

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

TALLY-HO PROPERTIES, INC.

and

HOTEL AND RESTAURANT EMPLOYEES LOCAL 267

Cases 4--CA--14120
4--CA--14120--3

DECISION AND ORDER

Upon a charge filed by the Union 2 December 1983, and an amended charge filed by the Union 30 January 1984, and a charge filed by the Union 10 January 1984, the General Counsel of the National Labor Relations Board issued a consolidated complaint 29 February 1984 against the Company, the Respondent, alleging that it has violated Section 8(a)(1), (3), and (5) and Section 8(d) of the National Labor Relations Act. Although properly served copies of the charge and complaint, the Company has failed to file an answer.

On 16 April 1984 the General Counsel filed a Motion for Summary Judgment. On 20 April 1984 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 Company 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 10 days from service of the complaint, unless good cause is

shown. The complaint states that unless an answer is filed within 10 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 Respondent failed to file an answer to the complaint and the time for filing under Section 102.20 of the Rules expired 13 March 1984. On 20 April 1984 the Board issued a Notice to Show Cause why the Motion for Summary Judgment should not be granted. The Respondent had until 4 May 1984 to show cause and the Respondent filed no response.

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.¹

On the entire record, the Board makes the following

Findings of Fact

I. Jurisdiction

The Company, a Delaware corporation, is engaged in the retail sale of food and liquor at a facility in Wilmington, Delaware, where it annually derived gross revenues in excess of \$500,000 and purchased and received goods and materials valued in excess of \$5,000 directly from points outside the State of Delaware. We find that the Company 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.

¹ In granting the General Counsel's Motion for Summary Judgment, Chairman Dotson specifically relies on the total failure of the Respondent to contest either the factual allegations or the legal conclusions of the General Counsel's complaints. Thus, the Chairman regards this proceeding as being essentially a default judgment which is without precedential value.

II. Alleged Unfair Labor Practices

The following individuals are, and have been at all times material herein, 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: Scott Camp, general manager; and Roger Nagy, assistant manager.

From about July 1983 to about January 1984, the Independent Security Company was an agent of the Respondent within the meaning of Section 2(13) of the Act.

At all times material, the Respondent, Tally-Ho Properties, Inc. of Wilmington, Delaware, and the Union, Hotel and Restaurant Employees Local 267, have been parties to successive collective-bargaining agreements. The most recent agreement is effective from 13 August 1981 to 31 August 1984 covering employees in a unit, referred to in article I of the agreement, which is appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act. The Union has been and is at all times material the exclusive representative of the unit within the meaning of Section 9(a) of the Act.

About 25 November 1983 the Respondent, acting through Scott Camp, (1) threatened to close its facility unless employees agreed to modifications of the collective-bargaining agreement between the Respondent and the Union; (2) threatened employees with more onerous working conditions if they did not agree to the modifications; and (3) created the impression that its employees' union activities were under surveillance by informing its employees that the Respondent knew what had occurred during a meeting between its employees and union representatives. Additionally, about 10 and 12 December 1983, the Respondent, acting through Scott Camp, threatened an employee with unspecified reprisals because of the employee's union activities. Accordingly, we find, by the acts and conduct set forth in this paragraph, that the Respondent has

interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed them in Section 7 of the Act, and has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

About 25 November 1983, the Respondent, acting through Scott Camp, bypassed the Union and dealt directly with its employees in the unit by polling employees regarding whether they would accept modifications to the collective-bargaining agreement. Accordingly, we find that the Respondent has failed and refused to bargain collectively with the representative of its employees, and has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

About 26 November 1983 the Respondent: (1) required its employees to wear ties while working; (2) prohibited its employees from smoking or drinking during working hours; and (3) prohibited its employees from taking breaks during their shifts without prior notice to the Union and without having afforded the Union an opportunity to negotiate and bargain as the exclusive representative of the unit with respect to such conduct. Accordingly, by engaging in such conduct, we find that the Respondent has failed and refused to bargain collectively with the representative of its employees, and has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

The Respondent has failed to continue in full force and effect all the terms and conditions of the collective-bargaining agreement at a time when the agreement could not be modified under Section 8(d) of the Act by since about mid-October 1983, refusing to pay its employees time and a half for overtime work as required by article XVII of the agreement. In addition, the Respondent since about early July 1983 failed to remit union dues and health and welfare and pension fund contributions to the Union in the manner required by articles

VI and XXI. Further, since about 26 November 1983 the Respondent interfered with employee gratuity arrangements by posting "no tipping" signs in its facility in violation of article XXII. Also, since about 1 December 1983 the Respondent failed to notify the Union of newly hired employees in the manner required by article V. Accordingly, by such actions set forth in the above paragraph, we find that the Respondent has failed and refused, and is failing and refusing, to bargain collectively with the representative of its employees and has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) and Section 8(d) of the Act.

About 26 November 1983 the Respondent: (1) required its employees to wear ties while working; (2) prohibited its employees from smoking or drinking during working hours; and (3) prohibited its employees from taking breaks during their shifts because the employees supported and assisted the Union. Accordingly, by such actions, we find that the Respondent has discriminated against its employees with regard to terms and conditions of their employment thereby discouraging membership in a labor organization and has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

About 16, 17, and 19 December 1983 the Respondent, acting through Independent Security Company and its employee, Fryesta Brown, imposed more onerous working conditions on its employees Arnold Russo and Arthur Able by observing them at work because the employees supported and assisted the Union. In addition about 20 December 1983 the Respondent, acting through Scott Camp, discharged its employee Arnold Russo and at all times since that date the Respondent has failed and refused and continues to fail and refuse to reinstate Arnold Russo to his former or a substantially equivalent position of employment because he supported and assisted the Union. Accordingly, by such conduct

as set forth in this paragraph, we find that the Respondent has discriminated and is discriminating in regard to the hire or tenure of employment of an employee, thereby discouraging membership in a labor organization, and has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

Conclusions of Law

1. Tally-Ho Properties, Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. Hotel and Restaurant Employees Local 267 is a labor organization within the meaning of Section 2(5) of the Act.
3. Scott Camp, general manager for the Respondent, and Roger Nagy, assistant manager for the Respondent, are supervisors within the meaning of Section 2(11) of the Act and are agents of the Respondent within the meaning of Section 2(13) of the Act.
4. From about July 1983 to about January 1984, Independent Security Company was an agent of the Respondent within the meaning of Section 2(13) of the Act.
5. The Respondent and the Union are parties to a collective-bargaining agreement effective from 13 August 1981 to 31 August 1984 covering employees in a unit, referred to in article 1 of the agreement, which is appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act.
6. At all times material the Union has been and is the exclusive representative of the unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.
7. By about 25 November 1983 the Respondent, acting through Scott Camp, (1) threatened to close its facility unless the employees agreed to modifica-

tions in the collective-bargaining agreement; (2) threatened employees with more onerous working conditions if they did not agree to the modifications; and (3) created the impression its employees' union activities were under surveillance. By such conduct, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act. Additionally, by about 10 and 12 December 1983, the Respondent, acting through Scott Camp, threatened an employee with unspecified reprisals because of the employee's union activities. By such conduct, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

8. By about 25 November 1983, the Respondent, acting through Scott Camp, bypassed the Union and dealt directly with employees in the unit in polling them as to whether they would accept modifications in the collective-bargaining agreement. By such conduct, the Respondent has failed or refused to bargain within the meaning of Section 8(a)(1) and (5) of the Act.

9. By about 26 November 1983 the Respondent (1) required its employees to wear ties while working, (2) prohibited its employees from smoking or drinking during working hours, and (3) prohibited employees from taking breaks during their shifts without prior notice to the Union and without having afforded the Union an opportunity to negotiate and bargain. By such conduct, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

10. By (1) about mid-October 1983 refusing to pay its employees time and a half for overtime work as required by article XVII of the collective-bargaining agreement; (2) about early July 1983 failing to remit union dues and to make health, welfare, and pension fund contributions to the Union in the manner required by articles VI and XXI; (3) about 26 November 1983 interfering with employee gratuity arrangements by posting "no tipping" signs in

its Wilmington facility in violation of article XXII; and (4) about 1 December 1983 failing to notify the Union of newly hired employees in the manner required by article V, the Respondent has refused to bargain collectively with the Union and has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) and Section 8(d) of the Act.

11. By about 26 November 1983 the Respondent (1) required its employees to wear ties while working; (2) prohibited employees from smoking or drinking during working hours; and (3) prohibited employees from taking breaks during their shifts because its employees supported and assisted a union. By such conduct, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

12. By about 16, 17, and 19 December 1983 the Respondent, acting through Independent Security Company, and its employee, Fyresta Brown, imposed more onerous working conditions on its employees Arnold Russo and Arthur Abel by observing them at work because they supported and assisted the Union. By such conduct, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

13. By about 20 December 1983, the Respondent, acting through Scott Camp, discharged employee Arnold Russo and at all times since that date failed and refused to reinstate him because he supported and assisted the Union. By such conduct, the Respondent has engaged in an unfair labor practice within the meaning of Section 8(a)(1) and (3) of the Act.

14. The aforesaid unfair labor practices are unfair labor practices affecting 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 within the meaning of Section 8(a)(1), (3), and (5) and Section 8(d) of the Act, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Specifically, we have found that the Respondent has refused, and continues to refuse, to bargain collectively with the Union as the exclusive bargaining representative of an appropriate unit of its employees. We shall therefore order the Respondent to bargain with the Union and give retroactive effect to the terms of the collective-bargaining agreement and to make whole its employees for any loss suffered as a result of its unlawful conduct, including making the required contributions to the health, welfare, and pension fund.² In the event that employees incurred expenses due to the Respondent's failure to comply with the contractual provision noted above, we shall also require that the Respondent reimburse employees for those expenses. We shall further order that the Respondent pay its employees the time-and-a-half pay provided for in the collective-bargaining agreement, which the Respondent failed to pay since about mid-October 1983, and that the Respondent remit to the Union the dues it failed to remit since about early July 1983.³

² Because the provisions of employee benefit fund agreements are variable and complex, the Board does not provide at the adjudicatory stage of a proceeding for the addition of interest at a fixed rate on unlawfully withheld fund payments. We leave to the compliance stage the question of whether the Respondent must pay any additional amounts into the benefit funds in order to satisfy our "make-whole" remedy. These additional amounts may be determined, depending on the circumstances of each case, by reference to provisions in the documents governing the funds at issue and, where there are no governing provisions, to evidence of any loss directly attributable to the unlawful withholding action, 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 (1979).

(Footnote(s) 3 will appear on following pages)

Having found that the Respondent also engaged in unfair labor practices in violation of Section 8(a)(3) and (1) of the Act, we shall order the Respondent to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Accordingly, we shall order the Respondent to offer Arnold Russo immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights or privileges previously enjoyed, and to make him whole for any loss of earnings he may have suffered as a result of the discrimination practiced against him. Backpay shall be computed in accordance with the formula set forth in F. W. Woolworth Co., 90 NLRB 289, with interest thereon to be computed in a manner described in Florida Steel Corp., supra, 231 NLRB 651.⁴

We shall also order the Respondent to remove from its records any reference to the unlawful discharge of Russo.

ORDER

The National Labor Relations Board hereby orders that the Respondent, Tally-Ho Properties, Inc., Wilmington, Delaware, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain collectively with Hotel and Restaurant Employees Local 267 as the exclusive bargaining representative of its employees in the appropriate unit.

(b) Failing and refusing to give full force and effect to its collective-bargaining agreement with the Union.

³ Interest shall be paid in the manner prescribed in Florida Steel Corp., 231 NLRB 651 (1977). See generally Isis Plumbing Co., 138 NLRB 716 (1962).

⁴ See generally Isis Plumbing Co., supra, 138 NLRB 716.

(c) Failing and refusing to make pension, health, and welfare contributions and to remit union dues in the manner required by the collective-bargaining agreement; failing and refusing to pay employees time and a half for overtime work as required by the collective-bargaining agreement; interfering with employee gratuity arrangements by posting "no tipping" signs in the Wilmington facility in violation of the collective-bargaining agreement; and failing to notify the Union of newly hired employees in a manner required by the collective-bargaining agreement.

(d) Threatening employees with closure of the facility unless employees agree to modifications of the collective-bargaining agreement; threatening employees with more onerous working conditions if they did not agree to modifications; threatening employees in any other means because of their union activities; and creating the impression that employees union activities are under surveillance.

(e) Discouraging membership in Hotel and Restaurant Employees Local 267, or any other labor organization, by imposing more onerous working conditions on its employees or by discharging or otherwise discriminating against any employee in regard to the hire or tenure of his employment or any terms or condition of employment.

(f) Promulgating new rules like requiring employees to wear ties while working, prohibiting employees from smoking or drinking during working hours, or prohibiting employees from taking breaks during their shifts to discourage union activity or without affording the Union an opportunity to negotiate and bargain as the exclusive representative of the unit with respect to the conduct.

(g) Bypassing the Union and dealing directly with employees in the unit by polling the employees as to whether they would accept a modification in the collective-bargaining agreement.

(h) 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) Bargain with Hotel and Restaurant Employees Local 267 as the exclusive representative of all employees in the appropriate unit by giving effect to the terms and conditions of the agreement.

(b) Make whole its employees for any loss suffered as a result of the Respondent's unilateral modification of the collective-bargaining agreement including the loss suffered as a result of the Respondent's failure to pay contributions to the health and welfare and pension funds and to remit union dues and the loss suffered as a result of the Respondent's unlawful refusal to pay employees time and a half for overtime, as required by the collective-bargaining agreement, in the manner set forth in the section of this decision entitled "'Remedy.'"

(c) Immediately rescind its rules requiring employees to wear ties while working, prohibiting its employees from smoking or drinking during working hours, and prohibiting employees from taking breaks during their shifts, which were promulgated because of the employees' activities on behalf of the Union and without prior notice to the Union and without affording the Union an opportunity to bargain with respect to this rule.

(d) Offer Arnold Russo immediate and full reinstatement, unless reinstatement has already been offered, to his former position or, if the position

no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed, and make him whole with interest for any loss incurred by reason of the discrimination in the manner set forth in the section of this decision entitled "Remedy."

(e) Remove from its files any reference to the unlawful discharge of Arnold Russo and notify him in writing that this has been done and that the discharge will not be used against him in any way.

(f) 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.

(g) Post at its facility in Wilmington, Delaware, copies of the attached notice marked "Appendix."⁵ Copies of the notice, on forms provided by the Regional Director for Region 4, 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.

⁵ 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."

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

Dated, Washington, D.C. 10 August 1984

Donald L. Dotson, Chairman

Don A. Zimmerman, Member

Robert P. Hunter, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

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 fail and refuse to bargain collectively with Hotel and Restaurant Employees Local 267 as the exclusive bargaining representative of our employees

WE WILL NOT fail and refuse to give full force and effect to our collective-bargaining agreement with the Union.

WE WILL NOT fail and refuse to make pension, health, and welfare contributions and to remit union dues in the manner required by the collective-bargaining agreement; nor will we fail and refuse to pay employees time and a half for overtime work as required by the collective-bargaining agreement; nor will we interfere with the employees' gratuity arrangement by posting "No tipping" signs in our Wilmington facility in violation of the collective-bargaining agreement; nor will we fail to notify the Union of newly hired employees in the manner required by the collective-bargaining agreement.

WE WILL NOT threaten employees with closure of our facility unless employees agree to modifications of the collective-bargaining agreement; nor will we threaten employees with more onerous working conditions if they do not agree to modifications in the collective-bargaining agreement; nor will we make any other threats to employees because of their engaging in union activities; nor will we create the impression of surveillance of our employees' union activities.

WE WILL NOT discourage membership in Hotel and Restaurant Employees Local 267, or any other labor organization, by imposing more onerous working conditions on our employees or by discharging or otherwise discriminating against any employee in regard to the hire or tenure of his employment or any terms or condition of employment.

WE WILL NOT promulgate new rules like requiring employees to wear ties while working, prohibiting employees from smoking or drinking during working hours or prohibiting employees from taking breaks during their shifts to discourage union activity or without affording the Union an opportunity to negotiate and bargain as the exclusive representative of the unit with respect to the conduct.

WE WILL NOT bypass the Union and deal directly with the employees in the unit by polling employees as to whether they would accept a modification in the collective-bargaining agreement.

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 bargain collectively with Hotel and Restaurant Employees Local 267 as the exclusive representative of all employees in the appropriate unit by giving effect to the terms and conditions of the agreement.

WE WILL make whole our employees for any loss suffered as a result of our unilateral modification of the collective-bargaining agreement including any loss suffered as a result of our unlawful failure to pay contributions to the health, welfare, and pension funds and to remit union dues in a manner as required by the collective-bargaining agreement and for any loss suffered as a result of our unlawful refusal to pay employees the time and a half for overtime as required by our collective-bargaining agreement, including paying appropriate amounts due as ordered by the National Labor Relations Board.

WE WILL immediately rescind our rules requiring employees to wear ties while working, prohibiting employees from smoking or drinking during working hours, and prohibiting employees from taking breaks during their shifts, which were promulgated because of our employees' activities on behalf of the Union and without prior notice to the Union and without affording the Union an opportunity to bargain with respect to this rule.

WE WILL offer Arnold Russo 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 any other rights or privileges previously enjoyed and WE WILL make him whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL notify him 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.

TALLY-HO PROPERTIES, 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, One Independence Mall, Seventh Floor, 615 Chestnut Street, Philadelphia, Pennsylvania 19106, Telephone 215--597--7643.