A W Behney Construction Company, Inc *and* Local 492, United Brotherhood of Carpenters & Joiners of America, AFL–CIO Case 4–CA–7677

June 17, 1976

DECISION AND ORDER

BY MEMBERS FANNING, PENELLO, AND WALTHER

On April 9, 1976, Administrative Law Judge Almira Abbot Stevenson issued the attached Decision in this proceeding Thereafter, the Respondent and the Charging Party filed exceptions and supporting briefs, and the Respondent filed an answering brief

Pursuant to the provisions of 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

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt her recommended Order

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, A W Behney Construction Company, Inc , Reading, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in said recommended Order

DECISION

STATEMENT OF THE CASE

ALMIRA ABBOT STEVENSON, Administrative Law Judge This case was heard on February 19 and 20, 1976, in Reading, Pennsylvania The complaint was filed and served on the Respondent on November 4, 1975 The complaint was issued on December 24, 1975, and duly answered by the Respondent

The issues in this case are whether the Respondent which entered into a collective-bargaining agreement with the Charging Party Union covering carpenters and apprentices on October 7, 1974, effective until April 30, 1977, violated Section 8(a)(5), (3), and (1) of the National Labor Relations Act, as alleged in the complaint and denied in the answer, on August 22, 1975, by withdrawing recognition, terminating the agreement, and announcing its intention of hiring nonunion men, and by terminating three employees because they were members of and represented by the Union, and refusing to reinstate them until October 24, 1975

Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel, the Charging Par ty and the Respondent, I make the following

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I JURISDICTION

The complaint alleges that the Respondent is a Pennsylvania corporation engaged in the construction business with its principal office located in Reading, Pennsylvania, during the past calendar year the Respondent purchased goods valued in excess of $50,000 from firms located in Pennsylvania which received the goods directly from outside Pennsylvania The Respondent does not deny these allegations, and I conclude that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act

II LABOR ORGANIZATION

The Charging Party Union is a labor organization within the meaning of Section 2(5) of the Act

III THE UNFAIR LABOR PRACTICES [1]

A *Background*

In August 1975, A W Behney, referred to herein as Behney, was president of the Respondent, as well as of Berks Do-All Construction Company, Inc These two organizations, plus another not further referred to in the record, operated out of a single office where they shared the telephone-answering services of a single secretary paid by the Respondent Berks Do-All and the Respondent both engaged in the repair and reconstruction of damaged residential buildings, largely for insurance companies, such business making up 98 percent of the Respondent s business Berks Do-All has always, apparently, operated nonunion The Respondent also operated nonunion until sometime prior to October 7, 1974, when it entered into a collective-bargaining agreement with the Union covering carpenters and apprentices Although not a member of Berks Constructor Associates, Inc , the Respondent on that date became a party to the residential carpenter agreement between the Association and the Union which is effective through April 30, 1977 With regard to the negotiations, Union Business Agent Joseph Covely testified that Behney came to his office and asked for an agreement with the Union in order for the Union to supply men for his residential contracting business from its membership Covely and Behney both testified that before the contract was entered into the two of them discussed health and welfare, pension, and other funds which were payable to the Union not later than the 10th day of each month under the written terms of the residential agreement, and that they made

[1] Except where specifically discussed the relevant facts are substantially undisputed

an oral "gentlemen's agreement" to the effect that the Respondent could be delinquent in making payments to the funds The two witnesses disagreed only on the length of the delinquency agreed to, Covely testifying it was a 1- or 2-month delinquency, and Behney insisting it was a 3- to 5-month delinquency [2] Behney testified that the reason the Union agreed to the delinquency was that the Union was new to residential work and wished to build that kind of work for the Union, and because Behney did so much insurance business and sometimes had to wait 6 months to be paid for a job

As far as the record shows, there was no discussion between Covely and Behney of that part of article IV of the written collective-bargaining agreement entered into by them to the effect that failure by the employer to make its payments to the funds "at the option of the Union, may be deemed to be non-payment of wages, and the employees may cease work, and may picket any job or site upon which any such employer is working or engaged " Nor was there any discussion of article V, which provided as follows

> Bonding
>
> All Employers who do not have a history of employer contributions to the funds herein, will be required to post a cash bond, or other form of security and/or pay of fringes weekly to cover monetary fringe benefits under this contract
>
> The amount and the form of the bond posted and the surety posting time shall be subject to the approval of the Union The Union specifically reserves the right to decide when the bond shall be posted and the amount of the bond to be posted, based on the previous delinquency records of the Employer or those Employers having no experience in the Funds

The Respondent soon began to fall behind in its payments into the funds, until the Union on August 18, 1975, filed suit against the Respondent in the Court of Common Pleas of Berks County, Pennsylvania, for $5,822 owed The suit was reported in the local newspaper the next day, where the Respondent's three carpenters, Walter Kerber, Antonio DeJesus, and Francis Pieller, all of whom are members of the Union, learned for the first time about the Respondent's delinquency When the three carpenters reported for work on August 20, they advised Behney they could not work for him if he did not make the payments Business Agent Covely was summoned and, after discussing the matter with Behney, he told the carpenters that Behney had promised to pay up by Friday, August 22, and advised them to go to work The men worked on August 20 and 21

B *The Terminations*

The complaint alleges, and the answer denies, that the Respondent violated Section 8(a)(1), (3), and (5) on August 22, 1975, by notifying the Union it was withdrawing recognition from and terminating its collective-bargaining agreement with the Union and intended to hire nonunion men as of August 25, 1975, and by terminating Kerber, DeJesus, and Pieller, and until October 24, 1975, refusing to reinstate them because they were members of and represented by the Union

Behney telephoned Business Agent Covely on Friday, August 22, and asked him to come to Behney's office at quitting time that day as he was going to discharge the Union's three members "and no longer operate as A W Behney " That afternoon the three carpenters were called to the office from their job locations Behney handed each of them two paychecks, representing their wages in full through the end of that day, and a copy of a letter addressed to the Union to the following effect

> As of 4 30 today, the 22nd of August 1975 we cannot afford to operate as a union contractor For the past three months, or more, we have been paying the 50 cents an hour increase in wages and the insurance companies that we work for will not pay the increase
>
> Therefore, as stated above we will no longer consider our company, A W BEHNEY CONSTRUCTION CO INC , any longer a union contractor As of August 25, 1975 we will hire non union men

Covely joined the group, was informed what had happened, and was shown a copy of the letters Behney told the group the Respondent would no longer be in business after that day, but that he had nonunion work for the three carpenters if they wanted it All rejected this offer and left with their business agent

Behney testified that the reason for this conduct was union pressure to pay up the fringe benefits and, as he intended to say in his letters, because he would have to quit operating union in May 1976 anyhow as his insurance company customers had notified him they would not compensate him for an additional wage increase which would take effect, under the union contract, at that time

On Monday, August 25, Kerber, DeJesus, and Pieller reported to the Respondent's office for work at the usual time, as instructed by Union Business Agent Covely, and accompanied by him Covely told Behney on that occasion that he had brought the men to work under the union contract, which was still in force, but Behney replied that the Respondent was no longer in business, and only the nonunion shop was operating

The parties stipulated that subsequent to August 22, 1975, the Respondent corporation continued in business, using as replacements for the three alleged discriminatees nonunion carpenters, and that there was work available for the alleged discriminatees from August 22, 1975, until January 20, 1976, had they not been terminated

The facts set forth above clearly establish, and I find, that on August 22, 1975, the Respondent withdrew recognition from the Union which was the exclusive contract representative of its employees in an appropriate unit of carpenters and apprentices, and terminated its contract with the Union without giving the notices required by Section 8(d) of the Act I conclude that the Respondent thereby violated Section 8(a)(5) and (1) of the Act, as alleged in

[2] The gentlemen s agreement also included certain privileges regarding the Respondent s employment of apprentices not pertinent to this case

the complaint I also find that the Respondent discharged Walter F Kerber, Antonio DeJesus, and Francis M Pieller because they are members of and represented by the Union, and conclude that this conduct was violative of Section 8(a)(3) and (1) of the Act [3]

C *The Reinstatement Offers*

As stated above, the complaint alleges that the Respondent refused to reinstate Kerber, DeJesus, and Pieller until October 24, 1975 The Respondent contends that on August 27 it offered unconditionally to reinstate the men on September 2, 1975

On Wednesday, August 27, Covely and Behney met at the courthouse and settled the lawsuit between them on the basis of Behney's paying the Union the full amount claimed According to Covely, Behney then told him he would call Monday for two men, naming Pieller and DeJesus, and Covely understood him to be asking for union men to work for the Respondent Covely replied that it would be necessary for Behney to post a bond Behney asked Covely about their gentlemen's agreement, but Covely replied that it was no longer in effect because of Behney's delinquencies and the court action which the Union had been forced to take Later the same day, Behney's secretary, Candice Conard, on Behney's instructions, left a call at the union hall for two men to report for work on Tuesday, September 2, as Monday was Labor Day Behney himself telephoned Covely on Tuesday, September 2, and asked for two men to work on the following day, Wednesday, September 3 Covely responded that he could not release the men until they had a settlement about the bond, to guarantee future payments of fringe benefits Behney insisted that the gentlemen's agreement should still be recognized, and told Covely he would not post a bond Covely had one other call from Behney after that, asking for men under the gentlemen's agreement, but Covely told Behney that a bond would be necessary Covely said his secretary told him on two other occasions that Behney tried to reach him, and Covely called back but was told that Behney was not in and Covely did not leave his name

Behney contacted DeJesus directly on August 27, September 2, and September 30 when they met at the unemployment compensation office,[4] and asked him to work under nonunion conditions DeJesus assumed these were offers of employment by Berks Do-All, and he refused them He and Pieller, however, did nonunion work on their own as contractors on two jobs unrelated to the Respondent, but quit the second job because Covely told them they would have to withdraw their union books if they continued to do that work

Pieller testified that Covely never told him Behney requested him and DeJesus to work, but that sometime after Labor Day Covely told him not to go back to work for Behney because he was nonunion and did not post a bond Kerber testified that Covely told him the first week after he was laid off, after Labor Day, that "A W Behney wanted someone to go up to his place to work, but he could not send me out unless he put up a bond " Covely said that it was union men Behney wanted, and that Kerber was supposed to go to work for Behney the day after Labor Day

Behney testified that he told a referee at the unemployment compensation agency on September 30 that he opposed the payment of unemployment compensation to these three men, "because I asked for them to work a week later after the union dispute started that they could work union or nonunion, I don t care, I want to get my jobs done "

Letters dated October 24, 1975, on A W Behney Construction Co , Inc , stationery, were sent by Behney, as president, to each of the carpenters, with a copy to Covely, as follows

> We have made many attempts with Joe Covely, business agent for Local 492, to try to get you back in our employment On or about Tuesday, Sept 30, 1975, we met in the unemployment office for a hearing for unemployment
>
> We have held an opening for your employment here, however, we cannot hold it any longer than Tuesday, November 4, 1975
>
> NOTE On Sept 30, 1975 Mrs Behney, C Conard, and Mr Behney made several attempts to try to resolve the dispute between the union Local 492, and A W Behney Const Co , Inc , however, Joe Covely would not return the calls And on Oct 1, 1975, Mr Behney called from his home at 8 15 A M and asked for the same men and also to resolve our differences The business agent refused completely to make any settlement and hung up

On October 29, Covely addressed the following letter to the Respondent

> Your letter of Oct 24, 1975 to Members, Kerber, DeJesus and Pieller have been reviewed by me
>
> You make a gross misstatement when you state that you made many attempts to get these men back in your employment On the contrary, there were periods of time when neither I, nor our members could reach you Secondly, your so called attempts were efforts on your part to secure conditions of employment that violated your agreement with us for instance, in spite of your poor record regarding pension and health & welfare payments (causing us to bring suit against you) you demanded that these funds not be payable or postponed for three months
>
> Further, I did talk to you but couldn't resolve the matter because you were asking to be permitted to be 3 months delinquent in pension and health & welfare payments
>
> Our members have always been ready, willing and able to report for work with you so long as you are willing to abide by your agreement with this Union

[3] Behney s offer of nonunion work did not alter the legal effect of his conduct on August 22 See *Marquis Elevator Company Inc* 217 NLRB 461 (1975) *John E Holkko d/b/a Lifetime Shingle Company* 203 NLRB 688 (1973) *Johnson Electric Company Inc* 196 NLRB 637 (1972)

[4] Based on DeJesus testimony I believe Behney s denial that he spoke to the men on September 30 represented a memory lapse he did not deny the other offers testified to by DeJesus

and this includes the protection for the pension, health & welfare funds

We shall expect to hear from you regarding the foregoing

Covely testified that, although as of August 27 the Respondent was settled up to date on fringe payments, Covely refused to supply men to the Respondent because Behney refused to post a bond, and because DeJesus told Covely that Behney tried to seduce him away from the Union and persuade him to work nonunion Covely said it was the contract which required the bond, but that, under the contract, the amount, the form, and the surety for the bond were at the Union's discretion and the Union had not decided these matters In refusing to assign men in this instance, he said he was carrying out the provisions of article IV of the written collective-bargaining agreement, which identifies fringe benefits as wages, and permits employees to cease work if an employer fails to make such payments

None of the three alleged discriminatees has returned to work for the Respondent Kerber testified that he showed his October 24 letter to Business Agent Covely who told him that the Respondent had never put up a bond, and he was "not allowed to send anyone out unless he fulfilled his half of the contract" in this manner Kerber did not return to work for Behney, he said, because Behney did not put up a bond DeJesus said that Covely told him, when he received his October 24 letter, that the business agent would take whatever steps were necessary, if any Pieller testified he did not return to work for Behney because "He said he's no longer union "

Behney testified that since August 25 he has had union jobs for Kerber, DeJesus, and Pieller and is prepared to abide by the union contract provided the "gentlemen's agreement," regarding apprentices and permitting him to remain 3 to 5 months late on payment of fringe benefits, is continued

The General Counsel contends that no valid offers of reinstatement were made before October 24 because none were made directly to the employees involved and neither Covely nor the Union were their agents for receiving such offers, Kerber was never specifically requested, all such offers failed to specify that they were for employment by the Respondent and not by Berks Do-All and that the Respondent had altered its policy of unlawful discrimination, and Behney's offers of nonunion work and failure to put the pre-October offers in writing demonstrated his bad faith The Charging Party contends, in addition, that none of the offers, including that of October 24, were unconditional because they were not clearly for work under the union contract, and because the Respondent wanted the special privilege of not posting a bond guaranteeing payment of fringe benefits as called for in the contract

The Board has held that offers of reinstatement conveyed to employees through their bargaining representative are valid offers of reinstatement where the Union was in fact their designated agent [5] In this case, the three discriminatees were members of the Union, they sent for Covely to represent their interests in dealing with Behney, and they followed his advice and instructions in all matters Covely acted as their spokesman with Behney and, by giving them advice and instructions, controlled their conduct Behney recognized Covely as the employees' representative and dealt with him as such I find, therefore, that Union Business Agent Covely was the agent of the discriminatees for receiving offers of reinstatement

Throughout this record, parties on both sides speak of union and nonunion work in the same way that to my knowledge the terms are generally used, as work which is covered, and work which is not covered, by a union contract It also seems clear that all parties knew that men obtained through the Union had to be employed under the union contract Therefore, when Behney, on August 27, upon settling the Union's suit against the Respondent, informed Covely he would call the union hall for men, he revealed a change of mind about his treatment of the Respondent's employees and their Union, its willingness now to take two of them back, and to employ them under the terms of the union contract and the oral agreement as Behney interpreted it Behney testified to this effect, and Covely clearly so understood and subsequently indicated as much to the employees None of them raised a question as to whether such offers might be for nonunion work or for employment by Berks Do-All

Similarly, Behney's October 24 letters to the discriminatees left no doubt that they were offers of work for the Respondent as they were written on its letterhead and signed by Behney as its president Moreover, that the offers were for union work was clear from Behney's sending a copy to Covely who acknowledged as much by responding for the addressees and raising no question on this subject Behney's offers of nonunion work to DeJesus were not made through the Union and neither Covely nor DeJesus was confused or that score In view of the availability of work and the Union's refusal to dispatch men, I find that the nonunion offers to DeJesus were not evidence that Behney's requests for men from the Union were made in bad faith but were, as Behney indicated, attempts to recruit a carpenter to work on any basis he could get him Nor do I find evidence of bad faith in Behney s pre-October failure to put his offers in writing or to specifically enunciate a promise not to discriminate again The record shows that Behney is not a particularly articulate person and that he considers himself ill-equipped to express himself in writing and no one suggested he do so or that he make any such promises, doubtless because all parties understood that by August 27 he had changed his mind about his recent conduct, found above to have been unlawful [6]

It is undisputed that Behney told Covely on August 27 that he would send for two men, specifically naming De Jesus and Pieller, the same day Behney's secretary requested the union hall to send two men on September 2, the day after Labor Day, the next day Behney made the same request, and made several subsequent attempts to obtain carpenters from the Union I find that the Respondent, by this

[5] *Lipman Bros Inc et al* 164 NLRB 850 (1967)

[6] The Board has not to my knowledge required in circumstances like those present here that offers of reinstatement be made in writing or contain assurances against future discrimination Cf *Art Metalcraft Plating Co Inc* 133 NLRB 706 (1961)

conduct, offered in good faith to reinstate DeJesus and Pieller on September 2

The evidence about Kerber is more puzzling Thus, there is no testimony by either Behney or Covely that Kerber was requested by name, or that more than two men were requested, but Kerber said Covely told him he could have gone back to work the day after Labor Day In view of Pieller's undisputed testimony that Covely never told him about Behney's request for him, I believe that Covely told Kerber instead In fact, however, there is no testimony that Behney offered reinstatement to Kerber, by name or by implication, before his letter of October 24

The Charging Party's contention that the Respondent's reinstatement offers were not unconditional because it wanted the special privilege of not posting a bond is, in my opinion, without merit Thus, Behney's insistence on the continuation of the gentlemen's agreement, which he contends allows him to be 3 to 5 months late in paying fringes, was not the imposition of a new condition on the employment of these men, but only reservation of his right to assert his argument in favor of his interpretation of the oral agreement, and expression of his willingness to return to the situation as it was before the employees were discharged [7] By contrast, the previou.'y existing situation had not encompassed the posting of a bond, and the Respon dent was not required to accede to the Union's demand that it do so in order to fulfill its obligation to unconditionally offer reinstatement [8]

Accordingly, I find that the Respondent did not place any conditions on its offers to reinstate the three unlawful ly discharged men, which offers were first made so as to toll his liability for backpay, effective September 2, 1975, as to DeJesus and Pieller, and effective October 24, 1975, as to Kerber

IV REMEDY

In order to effectuate the policies of the Act, I recommend that the Respondent be ordered to cease and desist from the unfair labor practices found and, in view of the nature thereof, to cease and desist from infringing in any other manner on its employees' rights guaranteed by the Act, and to take certain affirmative action

Having found that the discriminatorily discharged employees have already received unconditional offers, I shall not recommend that they again be offered reinstatement, but shall recommend that they be made whole for any loss of wages suffered by reason of the discrimination against them on August 22 plus interest at 6 percent per annum Antonio DeJesus and Francis Pieller until September 2, and Walter Kerber until October 24, 1975 [9]

Having found that the Respondent unlawfully refused to bargain, I shall recommend that it bargain in good faith with the Union

Upon the foregoing findings of fact and conclusions of law and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended

ORDER [10]

The Respondent, A W Behney Construction Company, Inc , Reading, Pennsylvania, its officers, agents, successors, and assigns, shall

1 Cease and desist from

(a) Discharging or otherwise discriminating against any employee because he is a member of or represented by Local 492, United Brotherhood of Carpenters & Joiners of America, AFL–CIO, or any other union

(b) Refusing to bargain collectively in good faith with the above-named Union as the exclusive representative of its employees in an appropriate unit of carpenters and apprentices, by withdrawing recognition from or terminating its collective-bargaining agreement with the Union without giving the notices required by Section 8(d) of the Act

(c) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act

2 Take the following affirmative action

(a) Make whole Antonio DeJesus, Francis Pieller, and Walter Kerber for any loss of wages suffered by reason of the discrimination against them plus interest at 6 percent per annum, in the manner set forth in the Remedy section of this Decision

(b) Upon request, bargain collectively in good faith with the above-named labor organization, as the exclusive representative of its employees in the appropriate unit of carpenters and appre ntices, concerning rates of pay, wages, hours of work, and other terms and conditions of employment

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

(d) Post at its locations in Reading Pennsylvania, copies of the attached notice marked Appendix [11] Copies of said notice, on forms provided by the Regional Director of Region 4, after being duly signed by an authorized representative, shall be posted by the 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 post ed Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material

[7] See *Texas Gas Corporation* 136 NLRB 355 369 par 3 (1962)

[8] See *Lion Oil Company* 109 NLRB 680 710 (1954)

[9] Backpay shall be computed in accord with *F W Woolworth Company* 90 NLRB 289 (1950) interest in accord with *Isis Plumbing & Heating Co* 138 NLRB 716 (1962)

[10] In the event no exceptions are filed as provided by Sec 102 46 of the Rules and Regulations of the National Labor Relations Board the findings conclusions and recommended Order herein shall as provided in Sec 102 48 of the Rules and Regulations be adopted by the Board and become its findings conclusions and Order and all objections thereto shall be deemed waived for all purposes

[11] In the event that the Board s 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

(e) Notify the Regional Director for Region 4, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith

APPENDIX

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

WE WILL NOT discharge or otherwise discriminate against any employee because he is a member of or represented by Local 492, United Brotherhood of Carpenters & Joiners of America, AFL–CIO, or any other union

WE WILL NOT refuse to bargain collectively in good faith with the above named Union as the exclusive representative of our employees in an appropriate unit of carpenters and apprentices by withdrawing recognition from or terminating our collective-bargaining agreement with the Union without giving the notices required by Section 8(d) of the National Labor Relations Act, as amended

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their rights under Section 7 of the Act

WE WILL make whole Antonio DeJesus, Francis Pieller, and Walter Kerber for any loss of wages they suffered by reason of the discrimination against them, plus 6-percent interest per annum

WE WILL, upon request, bargain in good faith with the above-named Union as the exclusive representative of an appropriate unit of carpenters and apprentices

A W BEHNEY CONSTRUCTION COMPANY, INC