Wright Contracting Company *and* Kermit A. Rogers.
Case 9–CA–8882

October 14, 1975

DECISION AND ORDER

BY CHAIRMAN MURPHY AND MEMBERS JENKINS AND PENELLO

On May 22, 1975, Administrative Law Judge Abraham H. Maller issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions 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 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 brief and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

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 Respondent, Wright Contracting Company, Clendenin, West Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

DECISION

ABRAHAM H. MALLER, Administrative Law Judge: On December 4, 1974, the Regional Director for Region 9 of the National Labor Relations Board, herein called the Board issued on behalf of the General Counsel a complaint and notice of hearing against Wright Contracting Company, herein called the Respondent.[1] Briefly, the complaint alleged that on or about June 3, 1974,[2] the Respondent discriminated in regard to the hire and tenure of employment of Kermit A. Rogers by discharging him and thereafter in failing and refusing to reinstate him to his former position of employment in order to encourage membership in Local Union No. 14614, United Steelworkers of America, AFL–CIO, herein called the Union. In its duly filed answer, the Respondent denied any violation of the Act.

Pursuant to notice a hearing was held before me at Charleston, West Virginia, on January 23, 1975. All parties were present at the hearing and were afforded full opportunity to be heard, to introduce relevant evidence, to present oral argument, and to file briefs with me. Briefs were filed by the General Counsel and the Respondent on February 18, 1975. Upon consideration of the entire record and the briefs, and upon my observation of each of the witnesses, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

Respondent's answer admits, and I find, that Respondent is a Georgia corporation engaged in general highway construction in several States of the United States, and, at the time of the filing of the complaint was engaged in highway construction at Clendenin, West Virginia. During the year preceding the filing of the complaint, which is a representative period, Respondent had a direct inflow of goods and materials in interstate commerce, valued in excess of $50,000, which were purchased and shipped to its construction site in West Virginia directly from points outside the State of West Virginia. Accordingly, I find and conclude that the Respondent is, and has been at all times material herein, engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that it will effectuate the policies of the Board to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

Local Union No. 14614, United Steelworkers of America, AFL–CIO, is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ISSUE

Whether the Respondent discharged Rogers in order to encourage membership in the Union, in violation of Section 8(a)(3) and (1) of the Act.

IV. THE UNFAIR LABOR PRACTICES

A. *The Facts*

In October 1970, Rogers had been a member of District 50, which later merged with the Union. At that time he worked for a construction firm known as Vacellio and Grogan. His supervisor on that job was Foreman James Smith, who at the time of the events herein detailed was the day foreman for the Respondent. Prior to working for Vacellio and Grogan, Rogers had worked 5 years for the State Road Commission. In all, Rogers had operated a grader,

[1] The complaint was issued upon a charge and an amended charge filed on October 18, and November 21, 1974, respectively.

[2] All events detailed herein occurred during 1974.

an end loader, a large size Caterpillar dozer, also known as a D–9, and had driven a truck.

On May 28, Rogers approached Foreman Smith, seeking employment with the Respondent. Foreman Smith introduced Rogers to Night Foreman James Wines and recommended him for employment, telling Foreman Wines that Rogers could do "about anything you'd ask him to do." Foreman Smith then discussed the matter with Superintendent Hugh Stewart. About half an hour later, Rogers was hired for work on the night shift and was directed by Foreman Wines to operate a rubber-tire roller with which to push pans or scrapers. At no time was Rogers directed to communicate with the Union.

Rogers worked that night, and at no time was he reprimanded by Superintendent Stewart, Foreman Wines, or any other person. During the night, another employee, Danny Young, had accidently run his equipment into a ditch, and Foreman Wines directed Rogers to get a D–9 dozer and push him out of the ditch. Rogers did so. The record reveals that on a prior occasion, employee Danny Young had accidently run the blade of his machine through a tire, causing approximately $600 damage, but the Respondent did not discharge Young, nor take any disciplinary action against him.

Rogers worked for 7-1/2 hours before rain halted operations at 1:30 a.m. Rogers reported for work the next two evenings, but Respondent was not doing any work because of the rain, and finally was told to report back to work on Monday, June 3.

When Rogers reported for work on Monday, June 3, Foreman Smith met him and handed him his check and told him that he had been discharged. According to Rogers, he asked Foreman Smith why he had been discharged and Foreman Smith replied, "because you've been out of the union over a year, and this other boy [Duffield] belongs to the union, and we're going to have to put him back to work."

According to Foreman Smith, Superintendent Stewart had directed him to discharge Rogers about 15 minutes before the shift started, that Superintendent Stewart gave no reason other than that Duffield would take Rogers' place, that Superintendent Stewart did not say that Rogers had worked improperly. Foreman Smith testified further:

> A. Well I gave him his check, and I told him that Larry Duffield, the dozer operator, who had returned from service, and had worked for the Company before, was to take his place. And that was the reason I gave him for dismissal, but at the time I told him there might be some other reason, that I'll try to find out.
>
> Q. Did you also tell him that he was being discharged because he had been out of the union for over a year, and you had to put a union member in his place?
>
> A. Yes, I did. I stated that, too.

Later, on examination by Respondent's counsel, Foreman Smith testified:

> Q. Now are you making this statement now in relation to the fact that you told him you understood that he'd been out of the union for over a year, and that's why he was terminated?
>
> A. Yes. That's why I believed him to be terminated, but I thought there might be some other reason I did not know.
>
> Q. Well you told him that at that time?
>
> A. I stated it that way.

On or about June 6, Rogers went to the Respondent's office and spoke with Superintendent Stewart, asking him why he had been discharged, and Stewart replied, "On account of the Union."

Superintendent Stewart admitted that Rogers had spoken to him about his discharge, but denied making the foregoing statement. Superintendent Stewart testified that he observed Rogers operating his equipment on May 28 before he went to dinner and thereafter before he went home at approximately 9:30 or 10 p.m. He testified that Rogers was operating the equipment negligently, by slipping, spinning the wheels, and bumping into the equipment that he was pushing; that continually bumping the equipment that he was pushing could tear up a dozer. He then testified:

> Q. And what, if anything, did you do in regard to Mr. Rogers' position with Wright Contracting after that?
>
> A. Well I thought about it in my mind, the way he operated the piece of equipment, and I made my mind up when we cranked back up to pay him off, when he came back to work. So I went and told my office manager to make out Mr. Rogers' check, and dismiss him.

Later, the following colloquy occurred.

> Q. (By Judge Maller) Mr. Stewart, did I understand you correctly on direct examination that you made up your mind when you saw Mr. Rogers operating the equipment, to fire him?
>
> A. I made up my mind, sir, that I didn't like the way he was operating the equipment.
>
> Q. Well when did you make up your mind to fire him?
>
> A. After thinking about it, when I went back to work I thought about it.
>
> Q. How long did you think about?
>
> A. I thought about those days, when I came back and I decided to make the change.
>
> Q. Well when did you finally decide to fire him?
>
> A. That afternoon.
>
> Q. Which afternoon?
>
> A. The afternoon of the day we went back to work. I told the office manager to make out his check.
>
> Q. The 3rd?
>
> A. Yes, sir.
>
> Q. You did not make up your mind then to fire him on the 28th of May?
>
> A. No, sir. I was only thinking.

Superintendent Stewart testified further that, when he was observing Rogers, he was 150 to 200 feet away from Rogers; that he did not say anything to Rogers, nor to Foreman Wines, about how Rogers was operating the equipment; and that Rogers did not damage any of the equipment. Superintendent Stewart testified further that he

had no conversation with any union official between the time that Rogers worked and the time he was discharged, and that he did not recall Union President Ledford's telling him that Rogers was not a member in good standing.

With regard to the ability of Superintendent Stewart to observe his work, Rogers testified on rebuttal that he did not see Stewart at the jobsite, that it was dark and visibility was limited to approximately 40 feet.

Kenneth Ledford, president of the Local Union, called as a witness for the Respondent, testified that Superintendent Stewart had called him and asked him if Rogers was still a member of the Union in good standing. He did not remember when the inquiry was made, that it might have been in May, June, or July. He denied putting any pressure upon Superintendent Stewart to hire only union men, but admitted that in a pretrial statement he had said that "the only statement I made earlier to Hugh Stewart was that he had to hire members in good standing." He admitted that he had had what he termed "contract disagreements" with Rogers prior to Rogers' employment by the Respondent. He testified further that he did not complain to Stewart about Rogers' employment; that the first he knew of Rogers' employment was a week or two after Rogers' discharge.

B. *Concluding Findings*

Counsel for the Respondent in his brief (p. 7) accurately stated the issue as follows:

> To state the obvious, the question presented here is purely one of credibility. If the allegations of Rogers are deemed to have been proved by substantial and creditable evidence, then the Company is guilty of an unfair labor practice. Conversely, should Rogers' allegations not be deemed to be supported by substantial and creditable evidence, the General Counsel's case has failed.

Respondent contends that Rogers' testimony is wholly uncorroborated by other witnesses; that the possibility of Rogers' obtaining an award of backpay and reinstatement makes him the only witness that stands to benefit by this proceeding; and that it has been held that a finding of an unfair labor practice based primarily on the uncorroborrated testimony of the party who stands to benefit from an award of reinstatement and backpay was not based on substantial evidence. That Rogers stands to gain by the instant proceeding is of course true, and in appraising his testimony I have taken into account his interest in the case. However, it should be noted also that Superintendent Stewart's testimony must likewise be examined with caution, as any liability that may accrue to the Respondent was caused by his action in discharging Rogers.

There are a number of elements in the case that have compelled me to accept the verity of Rogers' testimony, to reject Superintendent Stewart's testimony that Rogers was discharged for the reasons given by him, and to find that he was discharged because he was not a union member in good standing. Superintendent Stewart's testimony raises a number of significant questions that are not answered in the record. If Rogers' performance was negligent and subjected the equipment to possible damage, one wonders: (1) why he said nothing to Rogers, or (2) why he said nothing to Foreman Wines, and (3) why he did not then and there discharge Rogers or do so, at least, at the end of the shift. Superintendent Stewart's testimony as to when he made up his mind to discharge Rogers is somewhat equivocal. As previously noted, on direct examination he testified:

> Well I thought about it in my mind, the way he operated the piece of equipment, and I made my mind up when we cranked back up to pay him off, when he came back to work. So I went and I told my office manager to make out Mr. Rogers' check, and dismiss him.

The foregoing testimony could mean that Superintendent Stewart had made up his mind that night to discharge Rogers and to effectuate the discharge the next working day. If so, one wonders why Rogers was not given his discharge and his check the following evening when he reported for work, even though no work was being performed because of the rain.[3] It could also mean, as Superintendent Stewart testified later, that he did not make up his mind to discharge Rogers that night, but thought about the matter for 6 days until the afternoon of June 3. It would seem that if he had to think about the matter for 6 days before deciding to terminate Rogers, then Rogers' performance could not have been as horrendous as Superintendent Stewart would have us believe.

In considering Superintendent Stewart's testimony, account must also be taken of the testimony of Union President Ledford who testified that Stewart called him to inquire whether Rogers was a member in good standing.[4] Ledford did not remember whether the call was made in May, June, or July. However, Ledford's inability to fix the time is of no consequence. Plainly, Stewart could not have called before May 28, when Rogers was hired, as he did not know Rogers, and Rogers had not applied for employment before that date. Nor would Stewart have had any reason to call after June 3, when Rogers was terminated. Obviously, Stewart's inquiry into Rogers' union membership occurred between May 28 and June 3, and I so find. In sum, we have the following sequence of events: as admitted by President Ledford, he had told Superintendent Stewart in an earlier conversation that he had to hire members in good standing; between the hiring of Rogers and his discharge, Superintendent Stewart called President Ledford to find out whether Rogers was a member in good standing; and Rogers who was not in good standing was discharged. It is evident from the foregoing that Rogers was discharged because he was not a member in good standing and that the purpose and effect of Rogers' discharge was to encourage membership in the Union, in violation of Section 8(a)(3) and (1) of the Act, and I so find.

[3] As noted above, Rogers also reported for work the next evening and was told to report on June 3.

[4] Stewart testified that he did not recall inquiring of Ledford whether Rogers was a member in good standing.

V. THE EFFECT OF THE UNFAIR LABOR PRACTICE UPON COMMERCE

The activities of the Respondent set forth in section IV, above, occurring in connection with the operations of Respondent set forth in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

VI. THE REMEDY

Having found that the Respondent has engaged in an unfair labor practice within the meaning of Section 8(a)(3) and (1) of the Act, I shall recommend that it cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent discriminatorily discharged Kermit A. Rogers, I shall recommend that the Respondent be ordered to offer him immediate reinstatement to his former job, discharging, if necessary, any employee hired to fill such job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights, and make him whole for any loss of earnings he may have suffered by reason of such discharge, with interest to be computed in the customary manner.[5]

I shall further recommend that the Respondent be ordered to preserve and make available to the Board or its agents, upon request, payroll and other records to facilitate the computation of the backpay due and the right to employment.

As the unfair labor practice committed by the Respondent is of a character striking at the root of employees' rights safeguarded by the Act, I shall recommend that it cease and desist from infringing in any manner upon rights guaranteed in Section 7 of the Act.

CONCLUSIONS OF LAW

1. The Respondent is engaged in commerce within the meaning of Section 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. By discriminatorily discharging Kermit A. Rogers because he was not a member of the Union in good standing, the Respondent has engaged in an unfair labor practice within the meaning of Section 8(a)(3) and (1) of the Act.

4. The aforesaid unfair labor practice is an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act.

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

ORDER[6]

Wright Contracting Company, its officers, agents, successors, and assign, shall:

1. Cease and desist from:

(a) Encouraging membership in Local Union 14614, United Steelworkers of America, AFL–CIO, or in any other labor organization of its employees, by discharging or in any other manner discriminating against employees in regard to hire and tenure of employment or any type of working conditions of employment.

(b) In any other manner interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities, except to the extent that such right is affected by the proviso to Section 8(a)(3) of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Offer to Kermit A. Rogers immediate and full reinstatement to his former job, discharging, if necessary, any employee hired to fill such job, or if the job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights, and make him whole for any loss of earnings he may have suffered by reason of such discharge in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Preserve and make available to the Board or its agents, upon request, for examination and copying, all records necessary for the determination of amount of backpay due and the right to reinstatement.

(c) Post at its office at the jobsite in the area of Clendenin, West Virginia, copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 9, after being duly signed by an authorized representative of the Respondent, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 9, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

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[5] *F. W Woolworth Company*, 90 NLRB 289 (1950); *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[6] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommendations 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.

[7] In the event that the Board's 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."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT encourage membership in Local Union 14614, United Steelworkers of America, AFL–CIO, or in any other labor organization of our employees, by discharging or in any other manner discriminating against employees in regard to hire and tenure of employment or any type of working conditions of employment.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities, except to the extent that such right is affected by the proviso to Section 8(a)(3) of the Act.

WE WILL offer to Kermit A. Rogers immediate and full reinstatement to his former job, discharging, if necessary, any employee hired to fill such job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights, and make him whole for any loss of earnings he may have suffered by reason of such discharge.

All of our employees are free to become and remain members of the above-named Union or any other labor organization or to refrain from doing so.

WRIGHT CONTRACTING COMPANY