

K & W Electric, Inc. and International Brotherhood of Electrical Workers, Local 288. Case 18–CA–14218

October 30, 1998

DECISION AND ORDER

BY MEMBERS LIEBMAN, HURTGEN, AND
BRAME

Following a decision by an administrative law judge on January 15, 1998, K & W Electric, Inc., the Respondent, and the General Counsel of the National Labor Relations Board entered into a Settlement Stipulation subject to the Board's approval, signed on April 15, 1998, and April 27, 1998, respectively, providing for the entry of a consent order by the Board and consent judgment by any appropriate United States court of appeals. The Respondent and the General Counsel waived all further and other proceedings before the Board to which they may be entitled under the National Labor Relations Act, and the Respondent waived its right to contest the entry of a consent judgment or to receive further notice of the application therefor. The Charging Party refused to execute the stipulation and filed a statement of objections with respect to it.¹

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the Settlement Stipulation together with the judge's decision, the exceptions, the objections, and the briefs, and has decided to approve the Settlement Stipulation for the reasons set forth below.

The Charging Party opposes the Settlement Stipulation because it fails to remedy each of the unfair labor practices alleged in the complaint and because the Charging Party considers the Respondent a "repeat offender" likely to continue to violate the Act.

In deciding whether to accept a settlement agreement, the Board considers the following factors:

- (1) whether the charging party[ies], the respondent[s], and any of the individual discriminatee[s] have agreed to be bound, and the position taken by the General Counsel regarding the settlement;
- (2) whether the settlement is reasonable in light of the nature of the violations alleged, the risks inherent in litigation, and the stage of the litigation;
- (3) whether there has been any fraud, coercion, or duress by any of the parties in reaching the settlement; and
- (4) whether the respondent has engaged in a history of violations of the Act or has breached previous settlement agreements resolving unfair labor practice disputes.

¹ The Charging Party also filed exceptions to the judge's decision and a supporting brief. The Respondent filed a brief in answer to the Charging Party's exceptions and in support of the settlement stipulation.

Independent Stave Co., 287 NLRB 740, 743 (1987) (non-Board settlement); *Woodworkers Local 3-433 (Kimtruss Corp.)*, 304 NLRB 1, 2 (1991) (Board settlement).

As to the first factor, although the Charging Party opposes the settlement, the General Counsel agreed to it and recommends its approval by the Board.

As to the second factor, the settlement remedies the unfair labor practices found by the judge and, in one respect, provides a more comprehensive remedy than that recommended by the judge (i.e., the Respondent is additionally ordered to cease and desist from "refusing to accept applications or consider applicants who are currently employed by Employers with which Respondent does not have any mutual agreement not to hire away each others' employees"). Furthermore, by agreeing to the settlement, the Respondent has consented to the entry of both a Board Order and a court judgment enforcing it—a judgment that will in turn be enforceable through contempt proceedings. We have considered the Charging Party's exceptions to the judge's failure to find merit in all the unfair labor practice allegations of the complaint. It must be remembered, however, that there are risks and uncertainties inherent in any litigation, and this is particularly true here where the judge's findings adverse to the General Counsel and the Charging Party were based in part on credibility resolutions.

As to the third factor, there is no evidence of fraud, coercion, or duress.

Finally, although the Charging Party claims that the Respondent has a record of violating the Act in the past and may continue to do so, the Charging Party does not cite any prior Board cases involving the Respondent, but relies instead on the Respondent's execution of an informal Board settlement agreement in 1995. Even assuming arguendo, however, that the Respondent has previously violated the Act, that fact alone would not require rejection of a settlement stipulation that by its terms is enforceable by a United States Court of Appeals. *Philadelphia Building Trades Council (Wohlsen Construction)*, 279 NLRB 1242 fn. 1 (1986).

Accordingly, we find that it would effectuate the purposes and policies of the Act to approve the settlement as modified, and the Settlement Stipulation is approved and made a part of the record.²

Upon the basis of the Settlement Stipulation and the entire record, the Board makes the following

² We have deleted the following language from par. 1(a) of the Order, "except to the extent that such right might be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized by Sec. 8(a)(3) of the National Labor Relations Act, as amended." Should either the General Counsel or the Respondent object to the modifications to the Order, either party may within 7 days of this Order, notify the Executive Secretary of the Board of its objection, upon which the settlement shall be rejected.

FINDINGS OF FACT

The Respondent is an Iowa corporation with an office and place of business in Cedar Falls, Iowa, and is engaged as an electrical contractor in the building and construction industry.

The Respondent annually purchases goods valued in excess of \$50,000 which it receives at its Cedar Falls facility directly from points outside the State of Iowa and, further, provides services valued in excess of \$50,000 to enterprises within Iowa each of which, in turn, either annually performs services valued in excess of \$50,000 outside of Iowa or, alternatively, purchases goods and materials valued in excess of \$50,000 which are received at their Iowa locations directly from points outside of Iowa.

The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³

ORDER

The Respondent, K & W Electric, Inc., Cedar Falls, Iowa, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Any act or conduct interfering with, restraining, or coercing any of its employees in the exercise of their rights guaranteed under Section 7 of the National Labor Relations Act, which rights are as follows: To engage in self-organization; to form, join, or assist labor organizations; to bargain collectively through representatives of their own choosing; to act together for purposes of collective bargaining or other mutual aid or protection; or to refrain from any or all such activities.

(b) Continuing to refuse to accept group applications; refusing to accept applications, or consider applicants who are currently employed by Employers with which Respondent does not have any mutual agreement not to hire away each others' employees; continuing to prohibit employees from working elsewhere while employed by it, so long as that other employment does not interfere with the work which they perform for it; and coercively interrogating employees concerning their union membership, activities, and sympathies.

(c) Refusing to accept employment applications, refusing to consider for employment, refusing to hire, or otherwise discriminating against Merlin Kruse, Kenneth F. Marsh, Jack Schulte, Dale Bright, Russell Bertch, Curtis Baumgartner, Craig A. Hanson, Richard Martin Hurtado, and John A. Padget Jr., or any other employee, because of membership in, activities on behalf of, or sympathy

for International Brotherhood of Electrical Workers, Local 288, or any other labor organization.

(d) 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 to effectuate the policies of the National Labor Relations Act.

(a) Within 14 days from the date of this Order, notify Merlin Kruse, Kenneth F. Marsh, Jack Schulte, Dale Bright, Russell Bertch, Curtis Baumgartner, Craig A. Hanson, Richard Martin Hurtado, and John A. Padget Jr., in writing, that each may complete and file Respondent's employment application and participate in a preemployment interview.

(b) Evaluate the employment applications and interview results of the above-named employees who choose to file applications and participate in preemployment interviews, as well as all other available information relevant to the nine individuals' employment qualifications, in the same manner as ordinarily followed in evaluating potential employees and without regard to their membership in, activities on behalf of, or sympathies for the above-named labor organization, or any other labor organization.

(c) Within 7 days from the date of the final interview referenced above in paragraph 2(a), offer one of the individuals named above in paragraph 2(a) full employment to the job which he would have been offered January 6, 1997, without prejudice to seniority or any rights or privileges which would have been enjoyed had he not been denied employment.

(d) Make whole the employee described in paragraph 2(c) for any loss of earnings and other benefits he may have suffered, by paying to that individual an amount equal to the amount the employee would have earned had he been employed by Respondent from January 6, 1997, through August 29, 1997, and from September 11, 1997, through the actual date his employment offer is to take effect, less any interim earnings received by that individual, pursuant to standard Board compliance procedures.

(e) 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 back-pay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Cedar Falls, Iowa facility copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by its authorized representative, shall be

³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁴ 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."

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 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 Cedar Falls, Iowa facility, it shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by it at any time since April 4, 1996. In addition, it shall duplicate and mail, at its own expense, a copy of the notice to each of the following employees: Merlin Kruse, Kenneth F. Marsh, Jack Schulte, Dale Bright, Russell Bertch, Curtis Baumgartner, Craig A. Hanson, Richard Martin Hurtado, and John A. Padget Jr. Those notices will be mailed to the addresses supplied by the Regional Director, or his agent, for Region 18.

(g) 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 the Respondent has taken to comply.

IT IS FURTHER ORDERED that the judge's decision issued on January 15, 1998, be vacated.

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.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT continue to refuse to accept group applications.

WE WILL NOT refuse to accept applications, or to consider applicants for employment who are currently employed by Employers with which we do not have any

mutual agreement not to hire away each others' employees.

WE WILL NOT continue to prohibit our employees from working elsewhere while employed by us, so long as that other employment does not interfere with the work you are performing for us.

WE WILL NOT coercively interrogate you concerning your membership in, activities on behalf of, or sympathies for International Brotherhood of Electrical Workers, Local 288, or any other labor organization.

WE WILL NOT refuse to accept applications, refuse to consider for employment, hire, or otherwise discriminate against Merlin Kruse, Kenneth F. Marsh, Jack Schulte, Dale Bright, Russell Bertch, Curtis Baumgartner, Craig A. Hanson, Richard Martin Hurtado, and John A. Padget Jr., or any other employee, because of membership in, activities on behalf of, or sympathy for International Brotherhood of Electrical Workers, Local 288, or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights protected by the National Labor Relations Act.

WE WILL, within 14 days from the date of this Order, notify each of the above-named employees in writing that he can complete and file one of our employment applications and participate in a preemployment interview.

WE WILL evaluate the employment applications and interview results of any of the above-named employees who choose to submit applications and participate in pre-employment interviews, as well as all other available information relevant to the nine individuals' employment qualifications, in the same manner as we ordinarily follow in evaluating employment applicants and without regard to membership in, activities on behalf of, and sympathies for the above-named labor organization.

WE WILL offer one of the individuals named above full employment to the job which he would have been offered January 6, 1997, without prejudice to seniority or any rights or privileges which would have been enjoyed had he not been denied employment.

WE WILL make whole the employee, to whom we offer employment, for any net loss of earnings and other benefits sustained by reason of our failure to hire him from January 6, 1997, through August 29, 1997, and from September 11, 1997, through the actual date his employment offer is to take effect.

K & W ELECTRIC, INC.