

Hobart Crane Rental, Inc., and Hobart Welding and Fabrication, Inc., a Single Employer¹ and International Union of Operating Engineers, Local 150, AFL-CIO. Cases 13-CA-37664 and 13-CA-37715

May 10, 2002

DECISION AND ORDER

BY MEMBERS LIEBMAN, COWEN, AND BARTLETT

On January 4, 2001, Administrative Law Judge Marion C. Ladwig issued the attached decision. The Charging Party filed exceptions with 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,² and conclusions to the extent consistent with this Decision and Order and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Jessica Muth, Esq., for the General Counsel.

Steven A. Johnson, Esq., of Merrillville, Indiana, for the Respondent.

Pasquale A. Fioretto and Carol L. Oshana, Esqs. (Baum, Sigman, Auerbach, Pierson, Neuman & Katsaros), of Chicago, Illinois, for the Charging Party.

¹ Since the judge found "that no useful purpose would be served" by ruling on whether Hobart Crane Rental, Inc., and Hobart Welding and Fabrication, Inc., constituted a single employer as alleged in the consolidated complaint, he did not resolve this issue. As found below, we agree that it is unnecessary to decide whether the two companies are a single employer. We have decided not to modify the caption of the case, as proposed by Member Cowen. The single-employer reference in the caption is simply an allegation, reflecting the General Counsel's styling of the case, and does not indicate any determination by the Board as to the single-employer issue.

Member Cowen agrees with his colleagues that it is unnecessary to resolve whether, as alleged in the consolidated complaint, Hobart Crane Rental, Inc., and Hobart Fabrication and Welding, Inc., constitute a single employer. In addition, however, Member Cowen would amend the case caption by deleting from it the phrase "a Single Employer." It is Member Cowen's view that it is inappropriate to include within a case caption a substantive allegation of the complaint. Such a practice serves no legitimate purpose, and could tend to give the appearance that the Board has prejudged the relationship among the parties.

² Since we agree with the judge that the Board lacks jurisdiction over the Respondent and dismiss the consolidated complaint on that basis, we find it unnecessary to pass on the merits of the alleged violations.

DECISION

STATEMENT OF THE CASE

MARION C. LADWIG, Administrative Law Judge. These consolidated cases were tried in Chicago, Illinois, on June 13-15, 2000. The charges were filed by Operating Engineers Local 150 (the Union or Local 150) on March 19, and April 6, 1999 (amended October 14, 1999), and the consolidated complaint was issued October 20, 1999.

Hobart Crane Rental, Inc. (Hobart Crane), which rents large truck cranes with crane operators to contractors in the construction industry, is a party to a Local 150 collective-bargaining agreement that guarantees crane operators a full day's pay of 8 hours.

Hobart Welding and Fabrication, Inc. (Hobart Welding), was a nonunion company (located at the same address) which sold steel support beams to residential contractors. It cut the steel beams to the required lengths, transported them to the jobsite (using a boom truck, a flat bed truck with a small hoist attached), and installed them in the basement of new homes.

In September 1996, after repeated urgings by Hobart Crane, Local 150 issued work permits to two of Hobart Welding's employees, Larry Mason and Jeffrey Bonick, to work for Hobart Crane as crane operators. Hobart Crane paid the two union permit operators the same union scale it paid its senior union crane operators. (By June 1, 1998, under the union contract, the union scale for crane operators was \$26.95 an hour in wages and \$8.83 in benefits.) It, however, failed to honor its agreement to pay the permit employees the crane operator's 8-hour minimum at union scale.

Hobart Crane assigned 8-hour crane operator jobs to its senior employees and assigned shorter jobs (of 2, 4, and 6 hours) to Mason and Bonick. It then followed the practice (concealed from the Union) of having Mason and Bonick, when assigned to the shorter jobs, to work the rest of the day for Hobart Welding's nonunion wages of little more than one-fourth the union scale. This provided them full-time employment, but violated Hobart Crane's contractual obligation to pay them the 8-hour guarantee.

After 2 years, on October 14, 1998, when both Mason and Bonick had received their union journeyman cards and had reported the continual contract violations to the Union, they informed Hobart Crane that they would go "by the contract" or "by the book" (to be paid the 8-hour minimum for crane operators, at the union scale).

Hobart Crane informed them it could not afford to pay them the 8-hour guarantee on shorter jobs and explained that it would have to turn down shorter jobs for them unless it could schedule more shorter jobs in a day. It could no longer provide them full-time employment, but it promised to do its best to keep them busy. It also advised them that they had better go to the Union's training site to qualify themselves to work on more types of equipment; otherwise they would "starve" being referred (with their limited skills) to jobs from the Union's out-of-work list when not working for Hobart Crane.

Mason and Bonick continued working, but 2 days later, on Friday, October 16, 1998, Hobart Crane notified them that there was no work for them on Monday, October 19 (their first time

ever to be laid off). Thereafter, Hobart Crane recalled Mason (the more experienced operator) to work 1 or more days on October 20 and 23, November 2, 11, 16, and 30, December 8, 1998, and on January 27, February 3, March 15, April 29, May 21, and June 4 and 11, 1999. It recalled Bonick on October 20 to work 4 days and on November 16, 1998 to work 2 days.

The primary issue is whether Hobart Crane discriminatorily laid off Larry Mason and Jeffrey Bonick on October 16, 1998, because they “assisted the Union and engaged in concerted activities,” discouraging membership in the Union in violation of Section 8(a)(3) and (1) of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Hobart Crane and Hobart Welding, and the Union, I make the following

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges that Hobart Crane and Hobart Welding as “Respondent,” had direct and indirect *outflow* by performing services valued over \$50,000 for out-of-State enterprises and for in-State enterprises, including two named enterprises, “which themselves meet the Board’s direct jurisdictional standard.” The answer denied this allegation.

The complaint also alleges that “Respondent” had direct and indirect *inflow* by receiving goods valued over \$50,000 directly from outside the State and from in-State enterprises, each of which “received the goods directly from points outside the State.” The answer also denies this allegation.

At the trial, the parties stipulated that Hobart Crane’s 1997 income tax return shows gross sales of \$1,037,173 and purchases of \$126,753, and that its 1998 income tax return shows gross sales of \$798,292 and purchases of \$100,363. They also stipulated that “Respondent” purchases over \$5000 in materials and equipment “directly from points located outside the State.” (Tr. 6-7.) Hobart Welding’s 1998 income tax return shows gross revenues of \$607,316 and purchases of \$81,775.05 (GC Exh. 18).

The evidence, however, fails to support the allegations that Hobart Crane, Hobart Welding, or both of them together, had \$50,000 in direct and indirect outflow, or \$50,000 in direct and indirect inflow, as required for asserting Board jurisdiction over nonretail enterprises. *Siemons Mailing Service*, 122 NLRB 81, 85 (1958).

The evidence does not show that Hobart Crane had any direct or indirect outflow in 1997 or 1998. For Hobart Welding, invoices in evidence show direct inflow of \$487.07 in 1997 and \$241.29 in 1998 from a Wisconsin supplier (GC Exh. 22), and invoices from an out-of-State company shows in-State purchases totaling \$42,399 in 1998 (GC Exh. 19; Tr. 630-631). Other Hobart Welding invoices in evidence show neither direct or indirect inflow (Tr. 632-635; GC Exhs. 20, 21). (There is no contention that Hobart Crane or Hobart Welding concealed any relevant invoices at the trial.) Thus, the evidence does not show any direct or indirect outflow and merely shows that Hobart Crane and Hobart Welding together had \$487.07 in direct in-

flow in 1997 and \$42,640.29 (\$241.29 plus \$42,399) in direct and indirect inflow in 1998.

I therefore find that the General Counsel has failed to prove that the Board has jurisdiction in this proceeding. Alternatively, however, I shall rule on the merits of the allegation that Hobart Crane discriminatorily laid off Larry Mason and Jeffrey Bonick in October 1998.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Work Permits for Larry Mason and Jeffrey Bonick

On September 14, 1996, after repeated urgings by Hobart Crane, Local 150 issued work permits to two of Hobart Welding’s employees, Larry Mason and Jeffrey Bonick, to work for Hobart Crane as truck crane operators. Hobart Crane had been a union contractor since 1991, renting large truck cranes with union crane operators to contractors in the construction industry. (Tr. 26-28, 43-44, 114, 127, 129, 161, 196, 260-261, 281-282, 335-336, 429-430, 485-488, 492, 544-545, 564-566; GC Exhs. 2-4, 7-8, 12; R. Exh. 2; CP Exhs. 4 p. 2, 5 p. 2.)

Hobart Welding, located at the same address, was a nonunion company that sold steel support beams to residential contractors. It cut the steel beams to the required lengths, transported them to the jobsite (using a boom truck, a flatbed truck with a small hoist attached), and installed them in the basement of new homes. (Tr. 183, 268, 345-346, 484, 487-490, 492, 529, 545.)

Hobart Welding President Robert Czarny revealed at the trial that Hobart Welding, in business since 1978, had become a break-even operation and that he had been planning to dissolve it for years (Tr. 484, 746). Czarny, however, also managed Hobart Crane, and he could take advantage of having both companies being located in the same shop (Tr. 663).

Hobart Crane’s collective-bargaining agreement with Local 150 guarantees crane operators a full day’s pay of 8 hours (GC Exh. 13 pp. 10-11, art. 5, secs. 3-4). By getting union permits for Mason and Bonick, instead of hiring Local 150 journeymen, he could assign 8-hour jobs to his senior union crane operators and assign shorter jobs (of 2, 4, or 6 hours) to Mason and Bonick. Then when they arrived back at the shop from a short job, he would pay them (without notifying the Union) Hobart Welding’s nonunion wages for the remaining hours, instead of the 8-hour guarantee at union scale. (Tr. 169, 186-187, 225, 276-278, 407, 573-575, 680-682.)

The saving to Hobart Crane would be substantial. When this case arose in October 1998, the wage scale for a crane operator in the union contract (since June 1, 1998) was \$26.95 an hour in wages and \$8.83 in benefits, totaling \$35.78 an hour (GC Exh. 13 p. 21, art. 8, sec. 1; CP Exh. 1 p. 6). Mason and Bonick were being paid the full union scale for the length of their short crane operator jobs, but Mason was being paid \$9.50, and Bonick \$9, for the remainder of the 8-hour contractual guarantee (Tr. 225, 263).

Mason and Bonick—in fear of losing their jobs—did not complain to Czarny about the continuing contract violations, or report the violations to the Union, before both of them became journeymen (Tr. 175, 285). Bonick, the “low guy on the totem pole,” rarely worked on 8-hour jobs. Mason recalled that he

did “more of the shorter jobs” than he did the 8-hour jobs and that more experienced crane operators got the longer jobs most of the time. (Tr. 225, 407.)

B. Pay Complaints After Becoming Journeymen

After Larry Mason received his union journeyman card on May 1, 1998, he discussed with Jeffrey Bonick their dissatisfaction with Hobart Crane’s failure to pay the contractual 8-hour minimum, at union scale, for crane operator work. They decided that they would wait to report the violations to Local 150 until after Bonick also received his union journeyman card, to ensure that “if we lost our jobs,” both of them could find other work through the Union. (Tr. 25, 95, 99, 118–119, 127–129, 155–156, 172–173, 238–239, 261–262, 282–283; CP Exh. 4 p. 2.)

On September 19, when Bonick received his journeyman card, Mason and Bonick reported to Local 150 Business Agent John Sorensen that “we were getting paid two different rates [with a second check through Hobart Welding] and we weren’t getting paid the full 8 hours when we’d run equipment.” Sorensen advised them to talk to Czarny: “Explain to him that 8 hours constitute a minimum day” and “If they start to work, then he has to pay them at least 8 hours.” Sorensen had never heard of Hobart Welding before. (Tr. 98–100, 109, 173–175, 370, 284–285; CP Exh. 5 p. 2.)

Still being afraid of losing their jobs, Mason waited until October 8 or 9, 1998, to speak to Czarny. He then told Czarny that the Union knew “we were getting two rates of pay.” (Tr. 175, 285–286, 375.)

About Tuesday, October 13, Czarny told Mason “if we wanted to keep working with two rates,” Czarny could do away with the Hobart Welding check “to avoid problems with the Union” and pay Larry Mason as “Larry’s Crane Service or he could pay me through my wife like she was a bookkeeper,” or “maybe even cash.” (Tr. 286–287, 447–448, 743.)

After this conversation, Czarny spoke to Bonick and “said there would be no more Hobart Welding checks” and “that he could pay me a different way somehow. Either pay me under Bonick’s Repair Service or he could pay me under my girlfriend’s name or pay me in cash.” (Tr. 175–176, 743.)

The following day, Wednesday, October 14, Mason told Czarny “I am going to have to go by the contract.” Bonick then walked up and Czarny asked him, “What about you?” Bonick responded, “by the book.” (Tr. 176–177, 287, 434, 752–753.)

In their conversations, Czarny informed Mason and Bonick that Hobart Crane could not afford to pay them the 8-hour guarantee on shorter jobs and explained that he would have to turn down shorter jobs for them unless he could schedule more shorter jobs in a day. He could no longer provide them full-time employment, but he promised to do his best to keep them busy. He also advised them that they had better go to the Union’s training site to qualify themselves to work on more types of equipment; otherwise they would “starve” being referred (with their limited skills) to jobs from the Union’s out-of-work list when not working for Hobart Crane. (Tr. 177, 234–235, 287–288, 476, 743–745.)

C. The Layoffs

Mason and Bonick continued working after this Wednesday, October 14 conversation, but on Friday, October 16, they were notified that there was no work for them on Monday, October 19, 1998, their first time to be laid off (Tr. 178–179, 287–288, 337–338).

After being notified about the layoff, Business Agent Sorensen went to the Hobart Crane shop and met Czarny’s wife, Linda Czarny (who held the titles of president of Hobart Crane and secretary-treasurer of both Hobart Crane and Hobart Welding). When Sorensen asked to talk to Czarny, Linda Czarny said that she did not know when he would be around and that Sorensen could talk to her. (Tr. 101–103.)

Sorensen started talking to her about the union contract. Linda Czarny responded that if he wanted to talk about anything like that, he could audit the company. Sorensen said he did not want an audit, but wanted to get to the bottom of the problem about the 8-hour guarantee. She responded that “the Union’s always trying to stir up shit,” called Sorensen a “fucking asshole,” and referred him to “my attorney.” (Tr. 103–104.)

After a few minutes Czarny arrived and said he was Bob Czarny. Sorensen tried to talk to him about the problem, but Linda Czarny said he could not talk to Czarny. Sorensen said “I’d like to just talk to Bob for a couple of minutes. And she still kept complaining and yelling.” Czarny told his wife “to be quiet” and walked a short distance away with Sorensen to discuss the contract issue. (Tr. 104–105.)

Sorensen stated that the contract calls for an 8-hour minimum and asked if Czarny “could bring back [the junior, least experienced] Jeff Bonick to work and he said he couldn’t.” Czarny promised, however, to bring Larry Mason back “if I have work for him.” Sorensen then told Czarny, “whatever you do you have to do it according to the contract.” (Tr. 105, 200, 225, 407, 747.)

There was no mention in any of the conversations that Czarny held with Mason, Bonick, or Sorensen about the two employees giving up their union employment with Hobart Crane and Czarny offering them employment instead with the nonunion Hobart Welding (Tr. 175–178, 286–288, 434, 447–448, 458, 743–745, 752–753).

After the layoffs on October 16, Hobart Crane recalled Mason to work 1 or more days on October 20 and 23, November 2, 11, 16, and 30, December 8, 1998 and on January 27, February 3, March 15, April 29, May 21, and June 4 and 11, 1999, before he was referred to another employer on July 6, 1999 (Tr. 118–124, 151–152; CP Exh. 4 pp. 2, 4). It recalled Bonick on October 20 to work 4 days and on November 16, 1998 to work 2 days (Tr. 130–131; CP Exh. 5 p. 2).

D. Contentions and Concluding Findings

As found, Hobart Crane obtained union permits for Larry Mason and Jeffrey Bonick to work as crane operator on unprofitable shorter jobs of 2, 4, or 6 hours to evade its obligation under the union agreement to guarantee all its crane operators a full day’s pay of 8 hours.

Taking advantage of the permit operators’ fear of being laid off before becoming union journeymen, without any opportunity of obtaining other union employment, Hobart Welding

President Robert Czarny (as manager of Hobart Crane) concealed from the Union his practice of underpaying Mason and Bonick.

When assigning them to work as crane operators for Hobart Crane on the shorter jobs, Czarny paid them the \$35.78 union scale (\$26.95 wage and \$8.83 in benefits) for only the 2, 4, or 6 hours, reporting only the benefit payments for those hours to the union fringe benefit funds (CP Exhs. 2–3). Then for their work at Hobart Crane’s and Hobart Welding’s shop during the rest of the day, Czarny—without notifying the Union—placed Mason and Bonick on the Hobart Welding payroll and paid them nonunion wages of little more than one-fourth the union scale, \$9.50 an hour for Mason and \$9 an hour for Bonick.

For example, when Czarny assigned Mason as crane operator on Hobart Crane’s popular \$189 special for renting a truck crane with crane operator for 2 hours (Tr. 573–574, 744), Czarny would pay Mason \$9.50 an hour after the 2 hours. Instead of having Hobart Crane pay him the contractual 8-hour guarantee of \$286.24 (the \$35.78 an hour union scale times 8) for the day’s work, Czarny would pay him only \$128.56 (\$71.56 on Hobart Crane’s payroll for the first 2 hours and \$57 on Hobart Welding’s payroll for the remaining 6 hours)—*underpaying Mason \$157.68 for the day.*

Czarny had been planning for years to dissolve Hobart Welding because it was only breaking even, but he kept it in operation as a means of evading Hobart Crane’s obligation under the union agreement to guarantee its crane operators a full day’s pay of 8 hours.

Although Hobart Crane continually violated its collective-bargaining agreement and concealed the violations from the Union for 2 years, the complaint does not allege that the violations constituted an unlawful refusal to bargain, violating Section 8(a)(5) of the Act.

Instead, the complaint alleges that in October 1998 (after Mason and Bonick became union journeyman and refused to continue working in violation of the union agreement), Hobart Crane discriminatorily laid them off because they “assisted the Union and engaged in concerted activities,” discouraging membership in the Union in violation of Section 8(a)(3) and (1).

The General Counsel’s theory, as expressed in his brief (at 22–23), is that their layoff was unlawfully motivated under *Wright Line*, 251 NLRB 1083 (1980), and violated Section 8(a)(3) and (1) because “Mason and Bonick engaged in protected concerted activity when they asserted their contractual right to be paid in accordance with the 8-hour guarantee provision” in the collective-bargaining agreement.

To the contrary, the layoff of Mason and Bonick was motivated by the Union’s discovery that Hobart Crane had been violating the collective-bargaining agreement. Hobart Crane had obtained union permits for them to work for it as crane operators to evade the contractual 8-hour guarantee and enable it to obtain and perform the shorter crane operator jobs of 2, 4, and 6 hours at a profit, by paying Mason and Bonick nonunion wages for all hours worked beyond those hours during the day.

Once its contract violations were discovered, Hobart Crane had a business reason for assigning Mason and Bonick less work after October 16, 1998. As Czarny explained to them at

the time, Hobart Crane could not afford to pay them the 8-hour guarantee on the shorter jobs and he would have to turn down shorter jobs for them unless he could schedule more shorter jobs in a day.

Therefore, even assuming that the evidence supports the General Counsel’s theory that Hobart Crane was illegally motivated under *Wright Line* by laying off Mason and Bonick because they asserted their contractual right to be paid in accordance with the contractual 8-hour guarantee, the evidence shows that there was no Section 8(a)(3) and (1) violation.

Without being able to continue evading Hobart Crane’s obligation to pay Mason and Bonick the full day’s pay of 8 hours for their crane operator work on the shorter jobs, it would have to turn down shorter jobs for which they had been paid the union scale for only a portion of the day. For example, it could not afford to pay them the 8-hour guarantee of \$268.24 to perform Hobart Crane’s popular \$189 special for a 2-hour job.

Under these circumstances, Hobart Crane has met its burden of proof under *Wright Line* that it would have taken the same action in turning down the unprofitable shorter jobs, limiting work for Mason and Bonick, even if they were not the ones who revealed Hobart Crane’s contractual violations to the Union.

I therefore find that Hobart Crane did not violate Section 8(a)(3) and (1) of the Act.

E. Other Allegations

The complaint also alleges that Hobart Crane and Hobart Welding were a “single employer” and that Hobart Crane unlawfully refused to furnish the Union with information regarding that allegation. Both allegations were exhaustively litigated at the trial.

For the following reasons I find that no useful purpose would be served by rulings on these allegations.

(1) As found, the General Counsel has failed to prove that the Board has jurisdiction in this proceeding even when both companies’ inflow and outflow are included in the totals.

(2) Whether or not the two companies were a single employer is irrelevant in determining the merits of the allegation that Hobart Crane discriminatorily laid off Larry Mason and Jeffrey Bonick.

(3) Hobart Welding was dissolved as a corporation in December 1999 (Tr. 481, 662).

CONCLUSIONS OF LAW

1. The General Counsel has failed to prove that the Board has jurisdiction in this proceeding.

2. Hobart Crane did not violate Section 8(a)(3) and (1) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹

ORDER

The complaint is dismissed.

¹ 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.