

**Allied General Services, Inc. and Local Union No. 636, United Association of Journeymen & Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO.** Case 7-CA-41841

September 30, 1999

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

Upon a charge filed by the Union on March 9, 1999, the General Counsel of the National Labor Relations Board issued a complaint on April 19, 1999, against Allied General Services, Inc., the Respondent, alleging that it has violated Section 8(a)(1) and (3) of the National Labor Relations Act. Although properly served copies of the charge and complaint, the Respondent failed to file an answer.

On June 1, 1999, the General Counsel filed a Motion for Summary Judgment with the Board. On June 3, 1999, 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.

On August 3, 1999, the Board issued a Notice of Proposed Remedies and To Show Cause. No responses were filed to the August 3 notice.

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

Ruling on Motion for Summary Judgment

Sections 102.20 and 102.21 of the Board's Rules and Regulations provide 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 notes that unless an answer is filed within 14 days of service, all the allegations in the complaint will be considered admitted. Further, the undisputed allegations in the Motion for Summary Judgment disclose that the Region, by letter dated May 5, 1999, notified the Respondent that unless an answer were received by May 19, 1999, a Motion for Summary 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 Summary Judgment and we consider the Respondent to have admitted all of the allegations of the complaint.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a Michigan corporation with an office and place of business in Detroit, Michigan, has been engaged in the rental of boilers and also as a contractor engaged in the nonretail sale, repair,

and installation of commercial boilers and burners. During the year ending December 31, 1998, a representative period, the Respondent, in conducting its business operations described above, purchased and received at its Detroit facility goods valued in excess of \$50,000 directly from points outside the State of Michigan. 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 the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

At all material times, Steve Dickenson held the position of president of the Respondent, and Michael D. Dickenson served as vice president. These two individuals are 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.

The following employees of the Respondent (the unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time plumbers and pipe fitters employed by the Employer at its facility in Detroit, Michigan; but excluding office clerical employees, managerial employees, guards and supervisors as defined in the Act.

By about February 24, 1999, a majority of the unit had designated and selected the Union as their representative for purposes of collective bargaining with the Respondent. Since about February 24, 1999, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the unit.

On about March 8, 1999, the Respondent, by its agents Steve Dickenson and Michael D. Dickenson, discharged all three of its unit employees—William Ehlert, Brian Lacy, and Larry Zimmerman—thereby eliminating the entire unit, and ceased engaging in the nonretail sale, repair, and installation of boilers and burners.

The Respondent engaged in the above-described conduct because Ehlert, Lacy, and Zimmerman joined the Union, selected it as their collective-bargaining representative and engaged in concerted activities, and to discourage employees from engaging in these and other protected activities.

CONCLUSION OF LAW

By the acts and conduct described above, 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, and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and 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 discharging employees Ehlert, Lacy, and Zimmerman, we shall order the Respondent to offer them full and proper 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 or privileges previously enjoyed. We also shall order the Respondent to make these employees 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 1173 (1987).

The Respondent also shall be required to remove from its files any references to the employees' unlawful discharges, and to notify the discriminatees in writing that this has been done.

Further, having found that the Respondent has violated Section 8(a)(3) and (1) by ceasing that part of its business operation involved in the nonretail sale, repair, and installation of boilers and burners, we shall order the Respondent to resume that operation at its facility in a manner consistent with the level and manner of doing business that existed before the three unit employees were discharged and the operation discontinued. The Respondent will be permitted the opportunity at the compliance stage to establish that such a restoration remedy would be unduly burdensome. See *Lear Siegler, Inc.*, 295 NLRB 857, 861 (1989), and *We Can, Inc.*, 315 NLRB 170, 174 (1994).

Our reinstatement and restoration remedy differs from that sought by the General Counsel. In the complaint, the General Counsel did not seek an order requiring the Respondent to restore the nonretail operation in which the three discriminatees were employed. Consequently, the General Counsel requested a limited order requiring the Respondent to offer reinstatement to the three discriminatees only "if at any future time Respondent hires any employees."

The General Counsel's failure to seek the customary restoration and reinstatement remedies, however, does not preclude us from ordering those traditional remedies, as the Board has full authority over the remedial aspects of its decisions.<sup>1</sup> Nevertheless, in the unique situation presented in this no-answer summary judgment proceeding, the Board decided to give the parties prior notice that it was considering imposing remedies beyond those sought in the complaint. Thus, the Board issued the Au-

gust 3, 1999 notice of proposed remedies and to show cause, giving the parties an opportunity to express their positions on the validity and propriety of the imposition of the Board's customary restoration and reinstatement remedies in this case. As noted above, however, no response was filed to this notice. In these circumstances, and after careful consideration, we conclude that it is appropriate for us to order the full reinstatement remedy for the three discriminatees, and to require the Respondent to reestablish its closed operation, consistent with Board precedent.<sup>2</sup>

Further, in the complaint, the General Counsel seeks an order requiring the Respondent to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit, "if at any future time, the Respondent's workforce consists of two or more employees," including the reinstated discriminatees.<sup>3</sup> By requesting this remedy, the General Counsel essentially is contending that because the unfair labor practices here are so serious and substantial, the possibility of erasing their effects and of conducting a fair representation election is slight or impossible. Thus, the General Counsel is, in effect, requesting a bargaining order under the principles set forth in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

Like the reinstatement remedy sought by the General Counsel, however, the bargaining order requested in the complaint was conditioned upon the Respondent's restoration of its closed operation, in which the three unlawfully discharged employees were employed. Thus, the Board's August 3, 1999 notice of proposed remedies and to show cause also sought the parties' views on the appropriateness of a bargaining order. Again, no party filed a statement or brief in response to the notice either opposing or supporting the issuance of a bargaining order. For the reasons set forth below, and in accord with our conclusion that traditional restoration and reinstatement remedies are warranted here, we find that an unconditional bargaining order is a necessary part of our remedial order in this case.

Under *Gissel*, the Board will issue a bargaining order, absent an election, in two categories of cases. The first category involves "exceptional cases" marked by unfair labor practices so "outrageous" and "pervasive" that traditional remedies cannot erase their coercive effects, thus rendering a fair election impossible. The second category involves "less extraordinary cases marked by less pervasive practices which nonetheless have a tendency to undermine majority strength and impede the election

<sup>1</sup> See, e.g., *Schnadig Corp.*, 265 NLRB 147 (1982); *Loray Corp.*, 184 NLRB 577 (1970).

<sup>2</sup> "When an employer has curtailed operations and discharged employees for discriminatory reasons, the Board's usual practice is to order a return to the status quo ante." *We Can, Inc.*, 315 NLRB at 174 (1994).

<sup>3</sup> The complaint does not allege that the Respondent violated Sec. 8(a)(5) and (1) of the Act by failing to recognize and bargain with the Union.

processes.” In this second category of cases, the “possibility of erasing the effects of past practices and of ensuring a fair election . . . by the use of traditional remedies, though present, is slight and . . . employee sentiments once expressed [by authorization] cards would, on balance, be better protected by a bargaining order.” *Id.* at 613, 614–615.

Here, there are several significant factors that militate in favor of a bargaining order. We have found that the Union attained majority status in the unit on February 24, 1999, and that it has been the unit employees’ collective-bargaining representative since that time. We also have found that less than 2 weeks after that date, the Respondent’s president and its vice president discharged the entire unit and shut down the part of its operation in which that unit worked because the employees had selected the Union as their bargaining representative. Thus, in response to their employees’ union activities, the Respondent’s highest officials swiftly reacted with draconian actions that affected the livelihood of every one of the unit employees. Clearly, there is a strong likelihood that the Respondent’s unfair labor practices will have a pervasive and lasting deleterious effect on the Respondent’s employees’ exercise of their Section 7 rights. As the Board stated in *Cassis Management Corp.*, 323 NLRB 456, 459 (1997), *enfd.* 152 F.3d 917 (2d Cir. 1998), *cert. denied* 525 U.S. 983 (1998):

Discharge of an entire bargaining unit is the ultimate retaliation for union activity, the final assault on the employment relationship. It is difficult to conceive of unfair labor practices with more severe consequences for employees or with more lasting effects on the exercise of Section 7 rights. Mass discharges leave no doubt as to the response that the employees will reasonably fear from their employer if, after reinstatement, they persist in their support for a union. [*Id.* at 459.]

Consequently, we conclude that the Respondent’s conduct places it in the realm of those exceptional cases warranting a bargaining order under category I of the *Gissel* standard, such that traditional remedies cannot erase the coercive effects of the conduct, making the holding of a fair election impossible.<sup>4</sup>

This case is distinguishable from prior no-answer summary judgment proceedings in which the Board declined to grant the General Counsel’s request for a *Gissel* bargaining order. See, e.g., *Center State Beef & Veal Co.*, 327 NLRB 1246 (1999); *Imperial Floral Distributors*, 319 NLRB 147 (1995); *FJN Mfg.*, 305 NLRB 656 (1991); *Bravo Mechanical*, 300 NLRB 1019 (1990); *Control & Electrical System Specialists*, 299 NLRB 642 (1990); *Binney’s Casting Co.*, 285 NLRB 1095 (1987);

<sup>4</sup> See also *Balsam Village Management Co.*, 273 NLRB 420 (1984), *enfd.* 792 F.2d 29 (2d Cir. 1986).

*Michigan Expediting Service*, 282 NLRB 210 (1986); *Handy Dan’s Convenience Store*, 275 NLRB 394 (1985); and *Power Jet Cleaning, Inc.*, 270 NLRB 975 (1984).

In the cited cases, the Board found that the respective complaints did not allege sufficient facts to enable the Board to evaluate the pervasiveness of the violations. For example, in those cases, the complaints, in one or more respects, did not allege the size of the units, the number of employees directly affected by the violations, the extent of dissemination, if any, of the violations among the employees not directly affected by them, or the identity of the perpetrator of the unfair labor practice.

In marked contrast to those cases, however, here the complaint alleges sufficient facts on which to assess the pervasiveness of the unfair labor practices and to sustain a category I order. Thus, in the instant case we know the size of the unit, that all three unit employees were directly affected by the violations and therefore dissemination was complete, and that the violations were committed by the two highest ranking officials of the Respondent. We conclude that there are no material facts bearing on the appropriateness of a bargaining order that are absent from the complaint.<sup>5</sup> Accordingly, we find that a bargaining order is warranted to remedy the Respondent’s unlawful conduct.<sup>6</sup>

#### ORDER

The National Labor Relations Board orders that the Respondent, Allied General Services, Inc., Detroit, Michigan, its officers, agents, successors, and assigns, shall

##### 1. Cease and desist from

(a) Discharging or otherwise discriminating against employees and/or discontinuing the operation in which they are employed because they select Local Union No. 636, United Association of Journeymen & Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL–CIO, or any other labor organization, as their collective-bargaining representative, or because they engage in concerted activities.

<sup>5</sup> In any event, in a category I case like this one, the District of Columbia Circuit Court of Appeals has held that the Board “need not make detailed findings of the type required for Category II cases, but instead must only make ‘minimal findings’ of the lasting effect of unfair labor practices to support a bargaining order.” *Power, Inc. v. NLRB*, 40 F.3d 409, 422 (1994). Consistent with the court’s decision, we have set forth our reasons for finding that the detrimental effects of the unfair labor practices here will persist over time.

<sup>6</sup> Member Hurtgen finds it unnecessary to pass on whether a *Gissel* bargaining order is warranted under category I standards. Neither the complaint nor the notice of proposed remedies and to show cause specified that the General Counsel sought, or that the Board was considering, a *Gissel* I bargaining order. For example, the complaint did not allege that the unfair labor practices were outrageous and pervasive. Nor did the notice make that claim. However, Member Hurtgen agrees with his colleagues that a bargaining order is warranted under category II standards.

(b) 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, reestablish and resume that part of its operation involved in the nonretail sale, repair, and installation of boilers and burners consistent with the level and manner of operation that existed before the operation was closed on March 8, 1998, and offer William Ehlert, Brian Lacy, and Larry Zimmerman full reinstatement to their former jobs or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, unless it can show in compliance proceedings that those actions would be unduly burdensome.

(b) Make employees Ehlert, Lacy, and Zimmerman whole for any loss of earnings and other benefits suffered as a result of their unlawful discharges, in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges of employees Ehlert, Lacy, and Zimmerman, and within 3 days thereafter, notify them in writing that this has been done and that their discharges will not be used against them in any way.

(d) Upon request, recognize and bargain with Local Union No. 636, United Association of Journeymen & Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO as the exclusive collective-bargaining representative of the employees in the following appropriate unit on terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time plumbers and pipe fitters employed by the Employer at its facility in Detroit, Michigan; but excluding office clerical employees, managerial employees, guards and supervisors as defined in the Act.

(e) Preserve and, within 14 days of a 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 back-pay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Detroit, Michigan, copies of the attached notice marked "Appendix."<sup>7</sup> Copies of the notice, on forms provided by the Regional Director for Region 7,

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 facility 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 employees employed by the Respondent at any time since March 8, 1999.

(g) 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 the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discharge or otherwise discriminate against you and/or discontinue the operation in which you were employed because you select Local Union No. 636, United Association of Journeymen & Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO, or any other labor organization, as your collective-bargaining representative, or because you engage in concerted activities.

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 this Order, reestablish and resume that part of our operation involved in the nonretail sale, repair, and installation of boilers and burners consistent with the level and manner of operation that existed before the operation was closed on March 8, 1998, and offer William Ehlert, Brian Lacy, and Larry Zimmerman full reinstatement to their former jobs or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, unless we can show in compliance proceedings that those actions would be unduly burdensome.

WE WILL make employees Ehlert, Lacy, and Zimmerman whole for any loss of earnings and other benefits suffered as a result of their unlawful discharges, with interest.

<sup>7</sup> If 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."

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharges of employees Ehlert, Lacy, and Zimmerman, and within 3 days thereafter, we will notify them in writing that this has been done and that their discharges will not be used against them in any way.

WE WILL, on request, recognize and bargain with Local Union No. 636, United Association of Journeymen & Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO as the exclusive collective-bargaining representative of the employees in

the following appropriate unit on terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time plumbers and pipe fitters employed by us at our facility in Detroit, Michigan; but excluding office clerical employees, managerial employees, guards and supervisors as defined in the Act.

ALLIED GENERAL SERVICES, INC.