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Environmental Services, Inc. and Tri-State Building and Construction Trades Council, AFL-CIO.
Case 9-CA-34607

October 15, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

Upon a charge filed by the Union on February 5, 1997, the General Counsel of the National Labor Relations Board issued an amended complaint on May 9, 1997, against Environmental Services, Inc., the Respondent, alleging that it has violated Section 8(a)(1) and (3) of the National Labor Relations Act. Although the Respondent filed an answer to the amended complaint, it subsequently withdrew both that answer and a prior answer it had filed to an April 8, 1997 consolidated complaint issued in Cases 9-CA-34281-1 and 9-CA-34607.¹

On September 15, 1997, the General Counsel filed a Motion for Summary Judgment with the Board. On September 17, 1997, 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.

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 amended complaint affirmatively notes that unless an answer is filed within 14 days of service, all the allegations in the complaint will be considered admitted. Here, although the Respondent initially did file answers, the Respondent subsequently withdrew those answers. Such a withdrawal has the same effect as a failure to file an answer, i.e., all allegations in the amended complaint must be considered to be true. See *Maislin Transport*, 274 NLRB 529 (1985).

¹ After the Respondent withdrew its answers, the Regional Director granted the Respondent's motion to reinstate a prior settlement in Case 9-CA-34281-1, which had been set aside on issuance of the consolidated complaint. The Regional Director stated that pursuant to the reservations language in the settlement, the 8(a)(1) allegations which were the subject of the settlement would appear in the amended complaint, but that no remedy would be sought with respect to those allegations.

Accordingly, in the absence of good cause being shown otherwise, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a corporation, has been engaged as a construction contractor in the removal and installation of underground tanks out of its St. Albans, West Virginia facility. During the 12-month period preceding issuance of the amended complaint, the Respondent, in conducting its operations, provided services valued in excess of \$50,000 to customers located outside the State of West Virginia. 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

About August 18, 1996, the Respondent informed an employee that the employee would never have been hired if the Respondent had known of the employee's union membership. About August 20, 1996, the Respondent threatened employees with legal action for engaging in union organizing activity, told employees that they could not engage in union organizing activity or discuss the Union at any time on the Respondent's property or at any of its jobsites even on the employees' own time, threatened to close the Respondent's operations if the employees were represented by the Union, and threatened employees with loss of benefits if employees were represented by the Union.

From about August 20 until October 24, 1996, employees Donald Huff and Jerry Cordle ceased work and engaged in a strike against the Respondent. This strike was caused by the Respondent's unfair labor practices described above. About October 24, 1996, the Union, on behalf of Huff and Cordle, made an unconditional offer for the employees to return to their former or substantially equivalent positions of employment, and since that date, the Respondent has failed and refused to reinstate them to their former or substantially equivalent positions. The Respondent engaged in this conduct because Huff and Cordle joined or assisted the Union and/or because they engaged in the conduct described above and to discourage employees from engaging in such activities.

CONCLUSIONS OF LAW

By the acts and conduct described above, the Respondent has been interfering with, restraining, and coercing employees in the exercise of 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.

By failing and refusing to reinstate Huff and Cordle, 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 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.² Specifically, having found that the Respondent has violated Section 8(a)(3) and (1) by failing and refusing to reinstate striking employees Donald Huff and Jerry Cordle since about October 24, 1996, we shall order the Respondent to offer them 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, dismissing, if necessary, any persons hired as replacements after the offer to return to work was made. The strikers for whom no positions are immediately available shall be put on a preferential hiring list and shall be chosen from such list and offered reinstatement as positions become available and before other persons are hired for such work. The Respondent shall also make the striking employees 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).³ The Respondent shall also be required to expunge from its files any and all references to the unlawful failures to reinstate, and to notify the strikers that this has been done.

²As noted above, the 8(a)(1) allegations were the subject of a settlement agreement in Case 9-CA-34281-1 and the General Counsel is not seeking any remedy for those allegations. Accordingly, no cease-and-desist provisions are included in the Order with respect to those allegations.

³Backpay will commence as of the date of the unconditional offer to return to work on October 24, 1996. The 5-day grace period which accommodates the interests of the employees in returning to work and the employer's need to effectuate that return in an orderly manner, is inapplicable where, as here, the Respondent has rejected, unduly delayed, or ignored the unconditional offer to return to work. See *Northern Wire Corp.*, 291 NLRB 727 fn. 6 (1988).

ORDER

The National Labor Relations Board orders that the Respondent, Environmental Services, Inc., St. Albans, West Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing or refusing to reinstate employees because they join or assist the Union and/or because they engage in an unfair labor practice strike or to discourage employees from engaging in such activities.

(b) 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) Within 14 days from the date of this Order, reinstate Donald Huff and Jerry Cordle 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, dismissing, if necessary, any persons hired as replacements by the Respondent on or after October 24, 1996. If sufficient jobs are not available for the employees, they shall be put on the preferential hiring list and shall be chosen from such list and offered employment before any other persons are hired.

(b) Make Donald Huff and Jerry Cordle whole, with interest, for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this decision.

(c) Within 3 days from the date of this Order, remove from its record all references to it unlawful refusal to offer reinstatement to Donald Huff and Jerry Cordle and, within 3 days thereafter, notify them in writing that this has been done.

(d) Preserve and, within 14 days of a 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) Within 14 days after service by the Region, post at its facility in St. Albans, West Virginia, copies of the attached notice marked "Appendix."⁴ 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 posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps

⁴If 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."

shall be taken by the Respondent to ensure that the notices are not altered, defaced or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 5, 1997.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. October 15, 1997

William B. Gould IV, Chairman

Sarah M. Fox, Member

John E. Higgins, Jr., 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 fail or refuse to reinstate employees because they join or assist Tri-State Building and Construction Trades Council, AFL-CIO and/or because they engage in an unfair labor practice strike or to discourage employees from engaging in such 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, within 14 days from the date of the Board's Order, reinstate Donald Huff and Jerry Cordle 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, dismissing, if necessary, any persons we hired as replacements on or after October 24, 1996. If sufficient jobs are not available for the employees, we will put them on the preferential hiring list and they shall be chosen from such list and offered employment before any other persons are hired.

WE WILL make Donald Huff and Jerry Cordle whole, with interest, for any loss of earnings and other benefits suffered as a result of our discrimination against them.

WE WILL, within 3 days from the date of this Order, remove from our records all references to the unlawful refusal to offer reinstatement to Donald Huff and Jerry Cordle and, within 3 days thereafter, notify them in writing that this has been done.

ENVIRONMENTAL SERVICES, INC.