

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

T. E. BRIGGS CONSTRUCTION  
COMPANY, INC.

and

Case 19-CA-30668

INTERNATIONAL UNION OF OPERATING  
ENGINEERS, LOCAL 302

*Susannah C. Merritt*, of Seattle, Washington,  
for the General Counsel

*Bryan P. O'Connor* and *Sarah Capelli*, of  
Seattle, Washington, for Respondent

*Steve Scheffer*, of Bothell, Washington, for  
the Charging Party

**DECISION**

Mary Miller Cracraft, Administrative Law Judge. This case involves allegations that Respondent T. E. Briggs Construction Company, Inc. interrogated employees on two occasions and threatened employees on two occasions due to their activity on behalf of International Union of Operating Engineers, Local 302 (the Union) in violation of Section 8(a)(1) of the National Labor Relations Act.<sup>1</sup>

The case was tried on June 12, 2007, in Seattle, Washington. All parties were provided full opportunity to appear, to introduce relevant evidence, to examine and cross examine witnesses, and to argue the merits of their respective positions. On the entire record, including my observation of the demeanor of the witnesses,<sup>2</sup> and after considering the briefs filed by counsel for the General Counsel and counsel for the Respondent, I make the following findings of fact and conclusions of law.

**Findings of Fact**

Respondent is a non-union construction industry employer with offices in Edmond, Washington.

Respondent installs underground water and sewer pipes in residential subdivisions by digging trenches, setting the line and grade of the pipes, installing the pipes, and securing them

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<sup>1</sup> 29 U.S.C. §158(a)(1). The charge and amended charge were filed by the Union on January 16 and February 15, 2007, respectively. Complaint was issued on April 26 and the Answer was filed May 10, 2007.

<sup>2</sup> Credibility resolutions have been made based upon a review of the entire record and all exhibits in this proceeding. Witness demeanor and inherent probability of the testimony have been utilized to assess credibility. Testimony contrary to my findings has been discredited on some occasions because it was in conflict with credited testimony or documents or because it was inherently incredible and unworthy of belief.

in the ground. Respondent employs pipe layers, laborers, and equipment operators. Respondent's laborers are sometimes called "top men," in that they stand at the top of a manhole and hand any needed equipment and materials to the employee working in the hole. Respondent's operators dig main lines and backfill the lines after the pipe is laid and secured.

5 Tracy Briggs is the owner of Respondent. Ron Smith serves as the superintendent. One of Respondent's foremen was Bill Aven.

The Union targeted Respondent through its salting program in 2003 and 2006.

10 In 2003, Union organizer Steve Scheffer applied for work with Respondent in furtherance of the Union's salting program. Scheffer worked from April 1 to September 9, 2003, when he left to join a picket line protesting alleged unfair labor practices committed by Respondent. Eventually, the NLRB found that Respondent had twice unlawfully threatened Scheffer and also unlawfully refused to reinstate him following his unconditional offer to return to work after going  
15 on strike. **T. E. Briggs Construction Co.**, 349 NLRB No. 61 (March 30, 2007).

In 2006, Jay Sullivan and Charles Sadler began working for Respondent pursuant to the Union's salting program. Both Sullivan and Sadler made application to Respondent without divulging their Union affiliation. As of July 18, both Sullivan and Sadler were assigned to  
20 foreman Bill Aven's crew and were working at the Vintage job site in the Bothell, Washington area.

During the week of July 17, 2006, foreman Bill Aven and employee Charles Sadler conversed while Aven assisted Sadler in installing a flow restrictor. During this conversation, Aven did not  
25 ask Sadler if Sadler was affiliated with the Union.

According to Sadler, on his first day of work, July 18, foreman Aven assisted him in hanging a flow restrictor inside a type two catch basin (basically, a large manhole). Sadler was down in the basin and Aven was handing him tools from above. Sadler testified that during the  
30 course of their conversation Aven asked him about his background and his experience with pipe laying and whether he was affiliated with the Union. Sadler responded that he had five years of experience in pipe laying and was not affiliated with the Union.<sup>3</sup>

Aven recalled the same event and agreed that he asked Sadler if he had installed a restrictor before and also gave him other directions and information about the specific job. When asked whether he recalled asking Sadler whether he was a member of the Union, Aven testified he did not. Aven explained it was not part of his duty and that employees did not discuss the Union in front of him. Aven also made a blanket denial that he never questioned Sadler about whether he was a member of the Union. Aven testified,  
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I was instructed by Tracy [Briggs] that we were not to be involved with the coercing of union members. It wasn't a problem and it wasn't something I needed to know and it wasn't something I was worried about. I treated all my guys the same. We were a non-union company and it wasn't – it didn't matter.  
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Generally, as will be seen below, I credit the testimony of Aven and Sage over the testimony of Sadler and Sullivan. This credibility finding is based largely on the respective

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50 <sup>3</sup> Sadler told both T. E. Briggs and foreman Aven that his experience was in Spokane, Washington. Sadler explained that this was not true. He told them this to hide his experience with the Union.

plausibility of the testimony of the four witnesses. I can make few demeanor credibility findings as between Sadler and Sullivan and Aven and Sage. Further, no presumptions of credibility are apt. None of the four witnesses currently works for Respondent. Both Sadler and Sullivan left Respondent's employment to go on strike. Aven and Sage worked for other employers at the time of this hearing. I note that neither Sadler nor Sullivan has continued to work in the Union's salting program. Aven, Sage, Sadler and Sullivan were the only witnesses presented regarding the four allegations set forth above. According to all testimonial evidence, other employees were present during the four conversations. However, none of them were presented as witnesses at the hearing.

Generally, Sadler and Sullivan were articulate, thoughtful, and respectful witnesses. Their testimony was thoroughly consistent on direct, cross-examination, and redirect. Although neither gave the appearance of being over-rehearsed, I was nevertheless struck by their seemingly flawless recall of the events. This implausible, flawless consistency leads me to discredit their testimony generally.

On the other hand, Aven's testimony evinced an honest attempt to recall facts which were at the periphery of his memory. For instance, Aven remembered working with Sadler at the manhole sometime during the first week of Sadler's employment. He remembered asking Sadler about his experience but he did not recall asking him about Union affiliation and, in fact, due to the 2003 salting experience, Aven had been educated regarding the legality of such questioning and, at least in the abstract, knew that coercive interrogation was illegal. Aven testified that he knew better than to ask such questions. I note, moreover, that Sadler's testimony regarding a subsequent event somewhat corroborates Respondent's claim that it educated its foremen. Sadler testified that Aven told him that Respondent could not fire a suspected Union organizer (Sullivan) because it was illegal. Sullivan testified that Aven stated that Respondent just had to wait until Sullivan gave it grounds for discharge.

Based upon the relative plausibility of the testimony of Aven and Sadler, I find that Aven did not ask Sadler whether he was a member of the Union while the two of them were working at the manhole during Sadler's first week of employment.

During the last week of July 2006, employee Randall Sage spoke with employees Charles Sadler and Jay Sullivan. During this conversation, Sage did not ask Sadler and Sullivan if they were from the same Union. Moreover, Sage did not attribute his actions to Aven's inability to act.

Around 5:30 pm on either July 25<sup>4</sup> or 31,<sup>5</sup> Sadler, equipment operator Randall Sage, foreman Bill Aven, and pipe layer Chris Stokes were standing around Sage's truck drinking beer after work on the Willows jobsite. Jay Sullivan joined them. Sadler and Sullivan were aware that other employees and Aven suspected Sullivan was a member of the Union. Sullivan introduced himself to Sadler because they wanted the appearance that they did not know each other and were not affiliated.

According to Sadler and Sullivan, Sage asked if the two men were from the same union. Sullivan said, "Hell, yes." However, Sadler responded: "Randall, if you ask me that again, we're going to take it to the dirt." Sadler testified that everyone was laughing and the comment was an obvious joke because of his slight stature compared with Sage's much larger size.

<sup>4</sup> Sadler recalled the conversation on July 25.

<sup>5</sup> Sullivan recalled that the conversation took place on July 31.

According to Sadler, Sage responded, "Don't say that, Little Buddy. You know we put guys like you in the ground." According to Sadler's testimony, this was not the first time Sage had made a comment in Sadler's presence about burying Union guys.

5           After Sullivan left, Sadler testified he asked Aven, "So there's no way to get rid of that guy?" and Aven responded no, they just had to play the game. Sage then apologized for asking Sadler about his membership in the Union with Sullivan. Sadler further testified that Sage then said, referring to Aven, "Billy can't ask those questions, him being a foreman and all." Sadler testified that Aven nodded his head yes, and then said yes.

10           When asked whether he recalled any conversations on the Willows job site between Sage and Sadler in which Sadler made a comment about taking it to the dirt or putting union guys in a ditch or hole, Aven said he did not. Aven testified he had never heard Sage make any similar comments. When asked whether he recalled Sage ever saying in his presence that he was asking about Union membership because Aven could not, Aven responded, "Not in front of me, no. I don't recall that."

20           Sage testified that he could not remember a direct conversation with Sadler at the Willows site about the Union, but that if anyone came on site looking for work then it was natural to want to learn a little about them. He denied making a statement about asking questions about Unions because Aven could not. He did not remember Sadler making a comment about taking it to the dirt, and he said he believed it would be unlikely anyone would say that to him. Sage testified he did not make a statement in Sadler's presence about putting Union guys in a ditch. Sage also testified that that type of comment was not one he has made to anyone.

25           When asked if he recalled asking Sadler and Sullivan whether they belonged to the same Union, Sage responded, "I can't remember that instance, no." Sage testified that he suspected that Sadler was a Union member after working with him for a short period of time. Sage formed this suspicion based on the way Sadler handled his tools and set up for jobs. Sage had worked with Union pipe fitters in other jobs and felt that, "they kind of have their own little cadence. And from where the tape is in the pocket, the pencils, and rulers and little things that they use, these things denote that he's very professional." Sage also agreed that he asked Sadler if he was a member of the Union. Sage said they played a little game where he would ask, "Chuck, are you?" Sadler would respond that he was not and Sage would say okay.

35           Sage's testimony was forthright, candid, and spontaneous. Although he did not recall the specific conversations that Sullivan and Sadler did, Sage thoughtfully considered the statements attributed to him by Sullivan and Sadler. Hence, when asked if Sadler threatened to take him to the dirt, Sage responded, "You know, I don't remember him saying that. I don't think somebody would want to take it to the dirt with me." Sage admitted that he questioned fellow employee Sadler in their one-on-one conversations about his Union support and affiliation and admitted that he thought Sadler was a Union employee based on the way Sadler performed his work. I find Sage's and Aven's testimony regarding the alleged interrogation to be an honest account of the events and more plausible than that of Sadler and Sullivan.

45           In September or October, the Union made house calls on Respondent's employees. Randall Sage did not threaten that an accidental cave-in might occur during a conversation referencing Union organizer Jay Sullivan's house call to foreman Bill Aven.

50           On or about September 17 or 18 at the Summit job site, Sadler, Aven, Sage, Stokes, and Anders had a conversation about recent house calls by Union organizers. Aven recounted such a visit from former employee Jay Sullivan and Union organizer Brett Holley. According to

Sadler, Aven said he had not paid attention to what the organizers said because he was too busy staring a hole through Sullivan's skull. After Aven finished his story, Sadler testified Sage reacted by saying, "Yeah, isn't that some crazy shit? Who's to say a guy is not down in a ditch and an accidental cave-in happened and nobody knew a thing. Would that be some crazy shit?" Sadler testified that the crew, including Aven, reacted by laughing.

Aven testified he did not at any time on the Summit job site discuss Union officials coming to his house. He agreed that Union organizers had visited his house. Aven recalled the visit was in October because he remembered there were pumpkins on the front porch. When asked if he made a comment in front of employees on the Summit job site that he was staring a hole through Sullivan's skull, Aven testified he never made a comment to anybody because that was something he needed to talk to Briggs about first. He denied speaking with anyone about the incident after talking with Briggs. I find this explanation quite plausible and credit it for that reason.

In response to questioning about whether he recalled making a joke about a cave-in and putting Union people in a ditch, Sage responded, "Not hardly." He testified that no one in the industry jokes about that kind of thing. Aven agreed. He testified that he did not recall Sage ever making a statement about a cave in and specifically did not recall Sage joking about trapping Union sympathizers in that manner. Sage denied ever discussing a cave in or someone getting buried in a trench. In general, Sage testified that such a subject was not discussed among men who worked in trenches. I find this explanation plausible and, accordingly, credit Sage that he did not make such a statement.

In September or October 2006, soon after making a house call on foreman Bill Aven, Union organizer Jay Sullivan visited the jobsite. Aven left the jobsite as Sullivan arrived. Prior to leaving the site, foreman Aven did not state that Union organizer Jay Sullivan needs his ass kicked.

On the following day, Sadler, Aven, Sage, Stokes, and laborer Anders Svendsen were standing around Sage's truck drinking beer. According to Sadler, Aven received a call on his phone or walkie talkie. Sadler testified that Mark, the parts runner, told Aven over the walkie talkie that Sullivan was headed toward them and that Aven just looked at the other guys and said, "I've got to go." Sadler testified that as Aven walked away toward his truck, he yelled back to Sage, "You talk to him." Sage replied, "Well, what do you want me to say?" and Aven responded, "Draw the line."

Sadler testified that Sullivan drove by and waved on his way down the hill. There was a cul-de-sac at the bottom of the hill and Sadler thought Sullivan was going to drive down there and turn around. After Sullivan waved, Aven yelled down, "If he's going to act like that, he needs his ass kicked." Sadler testified that Sullivan had done nothing to warrant that reaction besides wave and smile. Sadler testified Sullivan did turn around and came over to talk to him and Sage. Sullivan recalled the same event and testified that he asked Sage to join the Union. Sage responded that he was not interested.

Aven testified that he remembered seeing Sullivan on this date driving up in a truck while Aven and the others were down in the cul-de-sac. Aven said he did not receive a call over his walkie talkie indicating Sullivan was coming, but that he recognized the truck from its color when it drove up and immediately walked away, got in his truck, and left for the day. Aven testified that he did not make any comments to anyone as he walked away. Additionally, he testified that Sage did not make any comments to him as he had already walked away before Sullivan drove back around the cul-de-sac to the jobsite.

Sage testified that on this date he was parked at the bottom of the hill and Anders was nearby cleaning or digging. He thought Stokes was with Anders. He said Aven was between the tank they had built and the road, between the truck and the edge of the job. Sage testified that Sullivan drove down the hill and turned around. He said as Sullivan got to the bottom of the hill, Aven was at his own truck and said, "I've got to go" to Sage because, as Sage described, "we knew who it was." Sage testified that Aven did not say anything besides "I've got to go."

I find it more plausible that Aven would leave the area without comment when he saw Sullivan drive to the jobsite. The workday was concluded and by that time Sullivan was on strike against Respondent. Both Sage and Aven agreed that Aven only said that he had to leave: "I've got to go." This makes sense. Aven, as foreman, knew that Sullivan was working for the Union. The workday was over and there was no reason for him to stay and overhear conversations about the Union, if that was Sullivan's intent on visiting the job.

### Conclusions of Law

The NLRB has jurisdiction of this matter because the employer is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent is a State of Washington corporation with an office and place of business in Edmonds, Washington, where it is engaged in the construction industry. In the course and conduct of its business operations, Respondent purchased and caused to be transferred to its facilities in the State of Washington, goods and materials valued in excess of \$50,000 directly from sources outside the State of Washington, or from suppliers within the State of Washington, which in turn obtained such goods and materials from sources outside the State of Washington. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

International Union of Operating Engineers, Local 302, is a labor organization within the meaning of Section 2(5) of the Act.

Respondent admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

The Respondent did not violate the Act as alleged in the complaint.

Based upon the credibility findings above, I conclude that employee Sadler was not interrogated by foreman Aven during Sadler's first week of employment. I find that it is unnecessary to determine whether equipment operator Sage is an apparent agent of Respondent because I credit Sage's denial that he questioned employees Sadler and Sullivan about whether they were from the same Union and I credit his denial that he referenced an accidental cave-in when speaking of former employee, Union organizer Jay Sullivan. I further conclude that Aven did not state, in reference to Sullivan, that he needed his ass kicked.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>6</sup>

<sup>6</sup> 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 complaint is dismissed.

5 Dated, Washington, D.C. September 5, 2007

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Mary Miller Cracraft  
Administrative Law Judge

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