

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

J. F. KIELY CONSTRUCTION CO.

and

Case 22-CA-25376

UTILITY WORKERS OF AMERICA,
LOCAL 409, AFL-CIO

Brian Caufield, Esq. for the General Counsel.
Anthony Lumia, Esq. for the Union.
Ronald Tobia, Esq. for the Respondent.

DECISION

Statement of the Case

D. BARRY MORRIS, Administrative Law Judge: This case was heard before me in Newark, NJ on February 19, 2003. Upon a charge filed on September 16, 2002¹, a complaint was issued on December 16, alleging that J. F. Kiely Construction Co. (“Respondent”) violated Section 8(a)(1) of the National Labor Relations Act, as amended (the “Act”). Respondent filed an answer denying the commission of the alleged unfair labor practices.

The parties were given full opportunity to participate, produce evidence, examine and cross-examine witnesses, argue orally and file briefs. Briefs were filed by the parties on April 11, 2003.

Upon the entire record of the case, including my observation of the demeanor of the witnesses, I make the following:

Findings of Fact

I. Jurisdiction

Respondent, a corporation with an office and place of business in Long Branch, NJ is a contractor engaged in the construction industry. It has admitted, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. In addition, I find that Utility Workers of America, Local 409, AFL-CIO (the “Union”) is a labor organization within the meaning of Section 2(5) of the Act.

¹ All dates refer to 2002 unless otherwise specified.

II. The Alleged Unfair Labor Practices

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A. The Facts

1. Background

Respondent has had a collective bargaining relationship with the Union for over 50 years. There is a current Collective-Bargaining Agreement ("CBA") in existence between Respondent and the Union effective March 26, 2000 through March 25, 2005. Article XV of the Agreement contains a grievance and arbitration clause.

John Kiely is Secretary-Treasurer of Respondent and has been involved in labor relations for the company since 1991. Joseph Kelemen has been employed by Respondent for over eight years. He was injured on the job and went on workmen's compensation in January 2002. Kelemen became President of the Union in June. Prior to that time he had been Secretary of the Union, served as Team Leader of the Safety Committee and was a member of the By-Laws and Negotiating Committees.

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2. Alleged Section 8(a)(1) Violations

Kelemen testified that on August 30, when he went to pick up his paycheck, he was told to report for "light duty" the following Tuesday, September 3. When he reported for work on Tuesday, he encountered Kiely who was leaving the office. Kelemen testified that he asked Kiely about the light duty. Kelemen testified that Kiely then told him:

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I'll be point blank with you. I think your claim is false, and when I find out it's false, I'm going to fire you...We didn't want you into this business as President; you know, you're a trouble-maker. I don't like you. You can cause a lot of trouble in your position.

Kelemen further testified that after that exchange, Kiely told him, "I'll deal with you later, and when there's light duty, we will call". Kelemen stated that no one else heard the conversation.

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Kiely testified that the company does not have a light duty policy and that, in any event, since Kelemen was permanently disabled, he would not have qualified for light duty. Kiely testified that as he was leaving the office on September 3, he encountered Kelemen. Kelemen asked him about light duty and Kiely testified that he responded that the company was negotiating with the Union about a light duty policy. Kiely testified that Kelemen told him that he had been elected president of the Union, to which Kiely replied, "I heard that...Congratulations". Kiely denied Kelemen's version of the conversation. He denied saying that he didn't want Kelemen to be president of the Union, that he would fire Kelemen, that Kelemen was a troublemaker or that "I'll deal with you later".

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B. Discussion and Conclusions

1. Deferral to Arbitration

Article XV of the CBA provides:

Any dispute or grievance arising between the parties hereto

involving the meaning, interpretation, or application of any clause in this Agreement...shall be settled in the following manner, provided that the grievance is presented within thirty...days of its occurrence...".

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Respondent argues that this matter should be deferred to arbitration, pursuant to *Collyer Insulated Wire*, 192 NLRB 837 (1971). General Counsel maintains that deferral is inappropriate because the grievance-arbitration clause is not "broad enough to embrace the instant dispute".

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As stated in *United Technologies Corp.*, 268 NLRB 557, 560 n.22 (1984), in order for there to be deferral, respondent must waive any "timeliness provisions of the grievance-arbitration clauses". See *Sterling Lebanon Packaging Corp.*, 332 NLRB 11, 13 (2000). The CBA provides that the grievance would have had to be presented within 30 days of the occurrence. Respondent has not waived this time limitation. Accordingly, deferral is inappropriate.²

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2. Alleged Section 8(a)(1) Violations

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The complaint alleges that Kiely threatened Kelemen with unspecified reprisals and discharge as a result of his activities as Union president. The only two witnesses in this proceeding were Kelemen and Kiely. The company and the Union have had a collective-bargaining relationship for over 50 years. There has been no showing of animus by Respondent towards the Union.

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Kelemen testified that on September 3 Kiely told him that when he finds out that his workmen's compensation claim is false, "I'm going to fire you", that Kiely didn't want him as president, that Kelemen is a "trouble-maker" and that Kiely told him "I'll deal with you later". Kiely denied that he made any of the alleged statements. There is nothing in the demeanor of the witnesses or in the evidence that persuades me to credit one of the two witnesses over the other. Accordingly, I do not credit Kelemen's testimony and I find that General Counsel has not sustained its burden of proving the allegations. See *Lancet Arch, Inc.*, 324 NLRB 191, 193 (1997); *National Telephone Directory Corp.*, 319 NLRB 420, 422 (1995). The allegations are therefore dismissed.

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Conclusions of Law

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1. 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.

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3. Respondent has not violated the Act in the manner alleged in the complaint.

² In view of my finding that deferral is inappropriate because Respondent has not waived the time limitation, I believe that it is unnecessary for me to decide whether the grievance clause is sufficiently broad to encompass the allegations in this proceeding.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended:³

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ORDER

The complaint is dismissed.

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Dated, Washington, D.C.

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D. Barry Morris
Administrative Law Judge

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³ 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.