

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

D & H Demolition, LLC)	
)	
Respondent)	
)	
and)	Cases 05-CA-233552
)	05-CA-233564
Construction and Master)	
Laborers Local Union 11)	
)	
Charging Party)	

D & H DEMOLITION, LLC'S RESPONSE TO NOTICE TO SHOW CAUSE

D & H Demolition, LLC, (the "Company" or "D & H") by its attorneys Eckert Seamans LLC and pursuant to Sections 102.24 of the Rules and Regulations of the National Labor Relations Board, as amended, hereby files its response to the Notice to Show cause issued in this matter.

Summary Judgement should not be granted in that the Acting Regional Director erroneously certified the charging party ("Union"). If the erroneous certification is to stand, a single challenged voter, who was excluded from the election eligibility list, who had declined assignment to work twice and who made no attempt to contact the Company in the 10 months between his last day of work and the election will determine the representation status of the bargaining unit employees.

BACKGROUND

The Company is a construction industry employer. The election in this matter was conducted on March 7, 2018. The Acting Regional Director found that all but one of the voters in the election was ineligible to vote. The Acting Regional Director found that this one voter, Carlos Lara, was eligible under the Steiny Daniel formula.¹ Lara's ballot was subsequently counted and the Union was certified as the exclusive representative of employees in the bargaining unit. D & H subsequently refused the Union's requests to bargain and for certain information the grounds that the Union's certification was erroneous.

SUMMARY OF ARGUMENT

This matter involves the voting eligibility of Carlos Lara, the *only* voter in the election who has not been found ineligible to vote. The Acting Regional Director found Lara eligible under the *Steiny/Daniel* eligibility formula, concluding that D & H had failed to establish that Lara had expressed a clear intention to quit before the election (DDC at p. 9). In doing so, the Acting Regional Director relied on erroneous factual findings and rejected evidence which, taken as a whole, establishes that Lara did not intend to return to work and clearly voluntarily terminated his employment. This evidence includes the fact that 1) on Lara's last day of work on Friday his supervisor instructed him to call to be assigned his next job and Lara did not do so; 2) when called the following Sunday by his supervisor for the purpose of him being assigned to another job on the next Monday, Lara declined, claiming illness; 3) when later called by the Company's administrative assistant to direct him to report the following day, Lara again refused

¹ See, *Daniel Construction Company, Inc.*, 133 NLRB 264 (1961) (as modified in *Daniel Construction Company, Inc.*, 167 NLRB 1078 (1967)) and *Steiny & Company*, 308 NLRB 1323 (1992).

the assignment, claiming illness; 4) despite having been twice told to call when able to work, Lara never called the Company in the ten months between his last day of work in June 2017 and the election; and 5) the Company never again called Lara after his second refusal of an assignment.

In concluding that Lara's communications to the Company had not "unambiguously manifested" his intent to quit before the election, (DCC at p. 9) the Acting Regional Director ignored established Board precedent that a termination of employment does not have to be communicated but can be found from surrounding circumstances. Specifically, the Acting Regional Director erred in failing to find that Lara's refusal of two separate job assignments based on asserted illness, when coupled with his ignoring, for ten months, the Company's directive to call when he was able to return to work and further coupled with the lack of any Company attempt to again call Lara, clearly shows that Lara chose to terminate, and the Company treated him as having been terminated, whatever employment relationship he could have claimed to have had with the Company.

The Acting Regional Director also misapplied Board precedent to the extent he relied on the fact that Lara, when twice declining employment, was told to call the Company when he was able to return. (DDC at 9). Under the *Steiny/Daniel* formula, voting eligibility does not turn on expectancy of re-employment once an employee ceases working. Rather, the *Steiny/Daniel* formula substitutes a test based on days worked in the preceding 12 or 24 months for the traditional "reasonable expectancy of employment" test for determining the eligibility of laid off employees. Under *Steiny/Daniel*, the sole inquiry is whether or not the employee ceases working as a result of the conclusion of the particular project upon which he/she is employed. If so, the

employee's eligibility is determined by the number of days worked in the applicable period. If not, then the employee has either been discharged for cause or has voluntarily resigned.

FACTS

The Acting Regional Director adopted the following findings of fact made by the Hearing Officer. Carlos Lara was working in June 2017 on a project at Laurel High School (TR 87) and that the first phase of the project ended on June 2. The second phase of the Laurel High School project commenced on or about June 19 and shortly before that, D & H supervisor Jose Santos called Lara "to see if he was working" (TR 86-88)² and Lara told Santos that he was not working because he had a health issue and was in the hospital. (DDC at pp. 5-6; TR 88) Santos told Lara to call him or the office when he was ready. (DDC at pp. 5-6; TR 88) Lara was also called in July³ by Margo Aguilar, the D & H Administrative Assistant, who calls employees for work and gives them their schedules. (DDC at p. 6; TR 105; 112; 141) Aguilar called Lara as directed by her superior to "tell him to come back to work", that she had a job for him. (TR 113; 142). The job was for the following day. (TR 142)⁴ Lara refused, telling Aguilar that he was sick and was "undergoing some treatment or exams". (TR 113). Aguilar then told Lara to call her when he got better. (DDC at p. 6; TR 113; 143). The second phase of the Laurel High School project began

² Contrary to this finding, Santos never testified that he called Lara "shortly" before second phase of the job. He only confirmed that he called before the start of the second phase (TR 91) and actually testified that he called Lara on the Sunday or Monday following the completion of the first phase on June 2 (TR 92). Santos also testified that, on the Friday that the first phase finished, he told Santos, "to call me or call the office for the next job" (TR 88) and that he called Lara on Sunday or Monday to "ask him what he was doing. I see will see people out of work and I put them to work". (TR 91-92) and that he calls the office to see if there is a position available. Thus, contrary to the Acting Regional Director, the preponderance of the evidence is that, on the Sunday or Monday following the conclusion of the first phase of Laurel High School project, Santos called Lara for the purpose of placing him at another jobsite.

³ While the Hearing Officer found this call to take place in July (TR 112), Aguilar also testified that the call was in June. (TR 141).

⁴ Given such testimony, the Acting Regional Director's finding (DDC at p. 6) that neither Lara nor the Company had an expectancy that Lara would work another job is inexplicable. Lara was clearly being called in order to put him to work.

on June 19, 2017. Lara was not employed on that work. The un rebutted testimony is that Lara never called either Santo or Aguilar. (TR 88; 113). Lara had not been called for work since Aguilar's call and Lara had not worked for D & H since June of 2017. (TR 143).

ARGUMENT

I. The Acting Regional Director Erroneously Found That Lara Had Not Quit His Employment.

The Acting Regional Director incorrectly found that Carlos Lara had not voluntarily quit his employment prior to the election and misapplied Board law in doing so. First the Acting Regional Director wrongly held that that it was necessary for Lara to have “expressed a clear intent to quit” before the election. In so finding, Acting Regional Director noted that, in declining further employment prospects to Santos and declining employment to Aguilar, Lara told both that he could not work because of a medical issue and that he was having tests done. He also relied on the fact that, when so told by Lara, both Santos and Aguilar told Lara to call when he wanted to return. The Acting Regional Director thus concluded that Lara had not “unambiguously manifested his intent to quit before the election”. (DDC at p. 9)

In finding that Lara had not quit, the Acting Regional Director erroneously ignored the undisputed fact that Lara unambiguously *declined* employment. Moreover, even assuming that Lara was being truthful when stating that he had a medical condition and was having tests, the Acting Regional Director erroneously ignored the un rebutted evidence that, having declined employment by claiming inability to come to work, Lara never, *as instructed*, called D & H for the purpose of returning to employment for 8 months and never otherwise contacted D & H. In addition, it is undisputed that D & H never again attempted to contact Lara. Thus the fact that Lara never attempted to return and never returned to employment with D & H can only be found to be caused by Lara's own election not to call D & H. Under such facts, it can only be

concluded that Lara chose not to attempt to return to D & H and abandoned his employment. The same facts establish that D & H considered Lara to be terminated. Contrary to the Acting Regional Director, a finding that Lara quit his employment by declining work and then never contacting D & H does not require that Lara affirmatively expressed an intent to quit to D & H. Rather, the Board has held that a finding that employment has terminated can be made from surrounding circumstances. As the Board stated in *J.C. Penny*, 347 NLRB 127 (2006):

“Affirmative termination can be found even in the absence of any formal or informal communication, in instances where the surrounding circumstances make clear that the employment relationship has ended.” *Air Liquide America Corp.*, 324 NLRB 661, 663–664 (1997) (citing *Cavert Acquisition Co. v. NLRB*, 83 F.3d 598, 607 (3d Cir. 1996))

When as in this case, an employee, eight months prior to an election, refuses work, or refuses to subsequently call for work, is never again called for work, the circumstances make clear that the employee has quit his employment prior to the election. In this regard, the Acting Regional Director’s reliance on *Town Concrete Pipe*, 259 NLRB 1002 (1982) is misplaced. There is no evidence that Lara requested or was granted any sort of leave or even that D & H has a policy of allowing leaves. Moreover, there is no evidence even to support a finding that Lara was being truthful when he told D & H that he was unable to work due to some illness and/or the need to undergo medical testing.⁵ Most significant, in failing to call or attempt to return for 8 months, it is clear that Lara exceeded whatever leave he could claim to have been granted and the fact that D & H made no attempt to contact him after June 2017 establishes its determination that he was no longer employed.⁶

⁵ Lara was not called to testify by the Petitioner. To the extent that the Petitioner would argue that Lara remained in D & H’s employ because he was granted a medical or some other leave, it was incumbent upon Petitioner to establish that Lara was in fact, ill and that Lara requested and was granted such a leave.

⁶ That D & H did not include Lara on the eligibility is consistent with its determination that he had quit his employment.

In finding Lara eligible, the Acting Regional Director also erred in relying on the fact that Lara had been told by both Santos and Aguilar to call when he was ready to return to work. Apart from the fact that Lara never did call, the fact that D & H considered or even continues to consider Lara eligible for rehire does not alter the fact that he quit and that his status as an employee ended. It is Lara's refusal of work and his decision not to return to D & H which determines his status. Thus, Lara's employment is no less "terminated" than that of an employee who submits a resignation letter but is told he can come back when he desires. Moreover, whether Lara had an opportunity or expectancy of being reemployed is *irrelevant* under the *Steiny/Daniel* formula because the formula is a total substitution for the traditional "reasonable expectancy of employment" test which applies to employers outside the construction industry. To consider the expectancy, possibility or probability of Lara to begin working again for D & H is to engage in the very "individualized determination" of voting eligibility that the *Steiny/Daniel* formula eschews.⁷ Thus, under the formula an employee who quits is ineligible despite the fact that he/she may be considered eligible for rehire. Further, accordingly, the challenge to the ballot of Carlos Lara must be sustained.

Finally, in finding that Lara had not manifested an intent to quit his employment, the Acting Regional Director completely ignored the fact that, for over six months, Lara never called the Company to return to work as he had been instructed. There is no evidence in the record that

⁷ The formula is "an easily ascertainable, short hand and predictable method of enabling the Board expeditiously to determine eligibility by adopting 'a period of time which will likely insure eligibility to the greatest number of employees having a substantial interest in the choice of representative.'" *Steiny & Company*, 308 NLRB 1323 (1992) at 1326 (quoting *Alabama Drydock Co.*, 5 NLRB 149, 156 (1938)). Had Lara merely refused work due to his medical issues but had not been told to call when he was ready to return, it cannot seriously be contended that he would not be viewed as having terminated his employment. Moreover, the purposes underlying the formula are better served by finding ineligible any employee who ceases active employment for any reason other than layoff at the conclusion of a project. Lara ceased active employment by refusing to seek reassignment and then refusing offered work.

Lara was medically incapable of doing so, yet the Regional Director refused to consider the evidence that Lara never again called the company and failed to explain how an employee who refuses an instruction to call in when able to work has not abandoned his employment. Lara is the only voter found to be eligible to vote and counting his ballot means that an employee who had no relationship with the Company from the date he refused his next assignment to the date of the election will now determine the representational status of D & H's active employees. Given that, and at the very least, the Board should deny summary judgment so that an administrative law judge may consider and rule on the issue of why Lara's failure to call the Company as instructed did not amount to an abandonment of his employment which rendered him ineligible to vote.⁸

CONCLUSION

For the above reasons, the Board should deny the General Counsels motion for summary judgment.

Respectfully submitted,



Edward R. Noonan
Eckert Seamans Cherin & Mellott, LLC
Suite 1200
1717 Pennsylvania Ave. NW
Washington, D.C. 2006
enoonan@eckertseamans.com

⁸ In the alternative, the Board should deny summary judgment and, in case 5-RC-183865, remand the proceeding to the Regional Director to explain why Lara's failure to call the Company as instructed did not amount to an abandonment of his employment.

CERTIFICATE OF SERVICE

The undersigned certifies that, on this 14th day of May 2019, a true and correct copy of the foregoing Response to Notice to Show Cause was served electronically and by regular, United States Mail, postage pre-paid, upon Counsel for Petitioner at the below addresses:

Gabriele Ulbig, Esq.
Brian Petruska, Esq.
Laborers International Union of North America
One Freedom Square
11951 Freedom Drive, Suite 310
Reston, VA 20190
Gulbig@maliuna.org
bpetruska@maliuna.org



Edward R. Noonan