Allied Products Corporation, Richard Brothers Division *and* International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), Local 701. Case 7–CA–11471

July 13, 1977

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS JENKINS AND PENELLO

On June 30, 1975, the National Labor Relations Board issued a Decision and Order in the above-entitled proceeding,[1] finding that Respondent had violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended, by refusing to bargain with the Union concerning two unit employees in the classifications of secretary to the division general manager and secretary to the vice president of manufacturing and physical resources. The Board also found that Respondent had violated Section 8(a)(5) and (1) of the Act by suspending its previously established merit wage review and/or increase program without prior notice to, or bargaining with, the Union. The Board ordered Respondent to cease and desist from refusing to bargain with the Union concerning the two secretarial employees, and from unilaterally discontinuing merit wage reviews and/or increases for the unit employees without prior notice to, or bargaining with, the Union. The Board further ordered Respondent, upon request, to bargain collectively and in good faith with the Union regarding the two secretarial employees, and to reinstitute the merit wage review and/or wage increase program formerly in effect, apply it retroactively from May 3, 1974, and make whole the employees in the unit for any loss of wages suffered by reason of the discontinuance of the program.

Thereafter, the Board filed an application for enforcement of its Order in the United States Court of Appeals for the Sixth Circuit. On January 28, 1977, the court issued its decision, which denied enforcement of the Board's Order as it pertained to the two secretarial employees on the ground that they should be excluded from the unit as confidential employees.[2] However, the court enforced the remainder of the Board's Order, concerning the merit wage review and/or increase program, except that the court declined to enforce the Board's backpay award until the Board had reconsidered the remedy in light of the court's application to the case of a different theory concerning the limitations period contained in Section 10(b) of the Act.

On March 28, 1977, the Board advised the parties that it had decided to accept the remand and that they might submit statements of position with respect to the issue raised by the remand. Thereafter, the General Counsel and Respondent filed statements of position.

Pursuant to the provisions of the Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

In our original Decision, we found that between at least 1970 and early 1974, Respondent had followed a policy of reviewing the work performance of each full-time office clerical employee it hired after the first 6 months of full-time employment and annually thereafter on or near the employee's anniversary date, except in cases of layoff where the review date might be extended, and that as a result of such performance reviews, Respondent had granted merit wage increases to each of such employees in amounts ranging from 10 cents to 25 cents per hour. Contrary to Respondent's established practice, employee Rhonda Moore did not receive her merit wage review and/or increase on February 27, 1974,[3] the date on which it normally would have been due. Moore reported this fact to Union Representative David DeMott at a union meeting on March 18.[4] DeMott told her that the matter was something that should be taken up with Respondent. A second employee was denied her merit wage review on the appointed date of May 2. At the first collective-bargaining meeting between Respondent and the Union, held on May 3, DeMott raised the issue of the merit review program, and was told by a representative of Respondent that, during negotiations, there would be no wage reviews. Subsequently, one or more unit employees failed to receive scheduled merit wage reviews during negotiations.

As stated, the Board determined that Respondent's suspension of the merit wage review and/or increase program violated the Act. In so finding, we concluded that the complaint alleging the violation was not barred by Section 10(b) of the Act, which provides in part that no complaint shall issue based upon an

[1] 218 NLRB 1246 (1975).

[2] *N.L.R.B.* v. *Allied Products Corporation, Richard Brothers Division*, 548 F.2d 644 (C.A. 6, 1977).

[3] All dates hereinafter refer to the year 1974, unless otherwise indicated.

[4] On December 20, 1973, a majority of Respondent's employees in the following unit selected the Union as their collective-bargaining representative in a secret ballot election:

> All office clerical employees employed by the Employer at its facility located at 235 E. Bacon Road, Hillsdale, Michigan, but excluding all production and maintenance employees, technical employees, professional employees, confidential employees, guards, and supervisors as defined in the Act, and all other employees.

On March 5, the Board certified the Union as the collective-bargaining representative of these employees.

unfair labor practice occurring more than 6 months before the charge was filed. In this case, the charge was filed on October 7, more than 6 months after employee Moore had failed to receive her merit wage review. However, the Board, relying upon *General Motors Acceptance Corporation* v. *N.L.R.B.*, 476 F.2d 850 (C.A. 1, 1973), decided in effect that suspension of the merit review program was unlawful as it affected employees who did not receive their scheduled reviews within 6 months preceding the filing of the charge and thereafter. The Board ordered affirmative relief retroactive from May 3.

Contrary to the Board, the court of appeals found that employee Moore's statement to Union Representative DeMott on March 18 that she had not received her scheduled merit wage review was insufficient to apprise him that "there had been a policy decision affecting all employees to abandon the existing practice."[5] The court found instead that DeMott did not learn of Respondent's decision to suspend merit wage reviews entirely during negotiations until the initial collective bargaining session on May 3.

Having found that the Union did not possess knowledge of facts which would indicate that Respondent had violated the Act until May 3, the court concluded that the limitations period prescribed in Section 10(b) of the Act had been tolled until that date. For that reason, the court deemed it unnecessary to consider whether Respondent's refusal to conduct merit wage reviews during the 6-month period prior to the filing of the charge and thereafter in itself violated the Act.

In view of our acceptance of the court's finding that the Union did not become aware of Respondent's unlawful conduct until May 3, we agree that the 10(b) limitations period was tolled until then. As the court recognized, the Board has uniformly held that the 6-month limitations period does not begin to run until the injured party has become, or should have become, aware of the respondent's unlawful action. *Russell-Newman Mfg. Co.*, 167 NLRB 1112 (1967), enfd. 406 F.2d 1280 (C.A. 5, 1969); *Alabaster Lime Company, Inc.*, 194 NLRB 1116 (1972). The Board has also decided that where the limitations period has been tolled with respect to the cause of action it is likewise tolled as regards the remedy. *Don Burgess Construction Corporation d/b/a Burgess Construction and Donald Burgess and Verlon Hendrix d/b/a V & B Builders*, 227 NLRB 765 (1977).

Therefore, because the statute of limitations was tolled both as to the cause of action and the remedy in this case until May 3, the charge filed on October 7 was obviously timely. It is thus evident that Respondent should be ordered to reinstate its merit wage review and/or increase program and apply it retroactively from February 27, the date upon which Respondent first passed over an employee entitled to a merit wage review under its established practice, and to make whole the employees in the unit for any loss of wages suffered by reason of the suspension of the program from that date.[6]

As the court has already enforced our Order as its pertains to the merit review program, except with respect to the backpay award, our supplemental Order will be limited accordingly.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Allied Products Corporation, Richard Brothers Division, Hillsdale, Michigan, its officers, agents, successors, and assigns, shall:

Take the following affirmative action which is deemed necessary to effectuate the purposes and policies of the Act:

(a) Reinstitute the merit wage review and/or increase program formerly in effect and apply it retroactively from on or about February 27, 1974. Further, make the employees in the bargaining unit whole by paying to them the differences, if any, between their actual wages and the wages they would have received had the merit wage review and/or increase program not been suspended, together with interest at the rate of 6 percent per annum as set forth in *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). The appropriate bargaining unit is:

> All office clerical employees employed by the Employer at its facility located at 235 East Bacon Road, Hillsdale, Michigan, but excluding the secretary to the division general manager, the secretary to the vice president of manufacturing and physical resources, all production and maintenance employees, technical employees, professional employees, confidential employees, guards and supervisors as defined in the Act, and all other employees.

[5] 548 F.2d at 651.

[6] Respondent's repetition in this statement of position of the argument it advanced before the court of appeals to the effect that the Board improperly granted affirmative relief *sua sponte* in its original Decision is outside the scope of the remand. The court in its decision rejected this contention as untimely, and remanded the case to us solely to reconsider the remedy "in light of" its affirmance of the Board's Order "based on a theory of the applicability of the §10(b) limitations period which differs from that upon which the Board relied . . . ." 548 F.2d at 654.

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its facility at Hillsdale, Michigan, copies of the attached notice marked "Appendix."[7] Copies of said notice, on forms provided by the Regional Director for Region 7, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 7, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

[7] In the event that 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."

APPENDIX

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

WE WILL reinstitute the merit wage review and/or increase program formerly in effect and apply it retroactively from on or about February 27, 1974, by paying the employees in the bargaining unit the differences, if any, between their actual wages and the wages they would have received had the merit wage review and/or increase program not been suspended, together with interest thereon at the rate of 6 percent per annum. The appropriate bargaining unit is:

> All office clerical employees employed by the Employer at its facility located at 235 East Bacon Road, Hillsdale, Michigan, but excluding the secretary to the division general manager, the secretary to the vice president of manufacturing and physical resources, all production and maintenance employees, technical employees, professional employees, confidential employees, guards and supervisors as defined in the Act, and all other employees.

ALLIED PRODUCTS CORPORATION, RICHARD BROTHERS DIVISION