

**Leisure Knoll Association, Inc. and Richard Musetti
and Dorothy Whitmer.** Case 29–CA–20014

January 28, 1999

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND BRAME

On December 3, 1997, Administrative Law Judge D. Barry Morris issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed exceptions and a brief in support of part of the judge's decision.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,¹ findings,² and conclusions³ and to adopt the recommended Order as modified.⁴

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Leisure Knoll Association, Inc., its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Substitute the following for paragraph 2(f).

"(f) Within 14 days after service by the Region, post at its facility in Ridge, New York, copies of the attached notice marked 'Appendix.'⁴ Copies of the notice, on forms provided by the Regional Director for Region 29, 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 cus-

¹ We agree with the judge's ruling, set forth in sec. II,B,7 of his decision, that the General Counsel was not required to produce the tape recording and transcript in question under Sec. 102.118(d) of the Board's Rules and Regulations. See *Delta Mechanical, Inc.*, 323 NLRB 76, 77 (1997); *JMB Properties Co.*, 305 NLRB 978, 984 (1991); *U.S. v. Skillman*, 442 F.2d 542, 553–554 (8th Cir. 1971); and *U.S. v. Sopher*, 362 F.2d 523, 525–526 (7th Cir. 1966).

² The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

³ The Respondent contends that its unilateral changes found unlawful by the judge were implemented more than 6 months prior to the filing of the unfair labor practice charge and thus were time barred under Sec. 10(b) of the Act. As this affirmative defense was not raised in the Respondent's answer or at the hearing, however, it is waived. See *Public Service Co.*, 312 NLRB 459, 461 (1993).

⁴ In conformity with *Excel Container, Inc.*, 325 NLRB 17 (1997), we modify the judge's recommended Order to require, in the event that the Respondent has gone out of business or closed the facility involved in these proceedings, that the Respondent mail a copy of the notice to all current employees and former employees employed by the Respondent at any time since the date of the first unfair labor practice, November 17, 1995, rather than the date the charge was filed.

tomarily 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 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 November 17, 1995."

Emily, DeSa, Esq., for the General Counsel.

Robert M. Ziskin, Esq., of Commack, New York, for the Respondent.

DECISION

STATEMENT OF THE CASE

D. BARRY MORRIS, Administrative Law Judge. This case was heard before me in New York City on December 4–5, 1996, and May 30, 1997. On a charge filed on May 21, 1996,¹ a complaint was issued on September 25, alleging that Leisure Knoll Association, Inc. (the Respondent) violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act). The Respondent filed an answer denying the commission of the alleged unfair labor practices.

The parties were given full opportunity to participate, produce evidence, examine and cross examine witnesses, argue orally, and file briefs. Briefs were filed by the General Counsel and the Respondent.

On the entire record of the case, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a New York corporation with its principal office and place of business in Ridge, New York, has been engaged in maintaining the property surrounding 701 homes. The Respondent has admitted, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. In addition, it has been admitted, and I find, that Local 806, International Brotherhood of Teamsters, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

1. Background

Since 1984 the Union has been the designated exclusive collective-bargaining representative of a unit consisting of leadmen, mechanic/maintenance men, handymen/grounds keepers, seasonal help and housekeepers. Such recognition has been embodied in successive collective-bargaining agreements, the most recent of which was effective for the period November 1, 1992, to October 31, 1995.

2. Unilateral changes

General Counsel's Exhibit 2 is a copy of the collective-bargaining agreement in effect from November 1, 1992, until October 31, 1995. It provides for the payment of time-and-a-

¹ All dates refer to 1996 unless otherwise specified.

half on Saturdays and double time for Sundays and holidays. Article VIII, dealing with holidays, does not list Martin Luther King's birthday as a paid holiday. The parties stipulated that since November 17, 1995, Sundays and holidays have been paid at the rate of time-and-a-half, not double time. Richard Musetti, a steward and leadman, credibly testified that Martin Luther King day was a paid holiday in 1996, whereas it was not a paid holiday from 1992 through 1995.

3. Dorothy Whitmer

Dorothy Whitmer, a housekeeper employed by the Respondent, appeared to me to be a credible witness. She testified that on May 9 she punched in at 8:01 a.m. She was responsible for opening the craft center and she testified that she normally opened it around 8:10 a.m. Whitmer testified that on May 9 when she came to the craft center it was already opened, she then walked over to the recreation hall and it was also already opened. She testified that when she came into the recreation center Edward Kubica, the Respondent's manager, told her that "he wanted the buildings opened at 8 o'clock." She replied:

Well I punch in at 8. So he says but he wanted the craft center, the rec hall open at 8 o'clock. And I said well it takes me time to get down here, by the time I get down here and open the craft center and the rec halls, its 10 after eight. So he wanted . . . me to come in earlier, a couple of minutes earlier every day, 15 minutes . . .

Q. And what did you say?

A. And I said . . . that's fine with me but I wanted to get paid for it. That's all I ask. It's a job.

Q. And what did Mr. Kubica respond?

A. He said . . . he would give me 15 minutes to half an hour at the end of the week.

Q. And what did you say?

A. I disagreed with that.

Q. What did you say?

A. I said if I come in 15 minutes early a day, I want 15 minutes a day pay for coming in.

Whitmer testified that Kubica became angry and "he told me to go down and punch out." The following day Kubica told Musetti that he wanted to speak to him and Whitmer after work. When Whitmer and Musetti went into Kubica's office, Kubica handed Whitmer a warning notice which she refused to sign.

Musetti testified that on May 9 when he came to the recreation hall Kubica told him that Whitmer "got snippy with him and he was sending her home and punching her card out." Musetti testified that on May 10, after Kubica gave Whitmer the warning notice, Kubica asked Musetti to initial it. Musetti replied, "I don't want to initial it because I don't agree with it either." Musetti credibly testified that Kubica then told him "If I didn't sign it he wouldn't need a leadman here."

B. Discussion and Conclusions

1. Suspension and warning of Whitmer

I have credited Whitmer's testimony that on May 9, after Kubica told her that he wanted her to come in a couple of minutes earlier every day she answered him that she wanted to get paid for it. He then told her that he would give her 15 minutes to a half-an-hour extra pay at the end of the week, with which she disagreed. She told Kubica "if I come in 15 minutes early a day, I want 15 minutes a day pay for coming in." At that point

Kubica told her to punch out and on May 10 handed her a warning notice. Respondent argues that Kubica was justified in disciplining Whitmer because of her "belligerent attitude with respect to opening the recreation and craft halls in a timely fashion" and because she "engaged in insubordination and stated that she was not going to punch out." I find that Kubica retaliated against Whitmer by suspending her and issuing her a written warning because she would not agree to change her present terms and conditions of employment negotiated by the Union and in direct response to her failure to go along with Kubica's proposal that she be paid 15 or 30 minutes extra pay at the end of the week. I find that Respondent's suspension of Whitmer and the warning were violations of Section 8(a)(1) and (3) of the Act. The Respondent has not satisfied its burden of demonstrating that the "same action would have taken place even in the absence of the protected conduct." See *Wright Line*, 251 NLRB 1083, 1089 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

2. Bypassing the Union

The complaint alleges that by Kubica negotiating with Whitmer whether to pay her 15 minutes to 30 minutes at the end of the week he bypassed the Union in violation of Section 8(a)(5) of the Act. I find that by dealing directly with Whitmer concerning her wages, the Respondent unlawfully bypassed the Union and failed in its duty to bargain exclusively with the Union, in violation of Section 8(a)(5) and (1) of the Act. See *E. I. Dupont & Co.*, 311 NLRB 893, 919 (1993).

3. Threatened demotion

Musetti testified that on May 10 after Kubica gave Whitmer the warning notice, Kubica asked Musetti to initial it. Musetti replied, "I don't want to initial it because I don't agree with it either." I credit Musetti's testimony that Kubica then told him "if I didn't sign it he wouldn't need a leadman here." Musetti was the shop steward and in that capacity he accompanied Whitmer when she was handed the warning notice. He was thus engaged in concerted protected activity. See *Guardian Industries Corp.*, 319 NLRB 542, 549 (1995). I find that Kubica's statement to Musetti that if he didn't sign the warning notice he "wouldn't need a leadman here" threatened Musetti with demotion because of his protected activities, in violation of Section 8(a)(1) of the Act.

4. Unilateral changes

I find that General Counsel's Exhibit 2 is the authentic copy of the collective-bargaining agreement which was in effect from November 1, 1992, until October 31, 1995. It provides for payment of time-and-a-half on Saturdays and double time for Sundays and holidays. Article VIII, dealing with holidays, does not list Martin Luther King's birthday as a paid holiday. The parties stipulated that since November 17, 1995, Sundays and holidays have been paid at the rate of time-and-a-half, not double time. In addition, I find that Martin Luther King day was a paid holiday in 1996, whereas it was not a paid holiday from 1992 through 1995. While certain changes to the contract were negotiated, I credit the testimony of Donald Calagna, the Union's representative, that he told the Respondent that he had to bring the package to the membership to have them vote on it. The membership rejected the proposals. I find that by instituting Martin Luther King day as a paid holiday and by failing to pay double pay since November 17, 1995, for work performed on Sundays and holidays, the Respondent engaged in unilateral

changes without notice to the Union and without affording the Union an opportunity to bargain, in violation of Section 8(a)(1) and (5) of the Act. See *American Ambulance*, 255 NLRB 417 (1981), enfd. 692 F.2d 762 (9th Cir. 1982).

5. Threat of termination

On May 31 Whitmer discovered that her paycheck included pay for an extra half hour which she was not entitled to. She found out that another employee, Voccia, had been overpaid for half an hour. Whitmer was very upset that she was overpaid and that Voccia was underpaid. I credit Whitmer's testimony that she told this to Kubica and he replied to her "I guess I have to f— fire everybody then." This testimony was corroborated by Tina Martin, who credibly testified that she heard Whitmer tell Kubica "it wasn't fair that Mr. Voccia got docked a half-hour" and then Kubica "yelled and screamed and said do I have to f— fire you all?" I find that Whitmer was engaged in concerted, protected activities in speaking to Kubica about a fellow employee not being docked the half-hour. See *Guardian Industries Corp.*, supra, 319 NLRB at 549; *Wilson Trophy Co. v. NLRB*, 989 F.2d 1502, 1507 (8th Cir. 1993). I find that Kubica's statement was a threat to terminate the employees, in violation of Section 8(a)(1) of the Act.

6. Subcontracting

The complaint alleges that during March the Respondent subcontracted work always previously performed by employees in the bargaining unit to an outside contractor, in violation of the contract. The General Counsel maintains that the Respondent subcontracted sandblowing work during a weekend in March without notification to the Union. During the period March 16, 1992, through March 15, 1995, the Respondent maintained a lawn maintenance contract with Priority Landscape Construction Corporation. Thereafter, a similar lawn maintenance contract was entered into covering the period March 1, 1996, through February 28, 1998, with Emerald Landscaping, Inc. Musetti conceded that the Respondent used Emerald Landscaping for sandblowing in 1996. Musetti also conceded that he did not see anyone blowing sand on weekends during 1996. Kubica credibly testified that during 1996 Emerald's employees did not perform any sandblowing duties on weekends. This testimony was uncontroverted. I find that the General Counsel has not sustained its burden of showing that the Respondent subcontracted sandblowing work during a weekend in March, in violation of the Act. Accordingly, the allegation is dismissed.

7. Tape recording

The Respondent contends that Musetti's testimony should be stricken since counsel for the General Counsel failed to turn over and produce a tape recording and transcript of Musetti's conversation with Kubica prior to the General Counsel's rebuttal. The Respondent contends that the tape recording and the transcript of the tape recording constitute "statements" within the meaning of Section 102.118 of the Board's Rules.

Section 102.118(d) states:

The term called "statement" as used in subsections (b) and (c) of this section means: (1) a written statement made by said witness and signed or otherwise adopted or approved by him; or (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the party obligated to

produce the statement and recorded contemporaneously with the making of such oral statement.

Clearly the term "statement" referred to in Section 102.118 refers to a statement by the witness. What is involved in this proceeding is a tape recording of a conversation by the Respondent's manager, Kubica. I find that the General Counsel was not required to turn over the material pursuant to Section 102.118. See *Caterpillar, Inc.*, 313 NLRB 626, 627 fn. 4 (1994). With respect to the use of the tape recording, in *McAllister Bros.*, 278 NLRB 601 fn. 2 the Board stated that it has "sometimes found tape recordings of employee meetings to be the best evidence of what was said. See, e.g., *Algrec Sportsweat Co.*, 271 NLRB 499, 505 (1984)."

CONCLUSIONS OF LAW

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

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By threatening demotion and by threatening to terminate employees for protected activities, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. By suspending Whitmer and issuing her a warning for protected activities, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

5. By bypassing the Union and by making unilateral changes without notice to the Union, the Respondent has engaged in unfair labor practices within of the meaning of Section 8(a)(1) and (5) of the Act.

6. The aforesaid unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

7. The Respondent has not violated the Act in any other manner alleged in the complaint.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find it necessary to order the Respondent to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having unlawfully suspended Dorothy Whitmer, I find it necessary to order the Respondent to make her whole for any loss of earnings she may have suffered. Backpay shall be computed in accordance with the formula approved in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).² In addition, Respondent having ceased paying the employees double pay for work performed on Sundays and holidays since November 17, 1995, I shall order the Respondent to make the employees whole for any loss of earnings they may have suffered, with interest as computed in *New Horizons for the Retarded*, supra.

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

² Under *New Horizons*, interest is computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

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

ORDER

The Respondent, Leisure Knoll Association, Inc., Ridge, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with demotion or termination, suspending employees, and issuing warnings to employees because they engaged in protected activities.

(b) Bypassing the Union or unilaterally changing terms and conditions of employment.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole Dorothy Whitmer for any loss of earnings she may have suffered because of her suspension, with interest, in the manner set forth in the remedy section of this decision.

(b) Within 14 days from the date of this Order remove from its files any reference to the unlawful warning to Whitmer, and within 3 days thereafter notify Whitmer in writing that this has been done and that the warning will not be used against her in any way.

(c) On request, recognize and bargain collectively with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment:

Leadmen, mechanic/maintenance men, handymen/grounds keepers, seasonal help and housekeepers.

(d) On request, reinstate the practice of paying double time for Sunday and holiday work and on request eliminate Martin Luther King day as a paid holiday and make the employees whole for any loss of earnings, with interest in the manner set forth in the remedy section.

(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 backpay due under the terms of this Order.

(f) Within 14 days after service by the Region post at its facility in Ridge, New York, copies of the attached notice marked "Appendix."⁹ Copies of the notice, on forms provided by the Regional Director for Region 29, 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

adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁹ 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."

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, 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 May 21, 1996.

(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 that Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

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 threaten employees with demotion or termination, suspend employees and issuing warnings to employees because they engage in protected activities.

WE WILL NOT bypass the Union or unilaterally change terms and conditions of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights under Section 7 of the Act.

WE WILL make whole Dorothy Whitmer for any loss of earnings she may have suffered because of her suspension, with interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful warning to Whitmer, and within 3 days thereafter notify Whitmer in writing that this has been done and that the warning will not be used against her in any way.

WE WILL, on request, recognize and bargain collectively with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment:

Leadmen, mechanic/maintenance men, handymen/grounds keepers, seasonal help and housekeepers.

WE WILL, on request, reinstate the practice of paying double-time for Sunday and holiday work and, upon request, eliminate Martin Luther King day as a paid holiday and make the employees whole for any loss of earnings, with interest.

LEISURE KNOLL ASSOCIATION, INC.