

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

LEE BUILDERS, INC.

and

ALABAMA CARPENTERS REGIONAL
COUNCIL-LOCAL 1274

CASES 10-CA-33718
 10-CA-33755
 10-CA-33788-1
 10-CA-33788-2

Lisa Y. Henderson, Esq.,
for the General Counsel.
John Wilmer, Esq. and
Richard Raleigh, Esq.
for the Respondent.

DECISION

Statement of the Case¹

LAWRENCE W. CULLEN, Administrative Law Judge: These consolidated cases were heard before me on October 21 and 22, 2002, in Huntsville, Alabama. The complaint as amended at the hearing was issued by the Regional Director of Region 10 of the National Labor Relations Board (“the Board”) based on charges brought by the Alabama Carpenters Region Council-Local 1274 (“the Union” or “the Charging Party”) and alleges that Lee Builders, Inc., (“the Company” or “the Respondent”) has engaged in and is engaging in certain unfair labor practices in violation of Sections 8(a)(1) and (3) of the National Labor Relations Act (“the Act”). The Respondent has by its answer as amended at the hearing denied the commission of any violations of the Act.

On the entire record, including testimony of the witnesses and the exhibits received in evidence and after review of the briefs filed by the General Counsel and the Respondent, I make the following:

¹ All dates are in 2002 unless otherwise specified.

Findings of Fact and Conclusions of Law

I. Jurisdiction

The complaint alleges, Respondent admits and I find that at all times material herein during the 12 months preceding the filing of the complaint, Respondent has been an Alabama corporation, with an office and place of business in Huntsville, Alabama, herein called its facility and has been engaged in the business of commercial construction, that during the past twelve-month period, Respondent, in conducting its business operations, purchased and received goods valued in excess of \$50,000 directly from suppliers located outside the State of Alabama 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, Respondent admits and I find that at all times material herein, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

A. Background

Lee Builders, Inc. is a family owned general contracting company in Huntsville, Alabama, that builds residential, commercial and small industrial buildings. Its projects range from very small construction work to projects costing up to \$9 million. There are four project managers, Bobby Lee, Bruce Lee, Jeff Lee and Harold Carter. The President of the Company is Jack Lee, the father of Bobby, Bruce and Jeff. The sons all own stock in the Company. Each project manager operates essentially as a separate branch of the business, finding projects, estimating the jobs, writing the contracts for the jobs, bidding the jobs, hiring for the jobs with ultimate responsibility for all work performed on their projects. The project managers have superintendents that work for them on their projects. The superintendents are involved in the daily supervision of employees on the job sites. The project managers and superintendents are responsible for discipline up to, and including discharge, on the projects where they are involved. It was stipulated at the hearing that Project Managers Bobby Lee, Bruce Lee and Harold Carter and superintendents Larry Shipman, Gary Lee, Sean Lee, Patrick O'Reilly, Ryman Sparks and Wayne Wright were at all material times supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act.

The Alabama Carpenters Regional Union-Local 1274, commenced organizing efforts at the Company in early 2002. The Union's agents discussed the Union with Respondent's employees and sought to represent Respondent's employees by contacting them by telephone at their homes, visiting them at their homes and solicited and obtained

union authorization cards on and off job sites. An election was scheduled but was postponed following the filing of charges by the Union in the instant cases.

B. The Section 8(a)(1) allegations

The Union commenced its organizing drive among Respondent’s employees in January 2002. When the Company became aware of the Union’s campaign in early April, it responded quickly to solicit information from employees concerning the campaign and to make clear to the employees its determination that the Union’s campaign would be defeated. The evidence at the hearing shows that Project Manager Harold Carter spoke to employees at the job sites of his projects. Additionally, Vice President-Project Manager-Owner Bobby Lee spoke to employees including Christopher Hughes at Bobby’s home which was being renovated and on which project Hughes was working. Employee Daniel Manuele testified that in early May, Bobby Lee asked him if he had signed an authorization card and if Union organizers had visited him at home after Manuel lent him a pencil with the Union’s Local number on it. Manuele told Bobby Lee that he had signed a Union authorization card. Employee Christopher Hughes testified that in late April 2002, Bobby Lee had questioned him about the Union stating, “I understand there is a union campaign going on right now.” Hughes told him there was and that he had been asked by the Union to hold a barbeque for other employees who were interested and that he had been hoping to speak with Bobby Lee about the Union. Employee Bradley Walls testified that at a meeting held in late April, Project Manager Harold Carter told the employees he supervised, to inform him when Union organizers came to their jobsites so he could have them escorted off the jobsite. Current employee Larry Moore testified that supervisors were “coming around to all the employees sensing our views . . .”

Dan Manuele also testified that in early May, Bobby Lee told a group of employees that “the Company would never go union” and that the Company would shut down rather than be unionized. Bobby Lee testified that he had told employees “I did not want to be associated with the Union, and I felt like the – the owners or the type of people that we work with would probably rather use a non-union type set-up.” Bradley Walls also testified that in late April 2002, Project Manager Harold Carter told a group of employees that “Lee Builders would shut the door before they let the Union in.” Carter denied that he had made this threat. Carter admitted at the hearing that in one group meeting of two he addressed, he told the employees that if Lee Builders were “forced” to become one of the only union contractors in the area, it may “affect how we fare in the bid world.” Gary Watkins, a former employee, testified that in a meeting at the Hazel Green Baptist Church job held by Project Manager-Vice President-Owner Bruce Lee in early May 2002, Bruce Lee told employees the Union would put the Company out of business because it would not be able to compete. On cross-examination Watkins testified that Bruce Lee was concerned about Respondent’s ability to compete if the employees chose union representation. Bruce Lee testified that during three meetings which he held with employees he told them he “felt like if the Union did come in and take over our labor force, that it would hurt our chances of getting competitive jobs” Bruce Lee also testified that he felt that the people and companies for which the

Company does construction work would prefer to use non-union general contractors. He testified he told the employees that he was not there to tell them how to vote, but that they should be careful of what they sign because it could obligate them. He told them that unions required their members to pay fees and can cause problems with strikes. He denied that he ever said or implied that the company would shut down if the union came in. Sean Lee, the grandson of Jack Lee and the son of Jeff Lee corroborated Bruce Lee's testimony. Bobby Lee testified he told employees at meetings that "I did not want to be associated with the Union, and I felt like there was a potential of its hurting our competitive edge and that I didn't think a lot of the owners would want it."

I find that the Respondent violated Section 8(a)(1) of the Act by interrogating its employees concerning their union activities and by threatening its employees that it would close its doors, that it would never go union demonstrating a threat of futility and implicitly threatening its employees with job loss because it would not be able to compete if the Union was successful in its campaign to represent the unit employees. I credit the testimony of the employee witnesses as set out above over that of the members of Respondent's management and its current employees who testified in this case. I find the Respondent did engage in the interrogation and threats as set out above. See *Wellstream Corp.*, 313 NLRB 698, 706 (1994); *Dlubak Corp.*, 307 NLRB 1138, 1143, 1152 (1992); see also *Classic Coach*, 319 NLRB 701, 702-703 (1995). It does not follow that a union's wage scale is fixed and not subject to negotiation and that the advent of the union on the scene initially translates into inability to compete and the closure of the business. However this is the manner in which this was presented to the employees by Respondent's high ranking management officials. *Debber Electric*, 313 NLRB 1094, 1097 (1994); *Crown Cork & Seal Co.*, 308 NLRB 445 fn. 3 (1992).

C. The Section 8(a)(3) allegations

The General Counsel presented the testimony of employees Christopher Hughes, Bradley Walls and Daniel Manuele, all of whom were employees discharged by Respondent in May of 2002. Each of these employees had expressed an interest in the Union campaign and signed union authorization cards. I credit the testimony of these employees which supports the conclusion that Respondent had knowledge of their union activities. Respondent's animus toward the Union is evident from the record in this case showing Respondent interrogated employees about their union activities and threatened them with the futility of their support for the Union and with closure of the business. The evidence shows that although these three employees may not have been exemplary employees, their conduct had been tolerated by Respondent until the advent of the Union campaign and Respondent's discovery that they were union supporters. In the cases of Christopher Hughes and Bradley Walls, both of these employees may have had attendance problems but had been tolerated in the past. Each were discharged without explanation by Respondent shortly after it was discovered that they supported the Union. In addition to their attendance problems, Respondent elicited testimony dealing with other alleged deficiencies in their work abilities and conduct on the job, in an attempt to bolster Respondent's position in these cases. However, the record in these cases shows

that all of the alleged deficiencies were tolerated until the advent of the Union campaign and Respondent's discovery of their support for the Union.

In the case of Daniel Manuel, he was found to have tested positive for marijuana and amphetamines in a drug test he was required to take following a workplace injury. He admitted having taken a "hit" or so of marijuana but contended that the other drug positive result was related to "Stacker 2's" a diet supplement. Respondent acknowledged as the record shows, that other employees such as Jason Alger and Bill Lemon had tested positive for drugs in the past but were not disciplined, although it had a drug policy in effect since 1997, which provided for discharge for a positive drug result. Bobby Lee testified that in the year 2002, Respondent had begun to require drug screening after on the job accidents on the recommendation of its workmen's compensation insurance carrier. In its brief Respondent contends that no employee who tested positive for drugs following a workplace injury had been retained by Respondent as an employee. However, there was only one instance cited of an employee other than Manuele who had tested positive and not remained an employee and in that case, the employee had resigned. According to the testimony of Bobby Lee, another employee named John Tillis was involved in a workplace accident with Manuele involving a grinder and tested positive for drugs and resigned the next day. There is no evidence that any employee other than Manuel had ever been discharged following a positive drug test. There was also no evidence presented to corroborate Bobby Lee's testimony of a change in policy providing for the discharge of employees who tested positive for drugs.

The General Counsel has established prima facie cases of violations of Section 8(a)(1) and (3) of the Act by Respondent's discharge of Christopher Hughes, Bradley Walls and Daniel Manuele because of their Union and concerted activities. Under *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982). The General Counsel has the initial burden to establish that:

1. the employees engaged in protected concerted activities
2. the Respondent had knowledge or at least suspicion of the employees' protected activities
3. the employer took adverse action against the employees
4. a nexus or link between the protected concerted activities and the adverse action, underlying motive

Once these four elements have been established, the burden shifts to the Respondent to prove, by a preponderance of the evidence that it took the adverse action for a legitimate non-discriminatory business reason. In the instant case all three employees signed Union authorization cards, Hughes was questioned by Vice President Bobby Lee and admitted he was considering hosting a barbeque on behalf of the Union, Manuele was questioned by Vice President Bobby Lee and admitted having signed a Union card and Walls discussed the Union with other employees and admitted to Project Manager Harold Carter that he had talked to the Union representative on the jobsite. It is clear that these three employees engaged in union and protected activities and that Respondent had

obtained knowledge of this or at least suspicion in the case of Walls. All three employees were discharged in less than a month. The animus of Respondent toward the Union and its supporters has clearly been established by the Section 8(a)(1) violations found above.

The Respondent has failed to establish its *Wright Line* defense by showing that it would have taken the adverse actions against Hughes, Walls and Manuel in the absence of their engagement in protected concerted activities. The attendance problems of Hughes and Walls were tolerated until they were found to be union supporters. Manuel was the first employee discharged for a positive drug test, thus demonstrating the disparate treatment he received by his discharge, whereas no such actions had been taken against other employees who had failed the drug test in the past.

I conclude that the General Counsel has established a prima face case of discrimination against Hughes, Walls and Manuele committed by Respondent and that Respondent has failed to rebut the prima facie case by the preponderance of the evidence and that Respondent thereby violated Section 8(a)(1) and (3) of the Act.

The timing of these multiple discharges by Respondent supports the conclusion that these actions were taken by Respondent in order to defeat the Union campaign by ridding itself of union supporters. Assuming arguendo that these three employees may not have been exemplary employees, the record supports the conclusion that their shortcomings were tolerated until shortly after the Union campaign became known to Respondent in April 2002. In the cases of Walls and Manuele, they had initially been employed by Respondent in 2001, and Walls was recalled in 2002, following a layoff attributable to a slowdown in the jobs which occurred in late 2001. Additionally all three employees were terminated without being initially given a reason for their terminations. In its defense Respondent trotted out a lengthy list of alleged shortcomings of these three employees in addition to the principal reason asserted for the discharges. This further supports the conclusion that the true reason for the discharges was the underlying motive of ridding itself of Union adherents in its effort to defeat the Union's campaign.

Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent violated Section 8(a)(1) of the Act by:
 - (a) Bobby Lee's interrogation of Daniel Manuele if he had signed an authorization card.

(b) Bobby Lee's interrogation of Christopher Hughes by the inquiry, "Its my understanding that there's a Union campaign going on right now," to which Hughes replied, "yes sir, there is."

(c) The demand by Project Manager Harold Carter that employees under his supervision notify him when the Union organizers came to the job site, so that he could have them removed.

(d) The threats of futility of the employees' support for the Union and job loss and business closure accompanying the interrogations and at the meetings held by Respondent's management.

4. The Respondent violated Section 8(a)(1) and (3) of the Act by its discharge of Christopher Hughes, Bradley Walls and Daniel Manuele.

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

The Remedy

Having found the Respondent has engaged in the above violations of the Act, it shall be recommended that Respondent cease and desist therefrom and take certain affirmative actions designed to effectuate the purposes and policies of the Act and post the appropriate notice. It is recommended that Respondent offer immediate reinstatement to employees Christopher Hughes, Bradley Walls and Daniel Manuele who were unlawfully discharged. The employees shall be reinstated to their prior positions or to substantially equivalent ones if their prior positions no longer exist. The employees shall be made whole for all loss of backpay and benefits sustained by them as a result of Respondent's unfair labor practices.

These amounts shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950) with interest computed at the "short term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. Section 6621.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended:²

ORDER

The Respondent, Lee Builder's, Inc., its officers, agents, successors and assigns shall:

² If no exceptions are filed as provided by §102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in §102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

1. Cease and desist from:

(a) Interrogating its employees concerning their engagement in union and other concerted activities and those of their fellow employees.

(b) Threatening its employees with job loss, closure of the business and the futility of their support of the Union.

(c) Discharging its employees because of their support of the Union.

(d) Respondent shall not in any like or related manner interfere with, restrain or coerce its employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative actions necessary to effectuate the policies and purposes of the Act.

(a) Within 14 days from the date of this Order, offer full reinstatement to Christopher Hughes, Bradley Walls, and Daniel Manuele to their former jobs or if those jobs no longer exist, substantially equivalent positions, without prejudice to their seniority or to any other rights or privileges previously enjoyed.

(b) Make the aforesaid employees whole for any loss of earnings and other benefits with interest suffered as a result of the discrimination against them in the manner set forth in “The Remedy” section of this decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges of Christopher Hughes, Bradley Walls and Daniel Manuele and within 3 days notify the employees in writing that this has been done and that these unlawful actions will not be used against them in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post copies of the attached notice marked “Appendix³.” Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and

³ If this Order is enforced by a Judgment of the 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.**”

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 April 2002.

(f) 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.

Dated, Washington, D.C.

Lawrence W. Cullen
Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES

**Posted by the 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.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union
Choose representatives to bargain on your behalf with your employer
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT ask you questions about your Union or concerted protected activities.

WE WILL NOT threaten you with the closure of our Company, job loss, or the inability of our Company to compete if you select a union to represent you.

WE WILL NOT threaten you with the futility of your support for the Alabama Carpenters Regional Counsel-Local 1274.

WE WILL NOT discharge our employees because of their support of the Union or their engagement in concerted protected 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 offer employees Christopher Hughes, Bradley Walls and Daniel Manuele full and immediate reinstatement to their former jobs, or, if these jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights and privileges previously enjoyed.

WE WILL make employees Christopher Hughes, Bradley Walls and Daniel Manuele whole for wages and benefits lost because of our unlawful discharge of them, with interest.

WE WILL remove from our files all references to our discharges of employees Christopher Hughes, Bradley Walls and Daniel Manuele and **WE WILL** inform them in

writing that we have done so, and that we will not use the discharges against them in any way.

LEE BUILDERS INC.
(Employer)

Dated: _____

By: _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

233 Peachtree Street NE, Harris Tower, Suite 1000, Atlanta, GA 30303-1531
(404) 331-2896, Hours: 8 a.m. To 4:30 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE.
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY **QUESTIONS** CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S

COMPLIANCE OFFICER, (404) 331-2877.