

Cash Equipment Rental and International Union of Operating Engineers, Local 12, AFL-CIO. Case 31-CA-21288

September 25, 1998

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND BRAME

On February 18, 1998, Administrative Law Judge James M. Kennedy issued the attached Bench Decision and Certification. The Respondent filed exceptions and a supporting brief, and the Charging Party filed a brief in support of the judge's bench decision and in opposition to the Respondent's exceptions.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order.²

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Cash Equipment Rental, Ontario, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Ann P. Pomerantz and William McCauley, for the General Counsel.

David P. Koppelman, House Counsel, of Pasadena, California, for the Charging Party.

BENCH DECISION AND CERTIFICATION

JAMES M. KENNEDY, Administrative Law Judge. This case was tried in Los Angeles, California, on January 26, 1998. The original charge was filed on May 17, 1995,¹ by the International Union of Operating Engineers, Local 12, AFL-CIO and amended on July 28. The complaint issued May 17, 1996. It alleges that Respondent violated Section 8(a)(1) in several ways and discharged its employee Christopher A. Nemeth in violation of both Section 8(a)(1) and (3) of the Act. Respondent's answer denied the commission of any unfair labor practice.

After hearing the evidence on January 26, 1998, including a stipulation of facts dated May 14, 1997, I determined that it was appropriate for me to issue a bench decision under the Board's Rule § 102.35(a)(10). Pursuant to the Board's Rule §

¹ The Respondent did not appear at the hearing in this proceeding.

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.

² Without passing on the validity of *Dean General Contractors*, 285 NLRB 573 (1987), Member Brame would not in any event apply the remedy approved in that case in circumstances where, as here, the discriminatee is a recent hire.

¹ All dates are 1995 unless otherwise noted.

102.45(a), I hereby attach pages 92-104 of the transcript to this decision as Appendix A and certify that it (including interlineal corrections), is an accurate transcription of my decision as delivered.²

Appendix B is the recommended notice to employees.³ The Regional Director is given discretion to require its publication/posting in any foreign language he deems appropriate.

APPENDIX A

92

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JUDGE KENNEDY: All right. I'm going to apologize in advance for this, because it's going to be a little herky-jerky. I didn't plan on this and I didn't really take enough time to write out in full organization what I was planning to do here, but let me—I have some things that I'm going to try to follow, cross-referencing, this and that. All right.

Well, I'm going to in the following pages set forth my decision and my logic together with my conclusions—my factual conclusions and my legal conclusions and I'm going to try to fashion an Order at the same time or at the end, anyway.

There are some procedural things you should know about in a bench decision and that is, eventually, when the court reporter is done in his ten days of putting together the hard copy of the record, I have to certify that portion of the decision to be my—or that portion of the record to be my decision. So there is a hard copy that eventually issues in kind of a traditional way.

There is also a notice that I usually attach. Although some people, some judges, have not attached it, I, probably, will. It gives me an opportunity to correct my misstatements as I go along here or whatever happens as my decision gets transcribed. So, although this becomes—this is my decision, it really doesn't become appealable until the—until the

93

certification and bench decision comes out, but then it's appealable in the same fashion and will be a decision pursuant to Section 102.45(a) of the Board's Rules. But the decision itself is rendered orally and as a bench decision pursuant to Board Rules, Section 102.35(a)(10). That's (a) and parentheses (10). All right.

BENCH DECISION

In this case, of course, we begin with the stipulation of fact which the parties entered into on May—various dates in May in 1997, signed by Mr. Cash on May 8th and by Mr. Koppelman a week earlier, on May 2, and, eventually, by Ms. Pomerantz on behalf of the General Counsel on May 15th. And we'll start there because it contains the standard boiler plate that the Board likes to see in its conclusions.

² 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.

³ 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."

First, the—I find that Respondent is and has been at all times material herein a sole proprietorship with offices and places of business located in Ontario, California, where it is engaged in the business of providing heavy earth moving equipment on a daily rental basis. Based upon the evidence, I further find that that rental basis can include an operator. It can also include renting the equipment without an operator. That was—I think we can call that No. 1A.

And No. 2—No. 1B is that, during the course and conduct of its business operations during the past calendar year Respondent purchased and received goods or services valued in

94

excess of \$50,000.00 from, at least, one other enterprise which has received goods directly from points outside the State of California; and,

2. that, as a result of what I found in paragraph 1, that Respondent is and has been at all times material herein an employer engaged in commerce and in a business affecting commerce within the meaning of Sections 2(6) and 2(7) of the Act.

3. the Charging Party, the International Union of Operating Engineers, Local 12, is now and has been at all times material herein a labor organization within the meaning of Section 2(5) of the Act.

4. at all material times, David J. Cash has been the Respondent's owner and its chief executive officer and has been a supervisor of Respondent within the meaning of Section 2(11) of the Act and an agent of Respondent within the meaning of Section 2(13) of the Act.

I think that in the Answer, and you can correct me if I'm wrong, Ms. Pomerantz, you alleged in the complaint that Mr. Cash was a sole proprietor and that I think that—I think he admitted that, did he not?

MS. POMERANTZ: Uh huh.

JUDGE KENNEDY: So I find that, as an employer, he is a sole proprietor.

5. the Respondent admits that on or about May 12, 1995,

95

Mr. Cash engaged in the following conduct at Respondent's Ontario facility and, during a confrontation with Mr. Nemeth, Mr. Chris Nemeth, that he (a) interfered with and threatened to fire employees for engaging in union and/or protected concerted activity, (b) interrogated employees as to their own and other persons' protected concerted activity, (c) told employees words to the effect that it would be futile to seek union representation because the Respondent would never sign an agreement with the union, and (d), threatened employees that he could or might shut down operations because the employees engaged in the protected concerted activity of asking for a raise.

In that regard, with respect to this particular section, there is factual support in the attachments to the—to the stipulation and which will warrant the Board concluding that the specific activity was actually engaged in and that the legal conclusions which are found in the stipulation are supported by those facts.

6. Now the next paragraph, which I think I called 6, is dealing with the question of whether Chris Nemeth was an employee within the meaning of Section 2(3) of the Act, employed by Respondent. This will involve some factual explication.

I find, based upon the testimony of Mr. Nemeth, that on May 5th of 1995, pursuant to a lead given to him by his brother, who was an employee of Respondent, that Chris Nemeth spoke to Mr. Cash regarding an open job, which was—or a job offering

96

that—a job opening that Mr. Cash had at that time and that during the course of that interview Mr. Cash made a decision to hire Mr. Nemeth and, as a result of that decision, handed Mr. Cash—Mr. Nemeth various paperwork normally associated with the hiring process. This included a job application form, which Mr. Nemeth filled out and returned a couple of days later, although he actually had gone to work by that time. It included a W-4 form, an I-9 form, and a payroll/personnel record form.

I find that these types of documents are normally not distributed to anyone that an employer does not intend to hire. Accordingly, the converse being true that, if those documents are proffered and are subsequently filled out, that that is persuasive that a job offer has been made.

During that weekend which followed, Mr. Cash contacted Mr. Nemeth and gave him instructions to report to a job site in Sun City, California where he was to operate a piece of heavy equipment in road grading work, known as a road scraper; that on Tuesday, May 9th, pursuant to instructions given to him by Mr. Cash, Mr. Nemeth appeared at the Ontario yard, was given a time card, was given certain types of purchase order authority, was given specific instructions regarding how to perform his job with respect to the maintenance of that road scraper, which included fueling it, greasing it, and otherwise maintaining that equipment in working order, and, simultaneously, was given a company fueling truck which he was to take to the job site.

97

I think I can—Maybe I should ask counsel for a representation about how far Sun City is from Ontario. What is it? 20 miles?

MR. KOPPELMAN: About 40 miles.

JUDGE KENNEDY: About 40 miles away. Leaving this piece of valuable equipment in Mr. Nemeth's hands. That is, the fuel truck left in his hands for that entire week. So Mr. Nemeth was able to commute to and from his home in that fuel truck, although he also went into the Ontario yard, I guess, at least, on one occasion both to return the paperwork that would have been filled out, as well as to get additional fuel and, perhaps, additional oil and grease. I'm not sure about that. But, anyway, he was maintaining the level of equipment that he was supposed to maintain. And, on one occasion, pursuant to Mr. Cash's instructions, went to a local dealer who handled Caterpillar repair parts, acquired, based on a purchase order authorized by Mr. Cash, a spare part for use in the scraper, and, during that period of time, he was paid on an hourly basis or he was, at least, working on an hourly basis. He filled out a time card on a daily basis, which, ultimately, was submitted to the Respondent's bookkeeper at Respondent's office, although, I guess, factually, it turns out she was not there at the time, but this material was placed in her in box.

Connected to that particular—those particular facts are some facts and assertions made in the record by the currently

98

absent Respondent that Mr. Nemeth was not an employee of Respondent, but was, in fact, an employee of Lorenz Construction Company.

I find that assertion to be without support. It is true that there is a pay stub that was issued to Mr. Nemeth on a Lorenz check sometime later. That check is suspicious on its face. It's after the fact. It's out of sequence in terms of numeration. But,

beyond that, there is no evidence that Mr. Nemeth ever knew who Lorenz Construction Company was or is. Indeed, when he reported to the Sun City job site, he was told to perform his daily tasks by a foreman who was employed by the general contractor, R. J. Noble Construction Company and, in fact, there's not even any showing that, at least, on this record, that Lorenz was actually on that job site, although there is material showing that there was some sort of contractual agreement between Lorenz and Respondent during this time for there's a document that purports to be a rental agreement whereby Lorenz rented such equipment without an operator for this job.

Frankly, I find myself very suspicious of the circumstances and I wonder whether or not there has not been some falsification of documents here. I'm much concerned about Lorenz issuing a check to someone it has never hired. There certainly is no record that Mr. Nemeth ever filled out the standard hiring papers for Lorenz, as he did with Cash.

99

Furthermore—So therefore—well, so, therefore, I conclude that Mr. Nemeth, beginning on May 5th, 1995, was an employee in the meaning of Section 2(3) of the Act and was, in fact, an employee of Respondent Cash Equipment Rental.

7. the next question which must be resolved is whether or not on May 12 Respondent discharged Mr. Nemeth and whether that discharge was for reasons protected by the Act.

I conclude that he was discharged and that those reasons were not permitted or were barred by the Act. In other words, the discharge was an illegal firing.

It is clear from the record that Mr. Nemeth shortly before the discharge had engaged in the concerted activity with another employee of requesting a raise and that, as a result, Mr. Cash decided to discharge him. That discharge occurred in a flurry of 8(a)(1) conduct, all previously listed, and in terms of connection by time, it all happened, essentially, simultaneously. Therefore, the firing was precipitous following the commission of—well, following the protected activity which Mr. Nemeth engaged in and its illegality is demonstrated by the nature of the comments made to Mr. Nemeth at the time he was told not to work anymore. Well, he wasn't told it exactly that way. I think he was told, specifically, to get off the property. He was told that in various ways, at least, three times and, finally, when Mr. Nemeth asked for some specificity about whether he was still employed, Mr. Cash replied that, if

100

there was work for him, he would call him over the weekend, and he never did and he never has and so the disconnection from employment is clear.

JUDGE KENNEDY: Let's go off the record for a minute.

(Off the record)

JUDGE KENNEDY: Back on the record.

JUDGE KENNEDY: In addition, I think it is clear that Mr. Nemeth had demonstrated during the course of his conduct that, at least, one of the reasons for his demanding that a wage increase was because of his concern and desire to have a union contract and to be paid wages commensurate with the level set in the union contract. So not only was the decision to discharge based upon his concerted activity for a pay raise, but that was inseparably connected to his union activities and his union desires. Therefore, I conclude that the discharge violated not only Section 8(a)(1) of the Act as a concerted activity, but Section 8(a)(3) of the Act as a union activity.

All right. Now, by way of remedy—

JUDGE KENNEDY: We'll be off the record for another minute. For a moment.

(Off the record)

JUDGE KENNEDY: Back on the record.

JUDGE KENNEDY: All right. At this point, I'm going to issue a Recommended Order and the Recommended Order will be as follows: that Respondent is hereby ordered that it cease and

101

desist from:

A. interfering with and threatening to fire employees for engaging in union and/or protected activity;

B. interrogating employees regarding their own and other persons'—that's a possessive—protected concerted activity;

C. telling employees words to the effect that it would be futile to seek union representation because Respondent would never sign an agreement with the union; and,

D. threatening employees that Respondent could or might shut down operations because the employees engaged in the protected concerted activity of asking for a raise.

2. Discharging or otherwise interfering with, restraining, or coercing Chris Nemeth or any other employee because he has engaged in union and/or concerted protected activity, including concertedly seeking a wage increase and seeking to have Respondent recognize the union as the collective bargaining representative of its employees.

Let's see. Did I number that A or B? I can't remember.

MS. POMERANTZ: That was 2.

JUDGE KENNEDY: Well, okay. That was 2 under cease and desist. Okay.

3. 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.

And then, as far as the affirmative action is necessary to

102

effectuate the policies of the Act, Respondent shall take the following action:

1. It will within 14 days from the date of this Order offer Chris Nemeth full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position without prejudice to his seniority or any other rights or privileges previously enjoyed. In this regard, I will comment that I specifically adopt the Board's policy set forth in *Dean General Contractors*, 285 NLRB 573 (1987), which assumes that in the construction industry that an individual discharged in that industry would, nonetheless, remain employed for subsequent jobs and that any burden to the contrary falls upon the Respondent.

Was that—Did I label that 1? That should have been 1.

MR. KOPPELMAN: Actually—

JUDGE KENNEDY: 2. Make Mr. Nemeth whole for any loss of earnings and benefits suffered as a result of the discrimination against him in the manner consistent with the Board's rules set forth in *Woolworth*, and I'll have to get the—well, maybe, I do have a cite on that. Yeah. Back pay shall be calculated in the manner set forth in *F. W. Woolworth Company*, 90 NLRB 289, 1950, including interest as set forth in *New Horizons for the Retarded*, 283 NLRB 1173, 1987.

3. Within 14 days of the date of this Order remove from its files any reference to the unlawful discharge and within three days thereafter notify the employee in writing that this

103

has been done and that the discharge will not be used against him in any way.

That is the Order. However, I do recognize that Respondent contends that it has not employed this individual and, therefore, there may be no such records. Nonetheless, the employee is entitled to a statement saying that there never were any records and, if that is the case, such a letter shall advise the employee of that fact.

4. Preserve and within 14 days of a request make available to the Board or its agents for examination and copying all payroll records, social security payment records, time cards, personnel records and reports, and all other records necessary to analyze the amount of back pay due under the terms of this order.

5. Within 14 days after service by the Region, post at its Ontario, California facility copies of a notice which will be attached to the Bench decision and certification which will issue in about 10 days. Copies of that notice on forms provided by the Director for Region 31 after being signed by the Respondent's authorized representative shall be posted by the Respondent 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 Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

104

In the event that during the pendency of these proceedings, the Respondent has gone out of business or closed its facility involved in these proceedings, Respondent shall duplicate and mail at its own expense a copy of the notice to all current employees and former employees employed by Respondent at any time since May 12, 1995.

What number am I at now? 6?

MR. MCCAULEY: 6.

JUDGE KENNEDY: 6. 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 Respondent has taken to comply.

Did I leave anything out?

(No oral response)

JUDGE KENNEDY: All right. That is my Order and my findings, both my findings of fact, my conclusions of law, and my Order.

All right. Does anybody have anything at this point?

MR. KOPPELMAN: No, Your Honor.

MS. POMERANTZ: No, Your Honor.

JUDGE KENNEDY: All right. The hearing is adjourned.

(Whereupon, 2:55 P.M., the hearing in the above-entitled matter 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 interfere with or threaten to fire employees for engaging in union and/or protected activity.

WE WILL NOT interrogate employees regarding their union activities or the union activities of other employees.

WE WILL NOT tell employees that it is futile to seek union representation or that we will never sign an agreement with a properly recognized labor organization.

WE WILL NOT threaten employees with shutting down the business because our employees asked for a raise in a protected, concerted manner.

WE WILL NOT discharge or otherwise discriminate against any of you for engaging in activities for the mutual aid and protection of employees such as concertedly asking for a wage increase or seeking the protection provided by a collective bargaining agreement.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting International Union of Operating Engineers, Local 12, AFL-CIO, or any other union.

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, within 14 days from the date of the Board's Order, offer Christopher A. Nemeth full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Christopher A. Nemeth whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Christopher A. Nemeth and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

CASH EQUIPMENT RENTAL