

**Architectural Glass & Metal Co., Inc. and Glaziers,
Architectural Metal & Glass Workers, Local
1165. Case 25-CA-22963**

March 17, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING
AND TRUESDALE

On November 18, 1994, Administrative Law Judge Martin J. Linsky issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions² as modified and to adopt the recommended Order.

AMENDED CONCLUSIONS OF LAW

Substitute the following for Conclusions of Law 3 and 4 and renumber the subsequent Conclusion of Law.

"3. By interrogating Harry Zell about his union activity, the Respondent violated Section 8(a)(1) of the Act.

4. By refusing to hire Harry Zell because of his union activities, the Respondent has violated Section 8(a)(1) and (3) of the Act."

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Architectural Glass & Metal Co., Inc., Indianapolis, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² After the judge's decision in this case issued, the U.S. Supreme Court granted certiorari in *Town & Country Electric v. NLRB*, 147 LRRM 2133 (8th Cir. 1994), petition for cert. granted docket No. 94-947 (1994).

We have amended the judge's recommended Conclusion of Law 3 to reflect properly the violations found.

J. Steven Robles, Esq., for the General Counsel.
David Miller, Esq., of Indianapolis, Indiana, for the Respondent.

DECISION

STATEMENT OF THE CASE

MARTIN J. LINSKY, Administrative Law Judge. On January 3, 1994, a charge was filed by the Glaziers, Architectural Metal & Glass Workers, Local 1165 (Union) against Architectural Glass & Metal Co., Inc. (Respondent).

On February 28, 1994, the National Labor Relations Board, by the Regional Director for Region 25, issued a complaint alleging that Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act), when it unlawfully interrogated an applicant for employment and when it failed and refused to hire that same applicant for employment, Harry Zell, because of his activity on behalf of the Union.

Respondent filed an answer in which it denied that it violated the Act in any way.

A hearing was held before me in Indianapolis, Indiana, on September 27, 1994.

Upon the entire record in this case, to include posthearing briefs timely filed by the General Counsel and Respondent, and upon my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is, and has been at all times material herein, a corporation existing under and by virtue of the laws of the State of Indiana.

At all material times herein, Respondent has maintained an office and place of business in Indianapolis, Indiana, where it is, and has been at all times material herein, engaged in the installation of metal and glass components for the construction of buildings.

During the past 12 months, a representative period, the Respondent, in the course and conduct of its business operations, purchased and received at its Indianapolis facility products, goods, and materials valued in excess of \$50,000 directly from points outside the State of Indiana.

Respondent admits, and I find, that it is now, and has been at all material times herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that the Union is now, and has been at all material times herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

Harry Zell, a 24-year-old man, became on August 1, 1993, a full-time paid field representative for the Union. His pay was \$600 per week plus expenses. In addition, he had full medical insurance and was covered by a pension. His main job was to organize employees. As a field representative he was authorized to apply for and accept employment at non-union employers in order to organize its employees. If he went to work for a nonunion employer Zell would continue to receive his full union salary plus benefits as well as any pay he might receive from his job with the nonunion em-

ployer. He would continue to carry out his union duties in his off hours. If the Union wanted him to quit a nonunion employer he was working for and seek employment with another nonunion employer Zell testified he would have done so. Legally, of course, Zell could refuse the Union's request to quit and continue his employment with the nonunion employer. In order to avoid union discipline he probably would have to resign his union membership.

On August 3, 1993, Zell applied for a job with Respondent who had placed an ad in the local newspaper seeking applicants for employment.

Zell filled out an application form. He left blank the space on the application form where the applicant is asked to identify his current employer. He listed in the section called for a list of former employers. He did not state on the form that he was an employee of the Union.

Respondent is a nonunion commercial glass and glazing company with approximately 25 employees. Its three principals are Greg Menefee, Tim Nelson, and Robert Peel. Menefee is in charge.

On August 3, 1993, Menefee was on vacation and Zell, after filling out an application for employment, was interviewed by Peel and Nelson. Although Peel and Nelson were aware that Zell had worked for union contractors because they recognized the names of the contractors the three men did not discuss the Union during the interview.

Peel and Nelson told Zell they would get back to him. The following day Respondent called Zell and left a message for him to call Respondent. Zell called Respondent back and spoke with Peel and Nelson. Zell secretly recorded the conversation he had with Peel and Nelson and a transcript of that conversation is in evidence as General Counsel's Exhibit 3.

Suffice it to say during the telephone conversation Peel offered Zell an \$8-an-hour helpers job to start the following Monday, August 9, 1993. When Zell laughed and asked if his being a member of the Union would be a problem Peel put Nelson on the phone. Nelson told Zell that Respondent would get back to him.

While one can speculate what Peel and Nelson's reaction would have been had Zell laughed and asked if they'd be any problem since he was not a member of the Union. That did not happen and we will never know how Peel and Nelson would have reacted.

Greg Menefee, Respondent's president, was advised by Peel and Nelson of what they thought was Zell's odd behavior, i.e., laughing and asking if his being a union member would be a problem. Menefee learned from Mark Officer, president of Pre-Fab, a nonunion company which Harry Zell had signed to a union contract, that Zell was a field representative for the Union.

Menefee called Zell. Zell returned his call on August 23, 1993, and Menefee told Zell that Respondent would not be hiring him. This phone conversation between Zell and Menefee was not recorded.

There is a conflict as to whether Menefee asked Zell if Zell was in the Union and was going to stay in the Union, which Zell claimed was said and which would be unlawful interrogation, or whether Menefee asked Zell if Zell was a field representative for the Union and would remain one if hired, which Menefee claimed was said and would also be unlawful interrogation if, and only if, it is unlawful to refuse

to hire a full-time paid union organizer because the person is a full-time paid union organizer. Since I find that it is unlawful to refuse to hire a full-time paid union organizer because of that status I conclude that under either Zell or Menefee's version of the conversation Respondent engaged in unlawful interrogation in violation of Section 8(a)(1) of the Act.

As to exactly what was said in the conversation I found both Zell and Menefee credible, therefore, the party with the burden of proof loses and I credit Menefee's version of the conversation. I find that Zell was mistaken.

It is clear from the record that Menefee refused to hire Zell or withdrew the offer of employment, depending on how you look at it, because Zell was a full-time paid union field representative who would, if hired, try to organize Respondent's employees.

Respondent's claim that both before and after it refused to hire Zell that it did in fact hire union members is irrelevant. Respondent, I note, had hired a number of persons, i.e., Dan Rowe, Tim Nelson, Mike Haynes, Tom Gillcrest, and Wayne Morris, who had union ties before Zell even applied for a job and Respondent hired union members Greg Matthews in September 1993 and Steve Amos, a voluntary union organizer, in April 1994 after Zell had been turned down for employment.

Menefee claims that Zell falsified his application when he didn't list his union employment and it is Respondent's policy to fire applicants who submit false applications but it never has had to do so. Zell claims that he didn't put down his union employment because he thought he was lawfully permitted not to disclose his union membership. Zell was less than candid but Respondent, I find, did not even seize on this lack of candor except as an afterthought.

Zell's lack of candor does not render him a less than bona fide applicant for employment.

Applicants for employment are employees under the Act and entitled to its protection. See *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 181-188 (1941).

It is settled Board law that full-time paid union organizers are employees and entitled to protection under the Act. See *Sunland Construction Co.*, 309 NLRB 1224 (1992); *Town & Country Electric*, 309 NLRB 1250 (1992), enf. denied 34 F.3d 652 (8th Cir. 1994).

There is a split in the circuit courts, however, on this issue. The District of Columbia, Second and Third Circuits hold that a full-time paid union organizer is an employee under the Act and entitled to its protection. See *Willmar Electric Service*, 968 F.2d 1327, 1329-1331 (D.C. Cir. 1992); *NLRB v. Henlopen Mfg. Co.*, 599 F.2d 26, 30 (2d Cir. 1979); and *Escada (USA), Inc. v. NLRB*, 970 F.2d 898 (3d Cir. 1992). But the Fourth, Sixth, and Eighth Circuits hold to the contrary. See *H. B. Zachry Co. v. NLRB*, 886 F.2d 70, 72 (4th Cir. 1989); *Ultrasystems Western Constructors v. NLRB*, 18 F.3d 251, 255 (4th Cir. 1994); *NLRB v. Elias Brothers Big Boy, Inc.*, 327 F.2d 421, 427 (6th Cir. 1964); and *Town and Country Electric v. NLRB*, supra.

I am, of course, bound by Board law unless and until modified by a decision from the U.S. Supreme Court.

The argument behind the notion that a paid union organizer is not a bona fide applicant for employment and not entitled to protection under the Act apparently had its basis in the notion that there is an inherent conflict of interest

when a servant serves two masters. But is there really such a conflict of interest. For example, police officers and members of the military are theoretically on duty 24 hours a day and, of course, the members of the military are subject to overseas assignment in the event of an emergency, but would a police officer or a member of the military not be considered a bona fide applicant for employment just because of their status. Would a student whose main objective is to graduate be considered something other than a bona fide applicant for employment just because he or she is a student. The police officer, military member, and student all serve two masters.

Respondent claims it would not hire a full-time employee who had a full-time job elsewhere but Menefee never asked if Zell's union job would interfere with his job with Respondent. I might add that many working women, especially those with younger children, quite reasonably look on their mothering responsibilities as a full time or close to it job that they do in addition to their "outside the home" jobs. What about employees who spend large amounts of time participating in coaching, scouting, or other voluntary efforts. Should they lose protection under the Act because they serve two masters?

Accordingly, relying on Board law I find that Respondent violated Section 8(a)(1) and (3) of the Act when it refused to hire Harry Zell because Zell was a full-time paid union field representative.

REMEDY

The remedy for this unlawful refusal to hire and unlawful interrogation should be the issuance of a cease-and-desist order, the posting of a notice, and the requirement that Respondent offer a job to Zell and give him backpay. There was evidence that Zell was offered employment elsewhere and chose not to accept it and that evidence will be relevant in determining what backpay, if any, Zell should receive to remedy this unfair labor practice. However, that is a matter best left to the compliance stage of this litigation.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce and in operations affecting 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.

3. By unlawfully interrogating Harry Zell about his union activity and refusing to hire Harry Zell because of his protected concerted activity on behalf of the Union Respondent violated Section 8(a)(1) and (3) of the Act.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Upon these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹

¹ 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.

ORDER

The Respondent, Architectural Glass & Metal Co., Inc., Indianapolis, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unlawfully interrogating applicants for employment about their union activity.

(b) Refusing to hire employees because they engage in protected concerted activity on behalf of a union.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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

(a) Offer to Harry Zell the position of helper or if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority and other rights and privileges.

(b) Make Harry Zell whole for any loss of pay and other benefits suffered by him commencing on August 9, 1993. Backpay to be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987) (see generally *Isis Plumbing Co.*, 138 NLRB 716 (1962)).

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility in Indianapolis, Indiana, copies of the attached notice marked "Appendix."² Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

² If this Order is enforced by a judgment of a 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

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT unlawfully interrogate applicants for employment about their activities on behalf of the Union.

WE WILL NOT refuse to hire employees because they engage in protected concerted activity on behalf of a union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed to them under Section 7 of the Act.

WE WILL offer to Harry Zell the position of helper or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges.

WE WILL make Harry Zell whole for any loss of pay or benefits he suffered because of the discrimination against him, plus interest.

ARCHITECTURAL GLASS & METAL CO., INC.