

**Yusuf Mohamad Excavation, Inc. and International  
Union of Operating Engineers, Local No. 673,  
AFL-CIO, Case 12-CA-12053**

12 May 1987

**DECISION AND ORDER**

**BY CHAIRMAN DOTSON AND MEMBERS  
STEPHENS AND CRACRAFT**

On 30 January 1987 Administrative Law Judge Irwin Kaplan issued the attached decision. The Charging Party filed exceptions and a supporting brief, and the Respondent filed a brief in opposition.

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 briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions and to adopt the recommended Order.

**ORDER**

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

<sup>1</sup> The Charging Party 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.

*Eduardo Soto, Esq.*, for the General Counsel.  
*Dennis F. Fountain, Esq. (Belleville & Aspinwall, P.A.)*, of Longwood, Florida, for the Respondent.  
*Travis E. Woodham*, of Orlando, Florida, for the Charging Party.

**DECISION**

**STATEMENT OF THE CASE**

IRWIN KAPLAN, Administrative Law Judge. This case was tried before me in Orlando, Florida, on 15 September 1986. The underlying charges were filed by the International Union of Operating Engineers, Local 673, AFL-CIO (Charging Party or Union) on 20 May 1986 and gave rise to a complaint and notice of hearing dated 29 July 1986 (amended at the hearing).<sup>1</sup>

In essence, it is alleged that Yusuf Mohamad Excavation, Inc.<sup>2</sup> (Respondent), violated Section 8(a)(3) and (1) of the National Labor Relations Act (the Act) by laying off seven employees on 14 May 1986 because of their union activities. Further, it is alleged that Respondent independently violated Section 8(a)(1) of the Act by a

statement to one of the laid-off employees linking the layoffs to the union activities.

The Respondent filed an answer conceding, *inter alia*, jurisdictional facts and the supervisory and agency status of certain individuals but denying that it committed any unfair labor practices. According to the Respondent, the decision to lay off employees was predicated solely on business considerations unrelated to union activities. The Respondent noted, *inter alia*, that the alleged discriminators were separated "contemporaneously with the discharge of other employees as a result of a work slow down."

Based on the entire record, including my observations of the demeanor of the witnesses as they testified, and after careful consideration of the posttrial briefs, I make the following

**FINDINGS OF FACT**

**I. JURISDICTION**

The Respondent, Yusuf Mohamad Excavation, Inc., is a Florida corporation engaged in the building and construction industry as a road building and land development contractor and maintains an office and place of business in Orlando, Florida. During the past 12 months, the Respondent, in connection with its aforementioned business operations, purchased and received at its Orlando place of business products, goods, and materials valued in excess of \$50,000 directly from points located outside the State of Florida. It is admitted, the record supports, and I find, that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

It is admitted, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

**II. THE ALLEGED UNFAIR LABOR PRACTICES**

**A. Background and Sequence of Events**

The Respondent has been engaged in the business of land clearing and general excavation in the Orlando, Florida area for the past 12 years. Yusuf Mohamad is Respondent's owner and president. According to Mohamad, because a major customer, the Anden Group of Florida (Anden) had instructed him to hold off further excavation work on a property known as the "Lindfield job," he decided to lay off a number of employees, mostly heavy equipment operators on 14 May 1986.<sup>3</sup>

Mohamad testified that after working on the Lindfield job for about 2 days, he was called by Ralph Spano, an owner of Anden, and told: "[W]e've got problems, please stop. Remove the equipment from the job." A followup letter dated 9 May from Spano to the attention of Nick Luxon, Mohamad's assistant in charge of contract negotiations stated as follows:

<sup>1</sup> At the hearing, par 5 of the complaint was deleted.

<sup>2</sup> The name of the Employer appears as amended at the hearing.

<sup>3</sup> All dates hereinafter refer to the year 1986, unless otherwise indicated.

I regret to inform you that the subdivision known as Lindfield P.U.D. scheduled to start on or before April 30, 1986, has been rescheduled to a later date.

Per our discussion, and my discussion with Mr. Mohamad, I have elected not to continue any site work until all the situations that are troubling this project are resolved. [R. Exh. 2.]

The Lindfield job involved a substantial amount of "dirt work" and, as such, the use of operators and heavy equipment, i.e., dozers. According to Mohamad, he had planned to employ his operators from his Lake Buena Vista project (Buena Vista) where, assertedly, the bulk of the clearing and dirt work was completed, on the Lindfield job. Thus, when the Lindfield project was put on hold, Mohamad, assertedly, did not have enough work to maintain those operators and instructed James Long, the general superintendent, to lay them off. Long testified that he in turn told his several area superintendents, on a one-to-one basis, that they had to reduce their crews and to select employees for layoffs where the work was least needed.<sup>4</sup> Patrick Crowe, the area superintendent at the Buena Vista location, Respondent's largest project, selected the employees (majority of the alleged discriminatees) laid off from that job.<sup>5</sup>

The union activity began in early May, approximately 2 weeks before the layoffs. Then, some eight employees had expressed among themselves their unhappiness with working conditions, which led one of them, Keith Dominy, on 2 May, to contact the Union and arrange a meeting. The meeting was held on 5 May after work about 5:30 p.m. at the Waffle House, across the street from the Buena Vista jobsite. There, Dominy, along with fellow operators Donald Graham and Richard Uber met with Union Business Agent Travis (Ed) Woodham and they discussed union representation. Dominy testified that over the next few days he obtained signed union authorization cards from eight employees across the street from the jobsite at a Texaco station.<sup>6</sup>

On 12 May, a second meeting with Business Agent Woodham was held at a 7-Eleven store, a half mile from the jobsite. At this meeting, Dominy, Graham, and Uber were joined by employees Walter Whitebirch, Roger Owens, and Michale Desmondez. All of them with the exception of Desmondez were laid off on 14 May.<sup>7</sup>

According to the General Counsel, on 15 May, Superintendent Crowe acknowledged that the employee layoffs were linked to their union activities. Whitebirch tes-

tified that he met Crowe on 15 May (1 day after the layoffs), around 4:30 p.m., at the 7-Eleven store and initiated a brief conversation. As further testified by Whitebirch, he told Crowe that he knew the employees were fired because of the union cards and the latter in response stated, "Yes, if I knew about the Union before anybody else in the Company, that I could have straightened it out and everybody would have kept their jobs." Whitebirch then assertedly asked Crowe whether he would hire him back, to which the latter responded, "No, there wasn't no [sic] work." Crowe denied any such conversation with Whitebirch or ever having made any reference to the Union. Crowe acknowledged, however, that on a number of occasions after the layoffs, he and Whitebirch passed each other going in and out of the 7-Eleven store, where they "probably" exchanged greetings.

After Whitebirch was laid off, he obtained other employment immediately next to his former jobsite. He was laid off from that job on 30 May. According to Whitebirch, that same day he had a conversation with Mohamad's brother, Shake, who told him that Respondent had obtained two new accounts and would be rehiring employees. Whitebirch testified that Shake asked him whether he had signed a union and, when Whitebirch denied that he had, Shake suggested that Whitebirch approach Long or Crowe about getting his job back.<sup>8</sup> Later that day, Whitebirch approached Long at the Buena Vista project and asked him if the Company was hiring. Long assertedly asked Whitebirch his name and whether he signed a union card. Whitebirch testified that when he answered in the negative, Long reached into a trunk and pulled out a piece of paper and inquired of Whitebirch why he had signed a union card. According to Whitebirch, although he did not see the contents on the piece of paper, he had guessed that his name was listed as a union card signer and, as such, he explained to Long that he signed because he had not received a wage increase. Whitebirch was assertedly told by Long that the Company was not hiring. According to Long, on the occasion in question, Whitebirch asked him whether he could get a job but as he, Long, did not then know whether the Company could use Whitebirch, he referred Whitebirch to Crowe.<sup>9</sup>

### B. Discussion and Conclusions

The General Counsel, citing the Board's causation test in discriminatory 8(a)(3) discharge cases, as set forth in *Wright Line*,<sup>10</sup> contends that he had made a prima facie showing to support an inference that the "employees' union activities were a motivating factor in Respondent's decision to lay them off." This, assertedly having been accomplished, the General Counsel also contends that the Respondent failed to meet its burden by showing that the disputed layoffs would have occurred notwithstanding

<sup>4</sup> Respondent employed approximately 100 employees on some 8 or 9 projects

<sup>5</sup> The record disclosed that 10 employees had been laid off between 14 and 17 May including the 7 alleged discriminatees and 2 other employees had resigned (Jt. Exh. 1)

<sup>6</sup> Dominy named only seven of the card signers: himself, Donald Graham, Gordon Martin, Roger Owens, Richard Uber, Wally Whitebirch Jr, and an employee named Roy. Dominy may have inadvertently omitted the name of Gregory Nelson, an alleged discriminatee. The record is silent otherwise regarding Nelson's union activity. As for the employee named Roy, the record disclosed that this individual had to be Roy Brunner. (See Jt. Exh. 1)

<sup>7</sup> It also appears that all of them with the exception of Desmondez, had signed union authorization cards and are alleged discriminatees. (See fn. 6, supra.) Although Brunner also signed a union card and was laid off on 14 May, he is not an alleged discriminatee

<sup>8</sup> Mohamad's brother "Shake" is not alleged to be a statutory supervisor or agent of Respondent. The individual referred to as "Shake," did not appear as a witness.

<sup>9</sup> It is not alleged that Long's comments to Whitebirch on the occasion in question, independently constituted a violation of Sec. 8(a)(1)

<sup>10</sup> 251 NLRB 1083 (1980).

ing the protected or union activity, as required under *Wright Line*.<sup>11</sup>

In assessing whether the General Counsel has established a prima facie case as a threshold matter, it is noted that the record disclosed certain critical elements tending to support the allegations. Thus, the record clearly revealed that at least six of the seven alleged discriminatees had engaged in union activities shortly before they were laid off. These same employees, inter alia, had signed union authorization cards and attended a union meeting near the jobsite only 2 days earlier. Although Respondent informed these employees that they were laid off for lack of work, it is noted, that they had worked overtime each of the preceding 3 weeks.

As for other critical elements, "knowledge" and "animus," the General Counsel relies almost entirely on statements assertedly made by Crowe and Long to Whitebirch, after the layoffs had occurred. It is noted, however, that the testimony of Crowe and Long, if credited, reflect that the statements ascribed to them could not have been made. For example, Crowe denied having a conversation with anyone about the Union. In particular, Crowe denied that he had any conversation with Whitebirch after the layoffs. According to Crowe, he first learned about the Union in preparation for the instant trial. Long, for his part, admitted that Whitebirch approached him for a job subsequent to the layoffs, but asserted that he merely referred him to Crowe.

As noted previously, Whitebirch testified that he met Crowe at the 7-Eleven store the day after the layoffs and that Crowe confirmed that the employees were discharged because of their union activities. According to Whitebirch, Crowe told him that if he knew about the Union before the others (presumably, Mohamad and Long), "he could have straightened it out and everybody would have kept their jobs." I find it implausible and highly unlikely that Crowe made this statement, noting particularly that Whitebirch also testified that immediately following Crowe's statement he, Whitebirch, asked about a job and was told by Crowe that he could not hire him because there was not any work. In rejecting Whitebirch's testimony, it is noted that it is somewhat incongruous for Crowe to confirm that the Union was the core of the problem and in the next breath state that there was not any work. Contrary to the General Counsel, I also fail to discern how "Whitebirch's testimony is corroborated by Crowe's admission that he had seen Whitebirch at the 7-Eleven store many times after May 14." Crowe admitted only that he saw Whitebirch at the store on a number of occasions and that they had exchanged greetings; he denied that he conversed with Whitebirch. The fact that Crowe saw Whitebirch frequently at the 7-Eleven store, without more, does not mean that Crowe would confide in Whitebirch or that his testimony corroborated Whitebirch's in any meaningful sense. Such chance meetings between them could be anticipated particularly where, as here, Respondent's jobsite as well as Whitebirch's home and work location were all in the same immediate area of the 7-Eleven store in question.

On 30 May, Whitebirch was laid off from his new job. According to Whitebirch's uncorroborated testimony, at some unspecified time that day, he learned from Mohamad's brother Shake, that Respondent had obtained two new accounts and would rehire employees. Shake assertedly asked Whitebirch if he had signed a union card, which the latter denied, and Shake then assertedly referred Whitebirch to Long or Crowe.

As noted previously, Shake is not alleged to be a statutory supervisor or agent. In fact, the record is devoid of any evidence regarding Shake's connection with the Respondent. Still, the General Counsel urges that an adverse inference is warranted against the Respondent for its unexplained failure to call Shake as a witness, citing *NLRB v. Cornell of California*, 577 F.2d 513, (9th Cir. 1978), enfg. 222 NLRB 303 (1976), and *KBMS, Inc.*, 278 NLRB 826, 848-849 (1986). These cases are factually distinguishable and inapposite. In both cases, the Respondent relied on employee statements of disaffection as a basis for withdrawing recognition from an incumbent union. Here, unlike the cited cases, the General Counsel relies on the uncalled witness' statement as binding against Respondent. In these circumstances, in which the General Counsel has not made an effort to explain his own failure to call Shake as a corroborative witness, and noting particularly an absence of any supervisory or agency allegation, I find that an adverse inference is improper. Compare *Wayne Construction*, 259 NLRB 571, fn. 1, par. 2 (1981), in which the Board refused to draw an adverse inference noting that there was no basis for inferring that a co-owner was not equally available to both the Respondent and the General Counsel.

Having rejected Whitebirch's testimony regarding his conversation with Shake on 30 May, as binding against Respondent, I also find little reason to credit his account of his subsequent conversation with Long that same day. Although it is undisputed that Whitebirch approached Long about his job, the testimony regarding what transpired between them on that occasion in virtually all other respects is in conflict.

In rejecting Whitebirch's version in material respects, it is noted that the General Counsel has largely substituted opinion, conjecture, and speculation for probative evidence. For example, according to Whitebirch, after he denied signing a union card (in response to Long's inquiry), Long asked Whitebirch his name and pulled out a sheet of paper and questioned Whitebirch why he had signed a union card despite the aforesaid denial. The General Counsel characterized the sheet of paper as a "hit list" of union supporters. In support thereof, the General Counsel noted that Crowe had compiled a list of names of employees to be laid off. However, as noted previously, the record is devoid of any credible evidence of Crowe's knowledge of union activity.<sup>12</sup> I also find

<sup>12</sup> Respondent's "Employment Termination" forms indicate that each of the alleged discriminatees was recommended to be rehired (R. Exhs. 1(a)-(g)). Most of these employees were supervised by Crowe. These records tend to cast further doubt on the General Counsel's claim that Crowe prepared a "hit list" of union supporters who were not to be recalled.

<sup>11</sup> Id. at 1089

plausible and credible Crowe's explanation for delineating at that time the best and needed employees from those less needed to meet Respondent's exigencies. In any event, there was no showing that the piece of paper assertedly referred to by Long was the same list compiled by Crowe. Significantly, in terms of discounting Whitebirch's testimony as probative evidence is that he admittedly never saw what was on the piece of paper in question.

According to Long's testimony (implicitly), he did not have to refer to any list of names because he had recognized Whitebirch from his earlier employment. In these circumstances, noting also an absence of any other animus or knowledge ascribed to Long, I find no cogent basis to reject his assertion that he recognized Whitebirch, particularly because the latter had left Respondent's employ only 2 weeks earlier.

In the instant case, it is noted, that virtually all the union activity took place off the jobsite. Although the Board has not hesitated to infer Respondent's knowledge of employees' protected activities from the surrounding circumstances in appropriate cases, the evidence does not support such an inference. Compare, *Dr. Frederick Davidowitz, D.D.S.*, 277 NLRB 1046, 1049 (1985) (the respondent, conducted a series of "coercive meetings" on the first working day after the discharge to prevent the union from organizing); *Matai (U.S.A.) Inc.*, 281 NLRB 327, 332 (1986) (while the respondent's supervisors had denied that they were told about the alleged discriminatee's union activities, they admitted that they were told that union cards were passed around and that union supporters were identified).<sup>13</sup>

Aside from the General Counsel's failure to demonstrate by credible evidence that Respondent harbored anti-union sentiments or that Respondent had knowledge of the employees' union activities, the record disclosed still other factors tending to militate against a prima facie case. Thus, in addition to the seven alleged discriminatees laid off on 14 May, two other employees, Roy Brunner and Randy Ellis were also laid off for lack of work that same day and five other employees left Respondent's employ shortly thereafter. (Jt. Exhs. 1(a)-(e)). Collectively, this group represented Respondent's largest reduction in force; the vast majority of them, including the alleged discriminatees, were operators. In this regard, it is noted, that the Respondent did not hire or rehire another operator until 2 June when Brunner, a union card signer, was rehired. Ellis, on the other hand, was not involved in union activities and has not been recalled. Operator Gregory Nelson was also laid off on 14 May and has not been recalled. Nelson, an alleged discriminatee did not testify nor is there any evidence that he engaged in union activities.

<sup>13</sup> In *Davidowitz*, the Board also noted an active "rumor mill" or "grapevine" so that hardly anything of significance escaped management's attention

The record disclosed that Respondent hired or rehired 17 equipment operators between 4 June and 3 September, but did not recall any of the alleged discriminatees. However, the record is largely silent regarding their overall qualifications or for which of Respondent's eight or nine projects they were assigned to work. Further, the record disclosed that after the layoffs, relatively little work was performed by equipment operators at the Buena Vista jobsite, where the alleged discriminatees had been hired primarily to work. In any event, the record is far from clear that Respondent maintained any formal or consistent policy regarding recalling laid-off employees.

Although Respondent's reasons for its actions are not free of doubt,<sup>14</sup> the Board has observed that even when the record raises "substantial suspicions" regarding employee discharges, the General Counsel is not relieved of "the burden of proving that Respondent acted with an illegal motive." *Affiliated Hospital Products*, 245 NLRB 703 fn. 1 (1979). Here, the record failed to establish any animus or knowledge of union activities on the part of Respondent. This, as well as the other factors noted above, persuades me that the General Counsel has failed to prove, prima facie, that Respondent acted with an "illegal motive." Accordingly, I shall recommend that the allegations be dismissed in their entirety.

#### CONCLUSIONS OF LAW

1. The Respondent, Yusuf Mohamad Excavation, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Union of Operating Engineers, Local No. 673, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. The General Counsel has not proved by a preponderance of the credible evidence that Respondent laid off employees in violation of Section 8(a)(3) and (1) of the Act.

4. The General Counsel has not established that Respondent independently violated Section 8(a)(1) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>15</sup>

#### ORDER

The complaint is dismissed in its entirety.

<sup>14</sup> The timing of the layoffs, inter alia, is not free of suspicion coming 2 days after a union meeting. On the other hand, the layoffs followed the shutdown of the Lindfield project, as ordered by Respondent's customer (Anden) and this project has not resumed operations. According to Mohamad, he had planned on using the Buena Vista operators (the laid-off employees) on the Lindfield project

<sup>15</sup> 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