

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

MICHAEL R. BUTTRAM, A SOLE PROPRIETORSHIP
d/b/a BLUE DOT MECHANICAL INSULATION and/or
BLUE DOT INSULATION CO.

and

Case 8-CA-38708

INTERNATIONAL ASSOCIATION OF HEAT
AND FROST INSULATORS AND ALLIED
WORKERS, LOCAL #41, a/w INTERNATIONAL
ASSOCIATION OF HEAT AND FROST
INSULATORS AND ALLIED WORKERS

Rudra Choudhury and Gregory M. Gleine, Esqs., for the General Counsel.

Michael Buttram, Pro Se, for the Respondent.

Marilyn Widman, Esq., (*Allotta, Farley & Widman, Toledo, Ohio.*) for the Charging Party.

DECISION

Statement of the Case

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Lima, Ohio, on November 17 and 18, 2010. International Association of Heat and Frost Insulators and Allied Workers, Local 41, "the Union," filed the initial charge in this proceeding on December 14, 2009.¹ The General Counsel issued a complaint on March 30, 2010.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Respondent and the Charging Party, I make the following

Findings of Fact

I. Jurisdiction

Respondent is a sole proprietorship with an office in Lima, Ohio. Respondent at all material times provided more than \$50,000 worth of services to entities which are engaged in interstate commerce. It also receives materials worth more than \$50,000 from entities within the State of Ohio which receive materials from outside of Ohio. Respondent admits and I find that it

¹ The Union filed an earlier charge, 8-CA-38632 on October 26, 2009, which concerned one of the allegations in this case, that on September 9, 2009, Michael Buttram threatened to kill Terry Bailey if he joined a union. The Union apparently withdrew this charge. G.C. Exh. 5. The fact that this charge did not allege that Respondent terminated Terry Bailey in September 2009, as does the charge filed on December 14, is another factor, albeit a minor one, for my finding that Respondent did not terminate Bailey's employment in September.

is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union, International Association of Heat and Frost Insulators and Allied Workers, Local 41, is a labor organization within the meaning of Section 2(5) of the Act.

5 II. Alleged Unfair Labor Practices

Respondent Michael Buttram is in the heating, air conditioning, ventilation and cooling business, primarily installing insulation material. Since February 2009, Buttram has operated under the name Blue Dot Insulation Company. Prior to February 2009, he operated under the name Blue Dot Mechanical Insulation Company. From February through September 2009, Respondent had two employees, Anthony Schneider and the alleged discriminatee, Terry Bailey. Bailey has worked for Respondent on and off since 2002.

15 In April 2009, Bailey and Schneider were performing work for Respondent at the Wright State University campus in Celina, Ohio. Ryan Wiersema, District Organizer for the Union, visited this jobsite on April 6, 2009. He left some union literature for Respondent's employees.

Terry Bailey called Wiersema about a week later. He and Schneider met with Wiersema on April 20. Bailey took a union evaluation test on July 9, 2009. He became a member of the Union on August 20 and was sworn in and began paying union dues on September 1.

Bailey continued working for Respondent after he became a union member. He worked for Respondent on Wednesday, September 9, 2009 at the Meadowdale High School in Dayton, Ohio. Bailey testified that on the evening of September 9, he went to Buttram's home, which is also his office, to return Respondent's van.

Bailey testified that Buttram opened his cell phone and read to Bailey a text message advising Buttram that Bailey had joined the Union and was going to try to organize Blue Dot. According to Bailey, Buttram became very angry. He told Bailey that he had previously told him not to ask him for more money or "talk about union again." Then, according to Bailey, Buttram said, "get the fuck out of my house before I kill you," Tr. 152-57.

Bailey testified that as he left, he and Buttram argued as to whether or not Bailey was quitting his job or whether he was being fired. However, Bailey testified that Buttram told him that he no longer had work for him and that he did not work for Buttram or Blue Dot after September 9, Tr. 157-59.

Buttram testified that this conversation never took place and that Bailey worked for him on Monday – Wednesday, September 21, 22 and 23, 2009. Thus this case turns on resolving the credibility of the testimony of Bailey, on the one hand, as buttressed by union organizer Wiersema and union business manager, David Marvin, and Buttram on the other. For the reasons stated below, I decline to credit Terry Bailey's testimony.

I find that Bailey worked for Respondent on September 9 and 10, and September 21, 22, and 23. Michael Buttram tried to contact Bailey on September 24, but was unable to do so. It is uncontroverted that at 7:00 a.m., September 24, 2009, Bailey reported to work for a union contractor. I therefore dismiss complaint paragraphs, 6(a) and 7.

50

*The basis for my credibility rulings**The Consistency of Michael Buttram's records*

5 I have doubts as to Michael Buttram's credibility in some respects. Most significantly, the position statements filed by the attorney then representing Respondent in January and March 2010 are clearly inconsistent with Buttram's trial testimony. Nevertheless, I find that the General Counsel did not prove that Respondent terminated Terry Bailey's employment on September 9, 2009, as alleged.

10 Respondent's testimony and records support Michael Buttram's contention that he did not fire Terry Bailey on September 9, and that the conversation that Bailey testified to on that date did not occur. Moreover, Buttram's contention that Bailey simply quit working for Respondent when the Union found a job for him is far more plausible than are those of the
15 General Counsel.

A January 27, 2010 position statement filed by Robert Dunlevy, an attorney then representing Respondent, contains several representations that are inconsistent with Respondent's testimony in this case, GC Exh. 8. It states that Bailey failed to show up for work
20 at the Wright State University project in Celina, Ohio on about September 15. The statement does not allege that Bailey worked for Respondent September 21, 22 and 23. However, documents attached to the position statement reflect, consistent with R. Exhs. 1, 2 and 6, that Respondent paid Bailey \$498.24 on September 11, and \$634.86 on September 25.

25 The position statement also denies that Buttram sent Bailey text messages as alleged in the Complaint. During the instant hearing, Buttram admitted sending these text messages to Bailey.

30 However, Respondent's pay stubs and its prevailing wage reports, are completely consistent with its position. I would note that neither the General Counsel nor the Union has introduced any evidence that Respondent's prevailing wage reports, R. Exh. 6, are either inaccurate or not authentic. Indeed, Union District Organizer, Ryan Wiersema, testified that he had reviewed these reports prior to the instant hearing in connection with Terry Bailey's prevailing wage claim against Respondent. Wiersema did not claim that the reports were not
35 authentic nor did he contend that they were inaccurate, Tr. 378-79. These documents show that Bailey worked for Respondent at the Meadowdale High School in Dayton on September 9, 10, 21 and 23.²

40 R. Exhibit 1, a pay stub for the week ending September 11, indicates that Bailey worked 16 hours for Respondent during the week of September 7-11 and was paid \$498.24.³ Respondent's prevailing wage report, R. Exhibit 6, indicates that Bailey worked on Wednesday,

45 ² The General Counsel's brief at page 15 states, "Respondent's reliance upon these records to demonstrate that Bailey worked between September 11 through September 24th is, at best, questionable." This overlooks the fact that it is General Counsel's burden to prove that Respondent terminated Bailey.

50 ³ Bailey testified that he was not paid for the work he performed during the week ending September 11. I do not credit this testimony. For one thing, if Bailey was not paid for work he performed I would expect to see some correspondence in this record to that effect. I would also note that when testifying that he did not sign the pay stub for the week ending September 11, 2009 Bailey did not indicate that the Gross Pay figure was incorrect, Tr. 412.

September 9 and Thursday, September 10, 2009 at the Meadowdale High School, a prevailing wage project. Bailey's gross wages for that week are consistent with two days work at the prevailing wage rate of \$31.14 per hour. This consistency also lends great weight to Respondent's contention that Bailey's log, GC Exh. 26, is either inaccurate or incomplete. That log indicates that Bailey only worked for Respondent one day that week, which would be completely inconsistent with a gross wage of \$498.⁴

Similarly, Respondent's pay stub for Bailey for the week of September 21-25 is consistent with its prevailing wage report. The pay stub indicates Bailey was paid \$634 on September 25. The prevailing wage report indicates that Bailey worked at Meadowdale on September 21 and September 23. When you subtract \$498 from \$634, the result is \$136, which is consistent with Buttram's claim that he paid Bailey for 8 hours of work at \$17 per hour on a non prevailing wage project, the Cridersville School, that same week.

Finally, Buttram's contentions are supported by his telephone records. They show that he spoke with Bailey on the telephone for 3 minutes beginning at 4:06 p.m. on September 21 and for 3 more minutes at 6:34 a.m. September 23. Buttram, at least attempted to call Bailey several times on the afternoon of September 24. There is no evidence as to what was discussed in these telephone calls, but I deem the fact that these calls were made to be inconsistent with the General Counsel's contention that Buttram fired Bailey on September 9.

Terry Bailey's credibility

Michael Buttram demonstrated a generalized animus to unions and to the Charging Party Union in particular. He does not seem to understand that the National Labor Relations Act gives his employees the right to form, join or assist a union and to choose representatives to bargain with him on their behalf. He does not seem to understand that if his employees wish to have a union represent them in their dealings with their employer that they are not obligated to work for some other employer.

I also do not find Buttram's testimony in this case to be entirely credible. However, the General Counsel bears the burden of proof with regard to the violations alleged in this case. I find the General Counsel's evidence in support of the alleged discriminatory termination to be completely incredible.

Terry Bailey testified at Tr. 198 that he occasionally signed Respondent's pay stubs when being paid in cash. However, at Tr. 400 - 413, he testified that his signature appears on 24 of these pay stubs between March 13, 2009 and September 25, 2009. He denied he signed five other pay stubs with "Terry Bailey" handwritten on the bottom. I find that Bailey signed every single pay stub every time he was paid after March 13.

Moreover, I discredit his testimony that he did not sign the pay stubs of June 12, July 10, September 4, September 11 and September 25. Bailey testified that he did not sign his name because the "ley" in his last name was decipherable on these documents and that when he signed his name, he ran the "ley" together in a straight line. However, the signatures on the pay stubs he admits to signing look to the nonexpert eye to be virtually indistinguishable from those he denies signing. For example, the very distinctive "T" in Terry is the identical on all these documents.

⁴ It strikes me as implausible that Buttram would fabricate a pay stub indicating that he owed Bailey wages for a day, September 10, that Bailey did not work.

Finally, I would note other troublesome inconsistencies in the General Counsel's evidence. Ryan Wiersema testified that Bailey called him on September 15, to tell Wiersema that he had been fired along with Anthony Schneider, Tr. 373-75, Union Exh. 1. Bailey's testimony regarding his confrontation and termination by Buttram on September 9, did not indicate that Schneider was present.⁵ Moreover, Bailey did not testify about calling Wiersema on September 15. He testified that he called Wiersema on September 17, after Bailey stopped by his house. According to Bailey on September 17, Buttram talked to Bailey's mother; not to Bailey.

Business Manager David Marvin testified that Bailey called him on September 9, to inform Marvin that he'd been terminated by Blue Dot, Tr. 446. The General Counsel elicited no such testimony from Bailey. Marvin did not testify that Bailey told him that Buttram had threatened to kill him.

Wiersema, on the other hand, testified that he talked to Bailey on September 9, but did not testify that Bailey told him that he'd been terminated; only that Buttram threatened to kill Bailey. Bailey did not testify that he called Wiersema on September 9. Buttram's alleged termination of Bailey on September 9, appears inconsistent with Wiersema's testimony, the Union's failure to make such an allegation in charge 8-CA-38632 filed on October 26, 2009, as well as Respondent's records. Finally, if Bailey told Marvin on September 9 that he had been fired, he would not have had to tell Wiersema the same thing on September 15. Thus, I do not credit either the testimony of Wiersema or Marvin.

Allegations of Violations Subsequent to September 9

Complaint paragraph 6(b)

On November 6, 2009, Michael Buttram sent the following text message to Terry Bailey:

Don't let me catch u out and about, and watch ur back around lima

On the basis of Buttram's testimony at Tr. 269-70, I find that he sent this text either because he was angry at receiving charge number 8-CA-38632, which was filed by union organizer Wiersema, learning that Bailey had joined the Union, or Bailey's pursuit of his claim that Respondent did not pay him what was due under the Ohio prevailing wage law. The Union also assisted Bailey with these claims. Thus, I find that Buttram violated Section 8(a)(1) in sending this text message because it is related to Bailey's joining the Union.

Complaint paragraph 6(c) and (d) and paragraph 8

Buttram and Bailey did not have any interaction between November 6, 2009 and February 9, 2010. On February 9, Michael Buttram and Terry Bailey ran into each other at a gas station/convenience store in Lima, Ohio. They exchanged words inside the store and afterwards outside. A surveillance video shows that Buttram walked over to Bailey's car. There is much in dispute as to what was said and what transpired out of view of the surveillance camera. I decline to take either Buttram's account or Bailey's account at face value. However, I find that Bailey struck Buttram in the face with his elbow. On the other hand, it is possible that

⁵ The attachments to Respondent's position statement, G.C. Exh. 8, indicate that Schneider worked regularly for Respondent through the end of 2009.

Buttram grabbed Bailey's shirt and threatened to strike him first. Buttram, who is African-American, claims that Bailey used a racial epithet. Bailey denies this. I decline to make a finding either way.

5 On February 10, Buttram sent Bailey two text messages.⁶ The first stated:

You ll get your chance

10 The second stated: U punch me and my glasses got knocked off then u jump on me a[nd] pumalled my face. I got friends everywhere

15 From Buttram's account at Tr. 271 and the surveillance video, I infer that he initiated the physical confrontation between himself and Bailey outside of the gas station on February 9. I also infer that this confrontation and the text messages that followed were related to Bailey's joining the Union and the Union's filing of unfair labor practice charges and would tend to intimidate Bailey in the exercise of his Section 7 rights. Thus, I find that Respondent violated Section 8(a)(1) as alleged in complaint paragraphs 6(c) and (d) and Section 8(a)(3), (4) and (1) as alleged in paragraph 8.⁷

20 *Conclusions of Law*

1. Respondent violated Section 8(a)(1) by sending threatening text messages to Terry Bailey that were related to Bailey's joining the Union.

25 2. Respondent violated Section 8(a), (3), (4) and (1) by initiating a confrontation with Terry Bailey on February 9, 2010.

30 3. Respondent did not terminate Terry Bailey's employment and thus did not violate Section 8(a)(3) and (1) as alleged.

Remedy

35 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.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁸

40

⁶ Buttram concedes that he sent these text messages.

45 ⁷ An adverse personnel action appears to be an unnecessary prerequisite to finding a Section 8(a)(3) and (4) violation in circumstances like the instant one, *Shirt Shed*, 252 NLRB 292, 301 (1980). The phrase "discrimination" under Section 8(a)(4) includes threats of retaliatory action, *Fuqua Homes*, 211 NLRB 399, 400 (1974).

50 ⁸ 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, Michael Buttram, a sole proprietorship, doing business in Lima, Ohio as Blue Dot Mechanical Insulation and/or Blue Dot Insulation Company, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) threatening any employee by sending them a text message or by any other means that is in any way related to their joining, forming, supporting or assisting a union.

(b) initiating a verbal or physical confrontation with any employee because they joined, formed, supported or assisted a union, or assisted a union in filing unfair labor practice charges.

(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) Within 14 days after service by the Region, post at its Lima, Ohio office copies of the attached notice marked "Appendix."⁹ Copies of the notice, on forms provided by the Regional Director for Region 8, 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 or closed the facility involved in these proceedings, 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 November 6, 2009.

In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means.

(b) 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.

Dated, Washington, D.C., January 12, 2011.

Arthur J. Amchan
Administrative Law Judge

⁹ 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."

5

10

15

20

25

30

35

40

45

50

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 I have violated Federal labor law and has ordered me 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

I WILL NOT threaten any employee by sending them a text message or by any other means that is in any way related to their joining, forming, supporting or assisting a union.

I WILL NOT initiate any physical or verbal confrontation with any employee because they joined, formed, supported or assisted a union in any way, including the filing of unfair labor practice charges with the National Labor Relations Board.

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

MICHAEL R. BUTTRAM, A SOLE
PROPRIETORSHIP
d/b/a BLUE DOT MECHANICAL INSULATION
and/or BLUE DOT INSULATION CO

(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.

1240 East 9th Street, Federal Building, Room 1695
Cleveland, Ohio 44199-2086
Hours: 8:15 a.m. to 4:45 p.m.
216-522-3716.

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, 216-522-3723.