

U.S. Department of Labor

Office of Administrative Law Judges
Washington, DC



In the Matter of:

Roger L. Foster,
Complainant

Case No. 82-TAE-7
82-DL-21

v.

Wilfred Theriault,
Woods Contractor, Inc.,
Respondent.

Appearances:

Robert N. Moore, Esq.
For the Complainant

Charles S. Einsiedler, Esq.
For the Respondent

Before: ROBERT M. GLENNON
Administrative Law Judge

DECISION AND ORDER

This is a complaint arising under the Immigration and Naturalization Act, 8 U.S.C. §1101 et seq., and filed in accordance with certain of its implementing regulations issued by the Secretary of Labor at 20 C.F.R. Parts 655 and 658 dealing with the certification process for the temporary employment of foreign workers in the United States. By that complaint Roger Foster, of Westfield, Maine, has alleged that Wilfred Theriault Woods Contractor, Inc., of Portage, Maine discharged him from its employment in violation of the terms of their contract and applicable regulations. Wilfred Theriault woods Contractor is an independent logging contractor engaged in the business of harvesting standing timber in northern Aroostock County, Maine. It is directed by Wilfred and Marcel Theriault, father and son.

In substance, Mr. Foster contends that his termination of employment was improper because the reasons given by Respondent therefor were not permissible within the terms of their contract; because he did not commit any "misconduct" within his proposed meaning of term; and because he was not furnished a copy of the contract as required by regulations.

In substance, Respondent contends that Foster failed to perform adequately to his job duties: that such failure jeopardized Respondent's own contract with the landowner; and that such failure was a proper ground for Foster's discharge under its employment contract with Foster.

A Compliance Officer of the Maine Department of Manpower Affairs conducted an informal investigation of the complaint, as provided for in the governing regulations at 20 C.F.R. 658.414, the results of which formed the basis of a State Monitor Advocate's findings that Foster's job performance justified his discharge and that the discharge was not violative of applicable regulations. Complainant thereafter requested a hearing before a state hearing officer, as provided for at 20 C.F.R. 414, 415. Following a full hearing session on January 19, 1982, the hearing officer set aside the finding below and ruled that Foster had been improperly discharged by Respondent, in violation of both contract provisions and applicable regulations, and that "remuneration" of \$952.00 should be paid to Complainant for a period of time during which he was unemployed. Employer then requested a review of the matter with a Regional Administrator of the Employment and Training Administration, U.S. Department of Labor, in accordance with 20 C.F.R. 658.416. The resulting decision of the Regional Administrator was that the decision of the state hearing examiner was "sound and proper" and would stand. The entire matter is now before me on a further appeal for a hearing by Respondent as provided by 20 C.F.R. 658.421.

My review of the record, and of the parties' pleadings filed pursuant to my Notice and Order of August 3, 1982, leads me to the conclusion that a de novo evidentiary hearing is not necessary for a fair and complete resolution of the issues here presented. Therefore, the matter has been decided on the basis of the existing public record of factual allegation, supporting documentation, and legal argument developed below.

1. General Regulatory Framework.

Due to the remote locations in which Respondent operates, it sometimes seeks to employ temporary, non-immigrant foreign (Canadian) workers. Upon a proper petition to this end from a prospective employer of foreign labor such as Respondent, these workers may be admitted under §1101 (a) (15)(H) (ii) of the Immigration and Naturalization Act, hereinafter the "H-2 program", when "unemployed persons capable of performing such service or labor cannot be found in this country." Id. While the Attorney General is initially charged with making this determination, 8 U.S.C. §1184(c), he has delegated the responsibility to the Commissioner of Immigration and Naturalization, 8 C.F.R. 2.1, who, in turn, has delegated the determination to the Secretary of Labor, 8 C.F.R. 214.2(h)(3). The regulations which implement the H-2 program state that such workers may be admitted only upon a certification from the Secretary that "qualified persons in the United States are not available and that the employment of the (temporary alien worker) will not adversely affect the wages and working conditions of workers in the United States similarly employed." 8 C.F.R. 214.2 (h)(3)(i) (1982). To this end, other regulations at 20 C.F.R. 655.200 et seq. establish a somewhat complex "certification process" to determine whether domestic workers are available for agricultural and logging employment and whether the admission of foreign workers, as proposed by the Employer, would, in fact, "adversely affect" the wages and conditions? of similarly situated United States workers.

This complex statutory and regulatory scheme, briefed in essential detail by Complainant with citation to recent case law, is designed to accommodate the interests of local employers in an adequate supply of labor with those of United States workers, that they will not be displaced by foreign workers and that their conditions of employment will not be adversely affected by the recruitment of foreign workers. The balance thus struck provides assurances to the United States worker that he will be given a preference over alien workers for jobs available in this country and that, when foreign workers are admitted, the working conditions of the United States worker will not be depressed. Puerto Rico v. Snapp, 50 U.S.L.W. 5035, 5037 (July 1, 1982). If these assurances cannot be made, the Secretary may not certify a need for foreign workers. If the assurances can be provided, and the need certified, and the Employer thereafter breaches the terms upon which his privilege to use foreign workers is conditioned, further service by the federal employment service system are discontinued. 20 C.F.R. 658.500, 501.

2. Factual Background.

During the period from June 1981 through March 1982, Respondent Theriault conducted logging operations in West Chapman and Chapman Township, Maine. During this period, Theriault entered into a contract with two land owners in the area, Huger Corporation and Seven Islands Land Company. Under the terms of Theriault's contract with the landowner, it was required to harvest trees designated by the landowners consistent with the landowners' cutting specifications. Certain testimony of a representative of the latter land-owner, with whom Respondent was under contract during the time period here pertinent, indicates that failure to comply with the landowners' cutting specifications could result in termination of the contract.

In March of 1981, in anticipation of the fact that it would be unable to fill its crews with U.S. workers, Theriault submitted a request for temporary alien labor certification, so that he could employ temporary Canadian woods workers. The application for woods workers was accepted by the Regional Administrator of the Department of Labor in Boston, Mass. and Theriault was directed by the Regional Administrator to engage in certain recruitment activities to test the availability of U.S. workers for the job. As part of these activities, the Regional Administrator requested that Theriault attend a "pooled job interview" to be conducted in Presque Isle, Maine.

At the pooled job interview, Theriault hired, among others Foster as a "logger all-round," under the terms contained in Theriault's "Clearance Order and Rural Manpower Job Offer" #0615253. Theriault's own job description of the position, contained in this job offer, was as follows:

Worker is required to carefully fall a tree without damaging other trees and limbs completely and topped (sic) at 4". (sic) Skidder driver¹ most (sic) not damage small

¹ As explained by Theriault on brief, and supported with pertinent citation to the Dictionary of Occupational Titles, a "logger all-round" is expected to use both a chainsaw and a "skidder" machine, the latter being an engine used to haul fallen trees from the cutting area. As

trees while yarding out to road space. They will cut trees (sic) with chain saw limb and top then skidder will yard to roadside and pile neatly and straight. Work may be interchangeable by 2 or 3 man crews.

Foster began his employment with Theriault in mid-May 1981. For the first two weeks or so, Foster worked principally as a skidder operator with another man on land owned by the Huber Corporation. In early June 1981, he was transferred by Theriault to another job site on land owned by the Seven Islands Land Company. After only three days on this site, Foster was discharged by the Theriault's on June 5, 1981. The Employers stated that the termination was the result of Foster's poor cutting practices; Foster stated that any work which was unacceptable to his Employer was due to the inexperienced "chopper" with whom he worked as well as to difficult physical working conditions. The Employer admitted that Foster had not been furnished a copy of his employment contract.

Article XI of the employment contract between Foster and Theriault states, in pertinent part:

Termination

If the Employer determines that the worker is unwilling to work in accordance with the terms of the agreement or determines that the worker has committed an act of misconduct or if the work (sic) is responsible for grossly negligent or willful damage to property of the Employer, or if the worker fails to abide by all reasonable camp rules, the Employer shall be entitled immediately to terminate his employment hereunder . . .

The regulations under which this complaint arises do not specifically address the termination of employment of an employee hired as a result of the mandated recruitment of domestic workers. The regulations do, however, state that "(n)o U.S. worker will be rejected for employment for other than a lawful job-related reason." 20 C.F.R. 655.203(c).

The state hearing official was apparently persuaded by Complainant's written argument that the term "misconduct" used in Article XI of the employment contract was central to the determination of the issue of right. ful discharge; moreover, that an apposite definition of this term could be found in the Maine Employment Security Law:

further explained by Theriault, and implicit in its job description, it is common for loggers all-round to operate in two man crews in which one member, known as the "chopper," operates a chainsaw to fell, "de-limb" and "top" the fallen timber, while the other member operates the skidder to haul out the timber. That these jobs are "interchangeable" between the two men is explicit in the job description.

"Federal Regulations do not define the term 'Misconduct', therefore, this tribunal will be guided by the definition provided by the Main Employment Security Law which defines 'Misconduct', in part, as a willful disregard of the employer's best interests."

When the hearing officer measured his factual findings against this standard, Complainant's termination was found to be improper.

3. Complainant's Performance as an Employee.

Foster was hired in mid-May 1981 and was assigned to work on previously harvested land owned by the Huber Corporation. He and another employee, Steven Webb, were instructed generally by the Theriaults to clean out the area. For the nearly three weeks during which this work was performed, Foster received no complaints from either his Employers or the land owner. It is reasonably assumed, then, that his work was at least satisfactory.

Apparently, though, either Foster's work, or the Theriault's satisfaction with his work, changed significantly when he was reassigned on June 1 to work on unharvested land owned by the Seven Islands Land Company. Here, Foster and another, unidentified co-worker received their instructions from Marcel Theriault and Kenneth White, an inspector for the Seven Islands Land Company. Complainant's testimony at the state hearing, corroborated by two inspection reports of Kenneth White, was that he and his first partner, Steven Webb, were each assigned a new man to work with their first day on Seven Island land, and so became two different "crews" (Tr.12) working on adjacent sites. Foster testified further that his new man was assigned as the "chopper" between them, but that this man was quite inexperienced and was let go after only a day and a half or so. Though not made clear on the record, it would appear then that Foster was without any partner for the remainder of his time on Seven Islands land, another day and a half.

As to the execution of particular tasks and responsibilities over this three day period, the testimony of Foster, Marcel Theriault and Kenneth White each tends to suggest that some dissatisfaction was clearly expressed to Foster, accompanied by general warnings that his work must improve; it is quite unclear, though, as to the exact sequence of these events. While it is understandable that memories of such a short period almost two years ago would be somewhat vague, I believe, nevertheless, that I can place little reliance on Foster's own recreation of these events. Several of his statements regarding the timing, number and content of the warnings given him were sharply inconsistent with each other, with other testimony of both Theriault and White, and with two inspection reports of his work. In reaching this conclusion, I hasten to add that I do not question Foster's credibility, only perhaps, the reliability of his memory.

Marcel Theriault testified that he personally viewed Foster's work during each of Foster's three days on Seven Islands land. On the first day, June 1, he recalled that Foster's area had not been cleared out properly and that he advised Foster accordingly. The next day, the area still had not been cleaned up and a second oral warning was given. Theriault and Foster, The testimony of and a White inspection report of June 11, all indicate that the area was substantially cleaned out by the third day though, but still not completely so.

Marcel Theriault testified that Steven Webb's work also was unacceptable, on the site adjacent to Foster's, and it does also appear, as urged by Complainant on brief, that Theriault may have confused the work of one as the work of the other. However, it appears equally that at least some work of each Employee has plainly unacceptable to both the Employer and landowner. Inspector White's report of June 5 states:

Foster and Webb crews have no system for felling and/or skidding. Wood left throughout chance. Big Cops. Trespass on small spruce. Tops and brush in the Townline. The foreman and jobber (Marcel Theriault and Wilfred Theriault, respectively) have been (or seen) told about these problems. The crews have been told and instructed to correct these problems.

The report later continues:

'The jobber is well aware that if these problems are not corrected the job will terminate. A lack of job layout and close supervision . . . seems to be partially at fault. However, the crews are taking extreme advantage of this situation. I was informed by W. Theriault that the crews will cleanup the mess or their jobs will terminate.

A second report of Inspector White, dated June 11 (both Foster and Webb were discharged on Friday, June 31, states as follows:

Foster crews - chance cleared satisfactorily except for 5 fir either cut and left or pushed and left. As stated last week this crew has no systematic method of cutting.

Webb crew - chance not cleared satisfactorily. One area partially clean the other 2 areas not cleaned at all. While cleaning the chance a pine was cut. This crew was told not to cut any wood until the chance had been cleaned.

Oliver crew - excellent job, good spacing and species mix of residual stand.

These two reports, written contemporaneously and in the ordinary course of business, support Marcel Theriault's testimony that he previously warned Foster about his cutting practices and that Foster did eventually comply, by Friday, June 3, with the request to clean his area. The first of these reports also support Marcel Theriault's testimony that the poor work of both Foster and Webb may have placed his general harvesting contract with the Seven Islands Land Company in some jeopardy.

By way of explanation for his job performance, Foster stated that he had had "problems" with the inexperienced chopper with whom he worked briefly, and that this unnamed individual was in fact the one responsible for the unacceptable accumulation of tree tops and brush. This individual was neither named nor produced by Foster at the hearing. On this subject, though,

Marcel Theriault did acknowledge on cross-examination that some of the poor work on Foster's work site could have been the fault of this chopper, but at the same time he emphasized that it was Foster's responsibility as skidder operator to clean the area properly. Foster excused other aspects of his performance as the result of having to work around the wreckage of an airplane in his area and the Theriault's failure to mark out trails for his skidder machines. These areas were not carefully probed by Foster, though, in his examination of Theriault.

With respect to the complaints of "poor cutting practices" on the Foster site, Marcel Theriault first stated that the timber was cut at angles which both damaged it and made it difficult to clear. As before, he admitted that some of this was attributable to the chopper, but he also recalled that Foster performed some cutting too, presumably after the chopper was let go. In any event, it seems clear that, whether or not Foster was alone for a time on his site, and whatever specific tasks he may have carried out, Marcel Theriault felt at the time that Foster and Steven Webb were not performing well:

. . . I couldn't get through to them what I wanted them to do . . . I told them to come and then get (Mr. White's) inspection reports that if this continues my job will be terminated. There was no other choice I had to make, but to terminate him (Foster) and clean up the mess before my job were (sic) terminated. As you can read, I imagine you have the inspection reports, there's one here, Roger Foster crew, (Webb) crew, and there is another job . . . which was just across the road . . . this guy was alone, just like these two (Foster and Webb) were when they first started. For some reason I was getting through to this person, but not to these two others.

The third man to whom Theriault referred above was another employee whose work was noted by Inspector White in his report of June 11: "excellent job, good spacing and species mix of residual stand."

Finally, as to Foster's assertion that his discharge was improper because he was never furnished a copy of his "woods contract" of employment, Marcel Theriault admitted that he did not provide such a copy. He stated further that one was always available in the main office who wished to review it and that Foster had at no time prior to bringing this complaint raised the issue.

4. Discussion and Conclusion.

On the surface of this record, there are a number of factual elements, some direct and some circumstantial, which tend to support Complainant's general argument that his discharge was improper when it is viewed in the context of Article XI of his employment contract. Firstly, Foster did clean up his work area when asked to by Marcel Theriault, albeit in neither an expeditious nor thorough manner. If the discharge rests to some degree on this transaction, it is at least arguable whether or not this constituted an unwillingness "to work in accordance with the terms of the contract," or whether it was "misconduct" in some sense. There also is some evidence that Foster was not solely responsible for the observed "poor cutting practices" or

accumulation of brush and tops or poorly cleared areas. Both he and Theriault stated that a third party - the inexperienced chopper - was at least partly responsible for some of this work. It does seem clear though, that whoever did what, Foster was not responsible for the work of this chopper and so should not be held accountable for it. It is apparent, too, that Marcel Theriault may have confused some of the unsatisfactory work of Complainant with that of Steven Webb, and thereby attributed some work of the latter to the former. As to any employer warnings which may have been given, the testimony is vague at best, contradictory at worst, that anything more than general instructions or nonspecific oral admonishment were given. In any event, it does seem that there was little opportunity for very many warnings, given both Inspector White's notation that close employee supervision was lacking, and the total time period here, involved, three days. Lastly, an inference could be drawn from some of Marcel Theriault's testimony that Complainant's discharge was perhaps not so much the product of quiet reflection, as of a reflexive response to a real fear of losing the general harvesting contract.

Taken by itself, without further inquiry or examination, this factual picture could establish a prima facie employment contract case of sorts, for Complainant.

On a more thoughtful review of the record, however, and on balance, I find sufficient credible evidence that Roger Foster's termination was not violative of either pertinent contract provisions or governing regulations. While the period of time during which all of the above-summarized events took place was indeed brief, it was long enough for the Theriaults to formulate a competent business judgment regarding Complainant's work for them. That work was, presumably, satisfactory for the few weeks he worked on Huber land, which was already harvested and needed only to be cleaned out, but the testimony of Marcel Theriault is specific and persuasive that Foster's work on the unharvested land of the Seven Islands Land Company was of a very different quality. Of particular probative interest to me were the contemporaneous written reports of Inspector White, an individual whose only concern was that the contracted services be performed satisfactorily. His recorded observations make clear that Foster's work was not satisfactory, and they note the specific aspects of the deficiency. Though Foster stresses the point of brief, the possibility that Marcel Theriault may have confused somewhat the respective work of Foster, Steven Webb and the unnamed chopper does not diminish the inadequacy of Foster's own work. On the entire record here, I have no doubt that much of Foster's work in harvesting the Seven Island Co. land was plainly unacceptable. I do not need to know which particular, improperly performed tasks he was in fact responsible for and which he was not. That much of the work in his site was unacceptable to the landowner is enough.

Analyzed within the terms of the employment contract, Complainant relies greatly on the term "misconduct" as used in Article XI. On review of the entire termination provision and the factual picture though, I believe that such a focus is too narrow.

Article I of that contract provides that "the worker agrees to perform the work required of him as specifically set forth in the relevant Clearance Order Rural Manpower Job Offer . . ." A narrative of this work has been excerpted above, and it amounts generally to a job description of the "interchangeable" duties of a chopper and skidder. In the opinion of the Employer at the time, there was considerable evidence that these duties were not being carried out adequately. This

evidence was observable to the Employer, and a concurring opinion of the landowner was specifically and clearly expressed. Moreover, that opinion also alluded to the possibility that the entire harvesting contract might be threatened by any continuing poor work of Complainant. In light of these factual elements, it seems a fully reasonable business judgment on the part of Employer to find that this employee had not "perform the work required of him as set forth in the . . . Job Offer." Though Complainant emphasizes the term "misconduct" in Article XI, that word is but part of one disjunctive clause setting forth a ground for termination which is preceded by another possible ground for termination: "(i)f the Employer determines that the worker is unwilling to work in accordance with the terms of the agreement . . . the Employer shall be entitled immediately to terminate his employment hereunder. . . ." Given this express contractual language, I need not construe the term "misconduct," nor look for actions amounting to "misconduct" in order to affirm the Employer's decision. By failing to "perform the work required of him" in a timely and effective manner, after repeated warnings, Roger Foster manifested an "unwilling(ness) to work in accordance with the terms of the agreement" and thereby conferred on his Employer the contractual right to discharge him.

In any event, apart from a rigid contractual analysis, I am persuaded that the Theriaults acted in good faith at all times. No specific factual allegation or evidence was ever adduced to question the Theriaults good faith, and none is apparent on the record. They warned Complainant, gave him the opportunity to improve his work, and when that work placed in jeopardy their own contract, acted quickly to improve their own situation vis-a-vis the landowner. In employer-employee relationships such as this, a measure of discretion must be allowed when good faith is shown.

As to the procedural aspect of this complaint, that the Theriaults failed to furnish a copy of the woods contract to Foster as required by 20 C.F.R. 655.202(b)(14), the record is clear that this is so. Marcel . . . Theriault readily admitted this, adding that a copy was available at all times in the main office to all employees. On brief, Complainant contends, apparently pro forma, that as a result of this technical violation "he could not be terminated by the Employer." I cannot agree. In the full context of the events of mid-May through June 3, 1981 - particularly June 1 through June 3 - this violation is a de minimus one and cannot justify such a conclusion. Nor can such a minimal, isolated nonobservance justify the discontinuance of further services to Wilfred Theriault Woods Contractor by the federal employment service system. On balancing the respective conduct of the parties, and the underlying equities, such a result would amount to the tail wagging the dog.

Based on the entire record of testimony, documentation and argument, and my discussion above, it is hereby Ordered that the decision of the State Hearing Officer be reversed, and the previous findings of the State Monitor Advocate be reinstated and affirmed.

ROBERT M. GLENNON
Administrative Law Judge

Dated: MAY 16 1983
Boston, Massachusetts