

Raven Government Services, Inc. and International Union of Operating Engineers, Local 826, AFL-CIO and International Union of Operating Engineers, Local 351, AFL-CIO. Cases 16-CA-18516, 16-CA-18761, 16-CA-18841

November 6, 2001

ORDER GRANTING MOTION

BY CHAIRMAN HURTGEN AND MEMBERS
LIEBMAN
AND WALSH

On June 30, 2000, the National Labor Relations Board issued its decision in the captioned case.¹ The Board found that the Respondent violated Section 8(a)(5) and (1) of the Act by, inter alia, making various unilateral changes in working conditions. The Board ordered the Respondent to make the unit employees whole for any losses resulting from the unilateral changes “in accord with *Ogle Protection Service*, 183 NLRB 682 (1970), rather than *F. W. Woolworth Co.*, 90 NLRB 289 (1950), cited by the judge.”²

On May 4, 2001, the Acting General Counsel filed a motion for clarification or modification of Board Decision and Order, specifically with respect to one of the Respondent’s unlawful unilateral changes, i.e., the elimination of job classifications. The Acting General Counsel asks the Board to order that any unit employees laid off or discharged as a result of unlawful unilateral changes be made whole for their losses in accord with the quarterly *F. W. Woolworth* backpay formula. He further asks the Board to order that the Respondent offer any affected employees full and immediate reinstatement to their former jobs.

On May 18, 2001, the Respondent filed a motion in the alternative for clarification or modification of Board Decision and Order, with a brief in opposition to the Acting General Counsel’s motion and in support of the Respondent’s alternative motion. The Respondent contends that the Acting General Counsel’s motion was incorrectly filed under Section 102.49 of the Board’s Rules and Regulations. The Respondent argues that the Acting General Counsel’s motion is really a motion for reconsideration and, as such, must therefore comply with Section 102.48(d) of the Board’s Rules and Regulations. The Respondent further asserts that the motion should be denied as untimely filed under Section 102.48(d). Finally, the Respondent argues, in the alternative, that if the Board grants the Acting General Counsel’s motion, it should also grant the Respondent’s motion to modify the

Board’s Decision and Order by reconsidering the issue of whether a management-rights clause gave the Respondent unilateral authority to eliminate certain job classifications and to lay off affected employees.

Analysis

For the reasons that follow, we grant the Acting General Counsel’s motion and deny the Respondent’s motion.

1. With respect to the procedural issue, the Acting General Counsel’s filing of the instant motion under Section 102.49 of the Board’s Rules and Regulations was appropriate. *Dorsey Trailers, Inc.*, 322 NLRB 181 (1996), dealt with the specific issue presented here. In *Dorsey*, the Board stated that

[B]oth Section 102.49 and Section 10(d) [of the Act] provide that the Board may modify its order at any time before the record in the case is filed in court; there is no explicit requirement that the Board act on the motion of a party. Indeed, the Board has long held that, under the plain language of Section 10(d), it has the authority to modify its orders sua sponte. Had the General Counsel not filed a motion at all, then, the Board could have modified its order sua sponte at any time before the record was filed in court. That being the case, it would be anomalous to find the Board without authority to modify its Order now, before the record has been filed in court, because a motion that was not even required for such a modification was not filed within the time period for filing other kinds of motions. [Footnote omitted.]

As a general matter, of course, the Board has full authority over the remedial aspects of its decisions, even in the absence of exceptions. See, e.g., *Indian Hills Care Center*, 321 NLRB 144 fn. 3 (1996); *Dorsey Trailers*, supra, 322 at 181 fn. 4. The remedial modifications we make today properly correct inadvertent errors by the Board and the judge.

Neither case cited by the Respondent in opposition to the Acting General Counsel’s motion supports its argument. *Community Medical Services*, 239 NLRB 1244 (1979), involved an untimely motion for reconsideration of a substantive Board ruling. *NLRB v. Selvin*, 527 F.2d 1273, 1276 (9th Cir. 1975), involved an untimely motion to reopen the record. In both cases, the time requirements for the filing of the disputed motions were controlled by Section 102.48(d), and each decision drew a clear distinction between motions filed under that section and motions, or actions taken sua sponte by the Board,

¹ 331 NLRB 651.

² Id. at 651 fn.1.

under Section 102.49.³ Therefore, we find that the Acting General Counsel's motion has properly raised a remedial issue.

2. We further find merit in the argument that the remedial modification in our original Decision and Order, 331 NLRB 651 fn. 4, substituting the backpay formula of *Ogle Protection Service, Inc.*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), for the quarterly backpay formula of *F. W. Woolworth Co.*, 90 NLRB 289 (1950), failed to account for undisputed record evidence that the Respondent's unlawful unilateral elimination of certain job classifications had resulted in the layoff or discharge of some unit employees. *Ogle Protection*, makes clear that "cessation of employment status" resulting from the Respondent's unlawful elimination of job classifications is appropriately remedied under the quarterly *Woolworth* backpay formula. The *Ogle Protection* formula applies only to remedy "a violation of the Act which does not involve cessation of employment status or interim earnings that would in the course of time reduce backpay." 183 NLRB at 683.

3. We also find merit in the Acting General Counsel's argument that our original Order should be modified to include the traditional remedial requirement, independent of the backpay remedy, that the Respondent make whole, employees discharged or laid off as a result of its unlawful unilateral action by offering them immediate reinstatement to their former jobs. We shall modify the Order accordingly.⁴

4. Because it represents an untimely attempt to relitigate an issue previously decided by the Board, we deny the Respondent's alternative motion to reconsider its argument that a management rights clause privileged its unilateral action.

ORDER

The Acting General Counsel's motion for clarification or modification is granted. Accordingly, it is hereby clarified that the Respondent shall make whole, unit employees laid off or discharged as a result of the Respondent's unlawful unilateral changes in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Respondent shall make unit employ-

³ We note that Sec. 102.49 of the Board's Rules says that the Board may modify its order "within the limitations of the provisions of . . . Section 102.48." However, there is no provision of Sec. 102.48 that would foreclose consideration of the Acting General Counsel's motion. That is, Sec. 102.48 contains limitations on motions for reconsideration, rehearing and reopening, but it contains no limitations on modification. Thus, we find no impediment to granting the Acting General Counsel's motion.

⁴ We shall also modify the Order in accord with our recent decision in *Ferguson Electric Co.*, 335 NLRB 142 (2001).

ees whole for other losses suffered as a result of its unlawful unilateral changes in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), plus interest as computed in *New Horizons for the Retarded*, supra.

It is further ordered that the Board's Order in the underlying decision (331 NLRB 651) is modified, and the Respondent, Raven Services Corporation d/b/a Raven Governmental Services, Inc., Fort Worth, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 2(d), relettering the subsequent paragraphs.

"(d) Within 14 days from the date of this Order, offer any unit employees who were laid off or discharged as the result of unlawful unilateral changes full reinstatement to their former jobs or, if those jobs cannot be reinstated for reasons unrelated to their unlawful elimination, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed."

2. Substitute the following for relettered paragraph 2(f).

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

3. Substitute the attached notice to employees for that which issued on June 30, 2000.

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.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT coercively interrogate you about your union support or activities.

WE WILL NOT withdraw recognition from and refuse to recognize and bargain with International Union of Operating Engineers, Local 351, AFL-CIO, as the exclusive collective-bargaining agent of our employees in the following appropriate unit:

INCLUDED: All service and maintenance employees working for the Employer at the Western Currency Plant in Fort Worth, Texas.

EXCLUDED: All other employees, including office clerical employees, quality control employees and administrative assistants, supervisors, including weekend supervisors, and guards as defined in the Act.

WE WILL NOT fail and refuse to furnish the Union with information necessary and relevant for bargaining on behalf of the unit employees.

WE WILL NOT bypass the Union as the exclusive collective-bargaining agent of the unit employees and will not deal directly with the employees concerning rates of pay, wages, hours, and other terms and conditions of employment and will not institute unilateral changes in these terms and conditions of employment.

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 recognize and, on request, bargain with the Union and if an understanding is reached, embody it in a signed agreement.

WE WILL furnish to the Union in a timely manner the information requested by the Union for bargaining.

WE WILL on request rescind any of the unilateral changes found unlawful by the Board.

WE WILL make the aforesaid bargaining unit employees whole for any loss of wages or benefits incurred as a result of our action found unlawful, with interest.

WE WILL, within 14 days from the date of the Board's Order, offer any unit employees who were laid off or discharged as the result of unlawful unilateral changes full reinstatement to their former jobs or, if those jobs cannot be reinstated for reasons unrelated to their unlawful elimination, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

RAVEN GOVERNMENT SERVICES, INC.