

**Barney Goldstein, Inc. and Furniture, Flour, Grocery, Teamsters & Chauffeurs, Local Union No. 138 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO.**<sup>1</sup> Case 22-CA-15155

March 18, 1988

## DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS  
JOHANSEN AND CRACRAFT

Upon a charge filed by the Union July 28, 1987,<sup>2</sup> the General Counsel of the National Labor Relations Board issued a complaint against Barney Goldstein, Inc., the Respondent, alleging that it has violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act. Although properly served copies of the charge and complaint, the Respondent has failed to file an answer.<sup>3</sup>

On November 19, the General Counsel filed a Motion for Summary Judgment. On November 24, 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.

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

### Ruling on Motion for Summary Judgment

Section 102.20 of the Board's Rules and Regulations provides 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. The complaint states that unless an answer is filed within 14 days of service, "all the allegations in the complaint shall be deemed to be admitted to be true and shall be so found by the Board." Further, the undisputed allegations in the Motion for Summary Judgment disclose that the General Counsel, by certified letter dated October 1, notified the Respondent that unless an answer was received by October 9 a Motion for Summary Judgment would be filed.

<sup>1</sup> The General Counsel's motion to amend caption and other documents to reflect the affiliation of the Teamsters with the AFL-CIO is granted.

<sup>2</sup> All dates refer to 1987 unless otherwise stated.

<sup>3</sup> On or about April 9, the Respondent filed a petition in bankruptcy in accordance with Chapter 7 of Title 11 of the United States Code. On or about April 14, Michael Detsky was designated by the bankruptcy court as the trustee in bankruptcy of the Respondent with full authority to continue operations and exercise all powers necessary to the administration of the Respondent's business. Accordingly, Michael Detsky, trustee in bankruptcy, is and has been since on or about April 14, a successor in bankruptcy to the Respondent. The trustee in bankruptcy was also served copies of the complaint, Motion for Summary Judgment, and the Notice to Show Cause and he has failed to file any responses.

The Respondent has failed to file an answer and has not notified the Regional Office of its intention to do so.

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.

On the entire record, the Board makes the following

## FINDINGS OF FACT

### I. JURISDICTION

The Respondent, a New York corporation, has been engaged in fabrication and cutting of steel and related products at its facility in Jersey City, New Jersey, where it annually purchased and received products, goods, and materials valued in excess of \$50,000 directly from points located outside the State of New Jersey. We find that the Respondent is an employer engaged in commerce within the meaning of Section 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

The classifications of employees of the Respondent, as listed in the collective-bargaining agreement between the Union and the Respondent effective January 12, 1985, to January 12, 1988, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act. For many years and at all material times, the Union has been the designated exclusive collective-bargaining representative of the unit and has been recognized as such representative by the Respondent. Such recognition has been embodied in successive collective-bargaining agreements, the most recent of which is effective by its terms from January 12, 1985, to January 12, 1988. The Union continues to be the exclusive representative under Section 9(a) of the Act.

1. On or about February 13, the Respondent, acting through its president, Ray Goldstein, threatened its employees with discharge if they wanted to retain the Union as their collective-bargaining representative and threatened its employees with plant closure unless they agreed to work without the Union as their collective-bargaining representative. On or about February 24, the Respondent, again acting through Ray Goldstein, solicited its employees to sign a petition seeking employees to work without the Union as their collective-bargaining representative and again threatened employees with discharge if they wanted to retain the Union as their representative.

We find that this conduct violates Section 8(a)(1) of the Act.

2. On or about February 24, the Respondent discharged employees E. J. Clark, Tony Bligen Jr., Rossie Leake Jr., James Mack, Dudley Dailey, Frederick Blackman, Sydney Walters, Talbert Dailey, Charles Keitt, Franklin Chisholm, and Lenford Brown because these employees joined, supported, or assisted the Union, and engaged in concerted activities for the purpose of collective bargaining or other mutual aid or protection, and to discourage employees from engaging in such activities or other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

We find that this conduct violates Section 8(a)(1) and (3) of the Act.

3. Since on or about February 1, the Respondent has unilaterally ceased making contributions to the Union's pension trust fund as provided for in the January 12, 1985, to January 12, 1988 collective-bargaining agreement with the Union. Since on or about March 23, the Respondent has unilaterally refused to provide employees with severance and vacation pay also provided for in the collective-bargaining agreement with the Union. The Respondent engaged in the acts and conduct described above without prior notice to the Union and without having afforded the Union an opportunity to bargain.

We find that each of the Respondent's acts set forth above violates Section 8(a)(5) and (1) of the Act.<sup>4</sup>

#### CONCLUSIONS OF LAW

1. By threatening its employees with discharge if they wanted to retain the Union as their collective-bargaining representative; threatening its employees with plant closure unless they agreed to work without the Union as their collective-bargaining representative; and soliciting its employees to sign a petition seeking employees to work without the Union as their collective-bargaining representative, the Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, and the Respondent thereby has been engaging in unfair labor

practices within the meaning of Section 8(a)(1) of the Act.

2. By discharging employees E. J. Clark, Tony Bligen Jr., Rossie Leake Jr., James Mack, Dudley Dailey, Frederick Blackman, Sydney Walters, Talbert Dailey, Charles Keitt, Franklin Chisholm, and Lenford Brown because they joined, supported, or assisted the Union and engaged in concerted activities for the purpose of collective bargaining or other mutual aid or protection, the Respondent has discriminated, and is discriminating, in regard to the hire or tenure or terms or conditions of employment of its employees, thereby discouraging membership in a labor organization, and the Respondent thereby has been engaging in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

3. By ceasing to make contributions to the Union's pension trust fund and by refusing to pay its employees severance and vacation pay as provided in the January 12, 1985, to January 12, 1988 collective-bargaining agreement, all of which conduct occurred without prior notice to the Union and without its being afforded an opportunity to bargain, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

4. The unfair labor practices of the Respondent described above affect commerce within the meaning of 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.<sup>5</sup>

Having found that the Respondent has unlawfully discharged employees E. J. Clark, Tony Bligen Jr., Rossie Leake Jr., James Mack, Dudley Dailey, Frederick Blackman, Sydney Walters, Talbert Dailey, Charles Keitt, Franklin Chisholm, and Lenford Brown, we shall order it to offer these employees immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed<sup>6</sup> and to make these

<sup>4</sup> This factual finding tracks the complaint which, in essence, alleges that the Respondent's conduct, in changing the employees' terms and conditions of employment set by the contract, occurred without notice or opportunity to bargain. These unilateral changes, however, would be unlawful regardless of notice and the opportunity to bargain being given the Union because they occurred while the collective-bargaining agreement was in effect. In light of Sec 8(d) of the Act, such midterm contract changes cannot be made without the consent of the Union. See, e.g., *Dunham-Bush, Inc.*, 264 NLRB 1347, 1348 (1982); *C & S Industries*, 158 NLRB 454, 456-459 (1966)

<sup>5</sup> The General Counsel requests a visitatorial clause authorizing the Board, for compliance purposes, to obtain discovery from the Respondent under the Federal Rules of Civil Procedure subject to the supervision of the United States court of appeals enforcing this Order. Under the circumstances of this case, we find it unnecessary to include such a clause. Accordingly, we deny the General Counsel's request. See *Cherokee Marine Terminal*, 287 NLRB 1080 (1988).

<sup>6</sup> In her Motion for Summary Judgment, the General Counsel requests, inter alia, that the employees be made whole for loss of wages incurred

employees whole for any loss of earnings they may have suffered as a result of the Respondent's unlawful discharges. Backpay shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest thereon to be computed in the manner prescribed in *New Horizons for the Retarded*.<sup>7</sup> We shall further order that the Respondent be required to remove from its records any reference to the unlawful discharge of each employee and to provide each employee with written notice of such removal and that his unlawful discharge will not be the basis of any future personnel action against him.

Having found that the Respondent unlawfully discontinued contractually required contributions into the Union's pension trust fund since on or about February 1 and refused to provide employees with contractually required severance and vacation pay since on or about March 23, we shall order it to make the employees whole by paying all pension fund payments that have not been paid and that would have been paid absent the Respondent's unlawful discontinuance of such payments,<sup>8</sup> and by remitting to its employees the severance and vacation pay it owes them, plus interest. We shall also order the Respondent to reimburse its employees for any losses or expenses incurred by them because of its failure to remit the contractually required pension fund payments, plus interest. *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enf. 661 F.2d 940 (9th Cir. 1981). Interest on all such sums shall be paid in the manner prescribed in *New Horizons for the Retarded*, above.

between the date of their discharge and the date the Respondent closed its facility. There is no other mention of Respondent closing its facility, nor is a date of closing given. Therefore, although we have included the standard reinstatement remedy, we leave to the compliance stage of the proceedings the determination of whether reinstatement is appropriate in these circumstances.

<sup>7</sup> In accordance with our decision in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

<sup>8</sup> Because this case arose in 1987, and the Respondent filed its bankruptcy petition in that year, the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. 98-353, Stat. 333 (1984), is controlling rather than *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984). Consequently, we have not limited the Respondent's make-whole liability for its 8(a)(5) violations to the prepetition period. Cf. *Can-Do, Inc.*, 279 NLRB 819 fn. 3 (1986).

Because the provisions of employee benefit fund arrangements are variable and complex, the Board does not provide for the addition of a fixed rate of interest on unlawfully withheld fund payments at the adjudicatory stage of a proceeding. We leave to the compliance stage the question whether the Respondent must pay any additional amounts into the benefit funds in order to satisfy our "make-whole" remedy. Depending on the circumstances of each case, these additional amounts may be determined by reference to the provisions in the documents governing the funds at issue and, when there are no governing provisions, by evidence of any losses directly attributable to the unlawful withholding, which might include the loss of return on investment of the portion of funds withheld, additional administrative costs, etc., but not collateral losses. *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).

## ORDER

The National Labor Relations Board orders that the Respondent, Barney Goldstein, Inc., Morganville, New Jersey, its officers, agents, successors, and assigns, shall

### 1. Cease and desist from

(a) Threatening employees with discharge for wanting to retain the Union, Furniture, Flour, Grocery, Teamsters & Chauffeurs Local Union No. 138 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO as their collective-bargaining representative.

(b) Threatening employees with plant closure unless they agreed to work without the Union as their collective-bargaining representative.

(c) Soliciting employees to sign a petition seeking employees to work without the Union as their collective-bargaining representative.

(d) Discharging employees because they joined, supported, or assisted the Union and engaged in concerted activities for the purpose of collective bargaining or other mutual aid or protection, and to discourage employees from engaging in such activities or other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

(e) Unilaterally ceasing to make contributions to the Union's pension trust fund, as provided for in its January 12, 1985, to January 12, 1988 collective-bargaining agreement with the Union.

(f) Unilaterally refusing to provide employees with severance and vacation pay, as provided for in its January 12, 1985, to January 12, 1988 collective-bargaining agreement with the Union.

(g) 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) Offer E. J. Clark, Tony Bligen Jr., Rossie Leake Jr., James Mack, Dudley Dailey, Frederick Blackman, Sydney Walters, Talbert Dailey, Charles Keitt, Franklin Chisholm, and Lenford Brown immediate and full 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 enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of this decision.

(b) Remove from its files any reference to the unlawful discharges and notify the employees in

writing that this has been done and that the unlawful discharges will not be used against them in any way.

(c) Make whole its employees by making all payments it has failed to pay to the Union's pension trust fund as required by the January 12, 1985, to January 12, 1988 collective-bargaining agreement with the Union, and by reimbursing them for any losses attributable to the failure to remit such payments, as provided in the remedy section of this decision.

(d) Make whole its employees by providing them with the severance and vacation pay it failed to pay them as required by its January 12, 1985, to January 12, 1988 collective-bargaining agreement with the Union, as provided in the remedy section of this decision.

(e) 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.

(f) Post at its facility in Jersey City, New Jersey, copies of the attached notice marked "Appendix."<sup>9</sup> Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt 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.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

<sup>9</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"

## 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 threaten you with discharge because you want to retain the Union as your collective-bargaining representative.

WE WILL NOT threaten you with plant closure unless you agree to work without the Union as your collective-bargaining representative.

WE WILL NOT solicit you to sign a petition that seeks employees to work without the Union as your collective-bargaining representative.

WE WILL NOT discharge employees because they joined, supported, or assisted the Union, and engaged in concerted activities for the purpose of collective bargaining or other mutual aid or protection, and to discourage employees from engaging in such activities or other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

WE WILL NOT unilaterally cease making contributions to the Union's pension trust fund, as provided in our January 12, 1985, to January 12, 1988 collective-bargaining agreement with the Union.

WE WILL NOT unilaterally refuse to provide employees with severance pay and vacation pay, as provided in our January 12, 1985, to January 12, 1988 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 offer E. J. Clark, Tony Bligen Jr., Rossie Leake Jr., James Mack, Dudley Dailey, Frederick Blackman, Sydney Walters, Talbert Dailey, Charles Keitt, Franklin Chisholm, and Lenford Brown immediate and full 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 and WE WILL make them whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL notify each of the employees that we have removed from our files any reference to his discharge and that the discharge will not be used against him in any way.

WE WILL make whole our employees by transmitting the payments we have failed to pay to the Union's pension trust fund as required by our January 12, 1985, to January 12, 1988 collective-bargaining agreement with the Union, and by reimbursing them for any losses attributable to the failure to make such payments, plus interest.

WE WILL make whole our employees by providing them with the severance pay and vacation pay we failed to pay them as required by our January

12, 1985, to January 12, 1988 collective-bargaining agreement with the Union, plus interest.

**BARNEY GOLDSTEIN, INC.**