

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

VALCOURT EXTERIOR BUILDING
SERVICES OF NEW JERSEY, L.C.

and

Case 22-CA-26385

PAINTERS DISTRICT COUNCIL 711

Chevella Brown-Maynor, Esq., for the General Counsel.
Robert F. O'Brien, Esq. and *Nancy S. Sokol, Esq.*, for the Union.
Lawrence B. Fine, Esq., *Kevin A. Ormerod, Esq.*
and *James J. Kelley II, Esq.*, for the Respondent.

DECISION

Statement of the Case

D. BARRY MORRIS, Administrative Law Judge. This case was heard before me in Newark, NJ during 12 days of hearing commencing November 14, 2005. The record was closed on July 12, 2006. Upon a charge filed on May 28, 2004 a Second Amended Complaint was issued on November 14, 2005, alleging that Valcourt Exterior Building Services of New Jersey ("Respondent") violated Section 8(a)(1) and (3) of the National Labor Relations Act, as amended (the "Act"). Respondent filed an answer denying the commission of the alleged unfair labor practices.

The parties were given full opportunity to participate, produce evidence, examine and cross-examine witnesses, argue orally and file briefs. Briefs were filed by the parties on August 21, 2006.

Upon the entire record of the case, including my observation of the demeanor of the witnesses¹, I make the following:

Findings of Fact

I. Jurisdiction

Respondent, a Virginia corporation, with an office and place of business in Elizabeth, NJ, has been engaged in the provision of building restoration services. It has been admitted and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. In addition, it has been admitted and I find that Painters District Council 711 (the

¹ Credibility resolutions have been based upon the witnesses' demeanor, the weight of respective evidence, established or admitted facts, inherent probabilities, and inferences drawn from the record as a whole.

“Union”) is a labor organization within the meaning of Section 2(5) of the Act.

II. The Alleged Unfair Labor Practices

5 A. The Facts

1. Background

10 Respondent is a seasonal employer that normally experiences a decline in work during the winter months. Prior to the winter of 2003 Respondent routinely reduced its work force by verbally laying off employees in the fall, when the weather became cold, and recalling those employees in the spring.

15 During the summer of 2003 the Union began an organizing campaign of the Valcourt employees. A petition was filed on September 3, 2003 and an election was held on October 8, 2003, which the Union won. On May 20, 2004 the Union was certified as the exclusive collective-bargaining representative of Respondent’s employees.

20 Carlos Villeda was a restoration mechanic. He testified that he met with the Union organizer during the summer of 2003 and handed out Union cards and flyers to fellow employees. He was at every Union meeting and the meetings were held in his house. He testified that Jose Wilfredo Guardado, a foreman, attended one of the meetings. He further testified that one week before the election, Ron Pilla, Respondent’s vice president, called him into his office and asked him “Why [did] you initiate the union in the company?”

25 Ramon Quintanilla was also a Valcourt restoration mechanic. He testified that he attended between four and six Union meetings and spoke to co-workers about Union benefits. He further testified that one time, when he was talking to other employees about the Union, Rigoberto Urbino², a Valcourt Superintendent, told him, “you know you’re going to have 30 problems in the company” and that “I was making a problem in the company because of talking to the co-workers about ...the Union”.

35 Jose Angel Vasquez, a restoration mechanic, testified that he attended all of the Union meetings, handed out Union cards and spoke to his co-workers about Union benefits. Figueroa testified that during a meeting of foremen Pilla asked whether “those persons that are outside” like Rodriguez, Villeda and Vasquez “are going to return to the company”. Answering his own question, Pilla stated “No, those persons are not going to return to the company”.

2. Failure to Recall

40 On December 12, 2003 Respondent included a termination letter with the employees’ paychecks. The letter stated “Valcourt historically experiences a decline in business and available work in the winter months, requiring the Company to reduce the size of its workforce”. The letter continued, “as a result of this decline in business, your employment with Valcourt 45 Building Services will be terminated effective December 12, 2003”. Quintanilla testified that he asked Urbino “what was happening”. Urbino replied, “This happens every year. Don’t worry, the end of March or April then you’re going to be rehired”. Quintanilla testified that beginning March 2004 he called the company around five or six times about being recalled. He was never

50 ² There appears to be a difference of opinion as to the correct spelling of Urbino’s name. I have used the spelling as it appears in the complaint and in General Counsel’s brief.

recalled.

Villeda and Vasquez were also terminated on December 12, 2003. Villeda testified that beginning April 2004 he contacted the office about being recalled. He was never recalled. 5 Villeda further testified that in the five years he worked for Valcourt he had always been recalled after the winter months. Similarly, Vasquez testified that after he received the December 12, 2003 termination letter he spoke with Pilla. Pilla told us “not to worry, that when the weather was going to be good we were going to return”. He testified that beginning in March 2004 he 10 contacted the company about returning to work, and in April he came to the office and spoke with Craig Bitten, Operations Manager. Bitten told him to “keep on calling”. Vasquez was not recalled.

3. Alleged Discharge of Rodriguez

15 Elisandro Rodriguez had been employed by Respondent for a number of years. He was a foreman, was bilingual and possessed a valid driver’s license. He was one of the few employees who had been entrusted with a Home Depot card, which allowed him to buy supplies for the company without receiving prior approval. Rodriguez was always retained during the winter months.

20 Bitten testified that in November or December 2003 Rodriguez showed up for work “sporadically”. He testified that Rodriguez told him that he was going through a divorce and had trouble finding day care for his daughter. Romeo Straube, a former employee and foreman, testified that in January 2004 Bitten asked him to serve as interpreter in a conversation Bitten 25 was having with Rodriguez. Straube testified that Rodriguez wanted to leave the company and that Bitten asked him to tell Rodriguez that he was a “good worker” and that Bitten wanted him to stay with the company. Rodriguez replied that “he doesn’t want to stay working. He wants to leave”. Straube testified that Rodriguez told him that he wants to collect unemployment compensation and that he was having trouble finding someone to care for his daughter. Straube 30 testified that Rodriguez drove his van into the warehouse, unloaded it and handed the keys to Bitten. Straube stated that Rodriguez “quit” his employment with the company.

4. Alleged Discharge of Hernandez

35 Carlos Hernandez had worked for Respondent for over three years. He consistently worked during the winter months and did not receive a termination letter on December 12, 2003. General Counsel Exhibit 5 states that Alex Onop, Project Manager, “tried numerous times to call Carlos in for work and he was unsuccessful in contacting him”. Hernandez was terminated on 40 January 20, 2004.

5. Alleged *Johnnie’s Poultry* Violation

45 Joseph Piesco is an attorney who formerly represented Respondent. On June 24, 2004 he asked Jorge Delgado to attend a meeting to discuss an unfair labor practice charge. At the meeting Piesco told Delgado that he was seeking to “question him about the charge”. Piesco testified:

50 I told him that participation was entirely voluntary and that there would be absolutely no reprisals taken against him if he chose not to answer any of my questions....And in response to my question

are you willing to answer my questions, he responded with words to the effect, "I'm not talking or speaking to you without my union representative".

5 Piesco testified that he asked Delgado a second time whether he would answer any questions and that Delgado said that he would not, absent a Union representative being present. Piesco stated that the conversation lasted approximately two minutes and that Piesco told him that he could return to work. Piesco testified that he did not ask Delgado any substantive questions and that Delgado did not give him any substantive information.

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6. Section 8(a)(1) Allegations

15 The complaint alleges that in early 2004 Pilla indicated to employees that it would be futile to support the Union. Figueroa testified that in January 2004, at a raffle meeting, Pilla said "the only person who can give you a raise is me, not the Union". Pilla denied that he made such a statement.

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General Counsel alleges that in December 2003 Pilla questioned Hernandez why he was in the company of Villeda, a Union supporter, and that the following Monday Pilla refused to grant Hernandez time to recover from an injury. Pilla denied questioning Hernandez. In addition, the record contains a doctor's note concerning Hernandez that he could "return to work – light duty".

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B. Discussion and Conclusions

1. Use of Interpreter

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Most of Valcourt's employees speak Spanish and not English. Pilla and Bitten speak English and not Spanish. Pilla and Bitten have regularly used the office secretary, Annette, to translate. In addition, at times Urbino has been used to translate. Respondent argues that statements made based on the use of an interpreter constitute invalid hearsay.

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In *Midessa Construction Co.*, 290 NLRB 269, 277 (1988), respondent regularly communicated with its non-English speaking employees by using bilingual co-workers. It was held that "In that situation, Respondent made the employee-interpreter its agent for such communication".

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Respondent used Urbino, a supervisor, to translate. In addition, Pilla and Bitten regularly used Annette to translate. Under such circumstances, I find that both Urbino and Annette acted as agents of Respondent, and accordingly, statements based on their translations do not constitute objectionable hearsay.

2. Failure to Recall Quintanilla

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I credit Quintanilla's testimony that Urbino told him that "I was making a problem in the company because of talking to the co-workers...about the Union". He testified in a forthright manner and in light of the circumstances his testimony appears credible. Respondent was thus aware of Quintanilla's Union activities.

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Under *Wright Line*, 251 NLRB 1083, 1089 (1990), once a *prima facie* showing is made the burden shifts to Respondent to show that the "same action would have taken place even in the absence of the protected conduct". Urbino testified that Quintanilla was not a desirable

employee. He stood around talking rather than working and refused to accept direction from his foreman. Yet he was not terminated. I find that Respondent has not satisfied its burden and its failure to recall Quintanilla constitutes a violation of the Act.

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3. Failure to Recall Villeda

Villeda attended every Union meeting and the meetings were held in his house. I credit his testimony that Pilla asked why did “you initiate the union in the company?” Villeda testified in a forthright manner and, in view of the record as a whole, his testimony appears credible. I find that under *Wright Line, supra*, General Counsel has made a *prima facie* showing. Respondent maintains that Villeda was encouraging his work crew to slow down and not to work so hard. If this were so, it is inexplicable why Villeda was not immediately fired. I find that the record does not support Respondent’s assertion. Accordingly, Respondent, not having sustained its burden, I find that it violated the Act by failing to recall Villeda.

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4. Failure to Recall Vasquez

Vasquez attended all of the Union meetings, handed out Union cards and spoke to fellow employees about Union benefits. I credit Figueroa’s testimony, who testified in a forthright manner, that at a meeting of foremen, Pilla stated that Vasquez would not return to the company. I find that pursuant to *Wright Line, supra*, General Counsel has made a *prima facie* showing sufficient to support the inference that Vasquez’ Union activities were a motivating factor in Valcourt’s decision not to recall Vasquez.

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Bitten testified that Vasquez did not train a junior employee but instead was just “standing there” without helping the other employee. He also stated that he did not receive any “actual complaints” concerning Vasquez. Bitten testified that he found Vasquez’ behavior “totally unacceptable”. Yet, Vasquez was not terminated. I find that Respondent has not sustained its burden of showing that the “same action would have taken place even in the absence of the protected activity”. *Wright Line, supra*. Accordingly, General Counsel, having satisfied her burden, I find that Respondent’s failure to recall Vasquez violated the Act.

5. Alleged Discharges

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The complaint alleges that Rodriguez was discharged because of his activities on behalf of the Union. Rodriguez testified that he went to the office on January 21, 2004 and asked Bitten permission that he not work that day because of the cold and that his hands hurt. Straube appeared to me be a particularly credible witness and I credit his testimony. When he testified, he was no longer working for Respondent and I believe he was a disinterested witness. He testified that Rodriguez stated that he did not want to stay with the company but instead wanted to collect unemployment compensation. Bitten asked him to remain an employee. Instead, Rodriguez drove his van into the warehouse, unloaded it and handed the keys to Bitten. Straube testified that Rodriguez did not say his hands hurt.

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I do not believe that General Counsel has made a showing that Rodriguez was discharged. If, however, it be deemed otherwise, pursuant to *Wright Line, supra*, I believe that Respondent has satisfied its burden and shown that Rodriguez quit. Accordingly, the allegation is dismissed.

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The complaint also alleges that Hernandez was unlawfully discharged. The record shows that Onop tried to call Hernandez several times for work but was unable to contact him. In her brief, General Counsel states that Hernandez was not “a known Union supporter.”

5 Instead, General Counsel argues that after his injury Hernandez was driven to the hospital by Villeda. While General Counsel maintains that Pilla stated that Villeda was the “f____ Union guy”, I have not credited that testimony. I do not believe that pursuant to *Wright Line, supra*, General Counsel has satisfied her burden of showing that protected conduct was a motivating factor in Respondent’s decision to terminate Hernandez. Even, however, if it be deemed that General Counsel has made a *prima facie* showing, I believe that Respondent has satisfied its burden of showing that the “same action would have taken place even in the absence of the protected conduct”. I have found that Hernandez was terminated on January 20, 2004 because Respondent was unable to contact him to come to work. Accordingly, the allegation is dismissed.

6. *Johnnie’s Poultry Allegation*

15 General Counsel argues that on June 24, 2004 Respondent violated the Act by not supplying to Delgado the safeguards detailed in *Johnnie’s Poultry*, 146 NLRB 770, 775 (1964), enf. denied, 344 F. 2d 617 (8th Cir. 1965). Piesco is an attorney who formerly represented Valcourt. He testified in a forthright manner and I credit his testimony. Based upon his testimony, I find that Piesco told Delgado that his participation was voluntary and that no reprisals would be taken. Piesco told Delgado that he would like to question him about an unfair labor practice charge. Delgado replied that he would not answer any questions unless a Union representative was present. Piesco asked him again and Delgado gave the same response. The conversation lasted approximately two minutes and Piesco then told Delgado that he may return to work. Piesco did not ask any substantive questions and Delgado provided no substantive information.

25 Based upon all of the circumstances, I find that Piesco did not engage in unlawful interrogation. He advised Delgado that his participation was voluntary and that no reprisals would be taken. No substantive questions were asked and no substantive information was given. Accordingly, the allegation is dismissed. See *Rhee Bros.*, 343 NLRB No. 80, slip op. at 1 (2004).

7. Section 8(a)(1) Allegations

35 The complaint alleges that in December 2003 Pilla unlawfully interrogated Hernandez by asking him why he was with Villeda, when Villeda is the “f____ Union”. Pilla denied having asked such a question. Pilla spoke in English and Hernandez does not understand English. I credit Pilla’s testimony. It is unlikely that Hernandez understood Pilla since Pilla spoke in English. The allegation is dismissed.

40 Figueroa testified that during a safety raffle meeting Pilla said “only I can give you a raise, not the Union”. None of the approximately 50 witnesses who purportedly heard this statement was called upon to corroborate Figueroa’s testimony. Pilla denied having made the statement and testified that “the raffle was a fun thing to do for the guys. It was a positive thing...”. It is unlikely that Pilla would have made such a negative statement during a “fun” time. I credit Pilla’s testimony that he did not make such a statement. In addition, the facts of this case are similar to the situation in *Fern Terrace Lodge*, 297 NLRB 8 (1989), where the Board held that such an expression is not violative of the Act. See also *Custom Window Extrusions*, 314 NLRB 850, 851 (1994). Accordingly, the allegation is dismissed.

50 The complaint also alleges that in December 2003 Pilla threatened an employee with job loss because of his support of the Union. General Counsel alleges that after Hernandez’ injury, Pilla told him that he must report to work. The doctor’s note in the record indicates that the

doctor said "return to work-light duty". While Hernandez testified that he was told not to work for one week, I credit Pilla's testimony, which is supported by the doctor's note. Accordingly, the allegation is dismissed. The complaint also alleges that on May 19, 2004 Pilla told employees that they were being laid off because of their Union activities. Delgado testified that on May 19, 2004 he shook hands with some of the employees on the picket line. He testified that Pilla said "f___ Carlos Villeda and Carlos Rodriguez". Pilla then continued, "no more work". Delgado testified that Pilla spoke in Spanish. I credit Pilla's testimony that he did not make the statement and that he does not speak Spanish. In addition, as Delgado conceded, there was no more work at that location "as a result of the pickets, the company no longer had that project". Accordingly, the allegation is dismissed.

Conclusions of Law

1. Respondent is an employer engaged in 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 failing to recall Villeda, Vasquez and Quintanilla because of their Union activities, Respondent has engaged in unfair labor practices within the meaning of 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.

5. Respondent did not violate the Act in any other manner alleged in the complaint.

The Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, having refused to recall Quintanilla, Villeda and Vasquez, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of the refusal to recall to the date of proper offers of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³

ORDER

The Respondent, Valcourt Exterior Building Services of New Jersey, L.C., its officers,

³ 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.

agents, successors, and assigns, shall

1. Cease and desist from:

5 (a) Refusing to recall employees because they have engaged in Union activities.

(b) 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.

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

(a) Within 14 days from the date of the Board’s Order, offer Carlos Villeda, Ramon Quintanilla and Jose Vasquez full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

20 (b) Within 14 days from the date of the Board’s Order, remove from its files any reference to the unlawful refusals to recall, and within 3 days thereafter notify the employees in writing that this has been done and that the refusals to recall will not be used against them in any way.

25 (c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

30 (d) Within 14 days after service by the Region, post at its office in Elizabeth, NJ copies of the attached notice marked “Appendix.”⁴ Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent 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. In the event that, during the pendency of these proceedings, the Respondent has gone out of business, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 1, 2004.

45 (e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

50 ⁴ 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.”

(f) IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C., September 26, 2006.

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D. BARRY MORRIS
Administrative Law Judge

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APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities

WE WILL NOT refuse to recall or otherwise discriminate against any of you for supporting Painters District Council 711 or any other union.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Carlos Villeda, Ramon Quintanilla and Jose Vasquez full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any references to the unlawful refusals to recall, and WE WILL, within 3 days thereafter, notify the employees in writing that this has been done and that the refusals to recall will not be used against them in any way.

**VALCOURT EXTERIOR BUILDING SERVICES
OF NEW JERSEY, L. C.**

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

20 Washington Place, 5th Floor
Newark, New Jersey 07102-3110
Hours: 8:30 a.m. to 5 p.m.
973-645-2100.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 973-645-3784.