UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 93-4871
Summary Calendar

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

VERSUS

D.S.E. CONCRETE FORMS, INC.,

Respondent.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD
(16 CA 14035)

(April 28, 1994)

Before DAVIS, JONES, and DUHÉ, Circuit Judges.

PER CURIAM:[1]

This case arose from an unfair labor practice charge filed by the Carpenters District Council of Houston and Vicinity, AFL-CIO ("Union"), under §§ 8(a)(1) and (3) of the National Labor Relations Act ("NLRA") against D.S.E. Concrete Forms, Inc. ("D.S.E"). Specifically, the Union charged that D.S.E. had violated the NLRA by refusing to hire or consider Union members for carpenter positions. After a hearing, the Administrative Law Judge (the "ALJ") rendered a decision in favor of the Union. On appeal to the

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[1] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

National Labor Relations Board (the "Board"), the Board affirmed the ALJ's decision and adopted the ALJ's order. The Board petitions this Court for enforcement of the order. D.S.E. cross-petitions this Court to review the decision and deny enforcement of the order.

BACKGROUND

D.S.E., a nonunion company, received a subcontract to provide concrete work for a postal service facility in Houston. D.S.E. hired Dalcan, Inc., another nonunion firm, to manage its work at the postal facility job site. Dalcan's management staff relevant to this dispute are Jim Renald (project manager), David Del Bosque (project superintendent), and Homer Staton (carpenter superintendent). Renald was based at Dalcan's headquarters in Dallas and visited the job site three or four times during the job's term. Both Del Bosque and Staton worked at the site.

The events that gave rise to this action are briefly summarized as follows. Although some of the testimony is disputed they provide a framework for examining D.S.E.'s argument on appeal. On February 1, 1989, James Herd, a Union representative, visited the job site to secure a contract and obtain employment for his members. Herd testified that Del Bosque was hostile and told him that D.S.E. did not want any union members working at the site. On February 20, thirty to forty union members visited the site, and a total of twenty-one members filed job applications for carpenter positions. D.S.E. accepted the applications, and Staton testified that he looked through them. On February 28, Herd visited the job

site again. According to Herd Del Bosque blamed him for bringing all the Union people to the site on February 20, reiterated that he did not want Herd's people, and instructed that if anyone wanted to apply they should sign the roster posted outside the D.S.E. trailer at the job site. Herd further testified that when Herd offered employment applications on behalf of additional Union members, Del Bosque refused to accept them. On March 7, Herd and another Union representative returned to the site with the same applications. Herd was told that he was barred from going into D.S.E.'s trailer. Four carpenters were hired by D.S.E. from February 20 through September 12, the date of the ALJ hearing. None of the Union members were hired.

DISCUSSION

I. Factual Findings

A. Standard of Review and Applicable Law

In reviewing decisions by the Board, we must determine, on the basis of the record taken as a whole, whether or not substantial evidence supports the Board's findings. Texas World Serv. Co. v. NLRB, 928 F.2d 1426 (5th Cir. 1991). Substantial evidence is defined as "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" Id. (quoting Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1951). When the Board's decision depends on witness credibility, this Court accords special deference to the Board's credibility findings and will overturn them "only in the most unusual of circumstances." Centre Property Management v. NLRB, 807 F.2d 1264, 1268 (5th Cir. 1987).

The Board found that D.S.E. violated §§ 8(a)(1) and (3)[2] of the NLRA by discriminatorily refusing to consider job applications of Union members. To prove such a violation, the general counsel must establish that D.S.E.'s refusal to consider the Union applicants was motivated by anti-union animus. See NLRB v. Mini-Togs, Inc., 980 F.2d 1027, 1032-38 (5th Cir. 1993). Once the general counsel establishes a prima facie case, the burden shifts to D.S.E. to prove that it would have taken the same action even if the applicants had not been Union members. See Id. If D.S.E.'s proffered reason for the employment decision is shown to be a mere pretext to disguise discrimination, its burden has not been met. See Marathon LeTourneau Co. v. NLRB, 699 F.2d 248, 252 (5th Cir. 1983).

B. Bona Fide Applicants

D.S.E. contends that the Union members were not entitled to the protections of the NLRA because they were not bona fide applicants for employment. Relying on the fact that the Union prohibits its members from working on nonunion jobs and that the applications were submitted en masse, D.S.E. argues that the applicants were merely participating in an effort to organize D.S.E. Contrary to D.S.E.'s assertions, our review of the record reveals substantial evidence indicating that the union applicants

[2] Sections 8(a)(1) and (3) respectively provide that it is an unfair labor practice "to interfere with, restrain, or coerce employees" in the exercise of their rights to form, join, or assist labor organizations; or by discrimination in "regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."

were genuinely seeking employment. The general counsel proffered testimony that Union representatives waived its prohibition on nonunion jobs so that its unemployed members could apply at D.S.E. Furthermore, the fact that the applications were submitted en masse does not remove the union members from the protections of the NLRA.

C. Anti-Union Animus

D.S.E. contends that the Board's finding that its conduct was motivated by anti-union animus was not supported by substantial evidence. Noting that the general counsel relied upon statements made by Del Bosque to prove anti-union animus, D.S.E. argues that Del Bosque's statements cannot be attributed to D.S.E. because Del Bosque was not a decision-maker in the carpenter-hiring process. It argues that Staton, who displayed no anti-union animus, had sole responsibility for hiring carpenters.

The ALJ reasonably rejected D.S.E.'s argument on credibility grounds. The ALJ found that Del Bosque's testimony that he had nothing to do with the carpenters was not credible because it was evasive. The ALJ also found that the testimony that Staton reported directly to Jim Renald was not credible because Renald was not based at the job site, and that it was more likely that Staton reported to Del Bosque, as did all the other craft superintendents. Other facts also support the ALJ's finding. Union representatives testified that Del Bosque told Herd that he did not want to hire any union people. Staton testified that Del Bosque oversaw the job site and that he sometimes consulted with Del Bosque on hiring

decisions. Based on the above, we find that Del Bosque's overt expressions of anti-union animus were appropriately considered.

D.S.E.'s next argument is that the Board erred by crediting Herd's testimony that he visited the job site for the first time on February 1. In support of its argument that D.S.E. harbored no anti-union animus, D.S.E. proffered testimony that Herd had visited the job site on an earlier date at which time Staton told Herd that his members were welcome to work and encouraged Herd to have them sign the roster. D.S.E. argues that the Board's refusal to credit this testimony was not supported by substantial evidence. We disagree. The ALJ reasonably based its decision on the fact that D.S.E.'s witnesses did not agree on the date of this alleged meeting and that Herd was a more credible witness than Staton. Furthermore, even if this alleged meeting did occur, Del Bosque's expressions provided substantial evidence to support the finding that D.S.E. had anti-union animus.

C. D.S.E.'s Reasons

Next, D.S.E. contends that none of the Union applicants would have been hired in any event. D.S.E. proffered evidence that it considered and hired carpenters through a four-step hiring process. First, it attempted to transfer available company employees from other sites. Second, it contacted Dalcan's Dallas office for Dalcan employee transfers. Third, it would seek referrals from its employees. And fourth, it would contact applicants who signed a roster posted outside D.S.E.'s trailer at the postal facility site. D.S.E. argues that the twenty-one applications submitted on

February 20 were accepted and considered by Staton in accordance with its four-step hiring process. It explains that none of these applicants were hired because none were former or existing employees of D.S.E. or Dalcan; none had been recommended by a D.S.E. employee; and the sign-up roster already had a large number of applications on it. Moreover, it denies that it refused to consider the applications that Herd attempted to submit on February 28 and argues that even if it did, it was acting pursuant to its policy requiring applicants to sign the roster.

The ALJ rejected D.S.E's reasons finding that the practical effect of the first three hiring steps was to preclude the consideration of union applicants. The ALJ reasoned that because D.S.E and Dalcan were nonunion it is unlikely that their former or existing employees would be union members. It further reasoned that because D.S.E. did not hire union members, it was unlikely that any D.S.E. employee would recommend one. While it is reasonable to find that the practical effect of the three criteria was to preclude the hiring of union members, it is unreasonable to conclude that because this was the practical effect, the criteria were just pretextual.

With regard to the fourth step, the ALJ found that the roster was merely a pretext because it was not regularly kept or followed. Our review of the record reveals substantial evidence supporting this finding. Despite D.S.E.'s denials, there is also substantial evidence to support the finding that D.S.E rejected the additional applications offered by Herd. Because the roster was used as

justification in refusing to further consider the applications submitted on February 20 and in refusing the applications offered on February 28, we are compelled to uphold the finding that D.S.E. engaged in an unfair labor practice.

II. Remedy

D.S.E. contends that the Board's remedial order is punitive because it requires D.S.E. to offer employment and make whole wages to twenty-eight persons for a position that would have yielded a maximum of four jobs. It argues that because D.S.E. hired only four carpenters only four people should be able to recover. We have no jurisdiction to consider this argument because D.S.E. raises it for the first time on appeal to this Court. See Woelke & Romero Framing, Inc. v. NLRB, 456 U.S. 645, 665-66 (1982); NLRB v. McEver Engineering, 784 F.2d 634, 643 (5th Cir. 1986).

If we could consider the argument, we would conclude that D.S.E. misinterprets the order. The order does not require D.S.E. to offer employment and make whole wages to twenty-eight people. Rather, it provides that remedies are owed to individuals who would have been hired but for D.S.E.'s discriminatory practices and notes that this determination will be made at a subsequent compliance proceeding.

CONCLUSION

For the foregoing reasons, the decision of the Board is AFFIRMED and the application for enforcement of the Board's order is GRANTED.