

**Gary Lee Lloyd d/b/a Lloyd Painting Company and Painters and Allied Trades, District No. 36 affiliated with International Brotherhood of Painters and Allied Trades.** Case 31–CA–23898

June 30, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS  
HURTGEN AND BRAME

On March 3, 2000, Administrative Law Judge Gerald A. Wacknov issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

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

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

ORDER

The complaint is dismissed.

*Brian Gee, Esq.*, for the General Counsel.

*James B. Markum, Esq. (Hodge & Markum)*, of Victorville, California, for the Respondent.

*Alexander Lopez, Business Representative*, of Pasadena, California, for the Union.

DECISION

STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge. Pursuant to notice a hearing in this matter was held before me in Los Angeles, California, on December 6, 1999. The original charge was filed by Painters and Allied Trades, District No. 36, affiliated

<sup>1</sup> The General Counsel 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'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In his decision, the judge credited testimony by the Respondent's owner, Gary Lee Lloyd, that the Respondent completed work at the Victorville Federal Prison on April 29, 1999. The judge also stated, inaccurately, that the General Counsel failed to call a representative of the general contractor on the project to testify concerning the completion date of the Respondent's painting subcontract, and that the General Counsel failed to argue in his posthearing brief to the judge that there was any further work for the Respondent at the jobsite at the time it ceased work. However, these errors do not affect our decision. In this regard, the record shows that the General Counsel called Reece Steele, business services manager of J. A. Jones Construction Company, who testified that the Respondent had two subcontracts at the Victorville jobsite, which were scheduled to be completed between March and August 1999. Steele further testified that the Respondent completed work on both contracts, but that he did not know the date on which the work was completed. We find that this testimony does not contradict Lloyd's credited testimony concerning the date on which the work was completed.

<sup>2</sup> The Respondent attached to its answering brief an affidavit and related cover letter. We have not considered these documents as they are not part of the record in this case.

with International Brotherhood of Painters and Allied Trades (the Union) on May 19, 1999, and was amended on August 30 and again on September 9, 1999. On September 16, 1999, a complaint and notice of hearing was issued by the Regional Director for Region 31 of the National Labor Relations Board (the Board) alleging violations by Gary Lee Lloyd d/b/a Lloyd Painting Company (the Respondent) of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act), and an amended complaint was issued by the Regional Director on November 5, 1999. The Respondent, in its answers to the complaint and amended complaint, duly filed, denies that it has violated the Act as alleged.

The parties were afforded a full opportunity to be heard, to call, examine and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from counsel for the General Counsel (the General Counsel) and counsel for the Respondent. On the entire record, and based on my observation of the witnesses and consideration of the briefs submitted, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a sole proprietorship engaged in business as a painting contractor, with an office and place of business located in Hesperia, California. During the 12 months preceding the issuance of the complaint the Respondent has provided services to J. A. Jones Construction Company within the State of California valued in excess of \$50,000. J. A. Jones Construction Company, a North Carolina corporation general contractor engaged in general construction in Victorville, California, annually purchases in excess of \$50,000 worth of goods and services directly from points outside the State of California for use at its California jobsites, including the jobsite directly involved here. On the basis of the foregoing, I find that the Respondent is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is admitted and I find that at all material times the Union is and has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Issues*

The principal issues in this proceeding are whether the Respondent has violated Section 8(a)(1) and (3) of the Act by coercively interrogating employees and by discharging employee Timothy Golding.<sup>3</sup>

B. *The Facts*

The Respondent, a painting contractor, was hired by J. A. Jones Construction Company, a general contractor, to perform certain painting work at the Victorville Federal Correctional Project for the Federal Bureau of Prisons, a prevailing wage job under the Davis-Bacon Act.

Timothy Golding began working for the Respondent on March 8, 1999,<sup>4</sup> at the Victorville Federal Prison facility, and was given the job of painting sprinkler pipes. At first several other painters worked with him, and about 2 weeks later the Respondent hired an apprentice, Dan Fernandez, to work with Golding. Thereafter, just

<sup>3</sup> The complaint was amended at the hearing to delete the allegation that Daniel Fernandez was also unlawfully discharged.

<sup>4</sup> All dates or time periods hereinafter are within 1999 unless otherwise specified.

Golding and Fernandez were assigned to this particular job, although the Respondent had other painters performing other work at the same facility.

Golding testified that when he was hired he had a discussion with Gary Lee Lloyd, the Respondent's owner, regarding wages. Lloyd told him that it was a prevailing wage job, that Golding would be making \$23.42 per hour as a journeyman, and that other painters made lesser amounts depending upon their experience.

Golding testified that on April 20, Ron Wheatly, a union representative, came to the jobsite. Wheatly, in the presence of Fernandez, asked Golding if he was making union scale on the job. Golding said that he was. Wheatly asked if he was interested in joining the Union. Golding replied that he had formerly been a union member, and would consider rejoining the Union if Wheatly could help him obtain the pension benefits that he believed he had earned during the period of his prior union membership, but which, due to a paperwork error or deficiency, had been denied him. Wheatly took some information from him and said that he would contact him.

Approximately 45 minutes later, according to Golding, Lloyd called him on the cell phone and said that he had received a phone call regarding a union representative being on the job, and that Golding and Fernandez were not to speak with the representative; rather, they were to give him the Respondent's phone number and refer him to Lloyd for any information. Golding did not tell Lloyd that Golding and Fernandez had already spoken to Wheatly. There was no further mention of the matter.

Golding testified that on Thursday, April 29, at about 2:30 p.m., Lloyd called Golding on the cell phone and told him to "clean up the pump and spray rigging and get all the paint and bring it all into the shop because he was pulling off the job." According to Golding, Lloyd said that he had other jobs that needed to be completed, that he was "swamped with work," and that Golding and Fernandez would be back out on the prison job as soon as he had caught up with the other nonprison jobs that had been scheduled. When Lloyd's son, Darren Lloyd, came to the jobsite that afternoon to pick up the spray rig and materials, he told Golding that he was not aware of any reason why the Respondent would be pulling off the job, and said that he thought work was slow. According to Golding the painting work at the prison was not near completion, and there was sufficient work for approximately another month and a half. Thus, Golding testified, "[A]t that point in time we were spraying primer on spot welds and a corrugated ceiling and we still had four or five mechanical rooms to complete."

On Friday, April 30, Golding and Fernandez, who rode together, reported to the Respondent's shop. According to Golding, other employees were present. Lloyd, dismissing the rest of the crew by sending them to the warehouse, asked Golding and Fernandez what was said during their conversation with the union representative out on the job, allegedly referring to the aforementioned April 20 conversation they had with Wheatly. Golding related the conversation to him. Golding does not recall whether Lloyd asked Fernandez anything. Golding then handed Lloyd the daily reports regarding the work that had been done on the prison job each day, and Lloyd "got agitated" about the reports and tore them up and threw them in the trash. Then, according to Golding, Lloyd brought the 9 or 10 other painters in from the warehouse area and assigned them work. Only Golding and Fernandez were not assigned work that day. Golding asked why he was not assigned any work, and Lloyd said that things were slow and that there was no work for them. Golding replied that there was still a lot of work at the prison, and Lloyd said that he was pulling off the job because "they owed him back

money and he wasn't going to invest any more time in out there until they paid him up." Golding asked why one employee, who had been hired after Golding, had been assigned work that morning rather than Golding. Lloyd said that the painters who were assigned work "were already on homes that they were painting and that they knew what they were doing, where to go, and that was about it." Lloyd said that his son had a side job that weekend and might need some help, but that he would have to talk to his son about it. He told Golding to call in and that if there was any weekend work he would call Golding.<sup>5</sup>

On Monday, May 3, Golding did not call in but rather went to the shop. Lloyd asked him if he knew who Alex Lopez was.<sup>6</sup> Golding said no. Lloyd said that he didn't know who Alex Lopez was either but that he had heard that Golding and Fernandez had been talking to union representatives out on the jobsite. Golding acknowledged this, and said that their conversation with the union representative did not pertain to the work they were doing, but that the union representative was only wanting him to join the Union. Lloyd told him there was no work for him that day.

Golding called Lloyd the next day, May 4, and inquired about work. There was no work. He went to the shop the following day, and was told there was no work, and that Lloyd would contact him if there was any work. He phoned on May 6 and inquired about work, and Lloyd said there was no work. On May 7, he called in the morning and was told there was no work, and then went to the shop at about noon, and was again told there was no work. On this occasion, Lloyd told him that he heard that Wilson and Hampton, a painting contractor, was hiring out at the prison site.<sup>7</sup> Golding contacted Lloyd again on May 13, and again on May 18,<sup>8</sup> and was told there was no work.

Fernandez did not testify in this proceeding.

Lloyd testified that on about April 29 he received a call from Bruce Heckert, the project/accounting manager for J. A. Jones Construction Company, asking him to come out to the prison and discuss a matter with Ana Hansen, whom he identified as being from the "compliance department." On about April 22, Heckert had received a Freedom of Information Act request from Hansen, a case investigator for Southern California Painting and Dry Wall Industries Apprenticeship Trust-Public Works Compliance, requesting that J. A. Jones submit the "certified payroll records" of the Respondent. Heckert apparently wanted Lloyd to straighten this out with the Union. Lloyd met with Heckert at the prison site, and Heckert asked him to phone Hansen from Heckert's office. During the phone conversation Hansen proceeded to tell Lloyd that he had not been paying his employees the correct wages and that he was not in compliance with Davis-Bacon Act requirements. Lloyd disagreed, stating that before bidding the contract he had called the Painters' union to find out what the prevailing wage was for the job. Hansen also told him that he was not permitted to use his own apprentices on the job, but was required to obtain apprentices from the apprenticeship training program. Lloyd had not been made aware of this requirement. Lloyd told Hansen that he would have to call his attorney about the matter.

<sup>5</sup> Golding filed a claim for unemployment insurance shortly thereafter. Under the heading "Reason for Separation," the form submitted to the Respondent by the California Employment Development Department states, "Laid off lack of work. Indefinite."

<sup>6</sup> Lopez is a union business representative.

<sup>7</sup> In fact, Golding rejoined the Union and began working for Wilson and Hampton at the prison site on about May 10.

<sup>8</sup> The record does not show whether this was by phone or in person.

Lloyd testified that on April 29, the same day he received the call from Heckert and spoke with Hansen, the work on the time and materials "purchase order" contract for touching up the steel, namely, the work that that Golding and Fernandez had been hired to perform, had been completed. At the same time the Respondent had completed other work pursuant to a separate and distinct contract at the prison, performed by about five additional painters. Thus, as of April 29 there was no further work to complete. He told Golding on that day that the work was completed and that Golding should put what materials he could into his truck and that he was sending out his son, Darren, with a larger truck to pick up ladders, scaffolding, and other equipment. Golding, according to Lloyd, was well aware that the work had been completed and that there was no more work to perform. Thus, in mid-April, Golding came to him and inquired about whether there was any additional work to do at the prison after he and Fernandez completed the touch up work on the steel. Lloyd said no. Golding said that since there was only a couple of weeks of touch up work remaining, "do you want me to like stretch it out a little bit because it's time and materials." Lloyd said no.

According to Lloyd, on Friday, April 30, a payday, Golding came to the shop to pick up his check. When Lloyd gave him his check Golding mentioned that someone from the Union had told him that he had not been receiving the correct wages. Lloyd, having had the conversation with Hansen the day before about prevailing wage discrepancies, said that he needed to get to the bottom of this and rectify the matter as quickly as possible. He asked Golding the name and number of the union representative that Golding had spoken with so that he could get the situation straightened out as soon as possible as this would affect his bid on an upcoming job for the painting of handrails which was to begin in August. Lloyd testified that he did not tear up the work reports that Golding handed him at that time. According to Lloyd, Golding never came to the shop or called in after April 30, and Lloyd had no further contact with Golding whatsoever until August when he happened to see Golding working at the prison for Wilson and Hampton, a union painting contractor.

Lloyd denied that he had a conversation with Golding on about April 20 about union representatives being on the job, or that he ever told Golding not to speak with union representatives on the job. Nor did Golding ever tell him that he was joining the Union. Other than the one April 30 conversation, there were no other conversations with Golding.

Lloyd testified that between April 29 and August, the Respondent performed no further work at the prison because the work had been completed. Further, work was very slow for the Respondent after April 29. The Respondent's payroll records show that it employed no painters from about April 29 until the payroll period beginning June 3. Lloyd testified that the available work was given to his regular painters who called in to seek work, and that Golding never called in to seek work.

#### Analysis and Conclusions

The record evidence is clear that, as I find Lloyd credibly testified, the Respondent had completed all of the work at the prison jobsite by April 29, and had no further work to perform at that location. If in fact this were not the case, the General Counsel could have easily demonstrated this by calling a representative of the general contractor, J. A. Jones Construction Company, to show that the Respondent pulled off the job in a precipitous manner, as

alleged by Golding. In fact, the General Counsel produced no such evidence, and does not even appear to maintain in his brief that there was any further work for the Respondent at the jobsite. Accordingly, I do not credit the testimony of Golding that there was work yet to be completed.

Further, given the fact that Golding would deign to give such inaccurate testimony on this point, I am similarly suspicious of the accuracy of the remainder of his testimony. And regarding the alleged April 20 phone call from Lloyd inquiring about the presence of a union representative on the job, it is significant that the General Counsel did not produce Fernandez as a witness to corroborate Golding's testimony. Fernandez, insofar as the record shows, although not wanting to become involved in this matter, was certainly available and could have been readily contacted and, if necessary, subpoenaed by the General Counsel. On the other hand, Lloyd impressed me as a forthright witness, and the scenario herein presented by the Respondent seems to be more plausible and likely than the scenario presented by Golding and the General Counsel.

I conclude that the only time Lloyd asked Golding any questions about the Union was on April 30, in response to Golding's remark, after he received his final paycheck, that he had learned from a union representative that he had not been paid the appropriate prevailing wage. Lloyd, having been admonished the day before by Hansen, was concerned about this matter, and asked the name and phone number of the union representative who spoke with Golding. Obviously, this was a noncoercive type of question, and in fact Golding could have reasonably assumed that the question was designed to assist Lloyd in determining that Golding would be paid correctly. Thereafter, I find, Golding did not contact the Respondent for further work, and, even if he did, no work was available as the Respondent's business was very slow at the time.

Assuming arguendo that the General Counsel has presented a prima facie case, I conclude that the Respondent has amply demonstrated that Golding was neither discharged nor thereafter refused employment because of his alleged union affiliation or activity. *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert denied* 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

On the basis of the foregoing, I shall dismiss the complaint in this matter.

#### CONCLUSIONS OF LAW

1. The 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. The Respondent has not violated Section 8(a)(1) and (3) of the Act as alleged.

On these findings of fact and conclusions of law, I issue the following recommended<sup>9</sup>

#### ORDER

The complaint is dismissed in its entirety.

<sup>9</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.