

SCR

302 NLRB No. 140

D--1972

St. Louis, MO

~~UNITED STATES OF AMERICA~~

BEFORE THE NATIONAL LABOR RELATIONS BOARD

LACEY REALTY COMPANY, INC.,
SUCCESSOR TO MILLS MANAGEMENT, INC.

and

Case 147-CA-21154

INTERNATIONAL BROTHERHOOD OF
FIREMEN AND OILERS, LOCAL NO. 7,
AFL-CIO

May 9, 1991

DECISION AND ORDER

By Chairman Stephens and Members Aircraft and Raudabaugh

Upon a charge filed by the Union December 10, 1990, the General Counsel of the National Labor Relations Board issued a complaint against Lacey Realty Company, Inc., 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 charge and complaint, the Respondent has failed to file an answer.

On March 13, 1991, the General Counsel filed a Motion for Summary Judgment. On March 15, 1991, 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 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.

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, "all of 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 counsel for the General Counsel, in a telephone conversation on March 5, 1991, and by letter dated March 6, 1991, notified the Respondent 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.

On the entire record, the Board makes the following

Findings of Fact

I. Jurisdiction

The Respondent, a corporation, has offices and a place of business in St. Louis, Missouri, known as the Portland Towers facility, where it has been engaged in the management and operation of commercial and residential real estate, including the Portland Towers facility. During the 12-month period ending November 30, 1990, in the course and conduct of its business operations just described, the Respondent (1) performed services valued in the aggregate in excess of \$50,000 for various entities in Missouri, each of which satisfies an appropriate standard for the assertion of jurisdiction by the Board other than an indirect inflow or indirect outflow standard; (2) derived gross revenues in excess of \$500,000; (3) performed services valued in excess of \$50,000 in States other than Missouri; and (4) derived gross revenues in

excess of \$100,000 from the management and operation of various office buildings, of which \$25,000 was derived from various entities, each of which satisfies an appropriate standard for the assertion of jurisdiction by the Board other than an indirect inflow or indirect outflow standard.

Mills Management, Inc. (Mills) is a corporation with an office and place of business in St. Louis, Missouri, where it has been engaged in providing nonretail real estate management and related services. During the 12-month period ending October 31, 1990, in the course and conduct of its operations just described, Mills (1) performed services valued in excess of \$50,000 for various entities in Missouri, each of which satisfies an appropriate standard for the assertion of jurisdiction by the Board other than an indirect inflow or indirect outflow standard; and (2) purchased and received at its St. Louis office and place of business products, goods, and materials valued in excess of \$50,000 directly from points outside Missouri.

We find that the Respondent and Mills are employers 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

About November 1, 1990,¹ the Respondent was awarded a contract to provide services related to the management, maintenance, and operation of the Portland Towers facility, which services previously had been provided by Mills. Since that date, the Respondent has continued to operate the Portland Towers facility and to perform the services previously provided by Mills in basically unchanged form.

¹ Unless otherwise specified, all dates are in 1990.

From about July 12, 1989, until about November 1, 1990, the Union had been the designated exclusive collective-bargaining representative of employees employed by Mills in the following appropriate unit:

All plant operation and maintenance employees at the Portland Towers facility, excluding office clerical and professional employees, guards and supervisors within the meaning of the Act, and all other employees.

About November 1, the Respondent refused to hire and failed and refused to consider for employment employees Joseph DiMariano, Sylvester Puckett, and Albert Moore. Since that same time, the Respondent has failed and refused, and continues to fail and refuse, to offer employment to DiMariano and Moore. The Respondent engaged in the conduct just described because the named employees joined, supported, or assisted the Union and engaged in 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 protected activities, and thereby violated Section 8(a)(3) and (1) of the Act, as alleged.

But for its failure and refusal to employ the named employees, the Respondent would have employed, as a majority of its employees, individuals who previously were employees of Mills. Because of its unlawful refusal to hire those individuals, and by virtue of the operations described above, the Respondent has continued the employing industry and is the successor to Mills at the Portland Towers facility.²

About November 5, the Union requested the Respondent to recognize it as the exclusive collective-bargaining representative of employees in the unit described above and to bargain collectively with the Union with respect to the

² Love's Barbeque Restaurant No. 62, 245 NLRB 78, 79 (1979), enfd. in relevant part 640 F.2d 1094 (9th Cir. 1981).

rates of pay, wages, hours of employment, and other terms and conditions of employment of employees in the unit. Since about November 6, the Respondent has failed and refused to recognize and bargain with the Union as the exclusive representative of the unit employees. The failure and refusal by the Respondent, as the successor of Mills, to recognize and bargain with the Union, is a violation of Section 8(a)(5) and (1) of the Act.

About November 1, the Respondent instituted changes in wages, pension benefits, medical insurance benefits, layoff and recall policies, preferential recall rights, seniority, vacation policies, and other matters affecting the compensation and working hours of employees in the unit. The Respondent did so without prior notice to the Union and without having afforded the Union an opportunity to negotiate and bargain over the changes and their effects. The Respondent's actions in making unilateral changes in the unit employees' terms and conditions of employment (all of which are mandatory subjects for collective bargaining) further violated Section 8(a)(5) and (1).

About November 1, the Respondent's president, Turner Lacey, a supervisor, told an employee that he would not be hired if he was a member of the Union, but that he would be considered for hire if he was not a union member. About December 14, the Respondent's supervisor, Sylvester Puckett, told an employee that the Respondent would not hire the employee because the Respondent did not want its employees in the unit to be represented by the Union. The statements of Lacey and Puckett interfered with, restrained, and coerced employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby violated Section 8(a)(1).

Conclusions of Law

1. The Respondent is the successor to Mills with regard to operations at its Portland Towers facility.

2. The following is an appropriate unit for collective bargaining within the meaning of Section 9(b) of the Act:

All plant operation and maintenance employees at the Portland Towers facility, excluding office clerical and professional employees, guards and supervisors within the meaning of the Act, and all other employees.

3. By failing and refusing to hire or to consider hiring employees Joseph DiMariano, Sylvester Puckett, and Albert Moore, and by continuing to fail and refuse to offer employment to DiMariano and Moore, 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.

4. By failing and refusing to recognize and bargain with the Union as the exclusive bargaining representative of employees in the unit, and by unilaterally changing terms and conditions of employment of unit employees without first notifying the Union and affording it the opportunity to bargain over the proposed changes, 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.

5. By telling an employee that he would not be hired if he was a member of the Union, but that he would be considered for hire if he was not a member of the Union, and by telling another employee that the employee would not be hired because it did not want its employees to be represented by the Union, the Respondent engaged in unfair labor practices affecting commerce 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.

We shall order the Respondent to offer DiMariano, Puckett,³ and Moore employment in the jobs unlawfully denied them, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges previously enjoyed, discharging, if necessary, employees hired from sources other than Mills. We shall also order the Respondent to make those individuals whole for any loss of earnings and benefits they may have suffered because of the discrimination against them, as 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).

We shall also order the Respondent to recognize and to bargain, on request, with the Union as the exclusive representative of employees in the unit and, if an understanding is reached, to embody it in a signed agreement. In addition, we shall order the Respondent to restore the terms and conditions of employment that were in effect before it took over Mills' operations with regard to the Portland Towers facility about November 1, 1990, and to make the unit employees whole for any losses they may have sustained as a result of its unlawful changes in those terms and conditions, as prescribed in Ogle Protection Service, Inc., 183 NLRB 682 (1970) (with interest to be computed as prescribed in New Horizons, supra), from the date of the changes until the

³ It appears that Puckett was subsequently employed as a supervisor. The issue of Puckett's employment, as well as the Respondent's liability to him for backpay, may be established in compliance proceedings.

Respondent negotiates in good faith with the Union to agreement or to impasse.⁴

ORDER

The National Labor Relations Board orders that the Respondent, Lacey Realty Company, Inc., St. Louis, Missouri, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Informing employees that they will not be hired if they belong to unions but will be considered for hire if they do not belong to unions, and that they will not be hired because the Respondent does not want its employees to be represented by unions.

(b) Refusing to hire, and failing and refusing to offer or consider offering employment to, employees because they join, support, or assist unions and engage in other concerted protected activities, and to discourage employees from engaging in such protected concerted activities.

(c) Failing and refusing to recognize and bargain with International Brotherhood of Firemen and Oilers, Local No. 7, AFL--CIO (the Union) as the exclusive bargaining representative of employees in the following appropriate unit:

All plant operation and maintenance employees at the Portland Towers facility, excluding office clerical and professional employees, guards, and supervisors within the meaning of the Act, and all other employees.

⁴ State Distributing Co., 282 NLRB 1048 (1987). With regard to benefits, we shall require the Respondent to remit all payments it owes to the employee benefit funds and to reimburse its employees for any expenses they may have incurred because of the Respondent's failure to make those payments, in the manner set forth in Kraft Plumbing & Heating, 252 NLRB 891 fn. 2, enfd. mem. 661 F.2d 940 (9th Cir. 1981). Amounts to be paid into the benefit funds shall be determined in the manner set forth in Merryweather Optical Co., 240 NLRB 1213 (1979).

(d) Unilaterally changing wages, pension benefits, medical insurance benefits, layoff and recall policies, preferential recall rights, seniority, vacation policies, and other matters affecting the compensation and working hours of employees in the unit, without first informing the Union and affording it an opportunity to bargain over the proposed changes.

(e) 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 collectively with the Union as the exclusive representative of employees in the above unit with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment and, if an understanding is reached, embody it in a signed agreement.

(b) On request of the Union, rescind any changes in the terms and conditions of employment that existed immediately before the Respondent took over the operations of Mills Management, Inc. with respect to the Portland Towers facility about November 1, 1990, retroactively restoring the preexisting terms and conditions of employment, including wages, pension benefits, medical insurance benefits, layoff and recall policies, preferential recall rights, seniority, and vacation policies, and make the employees whole by remitting all wages and benefits that would have been paid in the absence of its unlawful changes in those terms and conditions, in the manner set forth in the remedy section of this decision.

(c) Offer Joseph DiMariano, Sylvester Puckett, and Albert Moore immediate and full employment in the positions denied them or, if those positions no

longer exist, in substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, discharging if necessary employees hired from sources other than Mills Management, Inc., and make them whole for any loss of earnings and benefits they may have suffered because of the discrimination against them, in the manner set forth in the remedy section of this decision.

(d) 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.

(e) Post at its Portland Towers facility, St. Louis, Missouri, copies of the attached notice marked "'Appendix.'"⁵ Copies of the notice, on forms provided by the Regional Director for Region 14, 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.'"

(f) 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. May 9, 1991

James M. Stephens, Chairman

Mary Miller Cracraft, Member

John N. Raudabaugh, Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT tell employees that they will not be hired if they are union members but that they will be considered for hire if they are not union members, and that they will not be hired because we do not want our employees to be represented by unions.

WE WILL NOT refuse to hire, fail and refuse to consider for employment, or fail and refuse to offer employment to, employees because they join, support, or assist unions or engage in other protected concerted activities, and in order to discourage employees from engaging in such protected activities.

WE WILL NOT refuse to recognize or, on request, to bargain collectively with International Brotherhood of Firemen and Oilers, Local No. 7, AFL--CIO (the Union) as the exclusive bargaining representative of employees in the following appropriate unit:

All plant operation and maintenance employees at our Portland Towers facility, excluding office clerical and professional employees, guards, and supervisors within the meaning of the Act, and all other employees.

WE WILL NOT unilaterally change any of the terms and conditions of employment of employees in the bargaining unit without first notifying the Union and affording it an opportunity to bargain over the proposed changes.

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 collectively with the Union, as the exclusive representative of our employees in the above unit, with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment and, if an understanding is reached, embody it in a signed agreement.

WE WILL, on request by the Union, cancel any changes in the terms and conditions of employment that existed immediately before we took over operation of the Portland Towers facility from Mills Management, Inc. about November 1, 1990, retroactively restoring all preexisting terms and conditions of employment.

WE WILL make the employees in the above unit whole by remitting all wages and benefits that would have been paid in the absence of such changes from the dates of the changes until we negotiate in good faith with the Union to agreement or to impasse, with interest. WE WILL remit any payments we owe to

benefit funds and reimburse our employees for any expenses resulting from our failure to make the required payments.

WE WILL offer Joseph DiMariano, Sylvester Puckett, and Albert Moore immediate and full employment in the positions denied them or, if those positions no longer exist, in substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, discharging if necessary employees hired from sources other than Mills Management, Inc.; and WE WILL make them whole, with interest, for any loss of earnings or benefits they may have suffered because of the discrimination against them.

LACEY REALTY COMPANY, 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, 611 North 10th Street, Suite 400, Saint Louis, Missouri 63101--1932, Telephone 314--425--4361.