

Dilling Mechanical, Inc. and Indiana State Pipe Trades Association and United Association of Plumbers and Pipefitters, AFL-CIO, and Plumbers and Steamfitters Local Union 440, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada. Cases 25-CA-28171-2 and 25-CA-28185-1

April 4, 2003

DECISION AND ORDER

BY MEMBERS SCHAMBER, WALSH, AND ACOSTA

On December 23, 2002, Administrative Law Judge Arthur J. Amchan issued the attached decision. 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, and conclusions and to adopt the recommended Order.¹

ORDER

The complaint is dismissed.

Raifael Williams, Esq., for the General Counsel.
Ronald J. Hein Jr. and Jeremy C. Moritz, Esqs. (Franczek Sullivan, P.C.), of Chicago, Illinois, for the Respondent.
John Prikosovich, of South Bend, Indiana, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Indianapolis, Indiana, on October 17-18, 2002. The charge in Case 25-CA-28185-1 was filed on May 14, 2002; the charge in Case 25-CA-28171-2 was filed on June 5, 2002, and the consolidated complaint was issued on August 30, 2002.

The General Counsel alleges that the Respondent, Dilling Mechanical, Inc., violated Section 8(a)(3) and (1) by discharging James Michael Colvin on May 10, 2002. He also alleges that Respondent violated Section 8(a)(1) by prohibiting employees from leaving union literature in break areas; threatening employees with unspecified reprisals if they engaged in union activities, and prohibiting employees from talking about

¹ There are no exceptions to the judge's findings that Respondent did not violate the Act as alleged in the complaint. Respondent has accepted to the judge's decision insofar as it concludes that Respondent was the "sole employer" of alleged discriminatee James Colvin, and insofar as the judge's decision finds that Respondent was a joint employer of Colvin. We find it unnecessary to pass on the findings of the judge to which Respondent has accepted because they are not material to the disposition of this case.

the Union during breaktimes and prohibiting employees from discussing the Union on company property.

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

FINDINGS OF FACT

I. JURISDICTION

Respondent is a pipefitting contractor with its main office in Logansport, Indiana. In 2002, it provided services in excess of \$50,000 to firms within the State of Indiana, which are directly engaged in interstate commerce. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union, Indiana State Pipe Trades Association, United Association of Plumbers and Pipefitters Local Union No. 440, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

In March 2002, the Respondent, Dilling Mechanical, Inc. (DMI), began installing piping in an addition to an existing facility, which was under construction at Central Soya, Inc.'s soybean processing facility in Morristown, Indiana. Respondent was a subcontractor to Dilling Mechanical Contractors (DMC), a closely related company, which in prior cases has been found to be a joint employer with Respondent.

On the Central Soya project, Respondent utilized some of its own employees and supplemented this work force with employees provided by temporary staffing agencies (agency employees), through Dilling Mechanical Contractors. On the job-site, all employees were assigned work and supervised by Respondent's two onsite supervisors, Superintendent Mark Parmeter and Foreman Bill Davis. Generally, agency employees had contact with their nominal employees only once a week when a representative brought their paychecks to the worksite. The staffing agencies did not perform any onsite supervision of employees they provided to Respondent.

In some instances, agency employees were directed to contact the staffing agency, rather than Respondent, if they were going to miss work. However, on occasion, these employees contacted Respondent directly. If an agency employee desired permission to leave work early, he sought permission from Mark Parmeter.

Agency employees filled out timesheets and submitted them to Mark Parmeter for verification. Parmeter would then send the timesheets to the various staffing agencies. Either Dilling Mechanical Contractors or the staffing agencies, or both, determined the agency employees' wage rates.

On April 25, 2002, Cecil Crawford, who had been working at the Central Soya jobsite through U.S. Labor Force, and Rick McCorkle, who had been working for Respondent through the Tradesman staffing agency, presented Parmeter with a letter from union organizer John Prikosovitch, identifying themselves as volunteer union organizers.

Beginning on April 25, Crawford and McCorkle set union literature on tables in the employee breakroom. I find that the General Counsel has not established that Parmeter prohibited or interfered with Crawford and McCorkle's dissemination of

union literature in the breakroom, as alleged in complaint paragraph 5(a). The variance between Crawford's testimony on direct examination and his affidavit executed on May 16, 2002, leads me to find his testimony completely unreliable. The inconsistency between Crawford's testimony and McCorkle's testimony as to what they saw Parmeter do with the union literature leads me to find McCorkle's testimony no more credible than Parmeter's testimony that he merely removed one piece of union literature that was in front of his chair in the breakroom.¹

I also dismiss that allegation in complaint paragraph 5(b) that on about April 26, 2002, Mark Parmeter threatened employees with unspecified reprisals if they engaged in union activity. The only evidence bearing on this allegation is the following testimony of Rick McCorkle:

JUDGE AMCHAN: So, what you are saying is you saw Mr. Williamson talk to Mr. Parmeter and then you saw Mr. Parmeter go get the material and throw it in the trash.

A. Yes, I mean I did not actually hear him—

Q. And you infer that Mr. Williamson told—

A. Yes, sir.

Q. Mr. Parmeter about the fact that you guys had put out the union literature.

A. Yes

Q. (By Mr. Williams): What, if anything else, happened to the best of your recollection?

A. Well, he told him if he called me that they would wear it on their fucking foreheads.

Q. Say that again.

A. He said if he called with any of the particulars or these literature, they would wear it on their fucking foreheads.

Q. Who said that?

A. Parmeter.

Q. Was he saying that? Was he directing that statement towards any particular person?

A. Well, there were seven or eight of us right there and I was at the porta-john and it was mostly Dilling employees. (Tr. 219–220.)

First of all, it is not clear that McCorkle is testifying as to what he heard Parmeter say or what he heard Scott Williamson, a nonsupervisory employee, say. Moreover, the testimony is somewhat nonsensical and I deem McCorkle to be an insufficiently credible witness on whom to rely on in concluding that Respondent violated the Act as alleged.

On April 30, Foreman Bill Davis observed Cecil Crawford distributing union literature in the fabrication shop, a few minutes after employees had returned from the break trailer upon conclusion of the morning break. Davis told Crawford that he was not to distribute literature during worktime. In this regard, I

¹ I also decline to credit McCorkle's testimony due to his insistence that James Michael Colvin attended the union meeting of May 2. Given the fact that the record strongly suggests Colvin was not at that meeting, I conclude that McCorkle's testimony was calculated to support the Charging Party's allegations, even when he either did not recall the facts to which he was testifying, or knew or suspected that his testimony was inaccurate.

credit Davis' testimony over that of Crawford's. Indeed, Rick McCorkle's testimony on cross-examination (at Tr. 249), appears to corroborate Davis' testimony rather than Crawford's. McCorkle testified that Davis talked to Crawford about distributing stickers around breaktime and that McCorkle understood that distributing union literature should not be occurring during worktime.² I infer that McCorkle's understanding is what he gleaned from Davis' remarks. I therefore dismiss the allegation set forth in complaint paragraph 5(c).

Complaint paragraph 5(d) asserts, on the basis on testimony by James Michael Colvin, that Respondent, by Foreman Bill Davis, told employees during their lunchbreak on May 6, that they could not discuss the Union on company property. I decline to credit this testimony, which is not even corroborated by witnesses Crawford and McCorkle, who were allegedly present at the time. In general, I find Colvin to be a completely unreliable witness for the reasons set forth in footnote 3 below. Therefore, I dismiss this item of the complaint.

James Michael Colvin

A few days prior to April 30, 2002, James Michael (Mike) Colvin responded to an advertisement placed in a newspaper by All Trades Staffing. Colvin called Victor Szczechowski, the president of All Trades, who interviewed Colvin and reviewed his resume. Then Szczechowski sent Colvin to the DMC/DMI office in Logansport, Indiana, to take a drug test and a test administered by DMC and/or DMI determine his competency as a pipefitter.

Colvin reported to the Central Soya site to work for Respondent on Tuesday, April 30. On the third day, he was scheduled to work, Thursday, May 2, Colvin did not report to the jobsite. He called Szczechowski at All Trades to inform All Trades of his absence. Colvin did not report to work the next day, Friday, May 3, either. He spoke to Szczechowski at All Trades again, although, I cannot determine who initiated the call. Colvin worked for Respondent at the Central Soya jobsite on Saturday, May 4.

Colvin worked Monday, May 6, and Tuesday, May 7. On May 7 Foreman Bill Davis admonished Colvin for standing around too much.³ The next day, Wednesday, May 8, Colvin did not show up for work or call either All Trades or Respondent. On the afternoon of May 8, Mark Parmeter called

² McCorkle also answered affirmatively the question "[W]as it your understanding that engaging in union activity and distributing materials was to be restricted to break periods and lunch periods or pre or post shift." If Respondent restricted conversation about the Union during working time, while allowing conversation about other nonwork-related topics, it would have violated Sec. 8(a)(1), *Norton Audubon Hospital*, 338 NLRB 320 (2002).

³ The fact that Colvin denied being criticized for his productivity on direct examination and then recanted when confronted with his affidavit, is one of several reasons I deem Colvin to be an unreliable witness. I rely also on his testimony regarding his attendance at the May 2 union meeting, which I find to be inaccurate, and the inconsistency between his testimony on direct examination and on cross-examination regarding his efforts to contact Respondent on May 8. Finally, I rely on his uncorroborated testimony about Bill Davis' alleged May 6 admonition to himself, Crawford, and McCorkle, about discussing the Union on company property. I believe this testimony to be fabricated.

Szczecowski at All Trades and told him that Respondent did not want Colvin to work at Central Soya after Friday, May 10.⁴ Colvin worked at that jobsite Thursday, May 9, and Friday, May 10. Shortly before the end of the workday on Friday, Bill Davis informed Colvin that Respondent did not want him to return to the jobsite, even for the next day, when Dilling would be working. This was the first time anyone had told Colvin that his employment at Central Soya was being terminated. On Wednesday evening, May 8, Colvin attended his first union meeting at a bar and grill in Greensburg, Indiana. On the basis on Crawford's affidavit and Colvin's inability to identify the location of other union meetings (the Lee's Inn Motel in Greensburg), I find that he did not attend the union meeting conducted on May 2. I also find that the General Counsel has not established that Respondent was aware that Colvin engaged in any union or other protected activity prior to the afternoon of May 8, when it notified All Trades that it did not want Colvin's services after May 10.

In crediting Respondent's testimony as to the reasons it requested Colvin's removal from the jobsite, I also rely in part on the fact that on about April 22, Parmeter removed two agency employees from the jobsite who had shown up late 3 days in a row. In doing so, he effectively fired them. There is no evidence that these two employees engaged in protected activity. Thus, Parmeter's conduct with regard to Colvin appears to be consistent with his general practice in dealing with employees who repeatedly fail to show up at his jobsites when they are supposed to.

Analysis

Respondent was, so far as this record shows, the sole employer of James Michael Colvin, when Colvin worked on the Central Soya jobsite from April 30 to May 10, 2002.

In its answer to the complaint, Respondent denied that it ever employed James Michael Colvin. It then filed a motion for a bill of particulars with the Board, which was denied. However, two members of the Board read the complaint "as alleging that the Respondent is the sole employer of the alleged discriminatee, excluding all other theories of employment."

The General Counsel has alleged that Respondent was Colvin's employer at Central Soya. It has not alleged that it was a joint employer along with All Trades Staffing and/or Dilling Mechanical Contractors. In this regard, the evidence overwhelmingly establishes that Respondent was an employer of

Colvin in that it meaningfully affected matters relating to his employment relationship such as hiring, firing, discipline, supervision, and direction, *La Gloria Oil & Gas Co.*, 337 NLRB 1120 (2002). Colvin had to pass a Dilling pipefitting exam in order to be employed at the Central Soya site, as well as a Dilling-administered drug test. Respondent and only Respondent assigned tasks to Colvin and supervised him to insure that he performed them properly. For example, Respondent assigned Colvin the task of suspending pipe, a task he believed inappropriate for a pipefitter with his experience. No persons unassociated with Respondent gave Colvin any direction or provided any supervision for him on the worksite. Finally, Respondent exercised its unfettered discretion to terminate Colvin's employment on the Central Soya project.

The General Counsel made no effort to establish that either All Trades Staffing or Dilling Mechanical Contractors were also employers of Colvin and the record is insufficient to support a finding that such is the case. All Trades merely screened applicants for its clients and provided payroll services for them. Moreover, regardless of whether or not Respondent was Colvin's employer, it is properly held liable for its own deliberate actions that affect an individual's employment status with another employer, *Flay-O-Rich, Inc.*, 309 NLRB 262, 265-266 (1992); *Capitol EMI Music*, 311 NLRB 997, 1000 fn. 22 (1993).

The General Counsel failed to establish any of the violations alleged in the complaint.

I have dismissed all the alleged violations due to the General Counsel's failure to make a prima facie case in regard to any of them. With regard to the alleged 8(a)(3) and (1) violation, it is incumbent on the General Counsel to prove, as an element of his case, that James Michael Colvin engaged in protected activity prior to time that Respondent requested his removal from the jobsite and that Respondent was, by that time, aware of such activity. The General Counsel has failed to establish these essential elements of its case either through direct or circumstantial evidence.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁵

ORDER

The complaint is dismissed.

⁴ Parmeter and Szczecowski testified about this conversation in a consistent manner. Both also had contemporaneous, or nearly contemporaneous, notes regarding this telephone call. There is no evidence that contradicts Respondent's assertion that it notified All Trades on May 8, that it did not want Colvin on the Central Soya jobsite after May 10.

⁵ 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.