

Laborers' International Union of North America, Local No. 1184, AFL-CIO (Nicholson Rodio West Dam Joint Venture) and Jesse Lara. Case 21-CB-12273

November 17, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS
LIEBMAN
AND HURTGEN

On September 29, 1998, Administrative Law Judge Frederick C. Herzog issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel 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,¹ and conclusions and to adopt the recommended Order as modified and set forth in full below.²

ORDER

The National Labor Relations Board orders that the Respondent, Laborers International Union of North America, Local No. 1184, AFL-CIO, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Causing employers to fail or refuse to hire employees for reasons other than their failure to pay dues.

(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.

¹ 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), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In affirming the judge's finding that the Respondent violated Sec. 8(b)(1)(A) and (2) by causing Nicholson Rodio West Dam Joint Venture not to hire Jesse Lara, we note that the Respondent does not contend that its interference with Lara's employment was pursuant to a valid union-security clause or was necessary to the effective performance of its representative functions. See, e.g., *Stage Employees IATSE Local 720 (AVW Audio Visuals)*, 332 NLRB No. 3, slip op. at 2 (2000).

² In addition to the remedies provided by the judge, we shall order the Union to inform the employer that it has no objection to the employment of Charging Party Jesse Lara and to request that he be hired. *Sheet Metal Workers' Union Local 355 (Zinsco Electrical Products)*, 254 NLRB 773, 774 (1981), enfd. in relevant part 716 F.2d 1249 (9th Cir. 1983). We shall also substitute the Board's standard language for certain portions of the recommended Order and notice. See *Indian Hills Care Center*, 321 NLRB 144 (1996).

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

(a) Make Jesse Lara whole for any loss of pay and other benefits that he suffered because the Respondent unlawfully caused Nicholson Rodio West Dam Joint Venture not to hire him. Backpay shall be computed in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(b) Inform Nicholson Rodio West Dam Joint Venture that it has no objections to Lara's employment, and request that he be employed.

(c) Within 14 days after service by the Region, post at its union offices and hiring halls copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 21, 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 and members 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

(d) 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.

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.

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.

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."

WE WILL NOT cause employers to fail or refuse to hire employees for reasons other than their failure to pay dues.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make Jesse Lara whole, with interest, for any loss of pay and other benefits that he suffered because we unlawfully caused Nicholson Rodio West Dam Joint Venture not to hire him.

WE WILL inform Nicholson Rodio West Dam Joint Venture that we have no objections to Lara's employment, and request that he be employed.

LABORERS' UNION LOCAL NO. 1184 (NICHOLSON RODIO)

Erick M. Carr, Esq. for the General Counsel.
Alexander B. Cvitan, Esq. (Reich, Adell, Crost & Cvitan), of Los Angeles, California, for Respondent.

DECISION

STATEMENT OF THE CASE

This case was heard by me in Los Angeles, California, on December 3, 1997, January 26 and 27, 1998, and April 27, 1998, and is based on a charge filed on January 14, 1997, by Jesse Lara, an individual, alleging generally that Laborers' International Union of North America, Local No. 1184, AFL-CIO, (Respondent), committed certain violations of Section 8(b)(1)(A) and (2) of the National Labor Relations Act (the Act). On June 16, 1997, the Regional Director for Region 21 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing (subsequently amended), alleging violations of Section 8(b)(1)(A) and (2) of the Act. Respondent thereafter filed a timely answer to the allegations contained within the complaint, denying all wrongdoing.

All parties appeared at the hearing, and were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and file briefs. Based on the record, my consideration of the briefs filed by counsel for the General Counsel and counsel for Respondent, and my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges, and it is admitted, that the employer, Nicholson Rodio West Dam Joint Venture, has a jobsite, office, and place of business in Winchester, California, where at all material times it has been engaged in the business of construction of a dam; that the employer is a joint venture of Nicholson Construction Company and Rodio, Inc.; that during the 12-month period ending, in the course and conduct of its business operations, the employer purchased and received at its jobsite, mentioned above goods valued in excess of \$50,000 directly from points outside the State of California.

Accordingly, I find and conclude that Nicholson Rodio West Dam Joint Venture is now, and at all material times has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

The complaint alleges, the answer admits, and I find that the Respondent is now, and at all material times has been, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Issue

The sole issue in this case is whether or not Respondent violated Section 8(b)(1)(A) and 8(b)(2) of the Act by causing an employer not to hire employee Jesse Lara.

B. The Evidence

Lara credibly testified that he's been a member in good standing of Respondent since July 1985.

In March 1996, Lara was nominated for the position of Sergeant at Arms by a fellow member. However, the president of the Union, Jerry Bell, nominated another member, Luiz Flores, for that position. Ultimately, both men were appointed as Sergeants at Arms.

Lara testified without contradiction that prior thereto he had never been refused work by an employer. However, he was refused work by the Employer herein on Friday, September 20, 1996.

The day before, Lara was called by David Smith, a field representative for the Union, who told him he was being dispatched to work at Nicholson, and to pick up the referral later that day at the union hall for work to begin the following Monday. However, he was also told to report to Nicholson on Friday, to complete the paperwork for his dispatch as a laborer. There is no claim that the dispatch was done properly.

Lara went to Nicholson the next morning. There he gave his dispatch slip to Janet Ross, Nicholson's administrative manager, and received the necessary paperwork from her. Then he answered questions about his work skills, put to him by Fancesco Sidoti, Nicholson's senior construction manager, confirming that he had training and experience in such skills as drilling and grouting. He also advised that he'd left his last job due to a reduction in force. Lara testified that he'd never been asked such questions by a prospective employer.¹ According to Lara, he overheard Sidoti tell Ross that Lara shouldn't be hired because he was not qualified for anything on the job. Thus, Ross then handed Lara's dispatch slip back to him, and Lara left the job.

Lara called the Union and told a man named Bell what happened. Bell said he'd look into it and call him back, but Lara never heard from Bell.

¹ Lara testified twice in this case. In his first appearance, he made little sense. However, in his second appearance (immediately following the testimony of Sidoti), he credibly disputed Sidoti's testimony about never having spoken to Lara at the jobsite. I have determined to give assign credibility to Lara's testimony in this regard than I shall to Sidoti's.

Lara was next dispatched by the Union on October 1, when he went to Fleming Engineering for 4 weeks. Subsequently, he was dispatched to Lumsdine Construction and Kiewit-Granite for a 1-day spot, and to Coast Gio for 4 days of work.

By contrast, the Nicholson project lasted until May 1997.

Janet Ross was the General Counsel's sole other witness.

Ross testified that while she worked for Nicholson it was part of her job to phone the Union whenever Nicholson wanted the Union to dispatch laborers to the project. Nicholson was party to a project labor agreement, which required it to secure its laborers from the Union. Ross always assumed that a worker referred by the Union was competent, and other than Lara, she knew of no worker who was ever denied employment for any reason other than failing the drug test.

Ross first heard of Lara in August 1996, when David Smith, the Union's field representative, was in her office. He was upset and was cursing and stomping around while referring to Jesse Lara as a troublemaker, and as one of two employees (Lara and Marinelli) who would never work on a dam project again. Ross credibly testified that she recalled this incident and Smith's words because of how greatly Smith was upset.

On September 19, 1996, so Ross testified, David Smith came to the Nicholson office and told her that Lara's name had come to the top of the out-of-work list, and that he had to be dispatched. She recalled that he told her that, despite his referral, she was not obligated to hire him.

Ross went on to recount that, later that day, she got a telephone call from John Smith, David Smith's father, who serves as the business agent and secretary-treasurer for the Union. She had never spoken to him before, but he introduced himself as being from the Union. She testified that he reminded her that Nicholson was not obligated to hire all employees dispatched by the Union. While Smith mentioned no names to her, she recalled him excusing that in advance by saying, "I didn't mention any names, did I?"

While Ross later received an envelope containing a paper, which indicated that the employer did not have to hire all dispatches, I draw no inference therefrom concerning the Respondent. I regard it as having been explained by the testimony of Charlotte Stone, *infra*.

Ross acknowledged that, by the time Lara showed up at her office on the 20th, she knew that she did not have to, and would not, hire him. She gave Lara the paperwork only as a charade. So, she also called Sidoti into her office and said that Lara was a troublemaker and that he should make up an excuse to get rid of him. She recalled that Sidoti agreed with her, saying that Nicholson didn't need any troublemakers.² Thus, ultimately, she, Sidoti, and Nicholson refused to hire Lara.

Ross testified that she felt guilty over her part in the denial of employment to Lara. Accordingly, she spoke to the project manager, Hobelman.³ She also spoke to Gary Dixon, a labor

relations official, of the Metropolitan Water District, who suggested having Lara redispached.

She also called the Union and again spoke to Bell, telling him that what had happened to Lara was not right, and that she was requesting that he be redispached to Nicholson. She recalled that Bell assured her not to worry, and that Lara had already been dispatched elsewhere. Despite her request for Lara by name, he was never redispached to Nicholson.

Only days later, so Ross testified, Bell was again in Ross' office. She remarked to him that what had happened to Lara was not right, and he responded that she shouldn't worry about it, or let anyone hear her do so, or "we'll all lose our jobs."⁴

Alan Hobelman testified that he used to be vice president of Nicholson Rodio's western region. He had overall charge of the project where Ross worked as administrative assistant, with responsibility for accounts receivable, accounts payable, and payroll. He handled most labor relations matters. When the works manager,⁵ Francesco Sidoti, decided in concert with Hobelman that additional workers were needed, he told Ross. Ross then phoned the unions and asked for workers to be dispatched. Generally, they asked for more people than would be actually needed, since it was presumed that some would fail the drug test and others simply wouldn't show up. Hobelman opined that it would have set off a "red flag" with him had Ross ever conveyed information about a union representative black-listing a prospective employee, and since he doesn't recall any such event he doubts that she ever said anything to him or other management officials. Specifically, he was unaware of any such instance, much less any in which Ross intervened successfully to thwart a hiring. However, Hobelman was unable to say with certainty that no such incident ever occurred. He recalled that Ross left Nicholson's employ when she became indignant upon learning of the employer's plans to replace her.

Charlotte Stone, office manager for the Union, testified that in September of 1996, David Smith had Janet Ross on the phone, and he wanted clarification from John Smith about whether or not an employee named Mike McCafferty could remain employed. So, she got a copy of the Project Labor Agreement and took it into the office to John Smith. She stayed, as John asked her to find the section having to do with union recognition. She claimed that she overheard John Smith tell Ross that if the employee couldn't work the shift they needed him to work, they didn't have to retain him. She thereafter mailed a copy of the section to Ross.

David Smith testified that he works for the Respondent as a field representative, and is an officer as well. His primary job is to process grievances, primarily in an area, which included the project herein. As such, he routinely visited jobsites, and routinely met with management representatives. When he visited Nicholson, he generally met with Hobelman or Sidoti, but sometimes he met with Ross. When he met with Ross, it was generally over manpower issues. She was the person who generally phoned into the Union asking for employees to be sent.

² Ross also testified twice. In her second, very brief appearance, she identified Sidoti as the man who she told not to hire Lara.

³ Hobelman didn't recall this conversation, even though it would have raised a "red flag" for him mentally. As he recalled, Sidoti might

have acted on a request by Ross not to hire someone. But, so he recalled, Ross was not a very good employee.

⁴ Bell was not called as a witness at the trial.

⁵ The title is synonymous with "general superintendent."

It was not unheard of to make small talk with Ross, and he thought of their relationship as very friendly. He talked to her from once every week and a half, up to two or three times a week. In August 1996, he was handling a group of grievances filed by employees who had been discharged by another contractor, AWZ, on the project. Nicholson was a subcontractor of AWZ, and Lara had been employed by AWZ before being discharged. He was the field representative who handled the grievance, which had to be denied as not being timely filed. However, he denied that he ever had any conversation with Lara about the failure to process the grievance, or about Lara being upset with him or the Union. He denied that Lara was causing him any trouble in August of '96 over the grievance. However, he admitted that around that time Robert Marinelle was demanding that his grievance be taken to arbitration, and he admitted:

Q. Okay. Did you ever discuss Marinelle with Janet Ross in August of 1996?

A. Yes.

Q. Why would you do that?

A. Well, as I said at the time he was—he was one of the biggest problems for me on that job and probably in passing you know I mentioned something that that was a problem, he was one of my grievance that I was processing and I was having a lot of problems with him.

Q. Okay. And where were you, and where was Janet when you were discussing this?

A. We were in her office. The trailer someplace.

Q. Was there a business purpose for you discussing this, or was there some other reason?

A. No, it was just mostly conversation. You know, we were just—she was kind of telling me what kind of problems she was having on the site and I was telling her what kind of problems I was having on the site.

Q. Okay. During that conversation did you ever mention Jesse Lara's name?

A. No.

Q. Did you ever mention Jesse Lara's grievance?

A. No.

Q. Why is it that you would mention Marinelle but not Lara?

A. Well, Jesse's grievance was not timely so it really didn't go any further than that.

Q. In discussing Marinelle with Janet in August of 1996 do you recall being animated and yelling about it raising your voice?

A. No, I was not.

Q. Did you ever tell Janet Ross that Jesse Lara should not work on that project?

A. No, I did not.

Q. Did you ever tell her that you'd be damned if he does work on that project?

A. No, I did not.

Q. Did you ever tell her that Jesse Lara was a trouble maker?

A. No

Q. Did you ever tell her that Marinelle should not work on the project?

A. No.

Q. Did you ever tell her that you'd be damned if Marinelle works on that project?

A. No.

Q. And did you ever call Marinelle a trouble maker?

A. No.

David Smith recalled that he left town to attend a union convention on Friday, September 20, 1996. He admitted that he may have talked to Ross before leaving on his trip, probably on the 17th he thinks, about a large work order that was coming up. He also admitted that he called Lara about the dispatch. He said that he didn't remember ever speaking to Ross about Lara, but he still denied that at anytime after Lara was dispatched he ever told her or suggested to her that she did not have to hire Lara. Indeed, he believed that if he talked to her, it was on the phone, on the 19th, and had reference to Mike McCafferty, as testified to by Charlotte Sharp.

John Smith, Respondent's business manager, and an officer, testified that he never discussed Lara with any representative of Nicholson, but that he did once discuss the dispatch system with Janet Ross, on September 19th. The conversation came about from the referral of a phone call through Charlotte Stone, his secretary. Through that, so John Smith testified, a question to David Smith led her to ultimately talk to me about the correct hiring procedures. So, he had his secretary send Ross a copy of the correct procedure. He recalled her commenting that they had a problem with a prospect named McCafferty. I told her that if he couldn't meet Nicholson's production requirements, they didn't need to hire him. That was his only conversation with Ross.

Francesco Sidoti testified that he was the works manager at the Nicholson project from early 1996, until he left in October 1997. He worked under Hobelman, the highest ranking official there. He knew Janet Ross as the equal employment opportunity officer for Nicholson, who was in charge of calling the union whenever Nicholson needed workers. She dealt primarily with Laborers' Local 1184, the Respondent. Sidoti said that it was he who determined how many workers would be needed, and he told Ross how many to call for. Sidoti denied that he talked to employees before they began work for Nicholson. He also denied meeting Lara, or discussing him with Ross. He denied that Ross ever told her to avoid hiring Lara, due to him being a troublemaker, or that the Union did not want him working on the project. He denied telling Ross that the company didn't need any troublemakers on the project, and he denied that Ross ever asked him to get rid of Lara.

C. Conclusions

As I explained to the parties at the trial's conclusion, this is a simple case.

First of all, the legal standards governing violations of this sort are simple. A union violates Section 8(b)(1)(A) and (2) of the National Labor Relations Act whenever it causes an employer to discriminate against a union member for reasons other than the member's failure to tender dues. *Wenner Ford Tractor*

Rentals, Inc., 315 NLRB 964 (1994). See also *Desks, Inc.*, 295 NLRB 1 (1989).

Here, no evidence was offered that Lara failed to pay dues. Lara testified without contradiction that he has been a member of the Union in good standing since he joined in 1985.

As is true in every case, the General Counsel has the burden of establishing, by a preponderance of the evidence, the essential elements of the unfair labor practices alleged. *Ramar Coal Co.*, 303 NLRB 604 (1991).

Here, that burden merely makes it incumbent on the General Counsel to make out a prima facie case that Respondent asked Nicholson to forego hiring Lara and that Nicholson failed to do so based on that request. The General Counsel's burden is simple and straightforward.

It is not part of the General Counsel's burden to explain *why* Respondent acted as it did. Thus, I make no findings concerning whether or not Respondent engaged in its actions toward Lara because of his action in standing for the office of Sergeant at Arms. Not only are such findings legally unnecessary and irrelevant, but, also, I cannot reach any conclusions about those actions. This is so because Lara's testimony on the subject seemed to make no sense. Nor do I discuss further, the unsupported suggestion of the Union, that Lara was not, or might not have been, hired for some other, but legal, reason.

Here, Ross and Lara have testified that Nicholson, through Sidoti, refused and failed to hire Lara following the statement of David Smith of the Union to Ross that Lara was a troublemaker, and that Smith would be damned before he'd be allowed to work on any similar projects in future.

Sidoti, David Smith, and to some extent, John Smith, have all denied that David Smith ever told any such thing to Ross, or that Sidoti was so motivated not to hire Lara.

Clearly, it's merely a matter of which witnesses, I found credible, which will determine the outcome of this case.

The testimonies of Hobelman and Stone do not bear directly on the issue, which turns this case, i.e., did David Smith make the remarks attributed to him by Ross, and did Nicholson thereby refuse to hire Lara? Hobelman admitted that he could not say with certainty that no such incident ever occurred. And Stone's testimony, while useful on the issue of how Ross came to receive mail concerning hiring procedures, does not relate to the truth of Ross' testimony about what David Smith had to say to her.

In my opinion, the words of David Smith to Janet Ross, if believed, are sufficient to establish the requisite causal link between the Union and the failure of Nicholson to hire Lara. While it cannot be shown that Respondent ever *explicitly* instructed Ross not to hire Lara, the Board has held that an *express* demand or request by a union is not essential to finding a violation of the Act. Instead, a union violates the Act if any pressure or inducement is used to influence an employer, including mere suggestion. *Avon Roofing & Sheet Metal Co.*, 312 NLRB 499, 503 (1993). See also *Carpenters Northwestern Montana District Council (Glacier Park Co.)*, 126 NLRB 889, 897-898 (1960).

I have determined to credit the testimony of Ross and Lara over that of the Smiths and Sidoti. Both were seemingly credi-

ble in appearance.⁶ While it has been suggested that Ross left her employ under less than favorable terms, there has been no explanation as to how that suggestion, if assumed true, would lead her to falsify testimony against Respondent. While I have no explanation for "why" the Union would have behaved as it did, on the basis of my credibility resolutions here, I am satisfied that Respondent did, in fact, convey to Ross that Lara should not be hired, and that it did so with sufficient vehemence as to further convey the thought that trouble would be coming Nicholson's way, should it's warning be disregarded.

Sidoti's denial of the remarks and actions attributed to him by Ross was not at all convincing. He gave the impression that this entire process was merely an impingement on his time. That, of course, is consistent with the fact that he had to be subpoenaed, and the subpoena had to be enforced, before he would testify at all herein. In the face of Lara's credible testimony about what happened when he went to Nicholson's to begin work, and in the face of Ross' testimony about what she said to Sidoti, I discredit Sidoti's denial that he denied work to Lara because of a demand by David Smith of the Respondent.

The Smiths, in this case, did more than enough to "merely suggest" to Ross that she should not hire Lara. Under the credited evidence, David Smith told Ross on the 19th that he would "be damned" if Lara ever worked on a dam project again. This, by itself, was tantamount to the Union demanding that Ross not hire Lara. John Smith coyly noted that he was not mentioning any names while he discussed procedures with Ross.

For these reasons, I find and conclude that Respondent violated the Act by causing Nicholson to refuse work to Lara, all as alleged in the complaint.

REMEDY

The remedy in this case is for the Respondent Union to be ordered to cease and desist from this or similar misconduct, post appropriate notices, notify Nicholson that it has no objection to Lara being hired, and make Lara whole for the loss of any pay or benefits occasioned by his being unlawfully refused hire by Nicholson. The issues surrounding the length of the backpay period is not addressed herein, and is expressly left for compliance procedures.

CONCLUSIONS OF LAW

1. Respondent, Laborers' International Union of North America, Local No. 1184, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

2. Respondent violated Section 8(b)(1)(A) and (2) of the Act when it caused Nicholson Employer to refuse to hire Lara as a laborer on or about September 20, 1996.

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

[Recommended Order omitted from publication.]

⁶Notwithstanding Lara's obvious difficulties in presenting an appearance which seemed reliable during his first appearance on the witness stand.