Spinoza, Inc. and Jessie C. Davis, Donald H. Pendergraph, George L. Smith, Perry E. Miller, Obie V. Wasden, Jeremiah Winters. Cases 12-CA-5448-1, 12-CA-5448-2, 12-CA-5448-3, 12-CA-5448-4, 12-CA-5448-5, and 12-CA-5448-6

October 6, 1972

DECISION AND ORDER

BY MEMBERS FANNING, KENNEDY, AND PENELLO


Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge as modified herein and to adopt his recommended Order.

To the extent that the Administrative Law Judge implies that the employees' letter was protected activity because they were correct in their statements that Graham was, in fact, failing to perform his work efficiently, we do not rely on that rationale. Without passing on the merits of the complaints in the letter, we find the letter was protected activity since it was clearly for the employees' mutual aid or protection over a matter of concern to all the employees and over which Respondent had control. Thus, the particular merits of the employees' complaints are irrelevant to finding that the letter was protected. *Mushroom Transportation Company, Inc.*, 142 NLRB 1150, 1158, reversed on other grounds 330 F.2d 683 (C.A. 3).

Similarly, the petition was protected. The petition, as Smith, its author, stated, and as the Administrative Law Judge noted, was meant to make Borden aware that, if it took over the balance of Respondent's contract, Respondent's employees would desire to work for Borden. In such circumstances, we agree with the Administrative Law Judge's conclusions that the petition was protected activity.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that Respondent Spinoza, Inc., its officers, agents, successors, and assigns shall take the action set forth in the said recommended Order.

1 The title "Trial Examiner" was changed to "Administrative Law Judge" effective August 19, 1972.

2 We hereby correct certain inadvertent errors made by the Administrative Law Judge. (1) Graham's immediate supervisor was Howard Marten, not Charles Miller, as stated by the Administrative Law Judge, and it was Marten and not Miller who decided with Graham to discharge the Charging Parties. (2) It was Union Representative Al Taylor and not Dave Joyner who refused to show Smith a copy of the contract between Respondent and Borden. Also, contrary to the Administrative Law Judge, we find no evidence that the contract negotiations were stalled through the inability to get Graham to the negotiating table. There were 16 negotiating sessions. Graham testified he represented Respondent at these sessions and the record does not indicate Graham's absence from them. Hence it can hardly be said that there was any inability to get Graham to these sessions.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

THOMAS S. WILSON, Trial Examiner: Upon charges duly filed on January 17 or January 21, 1972, by the individual complainants listed in the caption, hereinafter referred to by name or as the Charging Parties, the General Counsel of the National Labor Relations Board, herein referred to as the General Counsel, and the Board, respectively, by the Regional Director for Region 12 (Tampa, Florida), issued its complaint dated February 23, 1972, against Spinoza, Inc., herein referred to as the Respondent.

The complaint alleged that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Labor Management Relations Act, 1947, as amended, herein referred to as the Act.

Respondent duly filed its answer admitting certain allegations to the complaint but denying the commission of any unfair labor practices.

Pursuant to notice, a hearing hereon was held before me in Bradenton, Florida, on March 29, 1972. All parties appeared at the hearing, were represented by counsel, and were afforded full opportunity to be heard, to produce and cross-examine witnesses, and to introduce evidence material and pertinent to the issues. At the conclusion of the hearing General Counsel made an oral argument consisting largely of citation of cases. A brief was received from Respondent on April 24, 1972.

Upon the entire record in the case and from my observation of the witnesses, I make the following:

FINDINGS OF FACT

1 BUSINESS OF RESPONDENT

The complaint alleged, the answer admitted, and I therefore find:

Spinoza, Inc., is, and has been at all times material herein, a corporation duly organized under, and existing by virtue of, the laws of the State of Delaware. At all times material herein Respondent has maintained an office and

1 This term specifically includes the attorney appearing for the General Counsel at the hearing.
place of business at Piney Point, Florida, where it is engaged in the business of industrial engineering, construction, and contract industrial maintenance. During the past 12 months, which period is representative of all times material herein, Respondent has purchased goods, materials, and supplies valued in excess of $50,000, directly from points located outside the State of Florida.

Accordingly, I found that Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE UNION INVOLVED

International Chemical Workers Union and its Joint Council No. 1, is now, and has been at all times material herein, a labor organization admitting to membership the employees of Respondent.

III. THE UNFAIR LABOR PRACTICES

A. The Facts

At all times material here Borden Chemical Company (Borden) has operated a phosphate fertilizer plant at Piney Point, Florida, where it employs approximately 75 production workers.

For the past 6 years Borden has had a contract, cost plus 40 percent, with Respondent whereby Respondent furnishes the Piney Point plant maintenance mechanics, carpenters, welders, millwrights, type mechanical men, laborers, and some equipment operators, in total some 85 employees including about 37 skilled employees. The contract is said to be cancelable at the option of either party upon 90 days' notice.2

Respondent's operations at Piney Point are under the direction of General Manager Robert P. Graham. Respondent's only permanent office in Florida is in the Borden Piney Point plant. All Respondent's employees report at that plant where they punch timecards which are sent to the local bank which issues checks to the employees on Spinoza checks. These timecards are also used to justify Respondent's charges to Borden under the contract. Respondent has its own foremen in the various divisions of the plant but its employees also take orders directly from the Borden supervisors as well as Respondent's.

Becoming dissatisfied with the joint supervision and the lack of pay increases, Respondent's employees in the fall of 1970 sought out Joint Council No. 1, International Chemical Workers Union to represent them in their deal-

B. The Negotiations

Negotiations for a contract began in March 1971. Respondent was represented in these negotiations by Robert P. Graham and the Union by Doug Joyner, Al Taylor, and Mike Higgins, business representatives, along with employees George L. Smith and Ben Hogg. Since that time there have been 16 negotiating sessions lasting in total for approximately 40 hours. Agreement has been reached on some of the terms of a contract but, when those negotiations concluded, the issue of wages had not even been discussed. Consequently no agreement has been reached between the parties. Business Representative Joyner told the employees he represented that the negotiations were extremely difficult because of the 90-day cancellation clause in the Respondent-Borden contract. Although Joyner had a copy of that contract, he refused to show the same to the employees although requested to do so.

During these protracted negotiations, Borden took over some of the electrical maintenance work theretofore done by Respondent under its contract. Also during this time Sam Kilby, maintenance superintendent for Borden, was asked by George Smith, then acting Local union president, if Borden was going to take over all the maintenance work. Kilby answered that they would like to but they couldn't do it but added that "he was working on it." The discussion went so far as having Kilby inquire of Smith which of Respondent's employees he would retain in the event that Smith were to become maintenance foreman for Borden. From this conversation Smith received the impression that Borden might well be going to take over Respondent's maintenance work. Other of Respondent's employees had received the same impression. Thus, Respondent's employees were left in a highly unsatisfactory situation.

The negotiations for a contract were stalled through the inability to get Graham to the negotiating table and through the apparent disinterest of the union business representatives. There was also the actual take over of some of Respondent's maintenance work by Borden plus the rumors that Borden might take over all the maintenance work.

In this unsatisfactory state of affairs, Smith, after consultation with other Local officers and union members, wrote a long letter to the Labor Department in Washington, D.C., detailing the employees' plight and requesting advice on how to proceed. Whatever answer the Labor Department made, if any, is not in evidence.

On or about October 6, 1971, Smith prepared and signed the following communication to Vice President Charles Miller who was Graham's immediate superior and located in the Respondent's head office in Houston, Texas. This letter read as follows:

We are writing you, concerning your operations for Borden Chemical Co. at Piney Point Florida.

Many of the people on your payroll, feel the company is Anti-labor and Anti-Union and that your name on our paycheck, is only for the purpose of keeping organized labor out of Borden's plant. There are some

2 The contract itself was not put in evidence.
of us, who feel no company would knowing set themselves up in this manner.

We have very carefully analyzed our experiences and reviewed our communications with your managing supervisor. We have come to the conclusion, that it may very well be, you are not aware of the true facts concerning your operations here. That your operations have deteriorated to the point, where the only service your company renders here is, time keeper for the maintenance personal. That because of this, we find ourselves working for Borden, with your company’s name on our pay checks. That your operations here are so unimportant to the company, that your supervisor Mr. Graham does not have to be here only two (2) or three (3) hours a week and some weeks not at all. That if you should call Mr. Graham, you would be told, that he was out in the plant, or was expected in soon, to leave your name or number and they would have him call you when he came in. The office man then calls Mr. Graham where ever he is, and he calls you from there. That some of the crew leaders and foreman do not perform their duties as they should and complaints by forman and even Borden’s personal lands on deaf ears because the men are frinds of Mr. Graham or frinds of frinds of Mr. Graham. That the same Mr. Graham has promised and agreed to do things that he would not do.

These facts have forced the morale of the men so low, that they do not wante to worke over or come in on callouts. They look upon Mr. Graham with disrepect and with out admiration. There has been a number of times when the men wanted to walk out, but we were able to talk them out of it.

We have been in commnication with the labor board in Washington and have furnushed them with a sworn statement, concerning your activities here or lack of it. We have been advised to acquaint your office with the facts here in disclosed, should you still feel there is no necessity for a full time supervisor, to schedule the work and to pass Borden’s orders on to his forman, then we must conceded that this is proof of the fact, that Spinoza’s name on our pay checks is for the purpose of keeping organized maintenance personal from negotiating with Borden company.

There outher facts which tend to foster this belief. The use of your contract with Borden as a reason for not being able to negotiate many of the articles in our proposed agreement. Your company’s apparent lack of interest for expanding to a state wide operation.

We submit, you could be unaware of the problems, with your supervisor. You could be unawaer, of him using your contract with Borden as a reason for not negotiating on some things, even though your contract with them was negotiated after you started negotiatiing with your employees. We will all be looking for some action on your part in the near furture. It would be a shame, to have all this time and money spent on negotiations only to have to do it all over agin with Bordens or to go to the time and trouble of organizing a state wide operation only to have it turned down because of the presence of one character.

Sincerely Your’s
George L. Smith
Perry E. Miller
Donald H. Pendergraph
Obie Wasden
Jeremiah Winters
Jesse C. Davis

P. S. To better exemplify your problems here, we are inclosing a copy of a petition, which has all of the mechanic’s names on it, except two. [sic]

Again, after consultation with the other Local officers and members, on or about October 10, 1971, Smith prepared the following petition which in the next 2 days was signed by 37 of the 39 skilled mechanics employed by Respondent including the six here involved:

To Whom It May Concern:

We, the members of the maintenance group, at the Borden plant Piney Point, Florida, do petition any and all officials of the Borden Chemical Company for AD-MITTANCE into the Company as a group or as individuals, in order to better our services to the Company. This signed petition was sent to Borden without any discernible result.

Just before Smith left on a 2-week vacation on October 24, he gave this October 6 letter to Local Union Vice President Jesse C. Davis with instructions to forward that letter together with a copy of the signed petition to Borden to Vice President Miller in Houston if the union officers determined during his absence that it was necessary for their welfare.

On or about October 31, 1971, after the latter had been signed by Perry E. Miller, Donald H. Pendergraph, Obie Wasden, Jeremiah Winters, and Jesse C. Davis, in addition to the original signature of George L. Smith, it was so forwarded with the petition enclosed to Miller.

On November 23, 1971, Miller arrived in Bradenton with the letter and enclosure. He conferred with Graham regarding the complaints made in the letter. They decided to fire the six men who had signed the October 6, 1971, letter.

On November 24, Respondent discharged Smith, Miller, Pendergraph, Wasden, Winters, and Davis for “disloyalty to the Company” for having composed, signed, and forwarded the aforequoted letter and petition. Counsel for Respondent agreed that all six of the employees were fired because of their connection with the above letter and petition.

B. Conclusions

It is admitted that the six dischargees here were discharged because they composed, executed, and mailed the letter, quoted heretofore, to Respondent Vice President Miller as well as the petition to Borden which was enclosed in the letter to Miller.

General Counsel contends that the actions of the six in regard to the letter and the petition constituted concerted, if not union, protected activity on the part of the dischargees and that, as they admittedly were discharged because of their participation in the above-referred-to activity, Re-
Respondent committed an unfair labor practice by discharging them on November 24, 1971.

Respondent, on the other hand, argues that by their participation in the letter and the petition, the discharges were "disloyal" to the Company,1 attempted to undercut the authority of General Manager Graham by taking their complaints to his superior, Vice President Miller, and further sought to cause Respondent to lose its contract with Borden so that the discharges were for cause and perfectly justified.

In its brief Respondent cites cases where the Board has held an employer committed no unfair labor practice in discharging an employee for offering information to an attorney prosecuting a negligence case against the Respondent utility,2 a case involving discharges for referring to the boss as an "old man" which the Board held to be "abusive,"3 or a case where the Board held justifiable the discharge of a life insurance salesman for writing letters to customers disparaging the Company.4

The cases cited are inapposite here for the simple reason that both the letter and the petition here directly involved the employment, wages, hours, and working conditions of the employees involved.

The letter, of course, was an attempt, as the employees saw it, to improve Respondent's service to its customer by keeping Respondent's general manager on the job as well as improve the morale and working conditions of the Respondent's employees on the job by making that same general manager available to handle some of the existing employee gripes and grievances in addition to handling Respondent's work with Borden. Certainly it is not "disloyalty" for employees to notify the employing company when one of its employees, even executives, is failing to perform the Company's work efficiently, especially when those employees reasonably believe that the Company does not know the facts about the alleged inefficiency. The general manager may well consider that the employees were being "disloyal" to him in so notifying the Company but it certainly cannot be considered as disloyalty to the Company. Many an employee has been discharged for inefficiency or lack of attention to duty. I know of no reason why executives should be exempt therefrom. The employees here were attempting to improve their own efficiency, their own jobs and working conditions, as well as to improve the Company's service to its customers.

The petition was much the same. Borden had already started using its own Borden employees to do some of the maintenance work (electrical) previously done by Respondent under its contract and had given Respondent's employees reasonable cause to believe that more, or all, of Respondent's maintenance work might be taken from Respondent so that Respondent's employees would lose their entire employment. The petition thus was a concerted effort by Respondent's employees to retain their jobs in the plant if or when Borden took over the remainder of the Respondent's work under the contract. This was a concerted effort at job preservation.

That such actions on the part of the six discharges here was both concerted and protected was determined in the oft and favorably cited case of N.L.R.B. v. Guernsey-Muskingam Electric Cooperative, Inc., 285 F.2d 8, enfg. 124 NLRB 682.

Here, as there, Respondent discharged the six discharges for engaging in concerted, protected activities in connection with their employment, wages, hours, and working conditions in violation of Section 8(a)(1) of the Act. I so find. In addition, as these activities were taken and directed by officers and members of the Local Union, albeit without the aid and assistance of the business representatives of the Joint Council No. 1, these discharges also constitute a violation of Section 8(a)(3) of the Act.

IV THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, having close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tends to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I will recommend that Respondent cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent discriminated in regard to the hire and tenure of employment of Jesse C. Davis, Donald H. Pendergraph, George L. Smith, Perry E. Miller, Obie V. Wadsen, and Jeremiah Winters by discharging them on November 24, 1971, because of their concerted and union protected activities in violation of Section 8(a)(1) and (3) of the Act, I will recommend that Respondent offer each of them full and immediate reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges and make him whole for any loss of pay he may have suffered by reason of said discrimination against him by payment to him of a sum of money equal to that which he would have earned from the date of the discrimination to the date of the Respondent's offer of reinstatement less his net earnings during such period in accordance with the formula set forth in F. W. Woolworth Company, 90 NLRB 289, with interest thereon at 6 percent per annum.

Because of the type of the unfair labor practices engaged in by Respondent, I sense an opposition by Respondent to the policies of the Act in general and I deem it necessary to order Respondent to cease and desist from in any manner interfering with the rights guaranteed its employees in Section 7 of the Act.

Upon the basis of the foregoing findings of fact and upon the entire record herein, I make the following:

1 Graham testified that Union Business Representative Joyner had told him that the discharges here deserved to be discharged for extreme "disloyalty" to Respondent. If this hearsay testimony be true, it may well account for the Union's obvious disinterest during the negotiations. Joyner, however, did not testify.

2 West Texas Utilities Company, 22 NLRB 560.

3 Technitol, Inc., 174 NLRB 1234.

4 Liberty Mutual Insurance Co., 194 NLRB No. 171.

5 Liberty Mutual Insurance Co., 194 NLRB No. 171.
CONCLUSIONS OF LAW

1. By discriminating in regard to the hire and tenure of employment of Jesse C. Davis, Donald H. Pendergraph, George L. Smith, Perry E. Miller, Obie V. Wadsen, and Jeremiah Winters by discharging each of them on November 24, 1971, because of the fact that they engaged in concerted and union protected activities, Respondent has engaged in and is engaging in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act.

2. By interfering with, restraining, and coercing its employees in the rights guaranteed them in Section 7 of the Act, Respondent has interfered with, restrained, and coerced its employees in violation of Section 8(a)(1) of the Act.

3. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the basis of the foregoing findings of fact and conclusions of law and upon the entire record in this case, I hereby issue the following recommended:7

ORDER

Respondent Spinoza, Inc., Piney Point, Florida, and Houston, Texas, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:
   (a) Discharging or otherwise discriminating in regard to the hire and tenure of employment or any terms or conditions of employment of any of its employees because of their concerted, and/or union, protected activities.
   (b) In any manner interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:
   (a) Offer to Jesse C. Davis, Donald H. Pendergraph, George L. Smith, Perry E. Miller, Obie V. Wadsen and Jeremiah Winters and each of them immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make each whole for any loss of pay he may have suffered by reason of said discrimination against him in the manner set forth in the section of this Decision entitled "The Remedy," with interest thereon at 6 percent per annum.
   (b) Notify immediately the above named individuals, if presently serving in the Armed Forces of the United States, their right to full reinstatement, upon application, after the discharge from the Armed Service, in accordance with the Selective Service Act and the Universal Military Training and Service Act.
   (c) Preserve and, upon 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, as well as all other records necessary to analyze and compute the amount of backpay due under the terms of this Decision.
   (d) Post at its Piney Point, Florida, facility copies of the attached notice marked "Appendix."8 Copies of said notice, on forms provided by the Regional Director for Region 12, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.
   (e) Notify the Regional Director for Region 12, in writing within 20 days from the receipt of this Decision, what steps have been taken to comply herewith.9

It is further recommended that, unless Respondent notifies said Regional Director within 20 days from the receipt hereof that it will take the action here ordered, the Board issue an order directing Respondent to take the action here ordered.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL not in any manner discharge or discriminate in regard to the hire and tenure of employment or of any term or condition of employment of any of our employees because of their concerted or union activities.

WE WILL offer to Jesse C. Davis, Donald H. Pendergraph, George L. Smith, Perry E. Miller, Obie V. Wadsen, and Jeremiah Winters immediate and full reinstatement to his former job or, if that job no longer exists, a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and we will pay each of them for any loss of pay he may have suffered by reason of our discrimination against him, together with interest thereon at 6 percent per annum.

WE WILL not in any manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form, join, or assist a union of their choice, to bargain collectively through a collective bargaining agent chosen by our employees, to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any such activities.

7 In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order heretofore shall be adopted.
8 In the event that the Board's Order is enforced by a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall be deleted and replaced with "Enforcing an Order of the National Labor Relations Board."
9 In the event that this recommended Order is adopted by the Board after exceptions have been filed, this provision shall be modified to read "Notify the Regional Director for Region 12 in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith."
Spinoza, Inc

(Employer)

Dated By

(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Office Building, Room 706, 500 Zack Street, P.O. Box 3322, Tampa, Florida 33602, Telephone 813-228-7227.