

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

INDUSTRIAL CONTRACTORS SKANSKA, INC.

and

Case 25-CA-130127

MICHAEL FEIST, an individual

LABORERS INTERNATIONAL UNION OF
NORTH AMERICA, LOCAL UNION No. 561

and

Case 25-CB-130081

MICHAEL FEIST, an individual

Derek A. Johnson, Esq., for the General Counsel.

Charles L. Berger and Jennifer Ulrich-Keppler, Esqs.

(Berger and Berger, LLP, Evansville, Indiana)

for Respondent Laborers Local No. 561.

Sara B. Kalis, Esq. (Littler Mendelson, P.C., Minneapolis, Minnesota)

for Respondent Industrial Contractors Skanska

*John Scully and Byron Andrus, Esqs., (The National Right to
Work Legal Defense Foundation, Springfield, Virginia),*

for the Charging Party.

DECISION

STATEMENT OF THE CASE

Arthur J. Amchan, Administrative Law Judge. This case was tried in Henderson, Kentucky on January 6, 2015. Michael Feist filed the charges in this case on June 5, 2014. The General Counsel issued the complaint on September 30, 2014.

The General Counsel alleges that Respondent Union, Laborer's Local 561, violated Section 8(b)(1)(A) and 8(b)(2) of the Act in notifying Respondent Industrial Contractors Skanska

(Skanska) that Michael Feist was no longer a union member in good standing and therefore was not eligible for hire by Skanska. More specifically the General Counsel alleges that the Union did not give Feist adequate notice of the amount of dues he owed, a deadline by which it must be paid, notice that he would be denied employment or giving Feist a reasonable time to pay.

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The General Counsel alleges that Skanska violated Section 8(a)(3) and (1) in refusing to employ Feist pursuant to its communication from the Union.

On the entire record,¹ including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Respondent Union, Respondent Employer and the Charging Party, I make the following

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FINDINGS OF FACT

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I. JURISDICTION

Respondent Industrial Contractors Skanska (Skanska) is large construction contractor which does business in the Evansville, Indiana area, amongst others. In 2013, Skanska performed services worth more than \$50,000 outside of the State of Indiana. Skanska admits that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent Union is a labor organization within the meaning of Section 2(5) of the Act.

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II. ALLEGED UNFAIR LABOR PRACTICES

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Michael Feist has been a member of Laborers' Local No. 561 since 1997. Since 1998 he has worked regularly, but not continuously, for Respondent Skanska. Skanska recalls Feist for work whenever it has work corresponding to his skills. He has also worked for other employers, but rarely uses the union hiring hall. Local 561 members are allowed to solicit work without going through the hiring hall. They also have recall rights with former employers with whom they have worked in the prior 12 months.

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Skanska laid Feist off of work at the end of March 2014. However, he was on a list of available employees who would be called whenever Skanska had a need for his services. On April 8, Feist went to the Local 561 union hall. There was a union membership meeting that evening and Feist went to pay his dues so that he could attend.

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When Feist attempted to pay, Diane McCormick, the Union's receptionist/secretary, informed Feist that his membership had been suspended and that she could not accept his dues payment. In such circumstances, a union member must pay all outstanding dues and a reinstatement fee. Feist was aware of this because his membership had been suspended on 4 previous occasions. On each of those occasions, Feist was informed of his suspension verbally. On each of these occasions, except the one in 2013, Feist claimed that the Union's records of his dues payments were incorrect. However, on these three occasions, he then paid his current and

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¹ Tr. 157, lines 16 and 20 should read *Beck* (referring to *Communications Workers v. Beck*, 487 U.S. 735 (1988)), rather than back.

back monthly union dues and a fine/reimbursement fee for each month that he owed dues in order to restore his membership in good standing. Feist paid his outstanding union dues and reinstatement fees as follows:

- 5 December 15, 2004: Feist paid \$60 in union dues and a \$192 reinstatement fee.
 September 13, 2007: Feist paid \$75 in dues and a \$112 reinstatement fee.
 May 14, 2012: Feist paid \$75 in dues and a \$336 reinstatement fee.
 March 1, 2013: Feist paid \$75 in dues and a \$112 reinstatement fee.

- 10 After talking to McCormick on April 8, 2014, Feist had a conversation with Barry Russell, the Business Manager and President of Local 561.

- 15 Feist told Russell that he had paid his dues. Russell asked Feist to show him a receipt. Then Feist left the union hall and returned with a receipt for union dues for the month of March 2014. However, the name on the receipt was that of Brian Simpson, another Local 561 member; not Feist's. When Russell pointed this out to Feist, the latter said he would have to talk to Brian Simpson. There is no credible evidence in this record indicating that Feist paid his \$25 monthly union dues for the months of February and March 2014.² I find that he did not do so. The Union automatically suspends the membership of any member who is more that 2 months and 1 day in
 20 arrears of his or her monthly dues.³

- At 3:40 p.m. on April 8, 2014, the Union faxed Skanska notification that Michael Feist would not be eligible for work or recall due to his failure to maintain his membership in the
 25 Union.

- In March 2014, the Union did not notify Feist that he was 2 months in arrears because it did not believe it had his current address. On one occasion prior to March 2014 Diane McCormick asked Feist for his address. He replied that the union pension fund had his mailing address, so there was no need for him to give it to Local 561. The Union is not entitled to such
 30 information from the pension fund.⁴

² While Feist maintains that he was not two months and 1 day in arrears, there is no credible evidence to support this claim. The only claim he ever made to the Union for this contention was presenting a receipt with Brian Simpson's name on it. At Tr. 103 Feist testified that he remembers making a payment in March 2014. I find that he did not do so. He kept receipts for the dues he paid, but does not have a receipt for a payment in March, Tr. 104. Feist did not testify that he went to the union hall to pay his dues between January 10, 2014, when he paid his dues for January, and April 8, 2014, or give any other details as to why he thinks he paid his March dues.

At trial, Feist testified that his union membership card indicates that he had paid his dues through February 2014. Since he never made this claim prior to the trial, I do not credit this testimony. Moreover, Feist knew that the receipts he received from the Union indicated that he was paid up only to the end of January 2014. He never raised the discrepancy between his receipts and his membership card with the Union. Moreover, I credit the testimony of the Union's secretary, Diane McCormick, that the placement of stamps on a membership card does not establish the payment status of a Local 561 member.

³ Members who are working are also assessed working dues that are deducted from their pay by their employer.

⁴ The receipts that the Union gave to Feist upon payment of his dues from March 2013 to January 2014 do not have a street address. However, they indicate that the Union believed he lived in zip code

Upon receiving notification from the Union, Skanska dispatcher Cinda “Susie” Titzer called Feist on April 8. She informed him that Skanska was changing his status from available for hire to suspended.⁵ Feist told Titzer that he was aware that the Union had suspended his membership and that he was seeking legal counsel. Feist also informed Titzer that he had a dispute with the Union involving his dues, Tr. 116. I credit Titzer’s testimony that Feist specifically claimed to have paid his dues, Tr. 91-92. Further, he told Titzer that he was not going to reinstate his union membership in good standing.

On May 28, 2014, Titzer called Feist again. She asked him about his membership status. Feist told her it was unchanged and that he chose not to reinstate his membership. Titzer informed Feist that he could not work for Skanska unless he was a union member in good standing. Article IV of the collective bargaining agreement to which Local 561 and Skanska are parties prohibits Skanska from employing a Local 561 member who has been suspended and not reinstated for non-payment of dues, G.C. Exh. 2, pp. 9-10.⁶

In June 2014, Titzer offered Feist a job on behalf of Skanska at an Alcoa plant and then withdrew the offer the next day.

Analysis

The General Counsel relies mainly on the Board’s decision in *Philadelphia Sheraton Corporation*, 136 NLRB 888, 896-7 (1962) enfd. 320 F. 2d 254 (3d Cir. 1963). In that case the Board found the Union violated Section 8(b)(1)(A) by demanding that the employer discharge two employees for failing to pay their dues. The Board so found because the Union in that case never satisfactorily notified the employees what their membership obligations were. Neither employee was told the amount of his dues or when payment was to be made. The Board found that under these circumstances it was grossly inequitable and contrary to the spirit of the Act to permit the Union to request the discharge of these employees.

However, the Board has also dismissed Section 8(b)(1)(A) allegations in this regard in situations in which the employee/member had actual knowledge of his or her dues obligations (amount, due date, etc., means of reinstating membership). In *Food & Commercial Workers Local 368A (Professional Services)*, 317 NLRB 352, 354-55 (1995), the Board dismissed the

47714 (which happens to be the same zip code as the one on Brian Simpson’s dues receipt). This is different than the zip code of the address at which Feist testified he receives his mail, 47720 (G.C. Exhs. 6 and 8). The pension fund sent mail to Feist at the 47720 address as late as October 2013. While Feist indicated at trial that he lived at the 47720 address until June 2014; he never told that to the Union. I do not read his testimony at Tr. 123-24 for the proposition that Feist gave his mailing address to the Union. The testimony stands for the proposition that he gave his address to the Health and Welfare Fund on 2 occasions.

⁵ Skanska receives 10-12 suspension notices a year from Local 561.

⁶ There is no evidence or allegation in this case that the union security clause violates Indiana’s right-to-work law. According to Skanska’s brief at footnote 5 on page 14, the Indiana right-to-work statute does not apply to contracts in effect on or prior to March 14, 2012. The collective bargaining agreement between the Union and Skanska became effective on March 12, 2012.

complaint because the delinquent employee, like Michael Feist in the instant case, had actual knowledge of the amount of dues owed, the date by which it had to be paid, the consequences of nonpayment and the means of reinstating her membership. Also like Feist, the employee in the *Food and Commercial Workers* case was aware of her dues obligations from suspensions of her membership prior to the one precipitating the suspension and discharge that give rise to the 1995 case. The Board has reached similar conclusions in *Local No. 60 Teamsters (Ralph's Grocery)* 209 NLRB 117, 124-25 (1974); *Big Rivers Electric Corporation*, 260 NLRB 329 (1982); *IBI Security*, 292 NLRB 648 (1989); and *Communications Workers Local 9509 (Pacific Bell)* 295 NLRB 196, 200 (1989).⁷

Michael Feist never claimed to be unaware of his dues obligation. In fact, from his past experience, he obviously was aware of the amount of dues owed and what he needed to pay to reinstate his membership. To the Union, he asserted he paid his March dues. He never claimed to have paid his monthly union dues for February to the Union—at least until the day of the instant trial. Even at trial, Feist did not claim that he was unaware of any facet of his dues obligation; he claimed he had paid for months for which the Union records showed that he did not pay.

While the Union may not have advised Feist of the employment consequences of his suspended status, Susan Titzer of Skanska did so on April 8 and in May. Thus, Feist made a conscious decision not to make the payments necessary to reinstate his status as a union member in good standing.

Feist testified that he expected to have union secretary-treasurer Harlin Scott investigate whether or not he had paid his March dues and report back to him. Assuming this to be so, Feist made no attempt to follow up with Scott or anybody else at the Union. There is nothing in this record to indicate that Feist had a good-faith belief that he had paid his dues. Indeed, he appears to have claimed to have paid his dues on three other occasions when he had no evidence to support this contention. Given his claims in 2004, 2007 and 2012 that he was being suspended for dues he had already paid, one would expect Feist to have been very careful about keeping his receipts. The fact that Feist did not have a receipt for his February and March 2014 dues leads me to conclude that he did not pay his monthly dues for these months.

Thus, I conclude Feist was well aware that he had not paid his monthly dues for over two months and that the Union was privileged to suspend his membership as a result. Therefore, Skanska could not recall Feist to work pursuant to the union security clause of the parties' collective bargaining agreement. I therefore dismiss the complaint against both Respondents.

In sum, I find that the Union's failure to notify Michael Feist of his dues obligations prior to suspending his membership did not violate Section 8(b)(1)(A) or 8(b)(2) because Feist had actual knowledge of those obligations. Consequently, I also find that Skanska did not violate the Act in refusing to employ Michael Feist.

⁷ *Valley Cabinet & Mfg. Co.*, 253 NLRB 98 (1980), which is relied on by the General Counsel and the Charging Party, strikes me as incompatible with this line of cases. However, I conclude that the weight of Board precedent is consistent with the above cited cases.

Moreover, I would dismiss the complaint against Skanska even if I were to have found that the Union violated the Act. By the terms of Section 8(a)(3), Skanska would be in violation of Section 8(a)(3) only if it had reasonable grounds for believing that the Union denied membership to Michael Feist on terms and conditions that were not generally applicable to other members, or that his membership was suspended for reasons other than failure to pay his monthly dues.

The Union's April 8, 2014 fax to Skanska did not specify that it was Feist's failure to pay his monthly dues that was the reason he failed to maintain his membership in the Union. However, when Titzer called Feist the same day, he informed her that he had a dispute with the Union involving his dues.

The Board has found an employer to be in violation of Section 8(a)(3) in circumstances in which it discharged an employee despite actual knowledge that the employee had satisfied his or her dues obligations, e.g. *Planned Building Services*, 318 NLRB 1049, 1063 (1995). It has also found an employer in violation of Section 8(a)(3) where the employee told the employer that the Union agreed that the employee had satisfied his or her dues obligations, but the Employer discharged the employee without checking with the Union to determine whether this was so, *H. C. Macaulay Foundry Co.*, 223 NLRB 815, 818 (1976); *Conductron Corporation*, 183 NLRB 419, 427-28 (1970).

In contrast, Feist did not tell Titzer that the Union now accepted his claim that he was not two months in arrears. One could argue that the Skanska still had an obligation to call the Union with regard to Feist's claim that Union Secretary-Treasurer Scott was in the process of investigating his contention. However, I would find a violation on the part of Skanska in these circumstances only if a call to the Union would have given Skanska reason to believe that Feist's membership had been suspended due to reasons other than failure to pay his monthly dues. To the contrary, such a call would have only led the employer herein to believe that the Union had a bona fide belief that Feist had not paid his dues as required. Thus, I conclude that Skanska did not violate the Act even assuming that the Union did so.

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

ORDER

The complaint is dismissed.

Dated, Washington, D.C., February 20, 2015

Arthur J. Amchan
Administrative Law Judge

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.