

Albert L. Smith, Incorporated and Laborers' International Union of North America, Local No. 859, AFL-CIO. Case 16-CA-3591

November 6, 1969

DECISION AND ORDER

BY CHAIRMAN McCULLOCH AND MEMBERS
FANNING AND JENKINS

On July 18, 1969, Trial Examiner George A. Downing issued his Decision in the above-entitled proceeding, finding that Respondent had not engaged in unfair labor practices as alleged in the complaint and recommending that the complaint be dismissed in its entirety, as set forth in the attached Trial Examiner's Decision. Thereafter, the General Counsel filed exceptions to the Trial Examiner's Decision and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision and the entire record in this case, including the exceptions and brief, and hereby adopts the findings, conclusions, and recommendation of the Trial Examiner.¹

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the recommendation of the Trial Examiner, and orders that the complaint be, and it hereby is, dismissed in its entirety.

¹The General Counsel's exceptions related, in large part, to the Trial Examiner's credibility findings. On the basis of our own careful review of the record, we conclude that these credibility resolutions are not contrary to the clear preponderance of all the relevant evidence. Accordingly, we find no basis for disturbing those findings. *Standard Dry Wall Products, Inc.* 91 NLRB 544, enfd 188 F 2d 362 (CA 3)

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

GEORGE A. DOWNING, Trial Examiner: This proceeding under Section 10(b) of the National Labor Relations Act, as amended, was heard at Fort Worth, Texas, on May 27, 1969,¹ pursuant to due notice. The complaint, which was issued on April 29, on a charge and an amended charge filed on April 3 and 28, respectively, alleged that Respondent engaged in unfair labor practices proscribed by Section 8(a)(3) and (1) of the Act by discharging James O. Roland because of his refusal to work behind a picket line established by another union at the jobsite

Respondent answered on May 5, denying the unfair labor practices.

Upon the entire record in the case and from my observation of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTIONAL FINDINGS; THE LABOR ORGANIZATION INVOLVED

I find on admitted allegations of the complaint that Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act,² and that the Charging Union is a labor organization within the meaning of Section 2(5) of the Act.

II THE UNFAIR LABOR PRACTICES

A The Issues

The issues herein, purely factual, are whether Respondent discharged James O. Roland on March 20 for refusing to work behind a picket line on a construction site and whether he was thereafter refused reinstatement. Respondent contends (1) that Roland quit and (2) that in any event, if a discharge were found, it was withdrawn on the same day by offering to permit Roland to return to work. Respondent does not question that a refusal to work behind a picket line would constitute engaging in concerted activity, protected by Section 7 of the Act, but denies it had knowledge that Roland quit for that reason.

B The Evidence

Respondent was the general contractor on the Castleberry Senior High School job at Fort Worth on which it employed Roland, a member of Local 859. This proceeding arose as a result of picketing conducted by United Cement, Lime and Gypsum Workers Union at times when trucks of Trinity Concrete Products Company were making deliveries of concrete to Respondent at the jobsite. The crafts which Respondent employed on the job were carpenters, laborers and iron workers, and a subcontractor employed operating engineers. Work stoppages occurred intermittently by the iron workers during the periods of actual picketing, with work being resumed upon departure of the Trinity trucks and the cessation of the picketing.

The principal events herein occurred on March 20. Roland, who was hired as a laborer on March 17, testified that after talking with some of the other laborers during the lunch hour he decided he would not work behind the picket line. However, he continued to work until around 3 p.m.,³ when he left the job and informed Job Foreman Lassiter he did not think he would work any longer behind the picket line. Lassiter replied that the picket line was not legal and that Roland should, "Go ahead and work, if you want the job. If you don't, I'll have to replace you. . ."

¹All events herein occurred in 1969

²Respondent, a Texas corporation engaged in the building and construction business as a general contractor, purchases annually goods and materials valued in excess of \$50,000, which are transported to its Fort Worth facilities directly from extrastate points

³In the meantime J. M. Breeding, Business Agent of Local 859, came to the job and talked with some of the laborers, and Roland testified he overheard Breeding make the comment to Job Foreman Vernon Lassiter that he himself never worked behind a picket line. There was also

Lassiter testified that Roland announced he was leaving shortly after Breeding came onto the job and spoke with some of the laborers about the picket line and that he (Lassiter) told Roland he should "leave until the picket leaves, and then come back and go to work."⁴ Roland stood around a while and Lassiter told him that if he was going to leave to do so, but otherwise to go back to work.

Roland went on to the job office where he informed Job Superintendent Leroy Tingle he did not want to work behind the picket line. Roland testified that Tingle stated that Roland was needed and that he should go back and go to work if he wanted his job. When Roland repeated his refusal to work behind the picket line, Tingle told him he could pick up his check the next afternoon at 3 or 3:30 p.m.

Tingle testified that Roland reported only that he was going to leave and that he (Tingle) replied that in that case Roland should come back Friday and pick up his check.

Before leaving the jobsite, however, Roland spoke with Breeding and they returned to speak with Tingle, in Lassiter's presence. Breeding demanded that Roland be paid in full because Tingle had fired him.⁵ Breeding admitted (as Tingle and Lassiter testified) that Tingle replied that Roland had not been fired and that if he wanted to work he should go back to work. Tingle added that if Roland wanted his check, it would be at the job office the next day at 3:30.

On the afternoon of March 21 Roland returned to pick up his check. Roland testified that Tingle informed him the check would not be there until after 3 p.m. Roland asked whether he could come back to work on Monday and Tingle said he could not because he walked off the job. Roland explained that he had informed Lassiter he would not work behind a picket line, but Tingle replied that so far as he was concerned Roland was "through." When Tingle later handed Roland his check, it did not cover all his pay and he renewed his inquiry whether he could come back to work on Monday. Tingle repeated that as far as he was concerned Roland was "through."

Melvin T. Glaspie, who accompanied Roland on the 21st, testified that he overheard the conversation with Tingle, though he was outside the job office at the time, and that he heard Tingle say that Roland could not come back to work.

Tingle testified, however, that Roland asked only about being fired, that he denied he fired Roland, and that Roland said nothing about coming back to work. Lassiter, who was present, testified similarly that Tingle denied firing Roland and that Roland did not ask for a job.

Roland testified further that he returned on March 28 for the balance of his pay, that he asked whether Tingle was ready for him to come back to work, and that Tingle

testimony by Job Superintendent Leroy Tingle, denied by Breeding, that Breeding stated he would "get" the cards of laborers who continued to work behind the picket line. The point is without relevance to the question whether Roland was discharged, for it is unnecessary to determine what motivated Roland's decision not to work. Cf. *Nuodex, Etc.*, 176 NLRB No. 79, and cases there cited. Tingle's testimony tended, however, to refute Respondent's denial of knowledge of the reason for Roland's work stoppage. See fn. 4, *infra*.

⁴Lassiter's testimony refuted Respondent's contention that it was without knowledge that Roland was refusing to work behind a picket line. Moreover other testimony by Lassiter and Tingle showed they were well aware that Breeding's presence on the job was directly concerned with the fact that the laborers were working behind a picket line. See fn. 3 *supra*.

⁵The contract provided, as Roland and Breeding knew, that a discharged employee should be paid in full.

replied he was not. Tingle testified that Roland asked why Tingle fired him and said nothing about coming back to work. Tingle again informed Roland he was not fired.

Tingle testified that there had been intermittent work stoppages by the iron workers prior to March 20, during periods when the cement trucks were being picketed, and that on March 20 the iron workers again stopped working at times when the pickets were present. Tingle did not discharge or lay off the iron workers but simply "docked" them for the time they were off the job. Tingle testified further that he needed laborers both on March 21 and 28 and that there was always room for Roland if he wanted to come back. On Monday (March 24) Tingle requested laborers through the Union's business agent but none were sent out. Again on March 31 he called the Union for laborers and referrals were made.

C. Concluding Findings

I conclude and find on the foregoing evidence that Roland did not quit on March 20, but that he refused to work behind the picket line, to Respondent's knowledge. See fns. 3 and 4, *supra*. I find further that Roland was not discharged. Though under Roland's testimony he assumed Lassiter discharged him, that assumption was plainly not warranted by Lassiter's statement (as Roland testified to it) that Lassiter would have to replace him if he did not go back to work.

Furthermore, Roland's testimony did not establish that Tingle discharged him. Thus, though Tingle told Roland he should go back to work if he wanted his job, Tingle did not tell Roland he was discharged when the latter repeated his refusal to work. Instead, Tingle told Roland he could get his check the following afternoon, though under contract provisions known to Roland a discharge or layoff required full payment of wages on the spot. Moreover, though Roland and Breeding assumed that Roland was discharged and demanded that Roland be paid off, Tingle immediately corrected any misapprehension on their part by informing them that Roland had not been fired but was free to go back to work.

Moreover, the evidence as a whole showed that Tingle's disposition was not to discharge employees who refused to work behind a picket line, for he took no disciplinary action whatever when faced with the far greater provocations of repeated work stoppages by the iron workers.

There remains the question whether Roland was denied reinstatement on March 21 and 28. Roland's testimony that Tingle rejected his request to return to work because he walked off the job was again plainly not consistent with Tingle's conduct in condoning repeated work stoppages by the iron workers. Furthermore, Tingle and Lassiter testified that Roland's inquiry concerned the reason for his discharge and that he said nothing about coming back to work. I credit that mutually corroborative testimony, for I find unpersuasive Glaspie's attempted corroboration of Roland. I also credit Tingle's testimony that on March 28 Roland asked only why he was fired and said nothing about coming back to work.

It is also to be noted that though Roland was informed on March 20, 21, and 28 that he was not discharged, he made no attempt to return to work (until his ultimate reinstatement on May 8), nor did he request the Union to refer him to the job on March 24 and 31 when Tingle was actively seeking referrals from the Union.

DECISIONS OF NATIONAL LABOR RELATIONS BOARD

In sum, I conclude and find that the General Counsel failed to establish his complaint allegations by a preponderance of the evidence on the entire records and I therefore recommend that the complaint be dismissed.