

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
NEW YORK BRANCH OFFICE
DIVISION OF JUDGES

OMEGA DEMOLITION CORPORATION

and

Case No. 13-CA-41041

ROBERT L. VEAL, An Individual

Jeanette Schrand, Esq., Counsel for the General Counsel.

Andrew Goldberg, Esq., Laner, Muchin, Dombrow, Becker, Levin & Tominberg, Ltd., Counsel for the Respondent.

DECISION

Statement of the Case

Joel P. Biblowitz, Administrative Law Judge: This case was tried before me in Chicago, Illinois on January 28, 2004. The Complaint herein, which issued on June 19, 2003 and was based upon an unfair labor practice charge that was filed by Robert Veal, an individual, on May 12, 2003, alleges that Omega Demolition Corporation, herein called the Respondent, discharged him on December 16, 2002¹ because of his union and concerted activities, in violation of Section 8(a)(1)(3) of the Act. The Respondent admits that it discharged Veal on December 16, but defends that he was discharged for misconduct, the unprovoked pushing of his foreman.

Findings of Fact

I. Jurisdiction

Respondent admits, and I find, that it has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. Labor Organization Status

Respondent admits, and I find, that International Union of Operating Engineers, Local 150, AFL-CIO, herein called the Union, has been a labor organization within the meaning of Section 2(5) of the Act.

III. The Facts

The Union represents certain of the Respondent's employees, more particularly employees engaged in demolition and asbestos abatement work. The most recent collective bargaining agreement covering these employees runs for the period June 1, 2001 through May 31, 2007. The events herein occurred at a demolition site in the city of Chicago on December 13 and 14, which culminated in an incident between Veal and his foreman, Gregory Scott, on

¹ Unless indicated otherwise, all dates referred to herein relate to the year 2002.

Monday, December 16, resulting in Veal's discharge on that day. There was admittedly an incident between them on December 16; there is, however, a credibility issue as to what actually transpired on that day.

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A. The Events of Friday, December 13, 2002

In addition to Scott and Veal the other principal employees at the job site were Patrick Greb, who operated a backhoe, and Marcell Smith, who operated a crusher, a machine that was described at the hearing as being as large as the hearing room, and about twelve feet high. Concrete from the demolished building is loaded into the crusher, where it is crushed into smaller pieces of concrete. Smith was stationed at the top of the crusher, while Veal, because a prior injury put him on light duty, was assisting him on ground level. The Respondent's employees worked from 6:00 or 6:30 a.m. to 2:30 p.m. Admittedly, at the end of the day on December 13, Veal asked Scott on a few occasions whether they would be working the following day, Saturday, since they were behind schedule on the job and Scott answered that they were not going to work the following day. Scott testified that on December 13, he had a number of telephone conversations with Daniel Delarosa, Respondent's superintendent, regarding whether his crew would be working on the following day. The first conversation was in the morning when Scott told Delarosa that they needed to work on Saturday because they wouldn't complete the job on schedule if they didn't work, and Delarosa said that he would speak to the boss and get back to him. At about 1:00, Delarosa called Scott and said that his crew would not be working the following day. At about 5:00, after the other employees had left for the day, the Respondent's owner called Delarosa and told them that the employees would work the following day. Delarosa then called Scott and told him that the boss said that they would work the following day. He asked Scott to call Greb, and he said that he would call Veal to tell him to report to work the following morning. Scott called Greb and told him to report for work the following morning. Delarosa had the employment files in his truck and he called the telephone number on Veal's application, but got a recording that the telephone number had been disconnected, so he was unable to notify Veal to report for work the following morning.

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B. December 14

Scott began working at about 7 a.m. At that time he called Delarosa and told him that Scott was not at work, and Delarosa said that he was not able to contact him the prior day. Scott asked him what he wanted him to do, and Delarosa said that they had to run the machine, even in Veal's absence. Delarosa told him that Veal would want to be paid for the day because they were running his machine and that they would take care of it on Monday, and Scott agreed. Article IX, Section 3 of the contract between the Respondent and the Union provides that employees regularly assigned to a piece of equipment shall be given preference when that equipment is employed on a regular workday, a Saturday, Sunday or a holiday.

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C. December 16

Veal reported for work on Monday, December 16 at his regular starting time. After receiving his work assignment for the day from Scott, Veal walked to the crusher and noticed that there were quite a few more piles of crushed concrete than there was when he left work on Friday. What follows are the different versions of what occurred after Veal realized that the other employees had worked on Saturday, and had used his machine.

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Veal's Testimony

Veal testified that he asked Scott if they worked on Saturday, and Scott said that they

5 did. Veal questioned him about why they hadn't contacted him to work on Saturday when he asked him on three occasions if they would be working the next day and Scott said, "Yes, but you were on light duty. You couldn't have done anything anyway, so there was no sense in bringing you in." Veal told him that the Union rules required that if his machine was operating, he should be working, and he said, "You're going to have to pay me for it." Scott then told him: "Just take it as a loss" and Veal said that he wasn't going to take it as a loss, he was going to call the Union. Scott told him not to call the Union; if he called the Union, it could cause problems for him or he could get fired. Veal said that he was going to call the Union, and he called the Union hall. About thirty minutes later, Dabney McCain, the business agent arrived and Veal told him that on Saturday the Respondent operated his machine without him so they owe him a day's pay. McCain, who did not testify, then asked who was the foreman on the job and Veal pointed to Scott. McCain motioned for Scott to come over to him and Scott was very upset and McCain told him to calm down, saying: "This man has every right to call the BA." McCain told Scott that if he ran the machine on Saturday, he would have to pay Veal for the day. Scott did not respond, but called Delarosa, who arrived about five minutes later. McCain told Delarosa that they had a problem; if they ran the machine on Saturday they would have to pay Veal, and Delarosa agreed that Veal would be paid for Saturday. Veal then returned to work. In testimony objected to as hearsay, Veal testified that at the conclusion of the break that morning, Smith told him that Scott told him that "Bob Veal had made problems for us." Smith testified that he never said that. At about 9:00, while Veal was in his position by the crusher, Scott approached him and said, "I told you that you shouldn't have called the BA. You're making problems for yourself and you can get fired." Veal said, "Well, we can settle this issue right here. Stay off our machines because you're not an operator." Scott told him: "Fuck you. I can do what I want. This is my job." Veal walked away, and Scott came up to him again and said, "You ain't shit. You shouldn't have called the BA." Veal replied, "Hey man fuck you" and walked away again. Scott then approached him again, pointing his finger at him and cursing, saying that he did seven years in prison and that "he would fuck me up and it wasn't nothing." Veal walked away again, and Scott continued yelling, cursing and pointing his finger at him. Veal then asked him for Delarosa's telephone number because he thought that the situation was getting out of hand, and Scott said that "he wasn't giving him shit." Veal told him, "Don't come in my face again" and walked away, but Scott approached him again and said, "If you say another word I'm going to kill you." Veal called him a bitch and Scott "ran up on me, his knee touching my knee and touching my chest. And my first reaction was to get him off of me" and Veal pushed him with both hands. Scott said, "You're fired now" and called Delarosa. At the same time, Veal called McCain. Delarosa came about five to ten minutes later, spoke to Scott and then approached Veal and asked him what happened, and Veal told him of his encounters with Scott. Delarosa went to speak to Greb, and returned and told Veal that he was fired, and that he was to leave the job.

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Greb's Testimony

Greb testified he was notified on Friday night at about 7:00 that he should report for work on Saturday. On December 16, at about 10:00, while he was operating his backhoe, Veal approached him and asked him why they ran his machine on Saturday without him, but Greb did not respond. Veal then walked over to Scott (about thirty feet from Greb) and "they were just talking to each other, like loudly", although he could not hear what was said, and then he saw Veal push Scott. Prior to that he did not see Scott make any threatening motions toward Veal, nor did he see Scott raise his hands into a fist or touch up against Veal's chest, although they were standing close together. After Veal pushed him, Scott walked away. He did not speak to Veal after this incident. Shortly thereafter, he was approached by Delarosa, who asked him what happened: "I just told Dan what happened, that...Bob Veal pushed Greg Scott. And that's pretty much it."

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Smith's Testimony

5 Smith, who is no longer employed by the Respondent, was operating the crusher, about ten feet from Veal and Scott, from the top of the machine at the time of the incident. He testified that he heard some yelling and turned the machine off; all he heard was Veal tell Scott not to put his hands on his machine. When he turned around he saw Veal approaching Scott, Veal faked a punch toward Scott and then pushed Scott. At this time Scott "was mostly in a defensive stand. He was like holding his hands up to prevent him from hitting him if he would have hit
10 him." After Veal pushed Scott, "a few more words were exchanged" and Scott walked away and called Delarosa. He knew that because a few minutes later, Delarosa came to the job site, and asked Smith what happened, and Smith recited the above facts.

Scott's Testimony

15 Scott testified that he reported for work at about 6:00 and Veal arrived at about 6:30. When Veal saw Scott that morning, the first thing he said to him was, "I see you guys worked Saturday" and Scott answered that they did. Veal asked: "You ran my machine?" and Scott said that he did, and Veal said that he had to be paid for it. Scott said that he should call DeLarosa and Veal said that he was going to call the Union. Scott said that he didn't think that was
20 necessary and that it didn't "have to go that far." He said this because "I thought we were making something bigger than what it should be because me and Dan had already discussed that Bob would probably get paid anyway." He never told Veal that since he was on light duty there was no sense bringing him in, nor did he tell him that he should take Saturday as a loss or
25 that he would be making problems for himself or that he could be fired for calling the Union. He told him to call Delarosa, who would straighten it out. Veal said that he was going to call the Union anyway and when Veal walked away, presumably, to call the Union, Scott called Delarosa to tell him what had occurred. About ten minutes later, McCain arrived and asked Scott what happened, and Scott told him that he should discuss it with Delarosa, who arrived a
30 few minutes later. McCain and Delarosa began talking, but the only part of the conversation that Scott overheard was Delarosa saying, "I know, I know." They spoke for about five minutes, shook hands, Delarosa told McCain that Veal would be paid for Saturday and they returned to work. At about 10:00, shortly after the break, Veal started "cussing" at him saying, "You
35 shouldn't have been running my mother fucking machine." Scott told him, "You got your money, what is the problem? I just did what I had to do." Veal then called him a pussy and a chump, but Scott thought that Veal was joking, because they previously had a good working relationship. Then Veal said that he would kick his ass, and "he mad a move like he was going to hit me." Scott put his hands up in a defensive manner and told Veal to be cool: "Then he made another
40 move towards me and he pushed me. And I told him he was fired." Scott did not make physical contact with Veal prior to Veal pushing him. Veal said that he couldn't fire him "because I wasn't nothing but a peon." Scott did not respond, but walked away and called Delarosa, told him what happened, and asked him to come to the job site. A few minutes later he arrived, and both Scott and Veal went to speak to him. Delarosa told them "one at a time" and separated them. First
45 Scott, then Veal, told him what occurred. He then saw Delarosa speaking to Greb and Smith. Delarosa approached Veal, and said that he was fired because they cannot allow that type of activity on the job. He told Veal to leave the site. A few minutes later McCain returned and spoke to Delarosa.

Delarosa's Testimony

50 Delarosa testified that at about 7:30 that morning he received a call from Scott asking him to come to the job site; that Veal was upset that they ran his machine on Saturday and that

a Union representative was on the way to the site. He arrived at the site about ten minutes later, at about the same time as McCain. Before he had an opportunity to speak to McCain, Veal told him that he wanted to be paid for his machine being run on Saturday, and Delarosa told him that they would take care of his situation and he would be paid. McCain then told Delarosa that he understood that they operated Veal's machine on Saturday, and Delarosa told McCain: "Yes. We have to pay him. I intend to pay him. I wasn't able to contact him over the phone and our intentions are to pay him." McCain said that was fair, and they shook hands and Delarosa left the job site. At about 10:30 he received a call from Scott saying that Veal had pushed him and that he should get to the job site right away. When he got to the job site both Scott and Veal approached him and started talking at the same time. He told them to speak one at a time, and Scott said that Veal was harassing him, was threatening him and pushed him. He then asked Veal what happened, and Veal said that they had gotten into an argument, Scott "got into his face and that he had pushed him." Delarosa asked him how he pushed Scott: "And he showed me by pushing me with both hands. He said just like that." Delarosa then told Scott that he had to be sure that he was telling the truth and Scott told him that if he didn't believe him, that he should ask the other operators. He then told Scott and Veal to stay away from each other while he spoke to the other operators. He spoke to Greb, who told him that he saw Veal push Scott, but didn't see anything else other than that they were arguing. Smith said that he heard them arguing and that Veal was walking around or after Scott, and that Veal raised his fists at Scott while Scott stood there, and then he pushed Scott. Delarosa then told Veal that he was fired and asked him to leave the site.

Delarosa identified Article 3.2 of the Respondent's Employee Handbook referring to harassment. It states that the Respondent would impose appropriate disciplinary action on any individual engaging in harassment, which, it states, includes physical or mental abuse, or taunting intending to provoke another employee.

IV. Analysis

This is a case to be decided by credibility. If I credit Veal's testimony, by calling the Union on December 16, he got Scott angry, which caused Scott to threaten him and to be "in his face," resulting in Veal being fired for pushing Scott away from him, satisfying Counsel for the General Counsel's initial burden under *Wright Line*, 251 NLRB 1083 (1980). If, however, I believe the Respondent's witnesses, there was no animus toward Veal for calling the Union. Delarosa and Scott knew on Saturday that they would have to pay Veal for Saturday, and Veal was fired only because, unprovoked, he pushed Scott, in violation of the Respondent's harassment rule.

This is a difficult credibility determination because none of the witnesses were obviously incredible. All appeared to be attempting to testify in an honest and truthful manner. However, it is obvious that either Veal or Greb, Smith and Scott were not telling the truth about the December 16 incident. With some reluctance, I credit the testimony of Greb, Smith and Scott and find that Veal provoked the incident and pushed Scott without provocation. I find this principally because Greb and Smith were disinterested witnesses who had no apparent reason to support the Respondent's story other than the fact that it was the truth, whereas any remaining animosity between Scott and Veal may have influenced their testimony. I say "with some reluctance" because Veal's testimony is fairly reasonable. Since he knew earlier in the morning that he would be paid for Saturday, probably at overtime rates, why would he provoke Scott later that morning, resulting in the altercation? The only reason would be a continuing resentment against Scott for using his machine on Saturday, without him. On the other hand, since it is clear that Scott was not to blame for the last minute decision to work on Saturday and for the Respondent's inability to contact Veal to report on Saturday, there would be no reason

for Scott to be angry at Veal for calling the Union about being paid for the day. I credit Greb's testimony that shortly before Veal's confrontation with Scott, Veal approached Greb at his machine and asked him why they operated his machine on Saturday in his absence. This indicates that even though Veal had already been assured that he would be paid for Saturday, he still harbored resentment over the incident. Because I found that that Greb and Smith were credible and disinterested witnesses, I credit their testimony about the December 16 incident. I therefore find that Veal was fired because he pushed Scott, and I recommend that the Complaint be dismissed in its entirety.

Conclusions of Law

1. The Respondent, Omega Demolition Corporation, has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union has been a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent did not violate Section 8(a)(1)(3) of the Act by discharging Robert Veal on December 16, 2002.

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

ORDER²

Having found that the Respondent has not engaged in the unfair labor practices alleged in the Complaint herein, I recommend that the Complaint be dismissed in its entirety.

Dated, Washington, D.C.

Joel P. Biblowitz
Administrative Law Judge

² 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.

