29-CB-9967

September 15, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On March 25, 1997, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations 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 as modified.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Local 1049, International Brotherhood of Electrical Workers, AFL-CIO, its officers, agents, and representatives, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(b):

“(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.”

2. Substitute the following for paragraph 2(a):

“(a) Within 14 days after service by the Region, post at its office and at all of its meeting halls, and at Tower's principal office, if Tower is willing, copies of the attached notice marked ‘Appendix.’³ Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and shall be maintained for 60 consecutive days in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notice is not altered, defaced, or covered by any other material.”

¹The 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.

Marcia Adams, Esq., for the General Counsel.
Vincent F. O'Hara, Esq. (Holm, Krisel & O'Hara), for the Respondent.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard by me on January 23, 1997, in Brooklyn, New York. The complaint herein, which issued on October 31, 1996,¹ and was based on an unfair labor practice charge filed on August 20 by Tower Landscaping (Tower) alleges that Local 1049, International Brotherhood of Electrical Workers, AFL-CIO (Respondent) violated Section 8(b)(1)(A) of the Act on about August 2 by making threats of physical harm if Tower did not sign an agreement with the Respondent and assign its landscaping work to Respondent's members.

FINDINGS OF FACT

I. JURISDICTION

Respondent admits, and I find, that Tower has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION STATUS

Respondent admits, and I find, that it has been labor organization within the meaning of Section 2(5) of the Act.

III. FACTS AND ANALYSIS

This case involves statements allegedly made on about August 2 by Richard Fridell, an organizer for the Respondent. Counsel for the General Counsel alleges that the statements constitute a threat of violence on the part of Respondent if Tower refused to sign an agreement with it and to assign Respondent's members to perform certain work. The Respondent, while admitting that Fridell made the alleged, or a similar, statement, defends that the statement related solely to the Respondent's lack of safety procedures.

Tower is engaged in the business of landscaping and related maintenance. In 1996, it bid for, and was awarded a contract by Long Island Lighting Company (Lilco) for grounds maintenance of Lilco's transmission line rights of way, resulting in an agreement between Tower and Lilco dated May 29. Apparently, prior to 1996, Lilco had contracted with an employer or employers whose employees were represented by the Respondent.

Michael Varrone, who was employed by Tower from September 6, 1994, to December 2, testified that on July 13, he received a telephone call from Fridell asking to speak to Robert Hole, Tower's owner. Varrone said that Hole was not available and asked if he could assist him. Fridell said that he understood that Tower was awarded the Lilco contract for grounds maintenance and Varrone said that it was. Fridell said that he would like to sit down with Tower to come to some agreement “to sign up with the Union.” Varrone said: “We've been a non-union shop for 39 years. From what I understand, we'd like to stay that way. Your men are welcome to come down and fill out applications if they want.”

The work under the May 29 agreement commenced on July 15. On August 2, Varrone received a telephone call from Mark Abrams, Tower's general foreman who was

¹Unless indicated otherwise, all dates referred to relate to the year 1996.

working on a Lilco job in the town of Bethpage, Long Island, New York. Abrams said that Fridell and about 8 or 10 of Respondent's members were at the jobsite trying to stop the work, and that Fridell wanted to talk to him. Varrone told Abrams to give Fridell the cellular phone. Fridell identified himself and said: "What the fuck is going on here? This is our work." Varrone told him that they were doing some work for Lilco; they were awarded the contract and that Respondent's beef was with Lilco, not Tower. Fridell said: "I don't give a shit about Lilco. If we can't sit down and come to a conclusion or some sort of decision, its going to get fucking bloody." Varrone told Fridell to calm down, and Fridell said that he was calm. Varrone asked Fridell to let the men work that day, and Fridell said that he would, but that if Tower did not call the Respondent by the end of the day, "this is going to get fucking bloody."

Rodolfo Diaz began his employment with Tower at the end of July; Abrams was his immediate supervisor. He testified that on August 2 he was performing maintenance work on a Lilco right of way in Bethpage with Abrams and about five other Tower employees. At about 9 a.m., Fridell and about eight other people came to the jobsite and he heard Fridell tell Abrams: "We could not work there because if we did, there was going to be blood, problems and so forth." At that time, Abrams said that he was going to call Varrone and made a phone call from his cellular phone and gave the phone to Fridell; at the time, Fridell was between 5 and 7 feet from where Diaz and the other employees were standing. Fridell walked back and forth with the phone and spoke loudly, saying that he would call Immigration and that no one was going to work there because there was going to be bloodshed and he told Varrone, "I'm going to kick your ass." After Fridell gave the phone back to Abrams, Abrams told the employees to pick up their equipment and they left the site without performing any work.

Fridell, who became an organizer for the Respondent on July 1, testified that his first contact with Tower was a telephone call that he made to Hole in mid-July. He introduced himself and asked him about the contract that he had with Lilco. Hole said that he had the work, but that he was not going to perform it with Respondent's members. Sometime after that conversation, he called Hole and spoke to Varrone and asked if there was any chance that they could sit down and talk. Varrone told him no, that Hole always worked non-union, and did not plan to change. On August 2, he went to the Bethpage site with five members who perform line clearance work, such as was performed by Tower. He had two purposes in going there: "I was still hoping to organize Tower," and he wanted to see the kind and quality of work that Tower was performing. They walked around the site and Tower's employees arrived in two trucks, each with three employees in the front cab and four or five employees in the back of both trucks; "they were jam packed." The Tower employees formed a semicircle around them and Fridell asked if they were from Tower, although he felt intimidated and nervous because he was outnumbered and did not know them. Fridell then asked the employees if they knew about the Respondent and if they had papers to work in the country, as most of them were Hispanic. He was then handed the cellular phone by someone, probably Abrams, who said, "[H]ere's Varrone." Varrone asked him what the problem was, and Fridell asked Varrone why he had not contacted him and said there was no problem other than the fact that

in a prior conversation he had told him that if they were going to be performing their work that the Respondent would be picketing. Fridell then told Varrone that his employees did not know how to properly use the equipment: "I didn't feel the guys were qualified to do the work and that they were going to—they could get hurt or bloody—I don't know if that was the term I used; I guess it was." He testified that he does not believe that he was speaking in a loud voice, but he was attempting to be heard over the cellular phone. He used the word "bloody" because Tower's employees had no protective headgear, no safety eyeglasses, and no ear protection or chaps (which protects the workers' legs).

By letter dated July 15, Fridell asked for an OSHA representative to accompany the Respondent to a jobsite of Tower on July 15. The letter states: "I strongly believe violations of OSHA regulations are being committed by the company on the site. It is imperative, due to the dangerous nature of the work that this inspection be performed immediately."

Due to the Respondent's defense herein, there was some testimony regarding Tower's safety program and record. Because of the nature of the unfair labor practice alleged herein, I did not allow any testimony regarding accidents or incidents after August 2. Varrone testified that during the term of his employment with Tower, it had no registered program with the state or Federal Government for training, had no certified instructors, and a majority of its employees were Hispanic, some of whom had problems understanding English. He testified further that sometime after August 2, Fridell told him that Tower's employees did not have the proper safety equipment, including eye protection. The employees were not given chaps on July 15; they were given chaps and helmets with face shields and ear protection on a later date, but he could not recollect at what time. Diaz testified that he was given a helmet that protects your face and ears, and protective pants on his first day of employment with Tower.

There is a credibility issue on what Fridell said on the morning of August 2. Varrone testified that about 2 weeks earlier, Fridell said that he understood that Tower had obtained the Lilco contract and asked to meet with Tower to sign a contract with the Respondent. On August 2, Fridell claimed that the work belonged to the Respondent. When Varrone replied that Lilco had awarded the contract to Tower, Fridell said: "I don't give a shit about Lilco. If we can't sit down and come to a conclusion or some sort of decision, it's going to get fucking bloody." Diaz testified that while at the Bethpage site, he overheard Fridell tell Abrams that the employees could not work there because there would be bloodshed and, on the cellular phone, tell Varrone that no one was going to work there because there was going to be bloodshed and that he would kick his "ass." Fridell testified that his concern was safety, and he told Varrone that he did not feel that the employees were qualified to do the work and that they could be hurt or get bloody. This is a rather simple credibility determination. Fridell was a young, new and, apparently, eager organizer for the Respondent, whose members had previously performed this work for other employers for many years. About 2 weeks after Fridell commenced his employment with Respondent as an organizer, Tower began performing this work with nonunion employees. He attempted to convince Tower to sign up with the Union

and, when that failed, threatened bloodshed. Varrone's version of the incidents, as supported by Diaz' testimony, is both credible and reasonable. Fridell's threat to Varrone, as overheard by the employees, was clearly meant to obtain the work for Respondent's members. The safety issue defense promulgated by Respondent here, while commendable, was clearly an afterthought.

It is alleged that Fridell's threat violated Section 8(b)(1)(A) of the Act because it restrained and coerced Tower's employees in the exercise of their Section 7 rights. Fridell made a clear threat of bloodshed should Tower refuse to sign a contract with the Respondent, and this threat was overheard by, at least, Diaz. Even though the threat was not made directly to the employees, and it was not a demand that they sign cards for the Union, it was overheard by them and could reasonably be viewed as a threat to their Section 7 rights to join, or to refuse to join, a union. I, therefore, find that Fridell's threat violated Section 8(b)(1)(A) of the Act. *Teamsters Local 212 (Stuart Wilson, Inc.)*, 200 NLRB 519 (1972); *General Iron Corp.*, 218 NLRB 770 (1975); *Electrical Workers Local 3 (Cablevision)*, 312 NLRB 487 (1993).

CONCLUSIONS OF LAW

1. Tower has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent has been a labor organization within the meaning of Section 2(5) of the Act.

3. By threatening Tower with bloodshed, in the presence of Tower's employees, if it refused to sign a contract with the Respondent, the Respondent violated Section 8(b)(1)(A) of the Act.

THE REMEDY

Having found that the Respondent has violated the Act as alleged in the complaint, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²

ORDER

The Respondent, Local 1049, International Brotherhood of Electrical Workers, AFL-CIO, its officers, agents, and representatives, shall

²If 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.

1. Cease and desist from

(a) Threatening physical harm in the presence of employees should an employer refuse to execute a collective-bargaining agreement with the Respondent.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its office and at all of its meeting halls, and at Tower's principal office, if Tower is willing, copies of the attached notice marked "Appendix."³ 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 upon receipt and shall be maintained for 60 consecutive days in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notice is not altered, defaced, or covered by any other material.

(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 Respondent has taken to comply.

³If 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 MEMBERS
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 threaten employees with physical harm in order to compel their employer to execute a collective-bargaining agreement with us.

WE WILL NOT in any like or related manner restrain or coerce Tower's employees in the exercise of the rights guaranteed them by Section 7 Act.

LOCAL 1049, INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS, AFL-CIO