Asbestos Services, Inc., d/b/a A.S.I., Inc. *and* Wayde Torrey Nelson. Case 31–CA–23691

January 22, 2001

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND HURTGEN

On September 11, 2000, Administrative Law Frederick C. Herzog issued the attached decision. The Charging Party filed exceptions and a supporting 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 the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Dean Yanohira, Esq., for the General Counsel.
Philip W. Ganong, Esq. (Ganong & Klier), of Bakersfield, California, for the Respondent.
Adam N. Stern, Esq. (Levy, Stern & Ford, P.C.), of Los Angeles, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

FREDERICK C. HERZOG, Administrative Law Judge. The case was heard before me in Bakersfield, California, on February 28 and 29, 2000, and is based on a charge filed on January 21, 1999, by Wayde Torrey Nelson, an individual, alleging, generally, that Asbestos Services, Inc. (Respondent) committed certain violations of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). On June 17, 1999, the Regional Director for Region 31 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing alleging violations of Section 8(a)(1) and (3) of the Act. Respondent thereafter filed a timely answer to the allegations contained within the complaint, denying all wrongdoing.

At the hearing I granted the General Counsel's motion to amend the complaint in certain respects.

All parties appeared at the hearing, and were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally and file briefs. Based upon the record and my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges, the answer admits, and I find that Respondent is a California corporation, with its principal place of business located in Bakersfield, California, where it is engaged in the business of asbestos abatement; and that it annually provided services valued in excess of $50,000 to enterprises in California which meet the Board's direct jurisdictional standard.

Accordingly, I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The complaint alleges, the answer admits, and I find that Heat & Frost Insulators & Asbestos Workers, Local 5 (the Union) is now and at all times material, has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

Wayde Nelson was an employee of Respondent. He signed for a copy of the employee manual on June 29, 1998, and was interviewed by Pat O'Malley on July 10, 1998. At that interview, Pat O'Malley, president of Respondent Company, informed him that Respondent was withdrawing from the Union.

Nelson testified that on July 13, 1998, he met with Kevin O'Malley, manager of Respondent Company. At that meeting, Nelson instigated a discussion into union issues by requesting confirmation that Respondent was withdrawing from the Union. Nelson also testified that on his first day of work, July 16, 1998, he began to talk to other employees about Davis-Bacon pay rates and safety issues. He additionally testified that, on July 27, 1998, he began discussing Davis-Bacon pay with Kevin O'Malley, and around the same time, he contacted the Union about safety and Davis-Bacon pay concerns.

Memoranda introduced into evidence by the Charging Party indicated that on September 9, 1998, as well as on October 30, 1998, Kevin O'Malley spoke to Nelson about Nelson's failure to take air sample data from a jobsite, a violation of California Occupational Health and Safety Administration (Cal-OSHA) requirements. On November 17, 1998, Respondent docu-

[1] The Charging Party has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative 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.

We also find without merit the Charging Party's allegations of bias on the part of the judge. On our full consideration of the record, we find no evidence that the judge prejudged the case, made prejudicial rulings, or demonstrated bias in his credibility resolutions, analysis, or discussion of the evidence. We, accordingly, deny the Charging Party's motion for a new hearing.

[2] The judge found that the Respondent established that it would have discharged Nelson even in the absence of his protected concerted activity for several reasons, including his complaining to the legal department at Vandenburg Air Force Base about the Respondent's alleged noncompliance with the Davis-Bacon Act. In adopting this finding, we note that the judge discredited Nelson's claim that he spoke to other employees about this issue. Consequently, although Wayde Torrey Nelson's activity at Vandenburg Air Force Base may have been protected, it was not concerted in this instance. See *Meyers Industries*, 281 NLRB 882 (1986), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied sub nom. *Meyers Industries v. NLRB*, 487 U.S. 1207 (1988).

mented an inability to bill a customer for a job because Nelson had failed to gather appropriate information.

Nelson filed a complaint against Respondent with the Department of Labor relating to Davis-Bacon pay and claimed that it was filed on his own behalf as well as the behalf of other workers. He testified that he filed a Cal-OSHA complaint in October 1998 regarding safety concerns, and he also filed charges with the NLRB against the Union. The complaint in this case alleges that Respondent interrogated him about his union activities, threatened employees with layoff and plant closure because he had filed complaints with Government agencies, discharged him, and have refused to reinstate him to his former position of employment.

B. Credibility Considerations

Credibility findings are critical in this case. The accounts provided by the only witness for the General Counsel, Wayde Nelson, sharply conflict with the accounts provided by Respondent's witness, Pat O'Malley.

Yet, "[C]redibility findings may rest entirely upon evidence through observation which words do not, and could not, either preserve or describe." *Roadway Express*, 108 NLRB 874, 875 (1954). The demeanor of a witness may satisfy the tribunal, not only that the witness' testimony is not true, but that the truth is the opposite of his story; for the denial of one, who has a motive to deny, may be uttered with such hesitation, discomfort, arrogance, or defiance, as to give assurance that he is fabricating, and that, if he is, there is no alternative but to assume the truth of what he denies. *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962) (quoting *Dyer v. MacDougall*, 201 F.2d 265, 269 (2d Cir. 1952)).

The following instances reflect some issues specific to this case that weighed upon credibility.

The General Counsel's witness, Nelson, repeatedly provided conflicting information and inconsistent testimony.

He chose to provide various reasons for his termination by Respondent to suit his evolving agenda. For example, he filed a Workers' Compensation claim indicating that he was fired for being injured on the job and he testified that he believed this was the reason he was discharged. Yet, with the Department of Labor, he claimed that he was fired for whistle blowing. Now, here, in a case concerning termination for union activity, in his affidavit, he testified that he did not talk about concerted activity or any union activity as part of the grounds for his termination.

When these discrepancies were highlighted at the hearing, Nelson blandly testified that some documents in evidence might contain forgeries of his signature. He also testified that any inconsistent information in his sworn and signed declaration, (and there were a number of them), were the result of "typos."

Nelson's pervasive engagement in artful dodging of questions caused me to labor unsuccessfully to obtain simple answers from him, such as the number of times he was claiming to have been interrogated in November 1998. He additionally impeached himself regarding whether he had met with any union officials in person.

By contrast, the demeanor of Respondent's witness, Pat O'Malley, lacked any of the flaws noted above with respect to Nelson. Pat O'Malley gave consistent, candid, and evidently forthright testimony. His testimony was often directly supported by documents admitted into evidence, such as the employee handbook, phone messages from Bird Roofing, and memoranda of concern about Nelson's work performance, to name a few. His testimony was additionally bolstered by another of Respondent's witnesses, Robert Garcia.

After thoroughly reviewing the testimony and exhibits, and considering all of the circumstances, including witness demeanor and inherent probability considerations in assessing and making the credibility resolutions critical to the findings I have ultimately made, I am persuaded by the superior veracity of Pat O'Malley. I am satisfied that the material facts revealed in the credited record, and Pat O'Malley's demeanor, reflect that he was telling the truth, and that Nelson was not. Bearing in mind these credibility conclusions, the findings below reflect my ultimate conclusions about the events of this case.

Testimony contrary to my findings, though occasionally noted, has been discredited because it conflicted with credited testimony or documentary evidence, or because I found it to be inherently incredible and unworthy of belief.

C. The Interrogation Allegation

Relevant Facts

During the time Nelson was employed with Respondent, there had been one visit from Cal-OSHA. It occurred prior to November 16, 1998, and Respondent did not link the visit to Nelson at that time.

On November 16, 1998, Respondent received notice from the NLRB about the charges Nelson had filed against the Union. The charge was included in the notice and alleged that the "complicity" between the Union and Respondent had caused employees to be working "without the appropriate safety gear and medical physicals as required by Cal-OSHA Regulations and the Federal Government." Prior to receipt of this notice, Respondent was unaware that employees had safety concerns.

At a meeting on November 17, 1998, Nelson was asked about the specifics of these general "safety gear" violations. The meeting took place at the Respondent's facility in a gathering area of the office. Nelson had normal, day-to-day access to this area in order to obtain job assignments, to turn in his daily reports as a Competent Person which included information such as job activities and the men working for him, to communicate with upper management, and to access his timecard.

Pat O'Malley, Kevin O'Malley, and Gus Theodore were all present at the meeting. All three men are agents of Respondent within the meaning of Section 2(13) of the Act and supervisors of Respondent within the meaning of Section 2(11) of the Act. Kevin O'Malley specifically is responsible for answering any charges of Cal-OSHA violations. Nelson was told that he was free to leave the meeting at any time and that no reprisal would result from leaving or from his answers to the questions. Additionally, Pat O'Malley told Nelson that he had no problem with him remaining an employee and working with him. Pat O'Malley did ask Nelson why he had not previously approached anyone about safety issues. As required by the em-

ployee handbook, it was one of Nelson's job duties to make sure that unsafe situations did not exist and if they did exist, to inform upper management, so they could be remedied.

Pat O'Malley told Nelson that he was concerned because if the allegations were true, and remained uncorrected, it could cause great harm to the Company including being closed down by Cal-OSHA. In Nelson's own testimony, he testified that he knew Cal-OSHA could close a company due to violations. Pat O'Malley also told Nelson that his main concern was to run a safe company and would make changes to do so but he needed to know what changes to make. However, when Nelson was asked what the specific safety concerns were, his answer was vague. He merely made global statements for the Respondent to look at the equipment.

Since Nelson was not indicating what the specific safety concerns were, Pat O'Malley began to wonder if there truly were any safety issues and decided to end the meeting. Pat O'Malley then asked Nelson if there was anything else Nelson wanted from Respondent, Nelson responded that he wanted to be paid his deserved wage; referring to the Davis-Bacon pay that Nelson believed he was owed. Pat O'Malley told him to make a list of what he thought he was owed and the list was received the next day.

Analysis

"It is well established that interrogation of employees is not illegal *per se*." *Rossmore House*, 269 NLRB 1176, 1177 (1984). Employer activity is prohibited under Section 8(a)(1) of the Act if, after looking at the record as a whole, the activity may reasonably be said to tend to restrain, coerce or interfere with employee rights. Id.; see also *Blue Flash Express, Inc.*, 109 NLRB 591 (1954); *American Freightways Co.*, 124 NLRB 146, 147 (1959); and *NLRB v. Illinois Tool Works*, 153 F.2d 811 (7th Cir. 1946).

Factors to consider about the questioning of an employee include the time, place, personnel involved, and information sought. *Blue Flash Express, Inc.*, supra at 594. In addition, the employer must inform the employee of the purpose of the questioning, assure him that no reprisal will take place, and obtain his participation on a voluntary basis; the questioning must occur in a context free from employer hostility to union organization and must not be itself coercive in nature; and the questions must not exceed the necessities of the legitimate purpose by prying into other union matters, eliciting information concerning an employee's subjective state of mind, or otherwise interfering with the statutory rights of employees. When an employer transgresses the boundaries of these safeguards, he loses the benefits of the privilege. *Johnnie's Poultry Co.,* 146 NLRB 770, 775 (1964), enf. denied on other grounds 334 F.2d 617 (8th Cir. 1965).

The information sought by Pat O'Malley's questioning was directed at safety issues. Pat O'Malley informed Nelson that his participation was voluntary, that he was free to leave and that there would be no reprisals for his answers. The meeting took place in an area that Nelson regularly used in his day-to-day business. Those present included Pat O'Malley (who is the president of Respondent Company), Kevin O'Malley (who handles Cal-OSHA complaints), and a foreman (who will likely have to answer to or verify the unsafe condition). I conclude and find that these persons present were all either necessary, or that it was not unusual for them to be present of this sort.

Discussions about safety are the type of employee/employer interaction which may be expected to occur. Moreover, when a company's safety concerns are heavily regulated, such as in the asbestos abatement industry, this should be an expected conversation. To not address safety concerns in such an industry would be remiss. Therefore, under all the circumstances, I find and conclude that this does not demonstrate a reasonable tendency to restrain, coerce, or interfere with Nelson's Section 7 rights.

D. Allegations of Threats to Close Plant

Relevant Facts

Nelson testified that on November 19, 1998, he saw Kevin O'Malley walking beside "several other Latino workers" and he overheard him say "that it looked like [Respondent] was going to have to close down the doors and lay everybody off because of union complaints that were filed."

Analysis

An employer has violated Section 8(a)(1) of the Act if its action may reasonably be said to tend to interfere with the free exercise of employee rights under the Act. *American Freightways Co.,* supra at 147 (citing *NLRB v. Illinois Tool Works*, supra at 814.

In this case, the General Counsel has not given enough facts to make a reasonable conclusion. Nelson's testimony is the only information on Kevin O'Malley's statements. There is no information concerning either the accuracy of the alleged statement, or any of the circumstances under which it was made. As Nelson did not hear any other part of the conversation, the circumstances of the statement are unknown, including what may have been said prior to and after the statement. We cannot even be certain that Kevin O'Malley's words were not spoken in direct response to a question from an employee. Although Nelson could name three of the men who were a part of the conversation, none were produced at trial to corroborate the testimony or to provide further details about the statement.

Given Nelson's inferior credibility, and obvious penchant for exaggeration, I feel free to infer that the words he testified to were the absolute worst that could be attributed by him to Kevin O'Malley. I cannot draw any inference, pro or con, from Pat O'Malley's failure to comment upon or deny the words attributed to Kevin O'Malley. However, I feel confident that, whatever Kevin O'Malley actually said, his words were, at worst, ambiguous. It is a fair reading that these words were nothing more sinister or violative than that he gave accurate information to employees. As a result, it cannot be found that the evidence preponderates in favor of the version under which a violation would be found. Ergo, this allegation must be dismissed.

E. Unfair Termination Allegation

Relevant Facts

The General Counsel alleges that Nelson was discharged due to his protected concerted activity. Nelson testified that he had

spoken to other employees about Davis-Bacon pay and safety concerns. However, Pat O'Malley testified to four reasons that led him to believe that it was in Respondent's best interest to discharge Nelson regardless of the protected activity.

First, there was an incident on November 30, 1998. Nelson was the Competent Person on a jobsite at Edwards Air Force Base. It was a subcontracting job under Bird Roofing and Waterproofing. The project superintendent at Bird Roofing, Robert Garcia, was extremely upset that the Nelson and his crew were working too slowly, forcing Bird Roofing to start weatherproofing in order to avoid water damage instead of completing the roof. Garcia credibly testified that he expressed his frustration with Nelson, and then called Kevin O'Malley, at which time Garcia requested that Nelson no longer work on any future Bird Roofing contracts that he supervised.

Second, Garcia also later told Kevin O'Malley that he believed Nelson took, or stole, a posted notice on prevailing wage rates from Bird Roofing's trailer. It was Respondent's conclusion that this allegation was true. As Pat O'Malley testified, a substantial amount of Respondent's business comes from Bird Roofing. Pat O'Malley, therefore, has a clear financial interest in maintaining a good working relationship with Bird Roofing. Respondent was worried that this, and the above-mentioned incident, could damage, or ever sever, its relationship with Bird Roofing, its major customer.

Third, Respondent bids a fixed price for each job. Therefore, low production either decreases or cancels out Respondent's profits. As a result of the complaint regarding slow work production, an audit of the jobs Nelson had worked on as Competent Person was conducted. Pat O'Malley credibly testified that, "without exception, every job was below par." By contrast, the same crew with a different Competent Person, had higher production. Respondent thereby reasonably concluded that it was losing money whenever Nelson was designated to serve as the Competent Person.

Fourth, on December 3, 1998, Pat O'Malley asked Nelson about the prevailing wage notice missing from the Bird Roofing trailer. Nelson denied knowing about it and then asked about his Davis-Bacon pay that was in dispute. Pat O'Malley testified that he told Nelson that Respondent would pay whatever the Department of Labor determined he was owed. Nelson's response was, "Fine, I'm going to do what I have to do."

Pat O'Malley credibly testified that Respondent does its best to comply with Davis-Bacon pay rates, as it is a confusing process. According to O'Malley's credited testimony, Respondent had no issues regarding paying the prevailing wage, if it later found that it had erred in its original calculation. Additionally, Respondent was already cooperating with the Department of Labor regarding Nelson's complaint about the issue. However, in recent months, Respondent had been inundated with paperwork over the issue, and Pat O'Malley testified that he felt Nelson had taken things too far by speaking about the issue to the legal department at Vandenburg Air Force Base, a valued business customer of Respondent. Pat O'Malley was concerned about how that would affect the business relationship with Vandenburg.

Although Pat and Kevin O'Malley had previously discussed the possibility of discharging Nelson, it was after the December 3, 1998 conversation with Nelson that Pat O'Malley made that decision final. At that time, he told the controller of Respondent company, Tracy O'Malley, to prepare Nelson's final check.

On the morning of December 4, 1998, Pat O'Malley brought another foreman with him and told Nelson that his employment was no longer desired. Nelson responded that this would not look good, given all the complaints he had filed. Later in the day, Pat O'Malley received a call from a hospital emergency room to inform him that Nelson was there, complaining of work related injuries, such as nausea, headaches, and an injured elbow from the day before. None of these alleged injuries had previously been brought to the attention of Respondent.

Analysis

With respect to Nelson's protected concerted activity, I will not decide whether Nelson's complaints regarding Davis-Bacon pay or safety issues were valid or invalid. Instead, I find only that it was shown by uncontroverted evidence that Respondent eventually arrived at the conclusion that the safety complaints were largely invalid, and that Nelson's Davis-Bacon pay concerns were jeopardizing the relationship of at least two of Respondent's customers (Bird Roofing and Vandenburg). Additionally, Respondent believed Nelson was not acting in good faith and Respondent's administrators spent an inordinate amount of the time working on the Davis-Bacon pay issue. Respondent was cooperating with the Department of Labor investigation. Yet, all of this may not have been enough for Nelson, as he would, "Do what I have to do," instead of accepting the determination of the Department of Labor.

With respect to the discharge itself, Section 8(a)(1) prohibits an employer from interfering with, restraining, or coercing employees in the exercise of their Section 7 rights. Concerted activity under Section 7 includes making Cal-OSHA complaints and conduct aimed at attaining higher wages. *Unico Replacement Parts*, 281 NLRB 309, 309 (1986), and *A.N. Electric Corp.*, 276 NLRB 887, 889 (1985). Section 8(a)(3) also prohibits employers from discriminating in regard to an employee's "tenure of employment . . . to encourage or discourage membership in any labor organization." Under the causation test established in *Wright Line*, 251 NLRB 1083 (1980), and approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), as modified in *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267 (1994), the General Counsel must make a prima facie showing sufficient to support an inference that the employee's conduct, here making safety and Davis-Bacon pay complaints, motivated the employer's adverse action.

To sustain his initial burden, the General Counsel must show (1) that the employee was engaged in protected activity, (2) that the employer was aware of the activity, and (3) that the activity was a substantial or motivating reason for the employer's action. Motive may be demonstrated by circumstantial evidence as well as direct evidence and is a factual issue which the expertise of the Board is peculiarly suited to determine. *Naomi Knitting Plant*, 328 NLRB 1279 (1999) (citing *FPC Moldings, Inc. v. NLRB*, 64 F.3d 935, 942 (4th Cir. 1995), enf. 314 NLRB

1169 (1994) (citations omitted)); see also *Meyers Industries,* 281 NLRB 882 (1986).

If the General Counsel establishes a prima facie case, the employer then has the burden of persuading the trier of fact by a preponderance of the evidence that the same adverse action would have been taken even in the absence of the employee's protected activity. *Best Plumbing Supply*, 310 NLRB 143 (1993); *Roure Bertrand Dupont, Inc.*, 271 NLRB 443 (1984).

Applying the foregoing principles to the facts of this case, I find that the General Counsel has made a weak prima facie case of discriminatory discharge established only through the fact that Nelson did file safety and Davis-Bacon pay complaints with various government agencies. However, as Nelson's testimony has been largely, if not wholly, discredited, it remains questionable whether these acts are protected concerted activity.

Concerted activity encompasses "those circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management." *Meyers Industries*, supra at 887. Despite the contention that Nelson spoke to other employees daily about these issues, the General Council has brought forth no witness to support it leaving the contention to rest solely on Nelson's discredited word. I also find it implausible that Nelson ever spoke to Respondent, prior to November 18, 1998, about any safety concerns. Such a claim conflicts sharply with the swift response by Respondent when safety concerns were otherwise brought to its attention. Such swift responses include speaking to and writing a memorandum about Nelson when he failed to take air samples as required by Cal-OSHA and the immediate concern when safety issues were mentioned in the notice of complaint against the Union.

However, despite my finding that the General Counsel has established a weak prima facie case, here the Respondent has met its burden of rebutting that case, by showing clear and convincing evidence of the actions which Respondent would (and should) have taken regardless. I credit the claims of Pat O'Malley that Nelson was fired for working at an unprofitable level, stealing from the property of customers, failing to inform management as required of any safety hazards, and unnecessarily disturbing relationships with customers that could significantly affect Respondent's business.

Thus, on the basis of the foregoing credited testimony, I find that Nelson's discharge has not been shown by a preponderance of the credibly to have been motivated by Nelson's joining or assisting the union, or his engagement in protected concerted activity, or in order to discourage employees form engaging in these activities.

Therefore, I find and conclude that Respondent has not been shown to have violated Section 8(a)(1) and (3) of the Act in any respect.

CONCLUSIONS OF LAW

1. Asbestos Services (Respondent), is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Heat & Frost Insulators & Asbestos Workers, Local 5 (the Union), is a labor organization within the meaning of Section 2(5) of the Act.

3. The General Counsel has failed to prove by a preponderance of the credible evidence that Respondent interrogated an employee. Therefore, the General Counsel has failed to prove that Respondent interfered with, restrained, or coerced employees in the exercise of the rights guaranteed in Section 7 of the Act and in violation of Section 8(a)(1) of the Act.

4. The General Counsel has failed to prove by a preponderance of the credible evidence that Respondent threatened employees. Therefore, the General Counsel has failed to prove that Respondent interfered with, restrained, or coerced employees in the exercise of the rights guaranteed in Section 7 of the Act and in violation of Section 8(a)(1) of the Act.

5. In regards to the discharge of the employee, Respondent has met its burden by persuading the trier of fact by a preponderance of the credible evidence that the same adverse action would have been taken even in the absence of the employee's protected activity. Respondent has therefore not violated Section 8(a)(1) and (3) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[1]

ORDER

The complaint should be, and it is, dismissed in its entirety.

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[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.