

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

A.J. MCNULTY & CO., INC.

and

Case No. 29-CA-27722

BUILDING MATERIAL TEAMSTERS,
LOCAL 282, INTERNATIONAL BROTHERHOOD
OF TEAMSTERS

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Ziskin, Esq.*, Counsel for the
Respondent

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Charging Party

DECISION

Statement of the Case

Raymond P. Green, Administrative Law Judge. I heard this case on November 6 and 7, 2006.¹ The charge and amended charges were filed on June 2 and August 29, 2006. The Complaint that issued on August 29, made the following allegations.

1. That in or about April 2006, the Respondent by Robert Serrone, its dispatcher, directed employees not to speak with the Union's shop steward and threatened employees with discharge if they did.

2. That on or about May 22, 2006 and in late May 2006, the Respondent by Serrone, **(a)** interrogated employees about their union activities, **(b)** directed employees not to speak with the shop steward and **(c)** threatened employees with discharge if they spoke to the steward or if they engaged in union activities.

3. That beginning in late May 2006, the Respondent reduced the work opportunities for Peter Klosterman because he spoke to the shop steward and because of other union activities.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following:

¹ Pursuant to an arrangement made on November 7, 2006, the parties were permitted to obtain records from Nextel regarding what radio calls were made by supervisor Robert Serrone to Peter Klosterman during the period from May 15, 2005 to July 2, 2006. A copy of these records were exchanged between the parties and received in evidence by me in January 2007. There is no dispute as to authenticity of these records.

Findings of Fact

I. Jurisdiction

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The Complaint alleges, the Answer admits and I find that the Employer is engaged in commerce within the meaning of Section 2(2) (6) and (7) of the Act. I also find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

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II. Alleged Unfair Labor Practices

The Respondent is a construction contractor, primarily engaged in the erection of steel buildings. It is located in Maspeth, New York and utilizes tractor trailers to deliver materials to various job sites throughout the New York metropolitan area. It employs about 40 people, most of who are represented by various labor organizations. It also employees about 5 to 8 drivers.

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For many years, the drivers have been represented by the Charging Party, Local 282. Christopher Fisher, one of the drivers, has been the union's shop steward for at least five years. The contract between Local 282 and the Respondent contains a grievance/arbitration clause. Although drivers cannot be discharged except for just cause, this does not apply to probationary employees. Klosterman, at the time of these events was still in his probationary period. Also, the contract sets out a procedure whereby a shop steward can only be discharged after the Company files a grievance and after the grievance and arbitration procedure has been completed. (Assuming of course that the Company prevails).

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In relation to the driving aspect of the Company's business, it employs Robert Serrone as its dispatcher which means that he is the person who is responsible for making sure that the trucks have the necessary drivers to deliver materials to the job sites. Serrone is also a driver and has been a member of Local 282 for about 10 years.

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Driving assignments come in two categories. In some cases, a driver will be assigned to deliver materials on a continuing basis to an ongoing job site for the duration of that job. In the second category are drivers who, when not assigned to an ongoing job, are given spot assignments by Serrone as needed. In the first situation, the driver will go to his assignment each day until the job is completed. In the second category, drivers without regular assignments will wait to receive a radio call from Serrone the night before any particular assignment. There is no practice at this company whereby drivers go to the Company's premises in the morning to get their assignments for the day.

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In general, assignments are made in order of seniority and there were, at the time of these events, five employees on a "seniority list." (Albeit not an actual piece of paper). Fisher, as the shop steward, had the highest seniority. Serrone had the second highest seniority, but he was often in the office doing dispatching work.² The others on the seniority list as of May 2006 were Stevano Jones, Jeff Marino and Andrew Solamore.

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Klosterman was hired in February 2006 by Serrone and he began working in early March. Serrone testified that he hired Klosterman because he knew him from other jobs and considered him to be a good diver.

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² It is interesting to note that Serrone was also a shop steward before he became the dispatcher.

5 In or about May 2006, the Company was using five permanent drivers, (including Serrone), and three or four drivers who had not completed their probationary periods.³ The probationary drivers most often used were Klosterman and Mitchell Fernandez. In addition, there were a couple of other drivers who were used on a more sporadic basis. Obviously, the non-probationary drivers were given priority for assignments and the probationary drivers were given the leftovers. There was sufficient work to keep the non-probationary drivers busy five days a week. According to Klosterman, he worked, on average, about two or three days per week. At the time of his hire, Klosterman was a member of Local 282. (As was Serrone).

10 Klosterman testified that at the time of his hire, Serrone told him that he should not speak to Fisher, (the shop steward), and that Serrone described Fisher as an asshole. Serrone denies that any such conversation took place.

15 In April 2006, Klosterman drove materials to a union job site in New Rochelle where, on his second day, he was stopped and asked for his union card by a member of another local of the Teamsters. Klosterman showed his card to this person, who apparently claimed that the Respondent had assigned a non-union driver to make deliveries to the site the day before. Klosterman testified that he told shop steward Fisher of this incident and at the end of the day, Serrone, asked him in a loud manner why he had told Fisher that the Company was possibly using non-union drivers. Klosterman testified that Serrone told him that if he had anything to say he should come directly to Serrone and that he, (Klosterman), should keep his mouth shut.

25 In relation to the above incident, Fisher testified that Klosterman told him that the Company was using non-union drivers at the site and that when he spoke to Serrone about this issue, Serrone said; "don't worry about it." (Actually Klosterman would not know if the Company was using non-union drivers to deliver materials to the site).

30 Serrone denied talking to either Fisher or Klosterman about this incident. He testified that it is not unusual for drivers to be asked for their union books at job sites and that this is not a matter of concern to him. He testified that from time to time, the Company hires drivers who have not yet become union members and that the Company has never had the experience of having drivers refused entry to a construction site on this account. (The contract contains a 30-day union security clause and obviously, the Company can hire people who are not already members of the Union).

35 Klosterman testified that on or about Friday, May 19, Serrone asked him to work on Saturday and he did. According to Klosterman, Serrone told him that if Klosterman kept his mouth shut, there would be a lot of work for him.

40 According to Klosterman, on Monday May 22, he told Fisher that he had worked on Saturday May 20. He states that Fisher responded that it was okay, "as long as it went to me and not somebody else." In any event, Klosterman testified that some time after he spoke to Fisher, Serrone approached him in the garage and started to scream at him. According to Klosterman, Serrone said that he should not be talking to Fisher and told him, in no uncertain terms, that if Klosterman wanted to keep his job, he should keep his fucking mouth shut. Serrone denied this entire transaction and I must say, I really don't understand why Serrone would get so upset about the alleged conversation between Klosterman and Fischer regarding

50 ³ Pursuant to the contract, the probationary period is 60 days. According to Serrone, drivers who have not completed their probationary period are not considered by him to have any seniority status and are not dispatched by him on a seniority basis.

the Saturday work assignment.

5 Klosterman testified that some time after the May 22 incident, he received a phone call from a friend, Ed Casselle, who told him that he had seen two people driving the Company's trucks, one of whom was in the Teamsters and one of whom was not a union member. According to Klosterman, he reported this conversation to Fisher and asked how come he, (Klosterman), had not been assigned to work the day that the two other drivers were spotted.

10 Klosterman states that a couple of days later, Serrone came over to him in the garage and said; "What the fuck is wrong with you? I told you to keep your fucking mouth shut. You want to work here, shut your fucking mouth." According to Klosterman, he went to complain about Serrone to the owner Larry Weiss. He states that he met with Weiss and his son and told them that he didn't like the way that Serrone treated him. Klosterman states that Weiss praised Serrone and explained that the non-union person who had driven the truck was someone he
15 wanted to give a chance to. Klosterman states that he told Weiss that he couldn't do this, (hire a non-union person), and Weiss replied that it was his company and he could do what he liked.

20 Serrone testified that during on May 23 and May 24, 2006, he tried to call Klosterman for work without success. (I should note here that Klosterman has difficulty hearing and could have missed the calls).⁴ The Nextel records show that Serrone made attempts to call Klosterman on the walkie-talkie on May 23 and 24, 2006. In this regard, Serrone testified that because he didn't reach Klosterman on either the 23rd or the 24th, he reached out to two other drivers who agreed to work on Tuesday, May 30. Serrone testified that when Klosterman appeared at the garage on May 30, he told Klosterman that he had committed himself to using the two other
25 drivers and was not going to send them home because Klosterman wanted to work that day.

30 According to Klosterman, on or about May 31, he told Weiss that he was not getting enough assignments and believed that he was being punished because of his friendship with Fisher. Weiss testified that told Klosterman that this was not the case and that the reason Klosterman wasn't getting as much work was because the Company was having difficulty in reaching him. He also told Klosterman that another probationary employee, Jeff Marino, had been assigned to a particular job at that time because that person had been recommended by the company that essentially subcontracted that particular job to the Respondent.

35 Klosterman testified that on or about May 31, Serrone told him that he no longer worked at the Company. He asserts that Serrone's words were; "Get the fuck out of here. You'll never work here again."

40 Later on May 31, 2006, Klosterman met with union business agent, Bisignano who made a telephone call to Weiss. Bisignano testified that he told Weiss that there was a history of bad blood between Serrone and Fisher and opined that Serrone was punishing Klosterman because of his relationship to Fisher. When Bisignano stated that he was preparing an unfair labor practice charge, Weiss responded that he didn't care.

45 On June 1, 2006, after Bisignano's conversation with Weiss and another conversation with the Company's attorney, Weiss faxed a letter stating in substance, that the Company had been trying to contract Klosterman for an assignment on June 2, 2006. (The records show two calls to Klosterman on June 1 at 2:00.12 and 2:00.25 p.m.). The letter went on to request that Bisignano try to reach Klosterman.
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⁴ Alternatively he might have been away for the Memorial Day weekend.

Notwithstanding Klosterman's testimony that he was told on May 31, 2006, that he would never work again at the Respondent, he nevertheless worked on June 5, 20, 23, 24 and 26, 2006. On June 29, 2006, Klosterman was supposed to go to work, but testified that had car trouble and called into Serrone that he would not be able to make it to work. After that, he did not get called by Serrone for any more assignments.

At this point, it is necessary to talk a bit about Fisher's relationship to the Company and to Serrone.

As previously noted, Serrone was the union shop steward before he was promoted to the dispatcher's job. After that, Fisher became the shop steward.

The evidence indicates that there was, in fact, some enmity between the Company and Fisher.

On August 3, 2006, the Company wrote a letter to the Union demanding that Fisher be fired. Under the contract, the Company can't fire the shop steward without first notifying the Union and then going through the grievance procedure. The Company's letter indicates that there were two triggering events. The first involves an accident that occurred on May 16, 2006 where the Company alleged that Fisher failed to provide the necessary information about the accident. The second involves some kind of grievance that Fisher filed on May 25 and revised on May 30, 2006. In that grievance, Fisher claimed that he had the right to bump another driver, (Marino), for an assignment to make deliveries, on a steady basis, to one of the ongoing projects. The letter states that Serrone advised Fisher on May 9, 2006 that there was no work for him on May 10 but that Fisher made a claim for wages for May 11 and 12. The Company's letter also enclosed other memoranda concerning Fisher's problems in 2003 to 2005. The issue of Fischer's continued employment is not pending before me and he is still working while the Company's demand for his discharge is making its way through the grievance procedure.⁵

Analysis

Anything is possible. Nevertheless, the question here is what is more probable. This case is more about shop steward Fisher than it is about the alleged discriminate, Peter Klosterman. Other than talking to Fisher, Klosterman really did not engage in any concerted activity. If there is a violation of the Act it would be, as the Charging Party asserts, because of the Respondent's "actions toward Klosterman, to the extent that they were the product of the simmering dispute with shop steward Fisher, (as distinguished from animus directly toward Klosterman)...."

The evidence does show that the Company, at least as early as May 25, 2006, was in conflict with Fisher. And on August 3, 2006, about a month after Klosterman last worked, the Company initiated the contract's grievance procedure in an effort to have Fisher fired. If Klosterman was adversely treated by the Company because it believed that he was too connected to or too sympathetic with Fisher, I would conclude, absent a showing of an

⁵ I note parenthetically that even if Fisher's wage claim was not correct under the collective bargaining agreement, it might be construed as protected concerted activity under *Interboro Contractors*, 157 NLRB 1295 enfd. 388 F.2d 495 (2nd Cir. 1967). An arbitrator would therefore have to decide if Fisher's claim was made in good faith and to what extent Fisher's discharge was "caused" by his wage claim.

independent and overriding non-discriminatory motivating factor, that its failure to assign him to work after June 29, 2006, was a violation of the Act.

5 On the other hand, this is a company that has maintained, over an extended period of time, labor agreements with multiple unions including Local 282. Moreover, there is nothing to suggest, apart from its more recent contempts with Fisher, that it has had a particularly aggravated or contentious relationship with these unions.

10 In substance, Klosterman testified that Serrone, on several occasions told him that he should not talk to Fisher if he wanted to keep his job. One of those occasions was in relation to a job in New Rochelle where Klosterman allegedly told Fisher that a person from another Teamster local had demanded to see Klosterman's union book before allowing him onto the job site. Serrone denied this conversation and I can't see any objective reason why Serrone would have flown off the handle because Klosterman allegedly reported the New Rochelle incident to
15 Fisher.

20 The next incident also seems to me to be implausible. Klosterman asserts that he told Fisher that he, (Klosterman), had gotten a Saturday assignment for May 20 and that Fisher had no problem with that. On Monday, according to Klosterman, Serrone approached him and started to scream that he should not be talking to Fisher. Klosterman states that Serrone told him that if he wanted to keep his job, he should keep his fucking mouth shut. But as I indicated before, there does not seem to be any rational reason why Serrone would have exploded in anger just because Klosterman told Fisher that he had worked on Saturday.

25 The Employer produced other employee witnesses who testified that Serrone had never told them that they should not speak to shop steward Fisher. These were James Zyats and Stevano Jones.

30 Although Klosterman claims that he did not receive any calls from Serrone to go to work assignments on May 30, 2006, Serrone testified that he did call Klosterman on numerous occasions on May 23 and 24. (This is confirmed by the Nextel records). Thus, when Klosterman showed up at the garage on May 30 and insisted on being put to work, Serrone told him that he had gotten two other drivers and would not renege on his agreement to use them.

35 Klosterman testified that on May 31, 2006, Serrone told him that he no longer worked at the Company. Nevertheless, after some phone calls by union agent Bisignano, Klosterman was assigned to work on June 5, June 20, 23, 24, 26, and 29, 2006. On June 29, 2006, Klosterman called in to report that he had car trouble and couldn't come to work. Thereafter, the Company did not offer him any more assignments.

40 On balance, I think that it is more probable that the Company did not offer additional assignments to Klosterman because of the occasions in May and June when he was unavailable for work either because he did not answer calls or because of his assertion that his car broke down. I note also that Klosterman was not a permanent employee, (not having
45 completed his probationary term), and the Company had other probationary people available who could do the same work.

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Conclusions of Law

5 As I will credit Serrone's denials that he told Klosterman that he could not talk to Fisher
and as I credit the Respondent's reason for not giving Klosterman any more assignments, I
conclude that the Respondent has not violated the Act in any manner encompassed by the
Complaint.

10 On these findings of fact and conclusions of law and on the entire record, I issue the
following recommended:⁶

ORDER

15 The Complaint is dismissed.

Dated, Washington, D.C., March 2, 2007.

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Raymond P. Green
Administrative Law Judge

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⁶ 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.