

**Western Tug and Barge Corporation and Claude C. Bailey, Jr.** Case 20-CA-7892

November 9, 1973

**DECISION AND ORDER**

BY CHAIRMAN MILLER AND MEMBERS  
KENNEDY AND PENELLO

On April 23, 1973, Administrative Law Judge Richard J. Boyce issued the attached Decision in this proceeding. Thereafter, General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering 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 authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs, and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.<sup>1</sup>

**ORDER**

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

<sup>1</sup> In excepting to the dismissal of the complaint by the Administrative Law Judge, the General Counsel contends, *inter alia*, that the burden of proof was on Respondent to establish that it had a legitimate business reason for accelerating the hire of James Armstrong as a replacement for one of its masters that was going to retire as of January 1, 1973. We do not agree. The burden of establishing every element of a violation under the Act is on the General Counsel. In this case, we find that he had failed to meet that burden. The General Counsel does not contend that Respondent decided to hire Armstrong in order to deprive Bailey, the alleged discriminatee, of casual work and to make good Vice President Williams' threat that Bailey would no longer work for Respondent if he had signed a card for the IBU. The fact that Respondent hired Armstrong 4 days after this threat cannot establish a *prima facie* case of unlawful motivation, when the fact is that Respondent continued to utilize Bailey's services to a greater extent than those of any other casual employee, and indeed, of the total of all other casuals. In these circumstances it was not for Respondent to come forward with evidence that it had valid business reasons for hiring Armstrong when it did. Accordingly, we affirm the decision of the Administrative Law Judge to dismiss the complaint.

**DECISION**

**STATEMENT OF THE CASE**

RICHARD J. BOYCE, Administrative Law Judge: This case was tried before me in San Francisco, California, on

March 15, 1972. The charge was filed November 2, 1972, by Claude C. Bailey, Jr., herein called Bailey. The complaint issued December 12, 1972, alleging that Western Tug and Barge Corporation, herein called Respondent, violated Section 8(a)(1) and (3) of the National Labor Relations Act, as amended.

**Issues**

The issues are whether Respondent withheld available employment from Bailey in and after August 1972; and, if so, whether that withholding was motivated by Bailey's support of the Inland Boatman's Union, herein called IBU, thereby violating Section 8(a)(3) and (1) of the Act.<sup>1</sup>

The parties were given full opportunity at the trial to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to argue orally. Briefs, which have been carefully considered, subsequently were filed for the General Counsel and Respondent.

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

**FINDINGS OF FACT**

**I. THE BUSINESS OF RESPONDENT**

Respondent is a California corporation with a place of business in Richmond, California, from which it is engaged in providing tugboat services in San Francisco Bay and adjacent waters. During the year immediately preceding issuance of the complaint, a representative period, Respondent performed tugboat services valued in excess of \$50,000 for Standard Oil of California, Santa Fe-Pomeroy, Inc., Ideal Cement Co., Pacific-Hawaiian Lines, and Peter Kiewit Sons' Co., each of which annually engages in business satisfying the Board's direct inflow and outflow standards.

Respondent is an employer within the meaning of Section 2(6) and (7) of the Act.

**II. THE LABOR ORGANIZATIONS INVOLVED**

The parties stipulated, and I find, that the IBU and Masters, Mates & Pilots Union, Local No. 17, herein called MM&P, both are labor organizations within the meaning of Section 2(5) of the Act.

<sup>1</sup> Respondent, in its answer, asserted the affirmative defense that the issues herein should be resolved by arbitration under the doctrine of *Collyer Insulated Wire*, 192 NLRB 837. This defense was withdrawn at the close of the trial on the stated ground that there is no apparent issue of contract interpretation. For that reason, and because the theory of the General Counsel's case is that Respondent discriminated against Bailey for supporting a labor organization in opposition to the union-party to the grievance/arbitration agreement, I conclude that it would be improper to invoke the *Collyer* doctrine in this case. Cf. *Kansas Meat Packers*, 198 NLRB No. 2

## III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Facts*

Respondent, during the period in question, had three tugboats, not all of which always were in use. The crew on each boat consisted of two persons—an operator (or master) and a deckhand (or mate). Respondent's normal complement of regular, full-time crew personnel was five—three operators, one combination operator/deckhand, and one deckhand. The operators sometimes did deckhand's work.

Thus, when all three boats were in operation, Respondent normally found it necessary to hire an additional deckhand on a casual basis to provide the requisite two-man crew for each boat. Bailey, characterized by Reese Williams, Respondent's vice president and general manager, as Respondent's "number one casual," commonly was the first person sought when this situation arose.<sup>2</sup> Bailey first worked for Respondent in early 1971, one day as a deckhand. He next worked for Respondent, again as a deckhand, on New Year's Day 1972. Thereafter, to the time of trial, he worked for Respondent as a deckhand, on a casual basis supplementing the regular employees, these months and hours:

April 1972—104 hours  
 May 1972—100 hours  
 June 1972—220 1/2 hours  
 July 1972—117 1/2 hours  
 August 1972—34 1/2 hours  
 Sept. 1972—44 hours  
 Oct. 1972—17 hours  
 Nov. 1972—0 hours  
 Dec. 1972—8 1/2 hours  
 January 1973—122 hours<sup>3</sup>  
 February 1973—0 hours  
 March 1973—0 hours

Although Bailey was and is considered Respondent's "number one casual," there apparently has been no clear practice or understanding that he always be given "first refusal" when Respondent needs a casual. Bailey testified of sometimes checking with Respondent about the availability of work and of an awareness that Respondent sometimes used other casuuls. This suggests that he felt some need to take the initiative to assure that he, rather than another casual, be hired. Consistent with this, Vice President Williams indicated in his testimony that, when a

<sup>2</sup> Bailey did not restrict his employment to Respondent. He worked substantial numbers of hours for other tugboat companies during the period of the alleged discrimination.

<sup>3</sup> According to Vice President Williams, Bailey could have worked all the hours he wanted in January 1973 in the cleanup of an oil spill in the Oakland Estuary.

<sup>4</sup> Williams also testified that Respondent may have tried, unsuccessfully, to call Bailey before hiring other casuuls during the period of alleged discrimination. This testimony was so vague and imprecise as to qualify as little more than speculation. There is no convincing evidence that, other than in December 1972 when Bailey declined work because of illness, Respondent tried during this period to call him before hiring other casuuls.

<sup>5</sup> During the investigation of the charge, Vice President Williams signed

casual was needed quickly for a short job, Respondent sometimes called casuuls other than Bailey.<sup>4</sup>

Roughly coincident with Respondent's allegedly discriminatory reduction in use of Bailey, two developments reduced its need for casuuls generally. The first was a marked business downturn, beginning in July 1972 and continuing through December.<sup>5</sup> This meant that the three boats were in simultaneous use less often. The second development was the hire, in late September 1972, of an additional regular employee, James Armstrong. Armstrong was hired in anticipation of the January 1973 retirement of one Migliore, an operator. This meant that, from late September until Migliore's departure, Respondent had six regular, full-time employees for crewing purposes—enough in ordinary circumstances to man the three boats without resort to casuuls.<sup>6</sup> The total hours worked for Respondent by all casuuls other than Bailey during the period of August 1972 to the time of trial were:

August 1972—0 hours  
 September 1972—5 hours  
 October 1972—0 hours  
 November 1972—5-1/2 hours  
 December 1972—12-1/2 hours  
 January 1973—557-1/2 hours  
 February 1973—0 hours  
 March 1973—0 hours

At all relevant times, a collective-bargaining agreement existed between Respondent and MM&P covering Respondent's operators and deckhands, both regular and casual. On May 18, 1972, Bailey signed a "pledge card" in support of IBU. On September 1, 1972, IBU filed with the NLRB's San Francisco Regional Office a petition for election among those employees of Respondent covered by the MM&P agreement.<sup>7</sup> IBU has picketed Respondent's premises from time to time.

After the filing of the IBU petition, according to Bailey's credible and unrefuted testimony, he had the following conversations with Marion Loehr, a tug captain for Respondent, and a supervisor and agent within the meaning of the Act:

(a) On or about September 6, 1972, Loehr telephoned Bailey and asked if he had signed an IBU card. Bailey replied that he had not, to which Loehr responded that he would obtain an MM&P membership application for Bailey if Bailey were interested.

(b) Sometime between September 24 and 28, 1972, in the office and presence of Vice President Williams, Bailey asked Loehr if he had any MM&P cards. Loehr ascer-

a statement for the NLRB in December 1972 in which he expressed the opinion that business had been up in September 1972. At the trial, however, Respondent introduced a graph, based upon business records, which depicts a substantial downturn. General Counsel did not object to the offer of this exhibit. I find the graph to be the more probative.

<sup>6</sup> Respondent learned of Migliore's intention to retire in June or July 1972. Armstrong submitted an employment application to Respondent on August 8, 1972. The General Counsel does not contend that Respondent violated the Act in hiring Armstrong, rather than Bailey, to replace Migliore.

<sup>7</sup> Administrative notice is taken that this petition was dismissed as untimely because of the existing MM&P agreement on September 21, 1972.

tained that he did not, but told Bailey he would attempt to obtain some.<sup>8</sup>

Bailey also testified to a telephone conversation with Williams on or about September 24, 1972, when he called in to check about work. According to Bailey, Williams said that there might be work the following Tuesday, then said he had heard a rumor that Bailey had signed an IBU card and asked if that were true. Bailey "didn't answer him yes or no." Williams said he would be disappointed if Bailey had signed, adding that Bailey would no longer work for Respondent if he had.<sup>9</sup>

### B. Analysis and Concluding Findings

The General Counsel contends that the reduction in hours suffered by Bailey beginning in August 1972, coupled with his having signed an IBU card, the filing of the IBU petition, and Williams' statement that Bailey would no longer work for Respondent if he had signed an IBU card, compel the inference that Respondent purposefully withheld work from Bailey because of his pro-IBU sympathies.<sup>10</sup>

It is apparent that the realization of a six-man regular complement through the hire of Armstrong in late September 1972, and the business downturn from July through December, largely obviated the need for casuals. The business downturn plainly was not contrived to reduce job opportunity for Bailey. This leaves two arguable bases for violation: that Respondent accelerated its hire of Armstrong to reduce the need for Bailey; and that Respondent, when it did need casuals, used others than Bailey without first attempting to call him.

The timing of Armstrong's hire is suspicious, coming within about 4 days after Williams' conditional resolve to deny work to Bailey yet about 3 months before Migliore's retirement. To this, the General Counsel adds that the record is devoid of evidence that Armstrong worked other than as a deckhand during that time—work that for all the record shows could have been done as well by Bailey. That the record is silent whether Armstrong worked as an operator during that period does not dictate the inference that he did not. But even if it did, the General Counsel's case would not be particularly strengthened. It would seem not unnatural that a replacement operator would be hired before the departure of his predecessor and that, pending the departure, he would work as a mate.

The question remains, however, whether discriminatory motivation can be inferred from the 3-month overlap of

predecessor and replacement employees, as opposed to some lesser period of time. Again the record is silent, but Respondent easily could have had valid business reasons for hiring Armstrong when it did, such as a concern that further delay would imperil its chances of obtaining an operator of his qualifications. To this end, it may have kept Armstrong on the payroll the 3 months doing deckhand's work exclusively, or doing little of either operator's or deckhand's work; that is, more or less "on retainer." For, although the record establishes that Armstrong did some deckhanding during this period, it is silent how much. True, this is judicial conjecture. The point is, it carries sufficient plausibility to disallow inferences adverse to Respondent based on the 3-month overlap, absent evidentiary context other than timing relative to Williams' statement.

I conclude, in other words, that it was General Counsel's burden to show that Respondent did *not* have a valid business purpose in hiring Armstrong when it did; not Respondent's to show that it did. This General Counsel failed to do. I, therefore, am unable to conclude that Respondent timed its hire of Armstrong with a purpose to discriminate against Bailey.

This leaves the other arguable basis for violation—that Respondent discriminatorily used casuals other than Bailey without first attempting to call him. Bailey had no established right of "first refusal," so such bypassing of itself would not bespeak an unlawful motive, unless of a frequency inconsistent with past practice. A comparison of hours worked by other casuals against those worked by Bailey during the period in question eliminates the possibility that bypassing of such frequency occurred. To the small extent that casuals other than Bailey did work, the 12-1/2 hours in December likely are explainable by Bailey's being ill, and the 5 September and 5 1/2 November hours perhaps by Respondent's practice, on jobs of short notice and duration, of hiring whatever casual happened to be readily at hand. In any event, there simply was not a sufficient incidence of bypassing to suggest a discriminatory pattern, Williams' statement to Bailey notwithstanding.

I conclude and find that Respondent did not withhold work from Bailey in violation of Section 8(a)(1) and (3) of the Act.

### CONCLUSIONS OF LAW

1. Western Tug and Barge Corporation is an employer engaged in commerce, and in activities affecting commerce, within the meaning of Section 2(2), (6), and (7) of the Act.

<sup>8</sup> Williams in his testimony described Loehr as something of an unofficial shop steward for MM&P.

<sup>9</sup> Williams explicitly denied conditioning Bailey's future employment upon not signing an IBU card. Based upon Bailey's persuasive demeanor on the witness stand and the straightforward quality of his answers, as compared with Williams' less convincing manner, occasional evasiveness,

and heavy reliance upon counsel's leading, I credit Bailey.

<sup>10</sup> The General Counsel did not allege and does not contend that Respondent committed independent violations of Section 8(a)(1). Accordingly, I make no findings with regard to the statements made to Bailey by Williams and Loehr.

2. Inland Boatman's Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has not withheld work from Claude C. Bailey, Jr., in violation of Section 8(a)(3) and (1) of the Act.

Upon the foregoing findings of fact and conclusions of law, upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER <sup>11</sup>

The complaint is dismissed in its entirety.

---

<sup>11</sup> In the event no exceptions are filed as provided in Sec. 102.46, of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and order, and all objections thereto shall be deemed waived for all purposes.