

Fire Tech Systems, Inc. and Fire Shield Sprinkler Systems, Inc. and Road Sprinkler Fitters Local Union No. 669 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO. Case 28-CA-12761

October 16, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING
AND COHEN

On July 6, 1995, Administrative Law Judge Gerald A. Wacknov issued the attached decision. The Respondents filed exceptions, and the General Counsel and the Charging Party filed briefs in response.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondents, Fire Tech Systems, Inc. and Fire Shield Sprinkler Systems, Inc., Scottsdale, Arizona, their officers, agents, successors, and assigns, shall take the action set forth in the Order.

¹In affirming the judge's remedy, we shall order that the make-whole payments be computed in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979), *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), and *New Horizons for the Retarded*, 283 NLRB 1173 (1987). To the extent that an employee has made personal contributions to a fund that are accepted by the fund during the period of the delinquency, the Respondent will be required to reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the Respondents owe to the fund.

Michael J. Karlson, Esq. and *Richard A. Smith, Esq.*, for the General Counsel.

Ronald T. Pfeifer, Esq. (Godfry & Kahn, S.C.), of Green Bay, Wisconsin, for the Respondents.

Helene D. Lerner, Esq. (Beins, Axelrod, Osborne, Mooney & Green, P.C.), of Washington, D.C., for the Charging Party.

DECISION

STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge. Pursuant to notice, a hearing in this matter was held before me in Phoenix, Arizona, on March 30 and 31, 1995. The charge was filed on September 27, 1994, by Road Sprinkler Fitters,

319 NLRB No. 43

Local Union No. 669 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO (the Union). On November 23, 1994, the Regional Director for Region 28 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing alleging violations by Fire Tech Systems, Inc. and Fire Shield Sprinkler Systems, Inc. (Fire Tech, Fire Shield, and/or the Respondents) of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act).

The parties were afforded a full opportunity to be heard, to call, examine, and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing briefs have been received from counsel for the General Counsel, counsel for the Respondent, and counsel for the Union. On the entire record,¹ and based on my observation of the witnesses and consideration of the briefs submitted, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondents are Delaware corporations engaged in the business of selling and installing fire protection systems, and at times material maintained offices and places of business in Scottsdale, Arizona. In the course and conduct of their business operations, each Respondent, during the 12-month period ending September 27, 1994, purchased and received goods, supplies, and materials valued in excess of \$50,000 directly from points outside the State of Arizona. It is admitted, and I find, that each Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is admitted and I find that the Union is, and at all times material has been, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Issues*

The principal issue presented by the complaint is whether the two Respondents are alter egos and a single employer within the meaning of the Act, and, as a result of this relationship, whether the Respondents have violated Section 8(a)(1) and (5) of the Act by failing and refusing to apply the terms and conditions of a collective bargaining between the Union and Respondent Fire Tech to the employees of Respondent Fire Shield.

B. *The Facts*

Fire Tech began its Arizona operations in 1986, and since that time has been engaged in the sale and installation of automatic sprinkler systems in the State of Arizona. Later, it expanded its operations to the State of Illinois, where it continues to be engaged in the same business operations. At the time of the hearing here it was winding down its Arizona

¹The General Counsel's unopposed motion to correct record is granted.

business operations and, through a subcontractor, was completing one remaining job in Arizona. It initially began its Arizona operations as a nonunion contractor, but on September 9, 1990, it entered into an assent and interim agreement with the Union covering its sprinkler fitters and apprentices. On April 12, 1994, during a time when Fire Tech was completing its remaining jobs, infra, it entered into a successor assent and interim agreement which bound it to the National Construction Agreement between the Union and the National Fire Sprinkler Association, effective by its terms from April 1, 1994, through March 31, 1997.

Gregg Huennekens is president, treasurer, and chairman of the board of Fire Tech and owns over 85 percent of that entity. He resides in Illinois, and spends only from 7 to 30 days per year in Arizona. Gregg is the uncle of Kevin Huennekens. Kevin was vice president and Arizona branch manager of Fire Tech from January 1992 through June 1994. He owned 5 percent of Fire Tech until April 1, 1994, when his shares were redeemed. Kevin was in charge of overseeing and conducting the day-to-day Arizona operations of Fire Tech, which maintained an office and place of business in Scottsdale, Arizona, and employed from 2 to approximately 15 employees. The great majority of his communication with Gregg was by phone.

The Arizona operation, despite the fact that it was profitable in 1993, had lost some \$250,000 in the last 3 years of its existence, and Gregg decided to shut it down. In about December 1993, he advised Kevin that he was probably going to shut the operation down during early 1994. Kevin, who wanted to remain in Arizona rather than work at his uncle's other fire protection businesses in Illinois or Wisconsin, conceived the idea of starting his own fire protection business, which, he told Gregg, would be operated on a nonunion basis. He asked Gregg if he would be willing to invest in this new business and Gregg agreed. Thereupon, in January 1994, Kevin incorporated Fire Shield, which was initially capitalized with \$2500 from Kevin and \$7500 from Gregg. Kevin became the president and chairman of the board of Fire Shield, and Gregg, who does not hold any corporate offices, is simply an "investor" who owns 75 percent of that entity.

On February 11, 1994, Gregg sent a letter addressed to the Arizona facility stating that effective March 1, 1994, Fire Tech would no longer solicit any more business and would close its offices. The letter states that the work in progress would be completed by Fire Tech, and that the reason given for the closure is that Fire Tech had suffered substantial losses since January 1991.

In about mid-February 1994, Kevin held a meeting with the field employees, namely, the journeymen and apprentice sprinkler fitters. Some office personnel were also in attendance. He told the employees that Gregg had decided to close the operation because it was not making money. Initially, Kevin testified that he did not mention the fact that he intended to establish and operate a new fire protection company. During his subsequent testimony, however, after former employees testified that Kevin did make such assertions at the meeting, Kevin testified that he told the employees that he "had an option to start my own company. I had an option to go back to Chicago. I had an option to work for someone here locally, and that's as simple as it was." He denied that he told the employees that the new company

he had the option of starting would be operated as a non-union company.

David Green was a sprinkler fitter for Fire Tech and was employed from September 1993 through June 1994. Green testified that at the February 1994 meeting, Kevin announced that Fire Tech was going out of business and that it would be shut down after several remaining jobs had been completed. Kevin also said, according to Green, that he was going to open up another company and that it would be called Fire Shield. He said that even though Fire Tech had made some money in the past it wasn't enough and that Fire Tech could not function as a union company and make money.

Berrin Mull is a journeyman sprinkler fitter and worked for Fire Tech from about June 1993 until February 1994. Mull attended the February 1994 meeting, and testified that Kevin told the employees that the "mother company back east" was closing the doors as the Arizona branch owed the company around \$200,000, and that although Fire Tech had made a profit of some \$40,000 in 1993, that was the first year that they had made a profit. Kevin said, according to Mull, that he was going to start his own company, that it would be nonunion, and that the employees could stay with him when he got going if they wanted to. He said he would appreciate it if the employees would stay to help him complete the work in progress.

The record evidence is clear that between March and the end of June 1994, Kevin continued to be in charge of the Fire Tech operations and also began soliciting business for and performing work under the name of Fire Shield. During this period of time Fire Shield had no office, materials, equipment, or vehicles of its own, and Kevin operated Fire Shield out of the Fire Tech facility, using Fire Tech's materials, equipment, and vehicles. Further, the record is clear that Gregg understood that Kevin was operating Fire Shield in this fashion, and did not voice any objection. Although Fire Shield's first job commenced on March 28, 1994, it was not until later when Kevin and Gregg entered into an informal agreement for the purchase of such items. Despite this agreement, Fire Shield has never made any payments to Fire Tech for the purchase or use of such items.

About the first of July 1994, Fire Shield obtained space of its own which happened to be located only some 200 feet from the offices and shop of Fire Tech. Thus, for a period of about a month, until Fire Tech's lease expired at the end of July, the two entities were located virtually adjacent to each other, but in different building complexes owned by different lessors. In order to obtain this space for Fire Shield, Gregg (and his wife) were required to be signatories to the lease. Thereafter, when the operations of Fire Tech were essentially shut down except for the work that was contracted out, Kevin continued using the majority of Fire Tech's tools, equipment, vehicles, and office equipment. None of Fire Tech's materials or equipment was shipped back to Fire Tech in Illinois, or was disposed of in any other manner. To date, however, as noted above, Fire Shield has paid no money to Fire Tech for any of these items. Further, Gregg has contributed some \$35,000 in additional funding to Fire Shield, none of which had been paid back; Kevin has contributed about \$5000. Gregg testified that he became an investor in Fire Shield for the purpose of hopefully making a profit. Kevin

readily acknowledged that were it not for the financial assistance of Gregg, Fire Shield would not be in existence.

The record is abundantly clear that Fire Shield is engaged in the same business as Fire Tech and there is no difference between the operations of the two entities in terms of the work solicited, the prospective customer base, the tools and materials utilized, the skills utilized by the journeymen and apprentice sprinkler fitters, the nature of the work performed, and the day-to-day management of the business. In addition to the foregoing similarities, Fire Shield employs a number of the same employees as did Fire Tech, including the office manager. In particular, Fire Shield employs Kraig Huennekens, who is Kevin's brother. Kraig, who is job superintendent for Fire Shield, was also job superintendent for Fire Tech, and has exercised the same supervisory authority for both entities, namely, the authority to hire, fire, and direct the work of the field personnel. The two entities are similar in size, although it appears that at times Fire Shield has had a somewhat larger employee complement. While Fire Shield, as nonunion operation, performs somewhat more non-commercial work, the only real difference of any note is the fact that the wages and benefits paid by Fire Shield to its nonoffice personnel is about 50 percent less than the wages and benefits required under the aforementioned collective-bargaining agreement and, accordingly, Fire Shield employs nonunion workers.

The Respondent maintains that the Union should have known about the existence of Fire Shield no later than the meeting in February 1994 when Kevin allegedly announced to the employees that Fire Tech was discontinuing its operations and that he was in the process of beginning his own nonunion operation. Record evidence shows that from about March 21, 1994, to the date of the filing of the charge here, the Union had attempted to acquire as much information as possible about the interrelationships of all of Gregg's fire protection operations through correspondence and questionnaires sent by the Union's attorneys to the attorneys of Fire Shield. On September 29, 1994, 2 days after the charge here was filed, the Union wrote to Gregg and Kevin stating that:

Based on the continuing investigation into the operations of both Firetech Systems, Inc. ("Firetech") and Fire Shield Sprinkler Systems, Inc. ("Fire Shield"), it appears that Fire Shield is simply a disguised continuance and/or alter ego of Firetech. Accordingly, we demand that Firetech and Fire Shield both recognize and adhere to their obligations to Local 669 under Federal labor law, and our collective bargaining agreement.

C. Analysis and Conclusions

The facts are clear and are not in material dispute. It is clear that Fire Tech was finding it difficult to compete in Arizona under the provisions of the union contract, and that Kevin decided that Fire Shield could be successful as a nonunion contractor. In this endeavor, Kevin relied nearly 100 percent on the assistance from Fire Tech and/or Uncle Gregg for virtually every aspect of the new entity, including the fact that Gregg became a signatory to Fire Shield's lease. Further, Gregg knowingly supported Kevin's nonunion operation by, in effect, simply donating, insofar as the evidence shows, the aforementioned considerable assets of Fire Tech to Fire Shield, as well as providing a substantial infusion of his own

money. The family ownership of the two entities is essentially the same, and the nature of their operations, including the day-to-day management of the two entities and the supervision of their employees, is identical, as Gregg was an absentee president of Fire Tech and took no part in its daily operations. There was no hiatus between the closure of Fire Tech and the commencement of Fire Shield, and the two entities were simultaneously operated, on a union and nonunion basis, respectively, out of Fire Tech's facilities for a period of 3 or 4 months, until Fire Tech's lease expired and Fire Shield obtained its own offices and shop. Accordingly, on the basis of the foregoing and other record evidence,² it is abundantly clear and I find that Fire Shield is the disguised continuance and/or alter ego of Fire Tech as alleged in the complaint. *Southport Petroleum Co. v. NLRB*, 315 U.S. 100, 106 (1942); *Advance Electric*, 268 NLRB 1001, 1002 (1984); *Haley & Haley, Inc.*, 289 NLRB 649, 652 (1988), enfd. 880 F.2d 1147 (9th Cir. 1989); *Barnard Engineering*, 295 NLRB 226 (1989); *Gilroy Sheet Metal*, 280 NLRB 1075 (1986); *Consumers Asphalt Co.*, 295 NLRB 749 (1988); *Continental Radiator*, 283 NLRB 234 (1987); *Goldin-Feldman, Inc.*, 295 NLRB 359, 373 fn. 43 (1989); *Precision Builders*, 296 NLRB 105 (1989); and *Milford Services*, 294 NLRB 684 (1989).

The Respondents would characterize Gregg's assistance to Fire Shield as simply the attempt of a very generous uncle to establish his nephews Kevin and Kraig in a business of their own; further, it is argued that it was not Gregg's intent to attempt to circumvent the provisions of the collective-bargaining agreement to which he, as the president of Fire Tech, had agreed. The Respondents appear to maintain that even if Fire Shield may technically, under applicable Board law, be a continuance and/or the alter ego of Fire Tech, there was no intent to evade the Act and therefore the Board should not interfere with such altruistic intrafamily relationships.

In addition to the fact that the Respondents have cited no authority in support of the above proposition, I find that the Respondents' premise is faulty. Thus, it is clear that Kevin's intent was precisely to establish a nonunion operation because Fire Tech, as a union contractor, was unable to successfully compete in the Arizona market.³ Gregg wholeheartedly supported Kevin in this endeavor, and set him up in business. Gregg, who owns 75 percent of Fire Shield,⁴ has permitted and encouraged it to operate on a nonunion basis, and stands to profit from its success. Moreover, the business operations of Fire Shield are commensurate in scope, indeed even somewhat greater, than the operations of Fire Tech; thus it appears that Gregg had something more in mind than

²The record evidence contains an abundance of additional evidence showing the close interrelationship between the interests of Gregg and Kevin vis-a-vis Fire Shield. Thus, for example, Fire Shield obtained two additional vehicles from another fire protection company owned by Gregg, and has not paid any money for these vehicles to date. Under the circumstances, it appears unnecessary to detail this additional cumulative evidence.

³I credit the testimony of employees Green and Mull, and find that Kevin told the assembled employees in February 1994 that he intended to start up a nonunion operation.

⁴In addition to Illinois operations of Fire Tech, Gregg owns several other fire protection businesses. Collectively, these businesses employ some 140 employees. With the exception of Fire Shield, all of Gregg's businesses are union operations.

merely providing a means of employment for his nephews. Altruism aside, Gregg's express intent is the same as Kevin's, namely, to own and hopefully profit from a non-union entity which is essentially no different than the union entity it replaced. See *Advance Electric*, supra at 1004.

The Respondent's contention that the charge here was untimely filed is without merit. The charge was filed on September 27, 1994. Fire Shield did not commence any jobs until March 28, 1994, a date within the 10(b) period, and the mere fact that it was incorporated prior to that time or that in February 1994 Kevin told the employees that he was intending to establish a nonunion operation, without stating how or when this entity would commence operations, is not sufficient to provide the Union with the requisite "clear and unequivocal notice of a violation of the Act." See *Leach Corp.*, 312 NLRB 990, 991 (1993). Moreover, notice to the employees does not constitute notice to the Union. See *NLRB v. Walker Construction Co.*, 928 F.2d 695, 696-697 (5th Cir. 1991) (and cases cited). The record is clear that from April 1994 until the date of the filing of the charge the Union diligently and persistently attempted to ascertain the operative relationships between the entities.

On the basis of the foregoing, I find that the Respondents have violated Section 8(a)(1) and (5) of the Act, as alleged.

CONCLUSIONS OF LAW

1. The Respondents are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent Fire Shield Sprinkler Systems, Inc. is the alter ego of Respondent Fire Tech Systems, Inc.
4. All journeymen, apprentice, and trainee sprinkler fitters employed by Fire Shield Sprinkler Systems, Inc., excluding office clerical employees, professional employees, guards, and supervisors as defined in the Act constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.
5. At all times material the Union has been the exclusive collective-bargaining representative of the employees in the appropriate unit within the meaning of Section 9(a) of the Act.
6. By refusing to honor and apply the collective-bargaining agreement between Fire Tech Systems, Inc. and the Union, the Respondents have violated Section 8(a)(1) and (5) of the Act.
7. The unfair practices set forth above are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondents have violated Section 8(a)(1) and (5) of the Act, I recommend that they be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the purposes of the Act, including the posting of an appropriate notice attached as Appendix.

The Respondents shall be required to honor the current collective-bargaining agreement and apply it to their Arizona employees, and to make the employees whole, with interest,

for any losses they may have suffered because of the Respondents' failure to honor and apply the collective-bargaining agreement. In addition, the Respondents shall be required to make whole their employees by making payments to the various trust funds established by the collective-bargaining agreement.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁵

ORDER

The Respondents, Fire Tech Systems, Inc. and Fire Shield Sprinkler Systems, Inc., Scottsdale, Arizona, their officers, agents, successors, and assigns, shall

1. Cease and desist from
 - (a) Establishing any entities in order to avoid their statutory responsibility to adhere to the terms and conditions of the current collective-bargaining agreement with the Union.
 - (b) Refusing to honor and apply the current collective-bargaining agreement to the unit employees, as described above, of Fire Shield Sprinkler Systems, Inc.
 - (c) 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 which is necessary to effectuate the policies of the Act.
 - (a) Honor and apply the collective-bargaining agreement with the Union.
 - (b) Make whole the bargaining unit employees and reimburse the funds established by the collective-bargaining agreement, with interest, for any losses suffered as a result of the Respondents' failure to honor and apply the collective-bargaining agreement.
 - (c) Preserve and, on 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.
 - (d) Post at the Respondents' facility in Scottsdale, Arizona, copies of the attached notice marked "Appendix."⁶ Copies of the notice, on forms provided by the Regional Director for Region 28, after being duly signed by the Respondents' representative, shall be posted immediately upon receipt thereof, and be maintained by the Respondents for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material.
 - (e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondents have taken to comply.

⁵If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁶If 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

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT establish any business entities in order to avoid our statutory responsibility to adhere to our collective-bargaining agreement with Road Sprinkler Fitters Local Union No. 669.

WE WILL NOT refuse to honor and apply our collective-bargaining agreement with the Union.

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 honor and apply our collective-bargaining agreement with the Union as the exclusive collective-bargaining representative of employees in the following unit:

All journeymen, apprentice, and trainee sprinkler fitters employed by Fire Shield Sprinkler Systems, Inc., excluding office clerical employees, professional employees, guards, and supervisors as defined in the Act.

WE WILL, in the manner prescribed by the National Labor Relations Board, make whole our bargaining unit employees and reimburse the funds established by the collective-bargaining agreement, with interest, for any losses suffered as a result of our failure to honor and apply our collective-bargaining agreement to the aforementioned unit employees.

FIRE TECH SYSTEMS, INC. AND FIRE SHIELD
SPRINKLER SYSTEMS, INC.