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**David M. Powers & Associates, Inc. d/b/a Dave's Market and United Food and Commercial Workers International Union, Local No. 1099, AFL-CIO-CLC.** Cases 9-CA-31273, 9-CA-31749, and 9-CA-31926

March 16, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS COHEN  
AND TRUESDALE

Upon a charge filed by the Union in Case 9-CA-31273 on November 1, 1993, the Acting General Counsel of the National Labor Relations Board issued a complaint against David M. Powers & Associates, Inc. d/b/a Dave's Market, the Respondent, on December 15, 1993. Subsequently, the Respondent filed an answer to the complaint. Thereafter, upon the charge filed in Case 9-CA-31273 and an additional charge filed by the Union on March 31, 1994, in Case 9-CA-31749, the General Counsel issued an order consolidating cases and consolidated complaint against the Respondent on May 18, 1994. Thereafter, upon the charges filed in Cases 9-CA-31273 and 9-CA-31749, an amended charge filed by the Union on June 14, 1994, in Case 9-CA-31749 and an additional charge filed by the Union in Case 9-CA-31926 on June 14, 1994, the General Counsel of the National Labor Relations Board issued an order consolidating cases and second consolidated complaint on July 29, 1994, against 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, amended charge and complaints, the Respondent failed to file answers to the consolidated complaint or the second consolidated complaint. Further, on January 20, 1995, the Respondent withdrew its answer to the original complaint.

On February 13, 1995, the General Counsel filed a Motion for Summary Judgment with the Board. On February 17, 1995, 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

Sections 102.20 and 102.21 of the Board's Rules and Regulations provide that the allegations in the 316 NLRB No. 124

complaints shall be deemed admitted if answers are not filed within 14 days from service of the complaints, unless good cause is shown. In addition, the complaints affirmatively note that unless an answer is filed within 14 days of service, all the allegations in the respective complaints will be considered admitted. Further, the undisputed allegations in the Motion for Summary Judgment disclose that the Respondent, on January 20, 1995, withdrew its answer to the complaint in Case 9-CA-31273 with the understanding that a Motion for Summary Judgment would be filed. Such a withdrawal has the same effect as a failure to file an answer, i.e., the allegations in the complaint must be considered to be admitted to be true.<sup>1</sup>

Accordingly, based on the withdrawal of the Respondent's answer to the complaint and the absence of good cause being shown for the failure to file timely answers to the consolidated complaint and the second consolidated complaint, 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 been engaged in the operation of a retail grocery store in Cincinnati, Ohio. During the 12-month period preceding issuance of the second consolidated complaint, the Respondent, in conducting its business operations, derived gross revenues in excess of \$500,000, and purchased and received goods valued in excess of \$15,000 directly from points outside the State of Ohio. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(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

Since about October 1993, and continuing thereafter, the Respondent substantially reduced the hours of work available to its employees, offered its employees less desirable evening hours of work, failed to provide its employees with health insurance benefits, and failed to provide its employees with paid vacations. About March 13, and 26, 1994, respectively, by the conduct described above, the Respondent caused the termination of its employees Rick Adams and Paul Schweinefuss.

The Respondent engaged in the foregoing conduct because the Respondent's employees formed, joined, and assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities.

<sup>1</sup> See *Maislin Transport*, 274 NLRB 529 (1985).

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

All employees of the Respondent at the store or stores of the Respondent located in Greater Cincinnati and vicinity, excluding one store manager in each store and all employees in the meat department, all office clerical employees and all guards and supervisors as defined in the Act.

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

All employees of the Respondent in the meat and/or deli department of the stores of the Respondent operated in Greater Cincinnati and vicinity, excluding all office clerical employees, guards and supervisors as defined in the Act.

At all material times, the Union has been the designated exclusive collective-bargaining representative of the units and has been recognized as such by the Respondent. This recognition has been embodied in separate successive collective-bargaining agreements concerning each unit, the latest of which were effective from October 1, 1990, through October 2, 1993. At all times since October 1, 1990, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the units.

Since about June 1993, the Respondent has failed to continue in effect all the terms and conditions of the agreements by failing to remit dues to the Union and by failing to make pension payments for employees in the units. Since about August 1993, the Respondent has also failed to continue in effect all the terms and conditions of the agreements by failing to make payments to the Health and Welfare Fund for employees in the units. These terms and conditions of employment are mandatory subjects for the purposes of collective bargaining. The Respondent engaged in this conduct without the Union's consent.

About October 19 and 28, 1993, the Respondent threatened to implement and about November 1, 1993, unilaterally implemented its contractual offers covering the units. The Respondent engaged in this conduct without the Union's consent and prior to a good-faith impasse in negotiations.

Since about October 1993, and continuing thereafter, the Respondent has used nonbargaining unit employees, less senior employees, and supervisors to perform bargaining unit work. Since about late February or early March 1994, and continuing thereafter, the Respondent has also refused to grant paid vacations for employees in the units and laid off employees in the units without consideration of seniority. These subjects

relate to wages, hours, and other terms and conditions of employment of the units and are mandatory subjects for the purposes of collective bargaining. The Respondent engaged in this conduct without prior notice to the Union and without affording the Union an opportunity to bargain with the Respondent with respect to this conduct and the effects of this conduct.

About late February or early March 1994, the Respondent bypassed the Union and dealt directly with its unit employees by conveying to employees the option of accepting voluntary layoffs out of order of their seniority.

#### CONCLUSION OF LAW

By substantially reducing the hours of work available to its employees, offering employees less desirable evening hours of work, failing to provide its employees with health insurance benefits, failing to provide its employees with paid vacations, and thereby causing the termination of employees Rick Adams and Paul Schweinefuss, the Respondent has been discriminating in regard to the hire or tenure or terms or conditions of employment of its employees, thereby discouraging membership in a labor organization, and has thereby 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. By the remaining acts and conduct described above, the Respondent has failed and refused and is failing and refusing to bargain collectively and in good faith with the Union as the exclusive collective-bargaining representative of its employees, and has thereby 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.

#### 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. Specifically, we shall order the Respondent to offer Rick Adams and Paul Schweinefuss 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 to make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Respondent shall also be required to expunge from its files any and all references to the unlawful discharges, and to notify the discriminatees in writing that this has been done.

Furthermore, having found that the Respondent, since about October 1993, substantially reduced the hours of work available to its employees, offered employees less desirable evening hours of work, failed to provide its employees with paid vacations, used nonbargaining unit employees, less senior employees, and supervisors to perform bargaining unit work; since late February or early March 1994, has refused to grant paid vacations to unit employees and laid off unit employees without consideration to seniority; and, about November 1, 1993, unilaterally implemented its contractual offers covering the units, we shall order the Respondent to restore the working conditions and benefits that existed before its unlawful actions and continue in full force and effect all the terms and conditions of the collective-bargaining agreements until a new agreement or good-faith impasse in negotiations is reached, and to make whole all unit employees adversely affected by these actions for any losses incurred by virtue of the unlawful conduct. Backpay shall be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enf. 444 F. 2d 502 (6th Cir. 1971), with interest in the manner prescribed in *New Horizons for the Retarded*, supra.

In addition, having found that the Respondent failed to provide its employees with health insurance benefits since October 1993, failed to make pension payments for employees in the units since about June 1993, and failed to make payments to the Health and Welfare Fund since about August 1993, we shall order the Respondent to make whole its unit employees by making all such delinquent contributions, including any additional amounts due the funds in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979). In addition, the Respondent shall reimburse unit employees for any expenses ensuing from its failure to make the required contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enf. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection Service*, supra, with interest as prescribed in *New Horizons for the Retarded*, supra.<sup>2</sup>

In addition, having found that the Respondent failed to remit to the Union, since about June 1993, dues that were deducted from the pay of unit employees pursuant to valid dues-checkoff authorizations, we shall also order the Respondent to remit such withheld dues to the Union as required by the agreements, with interest as prescribed in *New Horizons for the Retarded*, supra.

<sup>2</sup>To the extent that an employee has made personal contributions to a fund that are accepted by the fund in lieu of the Employer's delinquent contributions during the period of the delinquency, the Respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the Respondent otherwise owes the fund.

In addition, we shall order the Respondent to bargain with the Union in good faith as the exclusive collective-bargaining representative of the employees in the units.

Finally, because the documentary evidence submitted by the General Counsel in support of his Motion for Summary Judgment indicates that the Respondent has closed, we will order the Respondent to mail copies of the notice to all unit employees employed since June 1993.

#### ORDER

The National Labor Relations Board orders that the Respondent, David M. Powers & Associates, Inc. d/b/a Dave's Market, Cincinnati, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discriminating in regard to the hire or tenure or terms or conditions of employment of its employees, thereby discouraging membership in a labor organization, by substantially reducing the hours of work available to its employees, offering its employees less desirable evening hours of work, failing to provide its employees with health insurance benefits, failing to provide its employees with paid vacations, and terminating employees because the employees formed, joined, or assisted the Union or engaged in concerted activities, or to discourage employees from engaging in these activities.

(b) Failing to continue in effect all the terms and conditions of the collective-bargaining agreements with United Food and Commercial Workers International Union, Local No. 1099, AFL-CIO-CLC, effective from October 1, 1990, through October 2, 1993, covering employees in unit A and unit B, by failing to remit dues to the Union, and by failing to make pension payments and payments to the Health and Welfare Fund for employees in the units. The units include the following employees:

(Unit A): All employees of the Respondent at the store or stores of the Respondent located in Greater Cincinnati and vicinity, excluding one store manager in each store and all employees in the meat department, all office clerical employees and all guards and supervisors as defined in the Act.

(Unit B): All employees of the Respondent in the meat and/or deli department of the stores of the Respondent operated in Greater Cincinnati and vicinity, excluding all office clerical employees, guards and supervisors as defined in the Act.

(c) Threatening to implement or unilaterally implementing its contractual offers covering the units without the Union's consent and prior to a good-faith impasse in negotiations.

(d) Unilaterally using nonbargaining unit employees, less senior employees, and supervisors to perform bargaining unit work, refusing to grant paid vacations for employees in the units, or laying off employees in the units without consideration of seniority, without notifying the Union or affording it an opportunity to bargain with respect to this conduct and the effects of this conduct.

(e) Bypassing the Union and dealing directly with its employees in the unit by conveying to employees the option of accepting voluntary layoffs out of order of their seniority.

(f) 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) Offer Rick Adams and Paul Schweinefuss 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 and other benefits suffered as a result of the discrimination against them, with interest, as set forth in the remedy section of this Decision.

(b) Expunge from its files any and all references to the unlawful discharges, and notify the discriminatees in writing that this has been done.

(c) Restore the working conditions and benefits that existed before it unlawfully substantially reduced the hours of work available to its employees, offered employees less desirable evening hours of work, failed to provide its employees with paid vacations, used nonbargaining unit employees, less senior employees, and supervisors to perform bargaining unit work, refused to grant paid vacations to unit employees, laid off unit employees without consideration to seniority, and unilaterally implemented its contractual offers covering the units, continue in full force and effect all the terms and conditions of the collective-bargaining agreements until a new agreement or good-faith impasse in negotiations is reached, and make whole all unit employees adversely affected by these actions for any losses incurred by virtue of the Respondent's unlawful conduct, with interest, as set forth in the remedy section of this Decision.

(d) Make whole its unit employees for its failure to provide its employees with health insurance benefits since October 1993, its failure to make pension payments since June 1993, and its failure to make payments to the Health and Welfare Fund for employees in the units since August 1993, by making the delinquent payments and by reimbursing employees for any expenses ensuing from its failure to make the required

contributions as set forth in the remedy section of this decision.

(e) Remit to the Union dues it deducted but withheld since June 1993, as required by the agreement, with interest.

(f) Bargain with the Union in good faith as the exclusive collective-bargaining representative of the employees in the units.

(g) 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.

(h) Mail an exact copy of the attached notice marked "Appendix"<sup>3</sup> to the Union and to all unit employees employed since June 1993. Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be mailed immediately upon receipt thereof.

(i) 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. March 16, 1995

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William B. Gould IV, Chairman

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Charles I. Cohen, Member

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John C. Truesdale, 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.

WE WILL NOT discriminate in regard to the hire or tenure or terms or conditions of employment of our employees, thereby discouraging membership in a

labor organization, by substantially reducing the hours of work available to our employees, offering our employees less desirable evening hours of work, failing to provide our employees with health insurance benefits, failing to provide our employees with paid vacations, and terminating employees because the employees formed, joined, or assisted the Union or engaged in concerted activities, or to discourage employees from engaging in these activities.

WE WILL NOT fail to continue in effect all the terms and conditions of the collective-bargaining agreements with United Food and Commercial Workers International Union, Local No. 1099, AFL-CIO-CLC, effective from October 1, 1990, through October 2, 1993, covering employees in unit A and unit B, by failing to remit dues to the Union, and by failing to make pension payments and payments to the Health and Welfare Fund for employees in the units. The units include the following employees:

(Unit A): All employees of the Employer at the store or stores of the Employer located in Greater Cincinnati and vicinity, excluding one store manager in each store and all employees in the meat department, all office clerical employees and all guards and supervisors as defined in the Act.

(Unit B): All employees of the Employer in the meat and/or deli department of the stores of the Employer operated in Greater Cincinnati and vicinity, excluding all office clerical employees, guards and supervisors as defined in the Act.

WE WILL NOT threaten to implement or unilaterally implementing our contractual offers covering the units without the Union's consent and prior to a good-faith impasse in negotiations.

WE WILL NOT unilaterally use nonbargaining unit employees, less senior employees, and supervisors to perform bargaining unit work, refuse to grant paid vacations for employees in the units, or lay off employees in the units without consideration of seniority, without notifying the Union or affording it an opportunity to bargain with respect to this conduct and the effects of this conduct.

WE WILL NOT bypass the Union and deal directly with our employees in the unit by conveying to employees the option of accepting voluntary layoffs out of order of their seniority.

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 offer Rick Adams and Paul Schweinefuss 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 for any loss of earnings and other benefits suffered as a result of the discrimination against them, with interest.

WE WILL expunge from our files any and all references to the unlawful discharges, and notify the discriminatees in writing that this has been done.

WE WILL restore the working conditions and benefits that existed before we unlawfully substantially reduced the hours of work available to our employees, offered employees less desirable evening hours of work, failed to provide our employees with paid vacations, used nonbargaining unit employees, less senior employees, and supervisors to perform bargaining unit work, refused to grant paid vacations to unit employees, laid off unit employees without consideration of seniority, and unilaterally implemented our contractual offers covering the units, continue in full force and effect all the terms and conditions of the collective-bargaining agreements until a new agreement or good-faith impasse in negotiations is reached, and make whole all unit employees adversely affected by these actions for any losses incurred by virtue of our unlawful conduct, with interest.

WE WILL make whole our unit employees for our failure to provide our employees with health insurance benefits since October 1993, our failure to make pension payments since June 1993, and our failure to make payments to the Health and Welfare Fund for employees in the units since August 1993, by making the delinquent payments and by reimbursing employees for any expenses ensuing from our failure to make the required contributions.

WE WILL remit to the Union dues we deducted but withheld since June 1993, as required by the agreement, with interest.

WE WILL bargain with the Union in good faith as the exclusive collective-bargaining representative of the employees in the above-units.

DAVID M. POWERS & ASSOCIATES, INC.  
D/B/A DAVE'S MARKETS