

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

A. J. PENNEY, d/b/a PENNEY PAINTING SERVICE,  
AND ITS ALTER EGO, ELLA PALMER, d/b/a  
LLCYD JAMES DRYWALL & PAINT CO.

and

Case 16--CA--11068

INTERNATIONAL BROTHERHOOD OF PAINTERS  
AND ALLIED TRADES LOCAL UNION 807

DECISION AND ORDER

Upon a charge filed by the Union 6 May 1983, as amended 15 June 1983, the General Counsel of the National Labor Relations Board issued a complaint 22 June 1983, as amended 27 July 1983, against the Company, the Respondent, alleging that it has violated Section 8(a)(1) and (5) of the National Labor Relations Act. On 11 August 1983 the parties entered into a settlement agreement. On 13 January 1984 the Settlement Agreement was set aside because of the Company's failure to abide by its terms. On 13 January 1984 the General Counsel issued a second amended complaint. Although properly served copies of the charge and complaint, as amended, the Company has failed to file and answer.

On 24 February 1984 the General Counsel filed a Motion for Summary Judgment. On 28 February 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 General Counsel by letters dated 3 February and 9 February 1984, notified the Company that unless an answer was received immediately, a Motion for Summary Judgment would be filed.

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.<sup>1</sup>

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<sup>1</sup> The Company has filed no response with the Board to the General Counsel's Motion for Summary Judgment. Following the filing of the motion, the Company submitted to the General Counsel a document purporting to be an "answer" to the complaint as amended. In its purported "answer" the Company admits all of the allegations in the complaint as amended with the exception of one paragraph alleging that the entities named in the complaint as amended constitute a single integrated business enterprise. The Company appears to deny this allegation on the basis of certain alleged outstanding business debts which it has incurred. The Company admits however that these same entities constitute a single employer and are alter egos within the meaning of the Act. Because the Company's purported "answer" is untimely under the Board's Rules and Regulations and in any event does not materially dispute the allegations in the complaint as amended, we find it appropriate to grant the General Counsel's motion.

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

On the entire record, the Board makes the following

### Findings of Fact

#### I. Jurisdiction

A. J. Penney, d/b/a Penney Painting Service, a sole proprietorship, is engaged in the business of painting contracting in Moore, Oklahoma, where it annually provides services valued in excess of \$50,000 for enterprises within the State of Oklahoma and other employers each of whom is directly engaged in interstate commerce. Its alter ego Ella Palmer d/b/a Lloyd James Drywall & Paint Co., based on a projection of its operations since its establishment about 6 December 1982, will annually provide services valued in excess of \$50,000 for enterprises within the State of Oklahoma and other employers each of whom is directly engaged in interstate commerce. 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.

#### II. Alleged Unfair Labor Practices

All journeymen painters and apprentices, excluding all other employees, guards, office clerical employees and supervisors as defined in the Act, as amended, constitute an appropriate unit of the Company's employees for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

The Union is the representative of a majority of the employees in the unit described above for the purposes of collective bargaining and, by virtue of Section 9(a) of the Act, is the exclusive representative of all the employees in the unit for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

The Company has recognized the Union as such representative as embodied in successive collective-bargaining agreements. The most recent agreement was effective by its terms from 15 May 1982 through 14 May 1984.

Commencing about 6 December 1982 the Company terminated unilaterally the established wages and terms and conditions of employment of its unit employees including existing health and welfare, pension, and vacation benefits and rejected and repudiated unilaterally the collective-bargaining agreement effective by its terms from 15 May 1982 through 14 May 1984.

On 11 August 1983 the Union and the Company executed and entered into a settlement agreement in this case which was approved 15 August 1983 by the Regional Director for Region 16 providing that the Company would:

(a) Not refuse to bargain collectively with the Union as the exclusive bargaining representative of all journeymen painters and apprentices, excluding all other employees, guards, office clerical employees and supervisors as defined in the Act.

(b) Not unilaterally change wages, working conditions, or terms of employment established by the collective-bargaining agreement to unit employees or by unilaterally imposing changes in wages, hours, or conditions of employment.

(c) Not in any like or related manner interfere with, restrain, or coerce its employees in the exercise of their rights guaranteed in Section 7 of the Act.

(e) Post a \$30,000 bond.

(f) Make whole the employees' fringe benefits for liability which was incurred while operating as Penney Painting Service in the sum of approximately \$4000, to be paid within 6 months at a rate of not less than \$500 per month.

Since about 11 August 1983 the Company has failed to make the required fringe benefit fund payments as set out above and thereby violated the terms of the Settlement Agreement executed 11 August 1983.

On 13 January 1984 the Regional Director for Region 16 set aside the Settlement Agreement.

Based on the foregoing, we conclude that the Company has violated Section 8(a)(1) and (5) as alleged in the second amended complaint.

#### Conclusions of Law

1. By terminating unilaterally the wages and terms and conditions of employment of employees in the appropriate bargaining unit, including existing health and welfare, pension, and vacation benefits, and by rejecting and repudiating unilaterally the terms of an outstanding collective-bargaining agreement with the Union, the Company has refused to bargain with the Union and has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

2. By failing to make fringe benefit funds payments on behalf of employees in the bargaining unit as set forth in the Settlement Agreement entered into 11 August 1983, the Company has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and 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.

We have found that the Respondent violated Section 8(a)(5) and (1) of the Act by terminating wages and terms and conditions of employment of bargaining unit employees unilaterally and by rejecting and repudiating unilaterally the

terms of an outstanding collective-bargaining agreement. We shall therefore order the Respondent to make whole employees in the unit for any losses suffered because of this unilateral action, with interest computed in the manner set forth in Florida Steel Corp., 231 NLRB 651 (1977). See generally Isis Plumbing Co., 138 NLRB 716 (1962).

Further, we have found that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to make fringe benefit fund payments on behalf of bargaining unit employees as set forth in the Settlement Agreement of 11 August 1983. In order to remedy this conduct we shall order the Respondent to make the fringe benefit funds whole in the manner set forth under the terms of the Settlement Agreement executed 11 August 1983.<sup>2</sup>

#### ORDER

The National Labor Relations Board orders that the Respondent, A. J. Penney, d/b/a Penney Painting Service, and its alter ego, Ella Palmer, d/b/a Lloyd James Drywall & Paint Co., Moore, Oklahoma, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with International Brotherhood of Painters and Allied Trades Local Union 807 as the exclusive bargaining representative of the employees in the following appropriate unit:

All journeymen painters and apprentices, excluding all other employees, guards, office clerical employees and supervisors as defined in the Act.

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<sup>2</sup> Because the provisions of employee benefit funds are variable and complex, the Board does not provide at the adjudicatory stage of the proceeding for the addition of interest at a fixed rate on unlawfully withheld fund payments. We leave to the compliance stage the question whether the Respondent must pay any additional amounts into the funds in order to satisfy our make whole order. Merryweather Optical Co., 240 NLRB 1213 (1979).

(b) Unilaterally changing wages and terms and conditions of employment of employees in the bargaining unit and unilaterally rejecting and repudiating the terms of an outstanding collective-bargaining agreement.

(c) Failing unilaterally to make fringe benefit funds payments on behalf of employees in the bargaining unit as set forth in the Settlement Agreement entered into 11 August 1983.

(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 affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain collectively with Local Union 807 as the exclusive representative of the employees in the appropriate bargaining unit and make employees whole, with interest, for any losses suffered by reason of its unlawful unilateral action, as set forth in the Remedy section of this Decision.

(b) Make the Union's fringe benefit funds whole in the manner set forth in the Remedy section of this Decision.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payments records, timecards, personnel records, reports, and all other records necessary to analyze the amount of any backpay due under the terms of this Order.

(d) Post at its facility in Moore, Oklahoma, copies of the attached notice marked "'Appendix.'"<sup>3</sup> Copies of the notice, on forms provided by the Regional Director for Region 16, 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.

(e) 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. 28 August 1984

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Donald L. Dotson, Chairman

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Don A. Zimmerman, Member

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Robert P. Hunter, Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD

<sup>3</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.

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 refuse to bargain collectively with International Brotherhood of Painters and Allied Trades Local Union 807 as the exclusive bargaining representative of the following employees:

All journeymen painters and apprentices, excluding all other employees, guards, office clerical employees and supervisors as defined in the Act.

WE WILL NOT unilaterally change wages and terms and conditions of employment of employees in the bargaining unit and WE WILL NOT unilaterally reject and repudiate the terms of an outstanding collective-bargaining agreement.

WE WILL NOT unilaterally fail to make fringe benefit funds payments on behalf of employees in the bargaining unit as set forth in the Settlement Agreement entered into 11 August 1983.

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 on request bargain collectively with Local Union 807 as the exclusive representative of our employees in the unit described above, and WE WILL make employees whole, with interest, for any losses suffered by them by reason of our unlawful unilateral action.

WE WILL make the Union's fringe benefit funds whole in the manner set forth in the Settlement Agreement entered into 11 August 1983.

A. J. PENNEY, d/b/a PENNEY

PAINTING SERVICE, AND ITS ALTER

EGO, ELIA PALMER d/b/a

LLOYD JAMES DRYWALL & PAINT CO.

(Employer)

(Title)

(Representative)

Dated ----- By -----

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, Room 8A24, 819 Taylor Street, Fort Worth, Texas 76102, Telephone 817--334--2941.