American Firestop Solutions, Inc. *and* The International Association of Heat & Frost Insulators and Allied Workers, Local No. 74. Case 18–CA–19133

January 5, 2011

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS BECKER AND HAYES

On March 1, 2010, Administrative Law Judge Michael A. Rosas issued the attached decision. The Respondent filed exceptions, the Charging Party filed an answering brief, and the Respondent filed a reply brief.

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 findings[1] and conclusions, and to adopt his recommended Order as modified and set forth in full below.[2]

ORDER

The National Labor Relations Board orders that the Respondent, American Firestop Solutions, Inc., Respondent, Waukee, Iowa, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize the Union as the exclusive collective-bargaining representative of employees in the bargaining unit described below.

(b) Refusing to bargain with the Union regarding the terms of a collective-bargaining agreement to succeed its contract with the Union which expired on August 1, 2009.

(c) Making changes to employees' wages, benefits, and other terms and conditions of employment without first notifying and bargaining in good faith with the Union to either agreement or impasse.

(d) 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 action necessary to effectuate the policies of the Act.

(a) Recognize and, on request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning 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 mechanics, apprentices, preapprentices and applicators who perform insulation and/or fire-stop work and are employed by the Company at its Waukee, Iowa location; excluding professional employees, office clerical employees, guards and supervisors as defined in the National Labor Relations Act, as amended.

[1] The Respondent has effectively excepted to certain of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The judge found that the recognition clause in the parties' October 23, 2003 collective-bargaining agreement established a bargaining relationship under Sec. 9(a) of the Act. The Respondent argues that the recognition clause in that agreement should not be relied upon, asserting that there are discrepancies in the documents introduced as the parties' collective-bargaining agreements. There is, however, no discrepancy as to the recognition clause. Both the Respondent's and the Union's copies of the 2003 agreement contain the dispositive recognition clause quoted by the judge. The parties also agree that their bargaining relationship began on October 23, 2003, with the agreement they signed on that date. The judge was therefore correct in finding the other, unrelated discrepancies irrelevant.

The credited testimony of Respondent's president, Mark Gilchrist, provides extrinsic evidence that the parties had entered into a. 9(a) relationship. Accordingly, the result here would be the same under the D.C. Circuit's decision in *Nova Plumbing, Inc. v. NLRB*, 330 F.3d 531 (D.C. Cir. 2003), as under *Staunton Fuel & Material*, 335 NLRB 717 (2001). See *M&M Backhoe Service*, 345 NLRB 462 (2005), enfd. 469 F.3d 1047 (D.C. Cir. 2006) Under these circumstances, Member Hayes finds no need to reassess the rule of *Staunton Fuel*, that certain contract language, standing alone, can prove the establishment of a 9(a) relationship.

[2] We shall modify the Order and notice to conform to our standard remedial language. In the event that the Respondent's unlawful conduct caused any employee to suffer losses occasioned by a break in employment, backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289. For losses not involving a break in employment, backpay shall be calculated under *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971). The Respondent shall also reimburse unit employees for any expenses ensuing from its failure to make the required payments to the fringe benefit funds, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891, 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection Service,* supra. Interest on the foregoing amounts shall be computed at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

With respect to any fringe benefit payments that have not been made as a result of the Respondent's unlawful conduct, backpay shall include any additional amounts applicable to such delinquent payments as set forth in *Merryweather Optical Co*., 240 NLRB 1213, 1216 (1979).

We shall also modify the judge's recommended Order to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB No. 9 (2010). For the reasons stated in his dissenting opinion in *J. Picini Flooring*, Member Hayes would not require electronic distribution of the notice.

(b) On request of the Union, rescind any changes to employees' terms and conditions of employment made on or after August 1, 2009, and retroactively restore terms and conditions of employment, including wage rates and benefit plans, to what they were prior to August 1, 2009.

(c) Make whole bargaining unit employees to the extent they have suffered any losses in pay and benefits as a result of the Respondent's unlawful conduct, including losses to the Union's health and welfare, pension and other benefit funds, occurring on or after August 1, 2009, with interest.[3]

(d) 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.

(e) Within 14 days after service by the Region, post at its facility in Waukee, Iowa, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 18, 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. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other means, if the Respondent customarily communicates with its employees by such means. 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 August 1, 2009.

(f) 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.

Dated, Washington, D.C. January 5, 2011

Wilma B. Liebman,	Chairman
Craig Becker,	Member
Brian E.Hayes,	Member

(SEAL) 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 Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

We will not withdraw recognition from the International Association of Heat & Frost Insulators and Allied Workers Local No. 74 (Union) as the exclusive collective-bargaining representative of our employees in the unit described below.

We will not refuse to bargain with the Union regarding terms of a collective-bargaining agreement to succeed our contract with the Union, which expired on August 1, 2009.

We will not make any changes to employees' pay, wages, and terms and conditions of employment without first notifying and bargaining in good faith with the Union to either agreement or impasse.

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.

[3] Interest on all of the above amounts shall be computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987), and shall be compounded daily as prescribed in *Kentucky River Medical Center*, supra.

[4] 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 recognize and, on request, bargain with the Union as the exclusive representative of our employees in the following appropriate unit concerning 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 mechanics, apprentices, preapprentices and applicators who perform insulation and/or fire-stop work and are employed by us at our Waukee, Iowa location; excluding professional employees, office clerical employees, guards and supervisors as defined in the National Labor Relations Act, as amended.

We will, on request of the Union, rescind any changes to employees' terms and conditions of employment made on or after August 1, 2009, and retroactively restore terms and conditions of employment, including wage rates and benefit plans, to what they were prior to August 1, 2009.

We will make whole bargaining unit employees to the extent they have suffered any losses in pay and benefits as a result of our unlawful conduct, including losses to the Union's health and welfare, pension and other benefit funds, occurring on or after August 1, 2009, with interest.

AMERICAN FIRESTOP SOLUTIONS, INC.