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**Able Contracting Co., Inc. d/b/a K & R and Laborers' International Union of North America, Local 479, AFL-CIO. Cases 28-CA-13306 and 28-CA-13385**

March 29, 1996

**DECISION AND ORDER**

BY CHAIRMAN GOULD AND MEMBERS BROWNING  
AND FOX

Upon charges, amended charges, and a second amended charge filed by Laborers' International Union of North America, Local 479, AFL-CIO, the Union, on September 1, October 10, 13, and 26, and December 13, 1995, the General Counsel of the National Labor Relations Board issued a consolidated complaint (complaint) on December 13, 1995, against Able Contracting Co., Inc. d/b/a K&R, 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 charges, second amended charge, and complaint, the Respondent failed to file an answer.<sup>1</sup>

On February 26, 1996, the General Counsel filed a Motion for Summary Judgment with the Board. On February 27, 1996, 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 complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the complaint affirmatively notes that unless an answer is filed within 14 days of service, all the allegations in the complaint will be considered admitted. Further, the undisputed allegations in the Motion for Summary Judgment disclose that the Region, by letter dated February 15, 1996, notified the Respondent that unless an answer were received by February 20, 1996, a Motion for Summary Judgment would be filed.

<sup>1</sup>The Motion for Summary Judgment indicates that the Respondent also failed to answer the original complaint issued in Case 28-CA-13306 which was superseded by the consolidated complaint.

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 has been at all material times a Nevada corporation with offices and places of business in Phoenix and Tucson, Arizona, where it is engaged in the building and construction industry as a contractor installing underground piping at various jobsites, including those located in Nogales, Arizona, and the Sunnyslope and Cortez High Schools located in Phoenix, Arizona. During the 12-month period ending September 1, 1995, the Respondent, in the course and conduct of its business operations, purchased and received in interstate commerce at the Respondent's facilities goods and materials valued in excess of \$50,000 directly from points located outside the State of Arizona. During the same period, the Respondent provided services in excess of \$50,000 for Oakland Construction Company, an enterprise within Arizona which, during the same time period, in the course and conduct of its business operations, purchased and received in interstate commerce at its various construction jobsites throughout Arizona, goods and materials valued in excess of \$50,000 directly from points located outside the State of Arizona. 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**

The employees referred to in the collective-bargaining agreement described below constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act. About February 14, 1995, the Respondent entered into a collective-bargaining agreement (the 1995-1996 agreement) with the District Council and its constituent local unions, including Local 383 and the Union, which agreement incorporates and binds the Respondent to the terms of the Arizona Master Labor Agreement (the Wheeler Agreement), which by its terms is effective from March 14, 1995, to May 31, 1996. The Respondent, an employer engaged in the building and construction industry, granted recognition to the District Council, Laborers 383, and the Union (collectively the Unions) as the exclusive collective-bargaining representative of the unit without regard to whether the Union's majority status had ever been established under the provisions of Section 9(a) of the Act, such recognition being established by the 1995-1996 agree-

ment pursuant to Section 8(f) of the Act. At all material times, the Unions, by virtue of Section 9(a) of the Act have been, and are now, the limited exclusive representative of the unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

About August 30, 1995, the Respondent issued a memorandum to its employees advising them that effective September 1, 1995, the Respondent would no longer employ union laborers and would immediately withdraw its recognition of the Unions as the exclusive collective-bargaining representative of the unit. Since about August 30, 1995, the Respondent has withdrawn recognition of the Union as the exclusive collective-bargaining agent of the unit, has refused to adhere to the 1995-1996 agreement, and has failed and refused to continue in effect all the terms and conditions of the 1995-1996 agreement and the Wheeler Agreement, including, without limitation, failing and refusing to utilize the Unions' hiring hall for employee referrals for employment in the unit. About the same date, the Respondent changed the terms and conditions of the unit, including, without limitation, their wages, rates of pay, medical benefits, retirement benefits, vacation pay, training, overtime compensation, zone pay, and other benefits of the unit. These subjects relate to rates of pay, wages, hours of employment, and other terms and conditions of employment of the unit and are mandatory subjects of collective bargaining. The Respondent engaged in this conduct without prior notice to the Unions and without having afforded them an opportunity to bargain with the Respondent with respect to certain acts and conduct and the effects of such acts and conduct.

About August 30, 1995, the Respondent, by its unlawful withdrawal of recognition and unilateral changes, caused the termination of its employees Rodolfo Tovar and Terry L. Danbury, and since that date has failed and refused to reinstate them to their former or substantially equivalent positions of employment. About October 12, 1995, the Respondent discharged its employees Ramon Oros, Laureno Meza, Armando Cazarez, Francisco Frias, and Marco Amador, and since that date has failed and refused to reinstate them to their former or substantially equivalent positions of employment. The Respondent engaged in this conduct with respect to Rodolfo Tovar, Terry L. Danbury, Ramon Oros, Laureno Meza, Armando Cazarez, Francisco Frias, and Marco Amador because the named employees joined, supported, or assisted the Unions, or 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 ac-

tivities for the purpose of collective bargaining or other mutual aid or protection.

About September 26, 1995, the Unions picketed at the Respondent's Nogales jobsite to protest the Respondent's unfair labor practices described above. On that same date the Respondent threatened its employees with termination and other unspecified harm.

#### CONCLUSIONS OF LAW

1. 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 in Section 7 of the Act, and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By advising employees that it would no longer employ union laborers and would immediately withdraw recognition from the Union, by withdrawing recognition from the Union, by refusing to adhere to the collective-bargaining agreements, by unilaterally failing and refusing to continue in effect all the terms and conditions of the agreements, by changing the terms and conditions of the unit, and by causing the termination or failing and refusing to reinstate Tovar and Danbury, the Respondent has failed and refused to bargain collectively and is continuing to fail and refuse to bargain collectively with the Unions as the limited exclusive collective-bargaining representative of the unit, and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and Section 2(6) and (7) of the Act.

3. By causing the termination, discharging or failing and refusing to reinstate Tovar, Danbury, Oros, Meza, Cazarez, Frias, and Amador, 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 has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) 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, having found that the Respondent violated 8(a)(5) and (1) of the Act about August 30, 1995, by withdrawing recognition from the Unions as the limited exclusive collective-bargaining representative of the unit, refusing to continue in effect all the terms and conditions of the 1995-1996 agreement and the Wheeler Agreement, including, but not limited to, fail-

ing and refusing to use the Unions' hiring hall for employee referrals for unit employment, and unilaterally changing the terms and conditions of the unit, we shall order the Respondent to recognize the Unions as the limited exclusive collective-bargaining representative of the unit, comply with the terms and conditions of the 1995-1996 agreement and the Wheeler Agreement, including, but not limited to the hiring hall provisions, and, on request, rescind the changes made by the Respondent about August 30, 1995, to the terms and conditions of the unit, including, but not limited to, wages, rates of pay, medical benefits, retirement benefits, vacation pay, training, overtime compensation, and zone pay.

In addition, we shall order the Respondent to make whole the unit employees for any loss of earnings or other benefits they may have suffered as a result of the Respondent's August 30, 1995 unlawful changes and failure to adhere to the 1995-1996 agreement. Backpay will be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). In order to remedy the Respondent's failure, if any, to make contractually required contributions to the various funds, we shall order the Respondent to make whole its unit employees by making all such delinquent contributions since August 30, 1995, 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), enfd. mem. 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>

Further, in order to remedy the Respondent's unlawful failure to use the hiring hall, we will order a reinstatement and backpay remedy for those applicants who would have been referred to the Respondent were it not for the Respondent's failure to abide by the agreement. *J. E. Brown Electric*, 315 NLRB 620 (1994). The Respondent will have the opportunity to introduce evidence on reinstatement and backpay issues at the compliance stage with respect to any employees not specifically alleged in the complaint. Id. Backpay shall be computed in accordance with *F. W.*

<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 Respondent'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.

*Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, supra.

Finally, having found that the Respondent has violated Section 8(a)(3), (5), and (1) of the Act by causing the termination of Tovar and Danbury and failing and refusing to reinstate them, and that the Respondent has violated Section 8(a)(3) and (1) by discharging and failing and refusing to reinstate Oros, Meza, Cazarez, Frias and Amador, we shall order the Respondent to offer each of them 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 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 Respondent's unlawful conduct. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, supra, with interest as prescribed in *New Horizons for the Retarded*, supra. The Respondent shall also be required to expunge from its files any and all references to the unlawful discriminatory discharges, and to notify the discriminatees in writing that this has been done.

#### ORDER

The National Labor Relations Board orders that the Respondent, Able Contracting Co., Inc. d/b/a K&R, Tucson and Phoenix, Arizona, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Advising its employees that it will no longer employ union laborers or that it would withdraw its recognition of the Laborers' District Council of the State of Arizona, Laborers' International Union of North America, Local 383, AFL-CIO and Laborers' International Union of North America, Local 479, AFL-CIO as the limited exclusive collective-bargaining representative of the unit during the term of the collective-bargaining agreements with the Unions.

(b) Withdrawing recognition of the Unions as the limited exclusive collective-bargaining agent of the unit during the term of the collective-bargaining agreements with the Unions.

(c) Failing or refusing to continue in effect all the terms and conditions of the 1995-1996 agreement and the Wheeler Agreement, including, without limitation, failing or refusing to use the Unions' hiring hall for employee referrals for employment in the unit. The unit includes the employees referred to in these collective-bargaining agreements.

(d) Unilaterally changing the terms and conditions of the unit, including, without limitation, the wages, rates of pay, medical benefits, retirement benefits, vacation pay, training, overtime compensation, zone pay, and other benefits of the unit.

(e) Causing the termination of, or discharging employees, or failing or refusing to reinstate them to their

former or substantially equivalent positions of employment because they join, support, or assist the Unions, or engage in other concerted activities for the purposes of collective bargaining or other mutual aid or protection or in order to discourage employees from engaging in such activities or other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

(f) Unilaterally discharging its employees or failing or refusing to reinstate them to their former or substantially equivalent positions of employment.

(g) Threatening its employees with termination and other unspecified harm because the employees protest the Respondent's unfair labor practices.

(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) Recognize the Unions as the limited exclusive collective-bargaining representative of the unit and comply with the terms and conditions of the 1995-1996 agreement and the Wheeler Agreement.

(b) On request, rescind the August 30, 1995 changes in the terms and conditions of the unit, including, but not limited to, wages, rates of pay, medical benefits, retirement benefits, vacation pay, training, overtime compensation, and zone pay.

(c) Make whole, with interest, the unit employees for any loss of earnings or other benefits they may have suffered as a result of its unlawful changes in terms and conditions of employment or its failure to adhere to the 1995-1996 agreement and the Wheeler Agreement since August 30, 1995, including making any delinquent contributions to the various funds and reimbursing unit employees for any expenses ensuing from its failure to make the required contributions in the manner set forth in the remedy section of this decision.

(d) Offer immediate and full employment to, and make whole, with interest, in the manner set forth in the remedy section of this decision, any applicants who would have been referred to the Respondent were it not for the Respondent's failure to abide by the 1995-1996 agreement since August 30, 1995.

(e) Offer Rodolfo Tovar, Terry L. Danbury, Ramon Oros, Lauren Meza, Armando Cazarez, Francisco Frias, and Marco Amador, 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, with interest, for any loss of earnings and other benefits suffered as a result its unlawful conduct, in the manner set forth in the remedy section of this decision.

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

(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) Post at its facilities in Tucson and Phoenix, Arizona, copies of the attached notice marked "Appendix."<sup>3</sup> 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 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) 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 29, 1996

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William B. Gould IV, Chairman

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Margaret A. Browning, Member

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Sarah M. Fox, 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 advise our employees that we will no longer employ "Union" laborers or that we will withdraw our recognition of the Laborers' District Council of the State of Arizona, Laborers' International Union of North America, Local 383, AFL-CIO and Laborers'

<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."

International Union of North America, Local 479, AFL-CIO as the limited exclusive collective-bargaining representative of the unit during the term of the collective-bargaining agreements with the Unions.

WE WILL NOT withdraw recognition of the Unions as the limited exclusive collective-bargaining agent of the unit during the term of the collective-bargaining agreement entered into by us on February 14, 1995, with the District Council and its constituent local unions, including Local 383 and Local 479, which incorporates by reference and binds us to the terms of the Arizona Master Labor Agreement (Wheeler Agreement), which is effective from March 14, 1995, to May 31, 1996. The unit includes the employees referred to in these collective-bargaining agreements.

WE WILL NOT fail or refuse to continue in effect all the terms and conditions of the March 14, 1995-May 31, 1996 agreement with the Unions or the Wheeler Agreement, including, without limitation, failing or refusing to use the Union's hiring hall for employee referrals for employment in the unit.

WE WILL NOT unilaterally change the terms and conditions of the unit, including, without limitation, wages, rates of pay, medical benefits, retirement benefits, vacation pay, training, overtime compensation, zone pay, and other benefits of the unit.

WE WILL NOT cause the termination of, or discharge employees, or fail or refuse to reinstate them to their former or substantially equivalent positions of employment because they join, support, or assist the Unions, or engage in other concerted activities for the purposes of collective bargaining or other mutual aid or protection or in order to discourage employees from engaging in such activities or other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

WE WILL NOT unilaterally cause the termination of employees or fail or refuse to reinstate them to their former or substantially equivalent positions of employment.

WE WILL NOT threaten our employees with termination or other unspecified harm because they protest our unfair labor practices.

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 the Unions as the limited exclusive collective-bargaining representative of the unit and comply with the terms and conditions of the 1995-1996 agreement.

WE WILL, on request, rescind the August 30, 1995 changes in the terms and conditions of the unit, including, but not limited to, wages, rates of pay, medical benefits, retirement benefits, vacation pay, training, overtime compensation, and zone pay.

WE WILL make whole, with interest, the unit employees for any loss of earnings or other benefits they may have suffered as a result of our unlawful changes in terms and conditions of employment or our failure to adhere to the March 14, 1995-May 31, 1996 agreement since August 30, 1995, including making any delinquent contributions to the various funds and reimbursing our unit employees for any expenses ensuing from our failure to make the required contributions.

WE WILL offer immediate and full employment to, and make whole, with interest, any applicants who would have been referred to us were it not for our failure to abide by the March 14, 1995-May 31, 1996 agreement since August 30, 1995.

WE WILL offer Rodolfo Tovar, Terry L. Danbury, Ramon Oros, Lauren Meza, Armando Cazarez, Francisco Frias, and Marco Amador, 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 our unlawful conduct.

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

ABLE CONTRACTING CO., INC. D/B/A K  
& R