

Frans Joseph, Inc. and De Colores, Inc., Alter Egos and International Union of Painters and Allied Trades, District Council 57 of Western Pennsylvania, AFL-CIO, CLC. Cases 6-CA-33771 and 6-CA-33911

June 30, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND MEISBURG

The General Counsel seeks a default judgment in this case on the ground that the Respondents have failed to file an answer to the consolidated complaint. Upon a charge, first amended charge, and second amended charge filed by the Union in Case 6-CA-33771 on November 13, 2003, and January 26 and February 25, 2004, respectively, and a charge and first amended charge filed by the Union in Case 6-CA-33911 on January 26, 2004 and February 25, 2004, respectively, the General Counsel issued the consolidated complaint on February 27, 2004, against Frans Joseph, Inc. and De Colores, Inc., alter egos, the Respondent, alleging that it has violated Section 8(a)(5), (3), and (1) of the Act. The Respondent failed to file an answer.

On April 5, 2004, the General Counsel filed a Motion for Default Judgment with the Board. On April 8, 2004, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Default Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the complaint affirmatively stated that unless an answer was filed by March 12, 2004, all the allegations in the complaint would be considered admitted. Further, the undisputed allegations in the General Counsel's motion disclose that the Region, by letter dated March 23, 2004, notified the Respondent that unless an answer was received by the close of business on the third business day following receipt of the letter, a motion for default judgment would be filed.

In the absence of good cause being shown for the failure to file a timely answer, we grant the General Counsel's Motion for Default Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

On a date unknown to the General Counsel but particularly within the knowledge of the Respondent, Respondent De Colores was established by Respondent Frans Joseph and the Respondent as a disguised continuance of Respondent Frans Joseph, with substantially identical ownership, management, business purpose, operations, customers, and supervision.

Based on the conduct described above, Respondent Frans Joseph and Respondent De Colores have been, at all material times, alter egos and a single employer within the meaning of the Act.

At all material times, Respondent Frans Joseph, a Pennsylvania corporation with an office and place of business located in Manor, Pennsylvania, herein called Respondent Frans Joseph's facility, has been engaged in business as a painting and wallcovering contractor in the construction industry.

At all material times, Respondent De Colores, a Pennsylvania corporation with an office and place of business located in Murrysville, Pennsylvania, herein called Respondent De Colores' facility, has been engaged in business as a painting and wallcovering contractor in the construction industry.

During the 12-month period ending October 31, 2003, Respondent Frans Joseph, in conducting its operations described above, provided services valued in excess of \$50,000 to various customers, including Continental Building Systems, Inc. and Shawmut Design and Construction, Inc., Pennsylvania corporations, which are themselves directly engaged in interstate commerce.

During the 12-month period ending October 31, 2003, Respondent De Colores, in conducting its operations described above, provided services in excess of \$50,000 to various customers, including Continental Building Systems, Inc. and Shawmut Design and Construction, Inc., enterprises within the Commonwealth of Pennsylvania, which are themselves directly engaged in interstate commerce.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act, and that International Union of Painters and Allied Trades, District Council 57 of Western Pennsylvania, AFL-CIO, CLC is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

At all material times, the following named persons occupied the positions set forth opposite their respective names and have been supervisors of the Respondent within the meaning of Section 2(11) of the Act and

agents of the Respondent within the meaning of Section 2(13) of the Act:

Frank Blazetic	Co-Owner and President, Respondent Frans Joseph until December 31, 2002; Co-Owner and President, Respondent, until December 31, 2002
Carl Good	Co-Owner and Vice President, Respondent Frans Joseph; Co-Owner and Vice President, Respondent; Member, Board of Directors, Respondent De Colores; Member, Board of Directors, Respondent; Manager, Respondent Frans Joseph, Respondent De Colores, and Respondent

In about mid-July 2003, the Respondent constructively discharged Bill Denelsbeck, Mark Smith, Don Kalina, Joseph Kovac, Bob Evans, and other employees of Respondent Frans Joseph, whose identities are unknown to the General Counsel but whose identities are particularly within the knowledge of the Respondent. The Union did not become aware of the constructive discharges until on or about October 1, 2003.

Since about mid-July 2003, Respondent De Colores failed and refused to continue to employ Bill Denelsbeck, Mark Smith, Don Kalina, Joseph Kovac, Bob Evans, and other employees of Respondent Frans Joseph. The Union did not become aware of the failures and refusals to continue to employ until on or about October 1, 2003.

The Respondent engaged in the conduct described above because the named employees formed, joined, and assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities, and to avoid the obligations of the collective-bargaining agreement in effect between Respondent Frans Joseph and the Respondent and the Union, described below.

At all material times, the Union has been the designated exclusive collective-bargaining representative of certain employees of Respondent Frans Joseph and the Respondent (the unit), and has been recognized as such by Respondent Frans Joseph and the Respondent. Such recognition has been embodied in a collective-bargaining agreement, the effective dates of which are June 1, 2002 through May 31, 2005.

The unit, as set forth in the collective-bargaining agreement, constitutes a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

At all material times, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the unit.

Article XXIV of the collective-bargaining agreement, entitled "Preservation of Work/Evasion of Standards," provides, in pertinent part:

If the Employer performs on-site construction work of the type covered by this Agreement, under its own name or the name of another, as a corporation, company, partnership, or other business entity, including a joint venture, wherein the Employer, through its officers, directors, partners, owners, or stockholders, exercises directly or indirectly (through family members or otherwise), management, control, or majority ownership, the terms and conditions of this agreement shall be applicable to all such work.

In about mid-July 2003, the Respondent ceased operation of Respondent Frans Joseph's business, constructively discharged employees Denelsbeck, Smith, Kalina, Kovac, Evans, and other employees of Respondent Frans Joseph, and transferred all of its business operations to Respondent De Colores.

At all times since about mid-July 2003, Respondent De Colores and the Respondent failed and refused to continue to recognize and bargain collectively and in good faith with the Union as the exclusive collective-bargaining representative of the unit, to continue in effect all of the provisions of the collective-bargaining agreement, and to continue to employ the employees referred to above.

The subjects described above relate to wages, hours, and other terms and conditions of employment of the unit and are mandatory subjects for the purposes of collective bargaining.

The Respondent engaged in the conduct described above without prior notice to the Union and without affording the Union an opportunity to bargain with the Respondent with respect to this conduct and the effects of this conduct.

In the alternative, at all times since about mid-July 2003, the Respondent, by the conduct described above, failed to continue in effect all the terms and conditions of the collective-bargaining agreement, and specifically failed to adhere to article XXIV of the collective-bargaining agreement.

The Respondent engaged in the conduct described above without the Union's consent.

The terms and conditions of employment described above are mandatory subjects for the purposes of collective bargaining.

CONCLUSIONS OF LAW

By constructively discharging and failing to continue to employ employees Bill Denelsbeck, Mark Smith, Don Kalina, Joseph Kovac, Bob Evans, and other employees of Respondent Frans Joseph, the Respondent has discriminated in regard to the hire or tenure, or terms and conditions of employment, of its employees, thereby discouraging membership in a labor organization in violation of Section 8(a)(3) and (1) of the Act.

By ceasing operation of Respondent Frans Joseph's business, constructively discharging the employees referred to above, and transferring all of its business operations to Respondent De Colores; by failing and refusing to continue to recognize the Union as the exclusive collective-bargaining representative of the unit, to continue in effect all of the provisions of the collective-bargaining agreement, to continue to employ the employees referred to above, and specifically by failing to adhere to article XXIV of the collective-bargaining agreement, the Respondent has failed and refused to bargain collectively with the exclusive collective-bargaining representative of its employees, and has thereby engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

The Respondent's unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent has violated Section 8(a)(3) and (1) by constructively discharging and failing and refusing to continue to employ employees Bill Denelsbeck, Mark Smith, Don Kalina, Joseph Kovac, Bob Evans, and other employees of the Respondent, we shall order the Respondent to offer these employees full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed, and to make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them. Backpay shall be computed in accordance with *F.W. Woolworth Co.*, 90

NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 173 (1987).

The Respondent shall also be required to expunge from its files any references to the unlawful constructive discharges and failures to continue to employ, and to notify the discriminatees in writing that this has been done and that the discharges will not be used against them in any way.

In addition, having found that the Respondent violated Section 8(a)(5) and (1) by since mid-July 2003 ceasing operation of Respondent Frans Joseph's business, constructively discharging the employees referred to above, and transferring all of its business operations to Respondent De Colores; by failing and refusing to recognize the Union as the exclusive collective-bargaining representative of the unit; by failing to continue in effect all of the terms and conditions set forth in the collective-bargaining agreement, failing to continue to employ the employees referred to above, and specifically by failing to adhere to Article XXIV of the collective-bargaining agreement, we shall order the Respondent to recognize and bargain with the Union, and to abide by the terms of the agreement. We shall also order the Respondent to make whole its unit employees for any loss of earnings and other benefits they have suffered as a result of the Respondent's failure to comply with the agreement since mid-July 2003, in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, supra.

Further, in the event that the agreement provides for contributions to pension and benefit funds, we shall order the Respondent to make all contractually-required contributions to these funds that have not been made since mid-July, 2003, including any additional amounts due the funds in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 6 (1979). The Respondent shall also reimburse unit employees for any expenses ensuing from its failure to make the required contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981).¹

ORDER

The National Labor Relations Board orders that the Respondent, Frans Joseph, Inc. and De Colores, Inc.,

¹ To the extent that an employee has made personal contributions to a fund that are accepted by the fund in lieu of the Respondent's delinquent contributions during the period of the delinquency, the Respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the Respondent otherwise owes the fund.

Alter Egos, Manor and Murrysville, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Constructively discharging and failing and refusing to continue to employ employees Bill Denelsbeck, Mark Smith, Don Kalina, Joseph Kovac, Bob Evans, and other employees of the Respondent because they formed, joined, and assisted the Union and engaged in concerted activities, to discourage employees from engaging in these activities, and to avoid the obligations of the collective-bargaining agreement in effect between the Respondent and the Union, effective from June 1, 2002 through May 31, 2005.

(b) Failing and refusing to continue to recognize and bargain with International Union of Painters and Allied Trades, District Council 57 of Western Pennsylvania, AFL-CIO, CLC, as the exclusive collective-bargaining representative of its employees in the unit set forth in the collective-bargaining agreement.

(c) Ceasing operation of Respondent Frans Joseph's business and transferring all of its business operations to Respondent De Colores, and failing and refusing to continue in effect all of the terms and conditions set forth in the collective-bargaining agreement, and specifically failing to adhere to article XXIV of the agreement.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Bill Denelsbeck, Mark Smith, Don Kalina, Joseph Kovac, Bob Evans, and other employees of the Respondent full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges previously enjoyed.

(b) Make Bill Denelsbeck, Mark Smith, Don Kalina, Joseph Kovac, Bob Evans, and other employees of the Respondent whole for any loss of earnings and other benefits resulting from the unlawful constructive discharges and failures to continue to employ, with interest, in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from their records any references to the unlawful constructive discharges of, and failures to continue to employ, Bill Denelsbeck, Mark Smith, Don Kalina, Joseph Kovac, Bob Evans, and other employees of the Respondent, and within 3 days thereafter, notify them in writing that this has been done and that the unlawful constructive

discharges and failures to continue to employ will not be used against them in any way.

(d) Recognize and, on request, bargain with the Union as the exclusive collective-bargaining representative of the unit employees on terms and conditions of employment.

(e) Continue in effect all of the terms and conditions of the June 1, 2002 through May 31, 2005 collective-bargaining agreement, and specifically adhere to article XXIV of the agreement.

(f) Make whole the unit employees for any loss of earnings and other benefits they may have suffered as a result of its refusal since mid-July 2003 to continue in effect all of the terms and conditions of the collective-bargaining agreement, with interest, as set forth in the remedy section of this decision.

(g) Make all fund payments required by the collective-bargaining agreement that have not been made since mid-July 2003, and reimburse unit employees for any expenses ensuing from its failure to make the requirement payments, in the manner set forth in the remedy section of this decision.

(h) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(i) Within 14 days after service by the Region, post at its facilities in Manor and Murrysville, Pennsylvania, copies of the attached notice marked "Appendix."² Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former

²If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

employees employed by the Respondent at any time since mid—July 2003.

(j) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT constructively discharge or fail and refuse to continue to employ employees Bill Denelsbeck, Mark Smith, Don Kalina, Joseph Kovac, Bob Evans, and other employees, because they formed, joined and assisted the Union and engaged in concerted activities, to discourage employees from engaging in these activities, and to avoid the obligations of the collective-bargaining agreement in effect between us and the Union, effective from June 1, 2002 through May 31, 2005.

WE WILL NOT fail and refuse to continue to recognize and bargain with International Union of Painters and Allied Trades, District Council 57 of Western Pennsylvania, AFL-CIO, CLC, as the exclusive collective-bargaining representative of our employees in the unit set forth in the collective-bargaining agreement.

WE WILL NOT cease operation of Frans Joseph, Inc.'s business and transfer all of its business operations to De Colores, Inc., and fail to continue in effect all the terms and conditions set forth in the collective-bargaining agreement, and specifically fail to adhere to article XXIV of the collective-bargaining agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Bill Denelsbeck, Mark Smith, Don Kalina, Joseph Kovac, Bob Evans, and other employees full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges previously enjoyed.

WE WILL make Bill Denelsbeck, Mark Smith, Don Kalina, Joseph Kovac, Bob Evans, and other employees whole for any loss of earnings and other benefits resulting from the unlawful constructive discharges and failures to continue to employ, with interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any references to the unlawful constructive discharges of, and failures to continue to employ, Bill Denelsbeck, Mark Smith, Don Kalina, Joseph Kovac, Bob Evans, and other employees, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the unlawful conduct will not be used against them in any way.

WE WILL recognize and, on request, bargain with the Union as the exclusive collective-bargaining representative of the unit employees on terms and conditions of employment.

WE WILL continue in effect all of the terms and conditions of the June 1, 2002 through May 31, 2005 collective-bargaining agreement, and specifically adhere to article XXIV of the agreement.

WE WILL make whole the unit employees for any loss of earnings and other benefits they may have suffered as a result of our refusal since mid-July 2003 to continue in effect all of the terms and conditions of the collective-bargaining agreement, with interest.

WE WILL make all fund payments required by the collective-bargaining agreement that have not been made since mid-July 2003, and reimburse unit employees for any expenses ensuing from our failure to make the required payments.

FRANS JOSEPH, INC. AND DE COLORES, INC.,
ALTER EGOS