Choctaw Builders, Inc. *and* International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 48. Cases 17–CA–20333 and 17–CA–20515

March 14, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

The General Counsel seeks summary judgment in this case on the ground that the Respondent has failed to file an answer to the complaint. Upon charges and amended charges filed by the Union on September 23 and December 28, 1999, and January 26, and April 19, 2000, the General Counsel issued an order consolidating cases, consolidated complaint and notice of hearing on June 27, 2001, against Choctaw Builders, Inc., the Respondent, alleging that it has violated Section 8(a)(3) and (1) of the National Labor Relations Act.[1] On August 21, 2001, the Respondent filed an answer to the consolidated complaint. On August 22, 2001, the Respondent withdrew its answer.

On September 10, 2001, the General Counsel filed a Motion for Summary Judgment with the Board. On September 14, 2001, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

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

Ruling on Motion for Summary Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the consolidated complaint affirmatively states that unless an answer is filed within 14 days of service, all the allegations in the consolidated complaint will be considered admitted. Further, the Region by letters dated August 15 and 17, notified the Respondent that unless an answer was received by August 22, a Motion for Summary Judgment would be filed.

Here, according to the uncontroverted allegations in the Motion for Summary Judgment, although the Respondent initially filed an answer on August 21, 2001, the Respondent subsequently withdrew that answer.[2] The withdrawal of an answer has the same effect as a failure to file an answer, i.e., the allegations in the consolidated complaint must be considered to be true.[3]

Accordingly, based on the withdrawal of the Respondent's answer to the consolidated complaint, and in the absence of good cause being shown otherwise, we grant the General Counsel's Motion for Summary Judgment insofar as the consolidated complaint alleges that the Respondent violated Section 8(a)(3) and (1) of the Act by unlawfully refusing to hire 13 applicants on various dates in 1999 because they assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities.[4] We agree that the undisputed complaint allegations are sufficient to establish violations of Section 8(a)(1) and (3) under the standards set forth in *FES*, 331 NLRB 9, 12–16 (2000), supp. decision 333 NLRB 66 (2001), enfd. 301 F.3d 83 (3d Cir. 2002), supp. decision 338 NLRB 649 (2002). See *Jet Electric Co.*, 334 NLRB 1059 (2001); see also *Budget Heating & Cooling*, 332 NLRB No. 132 (2000) (not reported in Board volumes).

Under the *FES* standards, however, the complaint allegations are insufficient to enable us to determine the appropriate remedy. In this regard, the Board held in *FES* that in cases involving more than one applicant, the General Counsel, in order to justify an affirmative remedy of instatement and backpay, must show at the unfair labor practice stage of the proceeding the number of openings that were available. 331 NLRB at 14. See also *Jet Electric Co*., supra.

The consolidated complaint alleges that the Respondent refused to hire the 13 discriminatees, but does not allege how many openings were available. Because the General Counsel bears the burden of proving, at the initial unfair labor practice stage of the proceeding, that there were a sufficient number of openings available for the discriminatees, the complaint's allegations do not establish that a backpay and instatement remedy is warranted. *Jet Electric Co.*, supra. We shall therefore hold

[1] The Motion for Summary Judgment inadvertently refers to the date that the consolidated complaint issued as July 27, 2001.

[2] The exhibits attached to the Motion for Summary Judgment indicate that on August 21, 2001, the Region received a letter by facsimile transmission from the Respondent, signed by its agent Wayne Kannady, generally denying the allegations in the consolidated complaint and stating that the Respondent was no longer in business. On August 22, 2001, the Region received another letter sent by facsimile transmission from the Respondent, also signed by Wayne Kannady, stating: "I did not intend for my fax sent to the NLRB on August 21, 2000 [sic] to be an answer to any charges. However, if the NLRB did consider it as an answer I hereby withdraw my answer." In these circumstances, we need not pass on whether the Respondent's August 21, 2001 letter was a sufficient answer under Sec. 102.20 of the Board's Rules and Regulations.

[3] See *Maislin Transport*, 274 NLRB 529 (1985).

[4] The fact that the Respondent may no longer be in business is not a basis for denying the Motion for Summary Judgment. See *Beaumont Glass Co.*, 316 NLRB 35 fn. 1 (1995).

in abeyance a final determination of the appropriate remedy,[5] pending a remand of this case for a hearing before an administrative law judge on the limited issue of the number of openings that were available to the discriminatees.[6]

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, an Oklahoma corporation with an office and place of business in Indianola, Oklahoma, has been engaged as a third party provider of labor services to Flintco Companies, Inc. (Flintco). The Respondent, in conducting its business operations described above, annually provides services valued in excess of $50,000 for Flintco, an enterprise within the State of Oklahoma.

Flintco, an Oklahoma corporation with its principal place of business in Tulsa, Oklahoma, is engaged in business as a general construction company. During the 12-month period ending December 31, 1999, Flintco purchased and received at jobsites in the State of Oklahoma goods valued in excess of $50,000 directly from points outside the State of Oklahoma.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

About the dates in 1999 set forth opposite their respective names, the Respondent has refused to consider for hire or to hire the applicants named below:

John Norman	August 20
David Cloud	August 20
Jerry Collins	August 27
Jimmy Hestand	September 20
Ernie Bivins	September 21
Bobby Lee	September 23
Luke Harbin	September 23
Herron Collins	September 29
Robert White	October 14
Kelly Holmes	November 18
Derrick Haggard	November 18
Thomas Gehrke, Jr.	November 18

From about August 24 to about October 26, 1999, the Respondent refused to consider for hire or to hire applicant Michael (Mickey) Lea.

The Respondent engaged in the conduct described above because the named applicants assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities.

CONCLUSION OF LAW

By the acts and conduct described above, the Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, and has discriminated in regard to the hire or tenure or terms or conditions of employment of its employees, thereby discouraging membership in a labor organization, and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent has violated Section 8(a)(1) and (3) by failing to consider for hire or to hire applicants John Norman, David Cloud, Jerry Collins, Jimmy Hestand, Ernie Bivins, Bobby Lee, Luke Harbin, Herron Collins, Robert White, Kelly Holmes, Derrick Haggard, Thomas Gehrke Jr., and Michael (Mickey) Lea, we shall order the Respondent to expunge from its files any and all references to the unlawful refusal to consider for hire or to hire these individuals, and to notify them in writing that this has been done, and that the unlawful conduct will not be used against them in any way.[7]

ORDER

The National Labor Relations Board orders that the Respondent, Choctaw Builders, Inc., Indianola, Oklahoma, its officers, agents, successors, and assigns, shall

1. Cease and desist from

[5] The Board does not provide the standard *FES* remedy for a refusal-to-consider for hire violation where a more comprehensive instatement and backpay remedy for a refusal-to-hire violation is appropriate. This is so because the limited remedy for a refusal-to-consider violation is subsumed within the broader remedy for the refusal-to-hire violation. *Budget Heating & Cooling*, supra at 132 fn. 3. Accordingly, whether, or the extent to which, an affirmative remedy for the refusal-to-consider violations is warranted in this case will depend on whether the evidence shows that enough openings were available to justify the more comprehensive remedy of instatement and backpay for the refusal-to-hire violation. See *Jet Electric Co*., supra at fn. 2.

[6] A hearing will not be required if, in the event that the General Counsel amends the complaint, the Respondent fails to answer, thereby admitting evidence that would permit the Board to resolve the remedial instatement and backpay issue. In such circumstances, the General Counsel may renew the Motion for Summary Judgment with respect to this specific affirmative remedy. See *Jet Electric Co.*, supra at 1060 fn. 2.

[7] As previously stated, we shall hold in abeyance the determination of any further appropriate affirmative remedy.

(a) Refusing to consider for hire or to hire applicants because they assisted the Union and engaged in concerted activities, or to discourage employees from engaging in these activities.

(b) 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.

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

(a) Within 14 days from the date of this Order, remove from its files any and all references to the unlawful refusal to consider for hire or to hire John Norman, David Cloud, Jerry Collins, Jimmy Hestand, Ernie Bivins, Bobby Lee, Luke Harbin, Herron Collins, Robert White, Kelly Holmes, Derrick Haggard, Thomas Gehrke Jr., and Michael (Mickey) Lea, and within 3 days thereafter, notify them in writing that this has been done, and that the unlawful conduct will not be used against them in any way.

(b) Within 14 days after service by the Region, post at its facility in Indianola, Oklahoma, copies of the attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region 17, 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 the Respondent to ensure that the notices are not altered, defaced or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 20, 1999.

(c) 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.

[8] 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."

It IS FURTHER ORDERED that the issue of how many job openings were available at times relevant to John Norman's, David Cloud's, Jerry Collins', Jimmy Hestand's, Ernie Bivins', Bobby Lee's, Luke Harbin's, Herron Collins', Robert White's, Kelly Holmes', Derrick Haggard's, Thomas Gehrke Jr.'s and Michael (Mickey) Lea's applications for work is remanded to the Regional Director for appropriate action consistent with this Decision and Order.

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 Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to consider for hire or to hire applicants because they assisted the Union and engaged in concerted activities, or to discourage employees from engaging in these activities.

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, remove from our files any and all references to our unlawful refusal to consider for hire or to hire John Norman, David Cloud, Jerry Collins, Jimmy Hestand, Ernie Bivins, Bobby Lee, Luke Harbin, Herron Collins, Robert White, Kelly Holmes, Derrick Haggard, Thomas Gehrke Jr., and Michael (Mickey) Lea, and WE WILL, within 3 days thereafter, notify them in writing that this has been done, and that the unlawful conduct will not be used against them in any way.

CHOCTAW BUILDERS, INC.