

Marjo Corporation d/b/a Desert Valley Electric; Thomas O. Marsaw and Joan J. Marsaw d/b/a Desert Valley Electric, a Single Employer; Joint Employer; and alter ego¹ and International Brotherhood of Electrical Workers, Local No. 357, AFL-CIO and Trustees of the Electrical Workers Health and Welfare Trust, Trustees of the Electrical Workers Pension Trust, Trustees of the National Electrical Industry Fund; Members of the Joint Apprenticeship Training Committee; National Employees Benefit Board and Trustees of the Electrical Workers Vacation Savings Plan Trust. Cases 28-CA-10116, 28-CA-10193, 28-CA-10227, 28-CA-10451, and 28-CA-10453

February 28, 1991

DECISION AND ORDER

BY MEMBERS CRACRAFT, DEVANEY, AND OVIATT

On charges filed by the Union on January 26, 1990, March 21, 1990, and April 10, 1990, respectively, and amended on May 9, 1990, and also on both a charge filed by the Union on August 1, 1990, and amended on September 26, 1990, and a charge filed by the trustees on August 2, 1990, the General Counsel of the National Labor Relations Board issued a complaint dated September 27, 1990, against Marjo Corporation d/b/a Desert Valley Electric (Respondent Marjo) and Thomas O. Marsaw and Joan J. Marsaw d/b/a Desert Valley Electric (Respondent Marsaw and with Respondent Marjo called the Respondent), 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 charges and the complaint, the Respondent and the chapter 7 trustee² on behalf of the Respondent have failed to file an answer.

On October 22, 1990, the General Counsel filed "Motions to Transfer and Continue Matter Before the National Labor Relations Board and for Summary Judgment." On October 24, 1990, the Board issued an order transferring the proceeding to the Board and Notice to Show Cause why the motion should not be granted. The Respondent and the chapter 7 trustee on behalf of 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.

¹ About February 1, 1990, Marjo Corporation d/b/a Desert Valley Electric filed a petition for Ch. 11 relief, Case BK-S-90-0303-RCJ, in the Bankruptcy Court for the District of Nevada. About July 5, 1990, Thomas O. Marsaw d/b/a Desert Valley Electric and Joan J. Marsaw filed a petition for Ch. 11 relief, Case BK-S-90-2300-RCJ, in the Bankruptcy Court for the District of Nevada. On or about August 9, 1990, the above bankruptcy matters converted to Ch. 7 proceedings.

² See fn. 1, above.

The charges were filed on the Respondent only. The consolidated complaint was served on the Respondent and the Ch. 7 trustee.

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 by Respondent Marsaw and Respondent Marjo, "all of the allegations in the complaint related to that party 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 on October 15 and 16, 1990, the General Counsel caused to be served on the chapter 7 trustee a letter confirming that the trustee did not intend to file an answer to the complaint and that the trustee understood that the General Counsel would file a Motion for Summary Judgment with the Board.

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

Respondent Marjo is now, and has been at all times material, a corporation duly organized under, and existing by virtue of, the laws of the State of Nevada. At all times material, the Respondent has been owned by Thomas O. Marsaw and Joan J. Marsaw, a sole proprietorship doing business as, and trading under, the name of Desert Valley Electric. At all times material, the Respondent has maintained an office and place of business at 4620 Eaker Street, in the city of North Las Vegas, State of Nevada, where it is, and has been at all times material, engaged in the building and construction industry as an electrical contractor. At all times material, Respondent Marjo and Respondent Marsaw have been affiliated businesses operating from the same location with common ownership, management, supervision, day-to-day control, and common work and personnel. At all times material, the labor relations policies of the Respondent have been established, controlled, and maintained by the common owners, managers, and operation of the enterprises as described above. At all times material, Respondent Marjo and Respondent Marsaw, individually and collectively, have been joint employers of the employees of Desert Valley Electric. At all times material, Thomas O. Marsaw and Joan J. Marsaw were the sole owners of the stock of Marjo Corporation.

About December 1989, Thomas O. Marsaw and Joan J. Marsaw transferred the assets of the sole proprietorship described above to Respondent Marjo. Since about January 1, 1990, Marjo Corporation has

been engaged in the same business operations as were formerly engaged in by the sole proprietorship, and it has employed the same employees and supervisors as had been employed by the sole proprietorship described above. Since on or about January 1, 1990, Respondent Marjo has been established by the Respondent as a subordinate instrument to, and disguised continuation of, Respondent Marsaw. By virtue of the acts and conduct described above, Respondent Marjo and Respondent Marsaw are, and have been at all times material, alter egos and a single employer within the meaning of the Act.

During the 12-month period ending January 26, 1990, the Respondent provided services valued in excess of \$50,000 to the Nevada Power Company within the State of Nevada. Nevada Power Company is a Nevada corporation with its principal office and place of business in Las Vegas, Nevada, where it operates as a public utility engaged in the generation, transmission, distribution, and sale of electric power throughout southern Nevada. During the 12-month period ending January 26, 1990, Nevada Power Company, in the course and conduct of its business operations, purchased and received in interstate commerce at its Las Vegas, Nevada facility goods and materials valued in excess of \$50,000 directly from points outside the State of Nevada. During the 12-month period ending January 26, 1990, Nevada Power Company, in the course and conduct of its business operations, derived gross revenues in excess of \$250,000. We find that the Respondent is, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act; that the Union is a labor organization within the meaning of Section 2(5) of the Act; and that the trustees are a person within the meaning of Section 2(1), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Unit*

The following employees of the Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

All journeymen, wiremen, apprentices and helpers employed by the Respondent, but excluding all other employees, guards and supervisors as defined in the Act.

About April 19, 1989, a majority of the unit designated and selected the Union as their representative for the purposes of collective bargaining. At all times material, the Union has been designated the exclusive collective-bargaining representative of the unit described above. About April 19, 1989, the Respondent executed a letter of assent with the Union that incorporated by reference and bound the Respondent as of May 1, 1989, to the terms and conditions of the collec-

tive-bargaining agreement in effect between the Union and the Southern Nevada chapter of the National Electrical Contractors Association covering the unit.³ Therefore, at all times material, by virtue of Section 9(a) of the Act, the Union has been and is the exclusive representative of the unit employees for the purposes of collective bargaining regarding rates of pay, wages, hours of employment, and other terms and conditions of employment.

B. *The 8(a)(5) and (1) Violations*

1. Since about July 27, 1989, the Respondent has failed to comply with the benefit fund provisions of the collective-bargaining agreement. In addition, since about January 19, 1990, the Respondent has, inter alia, failed to comply with the vacation savings plan provision and has hired employees without regard to the exclusive referral procedure provisions of the collective-bargaining agreement. These provisions of the collective-bargaining agreement are mandatory subjects for purposes of collective bargaining. We find that the Respondent has engaged in the acts and conduct described above without prior notice to the Union and without having afforded the Union an opportunity to bargain as the exclusive representative of the employees in the unit with respect to such acts and conduct and the effects of such acts and conduct.

2. About January 4, 1990, the Respondent advised the Union that it was terminating the collective-bargaining agreement. Since that date, it has failed and refused to abide by that agreement and it has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit.

3. By letter dated March 13, 1990, the Respondent refused to meet and discuss or otherwise process a grievance concerning the unit filed with the Association by the Union.

4. By letters dated January 29 and March 15, 1990, the Union and its attorney respectively requested the Respondent to bargain collectively with the Union as the exclusive collective-bargaining representative of the unit. About July 5, 1990, the Respondent and the Union met for the first and only time to discuss and negotiate a successor collective-bargaining agreement and the Respondent presented the Union with its "last best offer" for a successor collective-bargaining agreement. By letter dated July 9, 1990, the Respondent announced that it was implementing its "last best offer." We find that by such acts and conduct the Respondent engaged in mere surface bargaining or bargaining without any real intention of reaching agreement during collective-bargaining negotiations with the Union.

We find that by the acts and conduct described in paragraphs 1 through 4, above, the Respondent has

³This agreement expired on May 31, 1990.

failed and refused to bargain in good faith with the Union as the exclusive collective-bargaining representative of the unit, and the Respondent thereby has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) and (1), Section 8(d), and Section 2(6) and (7) of the Act.

C. The 8(a)(3) and (1) Violations

1. About January 23, 1990, by the acts and conduct described above in paragraphs 1 and 2 in section B of this decision, the Respondent caused the termination of its employee Roy Campbell.

2. About January 26, 1990, by the acts and conduct described above in paragraphs 1 and 2 in section B of this decision, the Respondent caused the termination of its employee Al Davis.

3. About January 30, 1990, by the acts and conduct described above in paragraphs 1 and 2 in section B of this decision, the Respondent caused the termination of its employees Howard Highfill, Robert Gambee, and James Linford.

4. About March 9, 1990, the Respondent discharged its employee Jeffrey Crowel. Since about March 9, 1990, the Respondent has failed and refused to reinstate Jeffrey Crowel to his former or substantially equivalent position of employment.

The Respondent engaged in the acts enumerated in paragraphs 1 through 4 of this section because the employees joined, supported, or assisted the Union and engaged in other concerted activities for the purposes of collective bargaining or other mutual aid or protection and in order to discourage employees from engaging in such activities or other concerted activities for the purposes of collective bargaining or other mutual aid or protection. We find that by the acts and conduct described above in this section, the Respondent has discriminated, and is continuing to discriminate, in regard to the hire, tenure, and terms and conditions of employment of its employees, thereby discouraging membership in a labor organization, and the Respondent thereby has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

D. The 8(a)(1) Violations

1. About January 19, 1990, the Respondent announced in writing its repudiation of the agreement, its intent to operate nonunion, and its intent to unilaterally change the wages and other terms and conditions of employment of the unit.

2. About the beginning of February 1990, the Respondent stated to an employee that, but for the employee's activities on behalf of the Union, the employee would have received a position of greater responsibility with the Respondent.

We find that by the acts and conduct described above, the Respondent has interfered with, restrained, and coerced, and is continuing to interfere with, restrain, and coerce its employees in the exercise of the rights guaranteed them by Section 7 of the Act, and the Respondent thereby has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

CONCLUSIONS OF LAW

1. By terminating the collective-bargaining agreement and failing and refusing to abide by it; by failing and refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit; by failing to comply with the benefit funds provisions, vacation savings plan provision, and exclusive referral procedure provisions of the agreement; and by refusing to meet and discuss a grievance and engaging in surface bargaining regarding a successor agreement, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

2. By causing the termination of employees Roy Campbell, Al Davis, Howard Highfill, Robert Gambee, and James Linford, and by discharging Jeffrey Crowel and failing to reinstate him to his former or substantially equivalent employment, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

3. By announcing its intent to repudiate the collective-bargaining agreement, its intent to operate nonunion, and its intent to unilaterally change the employees' terms and conditions of employment, and by stating to an employee that, but for the employee's union activities, the employee would have received a position of greater responsibility with the Respondent, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) 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.⁴

To remedy the Respondent's failure to apply the collective-bargaining agreement to the unit employees, including provisions regarding benefit funds, vacation savings plan, and exclusive referral procedure, we shall

⁴The General Counsel in the Motion for Summary Judgment does not state that the requested remedy should be limited by the bankruptcy proceedings. We shall enter our usual remedies (although we will also include a mailing requirement) and leave to compliance the effect of the bankruptcy proceedings on our remedial order. Cf. *Joseph H. Day, Inc.*, 293 NLRB No. 57 (Mar. 31, 1989).

order the Respondent to abide by all terms and conditions of the collective-bargaining agreement by making such payments to the benefit funds and vacation savings plan and by giving effect to the terms and provisions of the collective-bargaining agreement pertaining to the exclusive referral procedure and by making whole its unit employees for any loss of wages or other benefits they may have suffered as a result of the Respondent's failure to adhere to the contract⁵ as prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), and with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

To remedy the Respondent's refusal to meet and discuss or otherwise process a grievance concerning the unit, we shall order the Respondent, on request, to meet with the Union's designated representatives for processing grievances.

To remedy the Respondent's refusal to bargain in good faith with the Union regarding a successor agreement, we shall order the Respondent to bargain collectively with the Union over wages, hours, and terms and conditions of employment for employees in the unit. Such bargaining in good faith shall commence immediately on the request of the Union and shall continue until an agreement is reached or a legitimate impasse occurs.

To remedy the Respondent's unlawful termination of employees Roy Campbell, Al Davis, Howard Highfill, Robert Gambee, James Linford, and James Crowel, we shall order it to offer them immediate and full reinstatement to their former positions or, if these positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and to make them whole, with interest, for any loss of earnings and other benefits they may have suffered as a result of the Respondent's unlawful conduct. Backpay shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

ORDER

The National Labor Relations Board orders that the Respondent, Marjo Corporation d/b/a Desert Valley Electric and Thomas O. Marsaw and Joan J. Marsaw

⁵These losses apparently include payments on the employees' behalf to certain employee benefit funds. Because the provisions of employee benefit fund agreements are variable and complex, we leave to further proceedings the question of any additional amounts the Respondent must pay into the benefit funds to satisfy our make-whole remedy. See *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).

The Respondent shall also reimburse its employees for any expenses ensuing from its failure to make contributions to various funds established by the collective-bargaining agreement between the Respondent and the Union. *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enf. mem. 661 F.2d 940 (9th Cir. 1981).

d/b/a Desert Valley Electric, North Las Vegas, Nevada, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with International Brotherhood of Electrical Workers, Local No. 357, AFL-CIO as the exclusive collective-bargaining representative of the unit.

(b) Failing and refusing to abide by and adhere to the collective-bargaining agreement by, inter alia, failing to comply with the benefit funds provisions and the vacation savings plan provision, and by hiring employees without regard to the exclusive referral procedure provisions.

(c) Failing and refusing to meet and discuss a grievance.

(d) Failing and refusing to bargain in good faith with the Union as the collective-bargaining representative of the unit employees regarding a successor collective-bargaining agreement.

(e) Terminating employees and refusing to reinstate them because they join, support, or assist the Union and engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to discourage employees from engaging in such concerted protected activities.

(f) Threatening to repudiate the collective-bargaining agreement, to operate nonunion, to unilaterally change the wages and other terms and conditions of employment of the unit, and to withhold positions of greater responsibility from employees because of their union activities.

(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) Recognize and, on request, bargain with the Union as the collective-bargaining representative of the unit.

(b) Make whole employees in the unit for the failure and refusal to abide by and adhere to the collective-bargaining agreement, including the benefit funds provisions, the vacation savings plan provision, and the exclusive referral procedure provisions in the manner set forth in the remedy section of this decision.

(c) On request, meet with the Union's designated representative for processing grievances.

(d) On request, bargain in good faith with the Union regarding a successor agreement.

(e) Offer Roy Campbell, Al Davis, Howard Highfill, Robert Gambee, James Linford, and Jeffrey Crowel 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 make them whole for any loss of earnings or any other

benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of this decision.

(f) Remove from its files any reference to the unlawful discrimination against Roy Campbell, Al Davis, Howard Highfill, Robert Gambee, James Linford, and Jeffrey Crowel and notify them in writing that this has been done and that this unlawful action will not be used against them in any way.

(g) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, time-cards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the term of this Order.

(h) Post at its facility in North Las Vegas, Nevada, copies of the attached notice marked "Appendix."⁶ Copies of this notice, on forms provided by the Regional Director for Region 28, 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.

(i) Mail a copy of the attached notice marked "Appendix" to the employees in the unit. Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative shall be mailed immediately upon receipt by the Respondent to the last known address of each such employee.

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

⁶If 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 fail and refuse to recognize and bargain with International Brotherhood of Electrical Workers, Local No. 357, AFL-CIO.

WE WILL NOT fail and refuse to abide by and adhere to the collective-bargaining agreement by, among other

things, failing to comply with the benefit funds provisions and the vacation savings plan provision, and by hiring employees without regard to the exclusive referral procedure provisions.

WE WILL NOT fail and refuse to meet and discuss a grievance.

WE WILL NOT fail and refuse to bargain in good faith with the Union as the collective-bargaining representative of the unit employees regarding a successor collective-bargaining agreement.

WE WILL NOT terminate you or refuse to reinstate you because you join, support, or assist the Union and engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to discourage you from engaging in such protected concerted activities.

WE WILL NOT threaten you that we will repudiate the collective-bargaining agreement, operate nonunion, unilaterally change the terms and conditions of employment of the unit, and withhold positions of greater responsibility from you because of your union activities.

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 recognize and, on request, bargain with the Union as the collective-bargaining representative of the unit.

WE WILL make the contractually required payments to the benefit funds and the vacation savings plan.

WE WILL give effect to the terms and provisions of the collective-bargaining agreement pertaining to the exclusive referral procedure.

WE WILL make whole employees for losses of earnings and other benefits suffered by reason of our hiring without regard to the exclusive referral procedure provisions of the collective-bargaining agreement less any net interim earnings, plus interest.

WE WILL make whole the employees in the unit for the failure and refusal to abide by and adhere to the collective-bargaining agreement including the benefit funds provisions, and the vacation savings plan provision.

WE WILL, on request, meet with the Union's designated representative for processing grievances.

WE WILL, on request, bargain in good faith with the Union regarding a successor agreement.

WE WILL offer Roy Campbell, Al Davis, Howard Highfill, Robert Gambee, James Linford, and Jeffrey Crowel 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, with interest, for any loss of earnings and other benefits suffered as a result of the discrimination against them.

WE WILL remove from our files any reference to the termination of Roy Campbell, Al Davis, Howard Highfill, Robert Gambee, James Linford, and Jeffrey Crowel and notify them in writing that this has been

done and that this action will not be used against them in any way.

MARJO CORPORATION D/B/A DESERT VALLEY ELECTRIC; THOMAS O. MARSAW AND JOAN J. MARSAW D/B/A DESERT VALLEY ELECTRIC, A SINGLE EMPLOYER; JOINT EMPLOYER; AND ALTER EGO