JD–35–08
Detroit, MI

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

WILLIE MCCORMICK & ASSOCIATES, INC. and
MNS CONSTRUCTION, INC., a Single Employer

and Case 7-CA-50592

ODELL A. CLEVELAND, SR., An Individual

Michael P. Silverstein, Esq., of Detroit, MI,
for the General Counsel.
Wendy S. Alton, Esq., of Livonia, MI,
for the Respondent Employer.

DECISION

Statement of the Case

Bruce D. Rosenstein, Administrative Law Judge. This case was tried before me on April 14 and 15, 2008, in Detroit, Michigan, pursuant to a Complaint and Notice of Hearing in the subject case (complaint) issued on October 31, 2007[1], by the Regional Director for Region 7 of the National Labor Relations Board (the Board). The underlying charge was filed by Odell A. Cleveland, Sr. (the Charging Party or Cleveland), alleging that Willie McCormick & Associates, Inc. and MNS Construction, Inc. (the Respondent or Employer) has engaged in certain violations of Section 8(a)(1) of the National Labor Relations Act (the Act). The Respondent filed a timely answer to the complaint denying that it had committed any violations of the Act.

Issue

The complaint alleges that on or about April 16, the Respondent failed to recall the Charging Party to the restoration crew because he engaged in protected concerted activities.

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

Findings of Fact

I. Jurisdiction

The Employer is engaged as a contractor in the replacement of water and sewer lines and then provides landscape services to restore the lines to their original configuration. The majority of its business is performed for the City of Detroit. The Employer, during the past calendar year, in conducting its business operations derived gross revenues in excess of $1,000,000 and provided services valued in excess of $50,000 for the City of Detroit, Michigan, an enterprise directly engaged in interstate commerce. The Respondent admits and I find that it

[1] All dates are in 2007 unless otherwise indicated.

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

II. Alleged Unfair Labor Practices

A. Background and Facts

Cleveland commenced employment with the Respondent in 2003, and was hired to be part of a restoration crew that performs seeding and mulching responsibilities after water and sewer lines are replaced and new water pipes are installed. He was hired by current Foreman Kirk Alford, Sr. who he met in high school, and they have remained friends for 37 years. The restoration crew normally consists of five employees who routinely work from April to the following October or November of each year before being laid off due to the winter season. This pattern occurred during the course of Cleveland's employment and he was recalled every spring between 2004 and 2006.[2] While in layoff status, Cleveland along with other crew members are eligible for and upon application receive unemployment benefits.

In June 2006, the restoration crew members were assigned additional work outside of their regular job duties for which they were not given adequate compensation. Accordingly, the crew discussed the matter and Cleveland volunteered to contact the Laborers Union, Local 1191, to determine whether they could represent the employees for the purpose of obtaining increased benefits and wages. Cleveland and the crew also discussed the possibility of contacting the Detroit Water and Sewerage Department (DWSD) to inquire whether they should have been earning prevailing wages for past and present work while employed at the Respondent. Cleveland obtained his co-workers consent to initiate these actions and routinely kept them apprised of his progress.

On July 24, 2006, Cleveland telephoned the DWSD and spoke with Construction Contracts Manager Daniel Edwards who recommended that he write a letter to the DWSD and enclose copies of his prior and current wage statements. Accordingly, by letter dated July 27, 2006 (GC Exh. 2), Cleveland wrote to the DWSD outlining the reasons that he believed that the Respondent was not paying prevailing wages to its employees in accordance with a contract that it had previously executed with the City of Detroit in April 2005 (GC Exh. 4). Before Cleveland mailed the letter to the DWSD, he discussed its contents with the crew members and showed a handwritten draft to fellow crew member Stevens who testified that he also saw a typed copy of the letter.

In August 2006, Stevens testified that while he was working on a jobsite, Respondent's owner Willie McCormick came up to him and inquired if he knew who was making trouble for him down at the DWSD.

Edwards testified that after the DWSD received Cleveland's letter, he placed a telephone call in August or early September 2006 to both Respondent's Comptroller James Gray and Alford to apprise them of the prevailing wage issue and sought their cooperation in resolving the matter. During the course of their conversations, Edwards identified Cleveland as the employee who had raised the prevailing wage issue.

By letter dated September 15, 2006, the DWSD notified Cleveland that it had completed an investigation into his claim that the Respondent is not paying prevailing wages and

[2] In 2006, the restoration crew included Cleveland, Daverne Riley, Kirk Alford, II (the son of Foreman Alford), Steven McCoggle, and Laron Stevens.

determined that his assertions were correct (GC Exh. 3). By letter dated September 19, 2006, the DWSD informed the Respondent that it had determined that it had not been paying prevailing wages to its employees and included a copy of its response to Cleveland and the pay stubs in question that were the basis for the claim (GC Exh. 4).

In late September or early October 2006, while on the jobsite, Alford stated to Cleveland that he did not know what was going on between him and McCormick, but McCormick told him to send Cleveland home and not to give him anymore overtime. This conversation occurred on a Friday when employees receive their pay checks and was overheard by Stevens who was standing approximately five feet away.

In early October 2006, in separate conversations, both Cleveland and Gray informed Alford that a letter would be written to the Detroit City Council concerning the refusal of the Employer to pay prevailing wages to its employees. Cleveland subsequently wrote such a letter (GC Exh. 1(m)).

On October 9, 2006, Cleveland was asked to come to the office. Gray asked Cleveland whether he filed a complaint with the DWSD. After Cleveland admitted that he had filed such a complaint, Gray presented him with a written agreement that represented back prevailing wages in the amount of $5869.13 for the period of May 6 to September 16, 2006. Grey told Cleveland that McCormick did not want the other crew members to know about it and this should make him whole. Gray did not deny this in his testimony. Cleveland refused to execute the agreement because it did not include back prevailing wages from 2003-2005 that he asserted were due and owing (GC Exh. 1 (m)).

On or about October 27, 2006, Alford informed Cleveland that he was going to be laid off for lack of work. Cleveland was upset as he observed other members of the crew continue to work through November 2006 (R Exh. 1, Alford II and Riley).

On November 3, 2006, Cleveland executed an acknowledgement and release for back prevailing wages for the years 2003-2006 in the amount of $28,510.78 (GC Exh. 7). Cleveland testified that when he signed the release, McCormick was present in the office and told him he was causing him problems out there and you will not get paid your workman's compensation because you signed a letter of release. McCormick did not deny this during the course of his testimony.

In December 2006, Alford met Cleveland at George's Coney Island restaurant and mentioned to him that he had recently had an argument with McCormick about the letters that Cleveland had written to the DWSD and the Detroit City Council. McCormick wanted to know why Alford had not informed him about Cleveland's written communication to these agencies. Cleveland asked Alford whether McCormick would call him back to work in the spring. Alford said no, because of your going to the DWSD about back prevailing wages. Alford, during his testimony, did not address the contents of the conversation that took place at the restaurant. Thus, Cleveland's recitation of the conversation stands unrebutted.

In January 2007, Cleveland filed a Whistleblower Protection Act lawsuit against Respondent due to the fact that he had not been recalled to work and felt that he had been terminated.

In January 2007, Cleveland again saw Alford at the restaurant. Alford gave several telephone numbers to Cleveland of prospective employers that he could call for employment opportunities. Cleveland inquired whether McCormick would call him back to work in the spring and Alford replied, no.

In late February or early March 2007, Alford telephoned Cleveland and requested that he meet him at the White Castle restaurant. During the meeting Alford provided Cleveland with a document on prevailing wages for asphalt and concrete work. Cleveland asked Alford whether he would be recalled to work when operations restarted in the spring and Alford replied, no. Alford also informed Cleveland not to call him on his work cell phone as the Employer could trace the calls back to him.

On April 16, the restoration crew commenced work with five crew members but Cleveland was not recalled to work (Jt Exh. 1). Of the five crew members who returned to work, two of them were new employees who had recently filed job applications on April 13 and 16, respectively (Jt Exh. 3 and 4). Neither of these two employees, in accordance with their job applications, had prior experience working on a restoration crew.

Alford testified that prior to April 16 he contacted members of the restoration crew by telephone including Cleveland to discern whether they were interested in returning to work. Alford asserted that he left three or four voice mail messages on Cleveland's cell phone but Cleveland never returned any of the calls to his cell phone number. Alford stated, however, that Cleveland did leave a telephone message on his home voice mail but he was uncertain when he listened to the voice mail message. He admitted, however, that he did not return a call to Cleveland. Alford acknowledged that he did not attempt to contact Cleveland in any other manner including by mail or a personal visit to his residence.[3] Accordingly, Alford concluded that since Cleveland did not return his cell phone calls he had no interest in returning to work and when other crew members were recalled to work on April 16, Cleveland was not included. To date, Cleveland has not been recalled to work at the Respondent.

McCormick testified that Cleveland was also not recalled to work based on an affidavit that he reviewed on or about April 23, that was given by Alford II in the lawsuit that Cleveland had filed against the Respondent (R Exh. 2). McCormick asserted that after he reviewed the affidavit, he determined that a number of the allegations contained therein were false and he decided not to recall Cleveland to work after restoration operations were restarted in April 2007.

B. The Section 8 (a)(1) Allegations

1. The Position of the Parties

The General Counsel alleges in paragraphs 7 and 8 of the complaint that the Respondent failed to recall the Charging Party to the restoration crew because he discussed with his co-workers the possibility of filing a prevailing wage claim with the DWSD prior to actually filing the prevailing wage claim. Therefore, the Respondent engaged in a violation of Section 8(a)(1) of the Act.

The Respondent argues that Cleveland's discharge was at all times undertaken for legitimate non-discriminatory reasons unrelated to any protected or union activities in which he might have engaged. In this regard, they argue that Cleveland did not engage in protected concerted activities on his or other employee's behalf because his actions in seeking back prevailing wages was solely limited to his own interests. Additionally, they opine that Cleveland never responded to Alford's repeated telephone inquiries about returning to work and

[3] Between 2003 and 2006, Cleveland credibly testified that Alford's practice was to either stop by his residence or telephone him to confirm that he would be recalled from layoff.

McCormick further determined not to recall him because of false accusations in an affidavit that was part of a lawsuit filed against the Respondent by Cleveland that was ultimately dismissed by the Court.

2. Analysis

The Board has held that Section 7 protects "concerted activities for the purpose of collective bargaining or other mutual aid or protection." No union need be involved, any activity by a single employee may be protected if it seeks to initiate, induce or prepare for group action. *Triangle Electric Company,* 335 NLRB 1037 (2001); *Prill v. NLRB (Meyers Industries),* 835 F. 2d 1481 (D.C. Cir. 1987), cert. denied, 487 U.S. 1205 (1988). This protection specifically includes discussions about wages and safety related issues between two or more employees. *Systems with Reliability, Inc.,* 322 NLRB 757 (1996). It also protects actions that improve working conditions by resorting to a regulatory agency. *Frances House, Inc.,* 322 NLRB 516, 522 (1996).

In *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer decision. On such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The United States Supreme Court approved and adopted the Board's *Wright Line* test in *NLRB v. Transportation Management Corp.,* 462 U.S. 393, 399-403 (1983). In *Manno Electric,* 321 NLRB 278, fn. 12 (1996), the Board restated the test as follows. The General Counsel has the burden to persuade that antiunion sentiment was a substantial or motivating factor in the challenged employer decision. The burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employee had not engaged in the protected activity.

Based on the testimony presented in the hearing and the documentary evidence introduced into the record, I reject the Respondent's defenses that Cleveland did not engage in protected concerted activities and that the refusal to recall him to work was for legitimate business reasons. I base my finding on the following reasons.

First, I find that Cleveland did engage in protected concerted activities when he discussed his intent to contact Laborers Union, Local 1191 and to communicate with the DWSD. In this regard, Cleveland's testimony to this effect stands unrebutted and is corroborated by Stevens who testified that not only did Cleveland discuss the contents of the July 27, 2006 letter to the DWSD with him and other crew members but provided him a handwritten draft to review and a copy of the final typed letter. Stevens also confirmed that Cleveland obtained the consent of all of the crew members to proceed with his attempt to obtain current and back prevailing wages for the employees. Lastly, I find that the letters Cleveland authored on July 27 and October 27, 2006 to the DWSD and the Detroit City Council establish that he referred to all employees on the restoration crew who were negatively impacted by the failure of the Employer to pay prevailing wages for past and present work performed.

Second, as it concerns the reasons the Employer advances for not recalling Cleveland to the restoration crew on April 16, I find that they are pretextual. In this regard, I credit Cleveland's testimony that Alford told him on three occasions prior to April 2007, that McCormick would not recall him when operations restart in the spring due to his raising the issue of prevailing wages with the DWSD. I further credit Cleveland's testimony that when he executed the release on November 3, 2006, McCormick told him that he was causing him

problems.[4] Alford's testimony that the reason he did not recall Cleveland to work was because he did not return his cell phone messages does not withstand scrutiny in light of my above findings and the unrebutted testimony of Cleveland that Alford instructed him not to call him on his cell phone. Moreover, it is incredulous that Alford could not pinpoint when he listened to Cleveland's voice mail message on his home telephone and more surprising why he did not return Cleveland's voice mail message. The inescapable conclusion is that Alford was previously instructed by McCormick not to recall Cleveland to work because of his prior involvement in complaining to the DWSD regarding the prevailing wage issue. Lastly, it strains credulity that Alford who has known Cleveland for over 37 years would not have made further attempts to contact him by mail or a personal visit to discern if he wanted to return to work at the Respondent. This is especially true when the two new employees that were hired for the restoration crew did not possess the work experience or length of service as Cleveland.[5]

Third, I reject McCormick's testimony that a second reason that Cleveland was not recalled to work was based on the affidavit that he reviewed in conjunction with the lawsuit that Cleveland filed against the Employer. In this regard, the affidavit was not executed until April 20, and McCormick did not review it until on or about April 23. Thus, reliance on this document as a reason for not recalling Cleveland to work on April 16 is rejected. The Respondent cannot bootstrap events that took place after the restoration crew was recalled to work to support its reasons for not recalling Cleveland.

Under these circumstances, I find that the Respondent violated Section 8(a)(1) of the Act by its refusal to recall Cleveland when the restoration crew restarted work on April 16.

Conclusions of Law

1. Willie McCormick & Associates, Inc., and MNS Construction, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. Respondent violated Section 8(a)(1) of the Act when it refused to recall its employee Odell A. Cleveland, Sr. to its restoration crew on April 16, 2007.

Remedy

The Respondent having discriminatorily refused to recall Cleveland, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of its refusal to recall him to date of proper offer 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 recommended[6]

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[4] I also note the unrebutted testimony of Stevens that in August 2006, McCormick approached him on the jobsite and inquired who was making trouble for him down at the DWSD.

[5] I note that Alford's trial testimony and pre-trial affidavit (GC Exh. 10) reveal glaring inconsistencies when discussing the same subjects, thus negatively impacting on his credibility.

[6] 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

Continued

ORDER

The Respondent, Willie McCormick & Associates, Inc. and MNS Construction, Inc., Detroit, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

   1. Laying off or otherwise discriminating against any employee for engaging in protected concerted activities.
   2. In any like or related manner 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.

   1. Within 14 days from the date of the Board's Order, offer Odell A. Cleveland, Sr. full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.
   2. Make Odell A. Cleveland, Sr. whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.
   3. Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful refusal to recall Odell A. Cleveland, Sr., and within 3 days thereafter notify the employee in writing that this has been done and that the refusal to recall will not be used against him in any way.
   4. 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.
   5. Within 14 days after service by the Region, post at its facility in Detroit, Michigan, copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 7, 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

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waived for all purposes.

[7] 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."

at any time since April 16, 2007.

6. 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.

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

Dated, Washington, D.C. July 11, 2008

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Bruce D. Rosenstein
Administrative Law Judge

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 engaging in protected concerted activities.

WE WILL, within 14 days from the date of this Order, offer Odell A. Cleveland, Sr. full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Odell A. Cleveland, Sr. whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful refusal to recall Odell A. Cleveland, Sr., and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the refusal to recall will not be used against him in any way.

Willie McCormick & Associates, Inc. and MNS Construction, Inc.
(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.nlrb.gov.

477 Michigan Avenue, Federal Building, Room 300
Detroit, Michigan 48226-2569
Hours: 8:15 a.m. to 4:45 p.m.
313-226-3200.

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, 313-226-3244.