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Koehn Painting Company and International Brotherhood of Painters and Allied Trades Local Union 76. Cases 17–CA–19923 and 17–CA–19998

April 28, 2000

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

Upon charges and amended charges filed by the Union on October 26 and December 29, 1998, and March 18, 1999, the General Counsel of the National Labor Relations Board issued a consolidated complaint on March 19, 1999, against Koehn Painting Company, the Respondent, alleging that it has violated Section 8(a)(1) and (3) of the National Labor Relations Act. Subsequently, on April 5, 1999, the Respondent filed an answer admitting in part and denying in part the allegations in the consolidated complaint. Thereafter, by letter dated March 3, 2000, the Respondent withdrew its answer to the consolidated complaint.

On March 20, 2000, the General Counsel filed a Motion for Summary Judgment with the Board. On March 22, 2000, 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. Here, although the Respondent initially filed an answer, the Respondent subsequently withdrew that answer. Such a withdrawal of an answer has the same effect as a failure to file an answer, i.e., the allegations in the consolidated complaint must be considered to be admitted to be true.¹

Accordingly, based on the Respondent's withdrawal of its answer to the consolidated complaint, and 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

¹ See *Maslin Transport*, 274 NLRB 529 (1985).

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a corporation, with an office and place of business in Newton, Kansas, has been engaged in the construction industry as a painting contractor. During the 12-month period ending September 30, 1998, the Respondent, in conducting its business operations, provided services valued in excess of \$50,000 for various customers, including CDI Contractors, L.L.C., within the State of Kansas. CDI, an Arkansas corporation, maintains an office and a place of business in Little Rock, Arkansas, where it is engaged in the construction industry as a general contractor. During the 12-month period preceding September 30, 1998, CDI, in conducting its business operations, performed services valued in excess of \$50,000 in States other than the State of Arkansas. 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

At all material times the following named individuals held the positions set forth opposite their respective names and have been supervisors of the Respondent within the meaning of Section 2(11) of the Act and agents of the Respondent within the meaning of Section 2(13) of the Act:

Leroy Koehn	Owner and Manager of Operations
Mrs. Leroy Koehn	Office Manager

On or about the dates set forth below, the Respondent, acting through its agents and supervisors at the Respondent's facility, engaged in the following acts and conduct:

By Leroy Koehn on May 20, 1998, and by Mrs. Leroy Koehn on December 8, 1998, interrogated employees about their support for or activities on behalf of the Union.

By Leroy Koehn on May 20, 1998, told employee-applicants that their applications would be adversely affected by their union affiliation.

By Leroy Koehn on September 15, 1998, told employee-applicants that they were not welcome at the Respondent's facility because it presumed that they intended to organize on behalf of the Union.

By Mrs. Leroy Koehn, on December 8, 1998, told employees that they could not engage in picketing.

By Mrs. Leroy Koehn, on December 8, 1998, promulgated and maintained a discriminatory rule by instructing employees not to talk about their picketing activities, and not to talk to Dillon's employees during worktime.

Since on or about April 27, 1998, the Respondent has refused to consider for hire and/or to hire employee-applicant Steve Pollack.

From about April 27 through about November 30, 1998, the Respondent refused to consider for hire and/or to hire employee-applicant Michael Ramsey.

Since on or about September 16, 1998, the Respondent has refused to consider for hire and/or to hire employee-applicant Rick Schon.

On or about December 8, 1998, the Respondent changed the working conditions of employee Michael Ramsey by isolating him from other employees, and by assigning Ramsey menial duties.

On or about December 18, 1998, the Respondent laid off employee Michael Ramsey.

The Respondent engaged in the conduct described above because the Steve Pollack, Michael Ramsey, and Rick Schon joined and assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities.

CONCLUSION OF LAW

By the acts and conduct described above, the Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act, in violation of Section 8(a)(1) of the Act. By refusing to consider for hire and/or refusing to hire the individuals named above, and by changing the working conditions of employee Michael Ramsey by isolating him, assigning him menial duties, and laying him off, the Respondent has been discriminating in regard to the hire or terms or conditions of employment of its employees, thereby discouraging membership in a labor organization in violation of Section 8(a)(1) and (3) of the Act. The foregoing unfair labor practices affect commerce within the meaning of 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 has violated Section 8(a)(3) and (1) by refusing to consider for hire and/or refusing to hire employee Michael Ramsey from about April 27 through about November 10, 1998, isolating him from other employees, assigning him menial duties, and laying him off, we shall order the Respondent to offer the discriminatee full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and to make him whole for any loss of earnings and other benefits suffered as a result of all the discrimination against him. 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 refusal to consider for hire and/or refusal to hire, the unlawful isolation, unlawful assignment of menial duties, and the unlawful layoff of Michael Ramsey, and to notify the discriminatee in writing that this has been done.

In addition, having found that the Respondent has violated Section 8(a)(3) and (1) by refusing to consider for hire and/or refusing to hire Steve Pollack and Rick Schon, we shall order the Respondent to offer them immediate employment in the same positions they would have had, but for the unlawful discrimination against them, or, if those jobs no longer exist, to substantially similar positions, 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 refusal to consider for hire and/or refusal to hire these individuals, and to notify the discriminatees in writing that this has been done.

ORDER

The National Labor Relations Board orders that the Respondent, Koehn Painting Company, Newton, Kansas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees about their support for or activities on behalf of the Union.

(b) Telling employee-applicants that their applications would be adversely affected by their union affiliation.

(c) Telling employee-applicants that they were not welcome at the Respondent's facility because it presumed that they intended to organize on behalf of the Union.

(d) Telling employees that they could not engage in picketing.

(e) Promulgating and maintaining a discriminatory rule by instructing employees not to talk about their picketing activities, and not to talk to Dillon's employees during worktime.

(f) Discouraging membership in International Brotherhood of Painters and Allied Trades Local Union 76, or any other labor organization, by laying off employees, isolating them, assigning them menial duties, refusing to consider them for hire, refusing to hire them, or otherwise discriminating in any way with respect to their hire or tenure of employment or any term or condition of employment.

(g) 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, offer Michael Ramsey full reinstatement to his former job, or, if that job no longer exists, to a substantially equivalent position.

(b) Make Michael Ramsey whole for any loss of earnings and other benefits suffered as a result of all the discrimination against him, with interest, as set forth in the remedy portion of this decision.

(c) Within 14 days from the date of this Order, remove from its files any and all references to the unlawful refusal to consider for hire and/or refusal to hire, the unlawful isolation, the unlawful assignment to menial duties and the unlawful layoff of Michael Ramsey, and within 3 days thereafter notify him in writing that this has been done and that the unlawful conduct will not be used against him in any way.

(d) Within 14 days from the date of this Order, offer Steve Pollack and Rick Schon immediate employment in the same positions they would have had, but for the unlawful discrimination against them, or, if those jobs no longer exist, to substantially similar positions.

(e) Make Steve Pollack and Rick Schon whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, with interest, in the manner set forth in the remedy portion of this decision.

(f) Within 14 days from the date of this Order, remove from its files any and all references to the unlawful failure and refusal to consider for hire and/or refusal to hire these individuals, and within 3 days thereafter notify them in writing that this has been done and that the unlawful conduct will not be used against them in any way.

(g) 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.

(h) Within 14 days after service by the Region, post at its facility in Newton, Kansas, copies of the attached notice marked "Appendix."² Copies of the notice, on forms provided by the Regional Director for Region 17, 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 shall be taken by the Respondent to ensure that the notices are not altered, defaced or covered by any other material. In the event

² 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."

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 April 27, 1998.

(i) 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. April 28, 2000

Sarah M. Fox, Member

Wilma B. Liebman, Member

Peter J. Hurtgen, 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 interrogate our employees about their support for or activities on behalf of the Union.

WE WILL NOT tell employee-applicants that their applications will be adversely affected by their union affiliation.

WE WILL NOT tell employee-applicants that they were not welcome at our facility because we presumed that they intended to organize on behalf of the Union.

WE WILL NOT tell our employees that they cannot engage in picketing.

WE WILL NOT promulgate and maintain a discriminatory rule by instructing our employees not to talk about their picketing activities, and not to talk to Dillon's employees during worktime.

WE WILL NOT discourage membership in International Brotherhood of Painters and Allied Trades Local Union 76, or any other labor organization, by laying off our employees, isolating them, assigning them menial duties, refusing to consider them for hire, refusing to hire them, or otherwise discriminating in any way with respect to

their hire or tenure of employment or any term or condition of employment.

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, offer Michael Ramsey full reinstatement to his former job, or, if that job no longer exists, to a substantially equivalent position.

WE WILL make Michael Ramsey whole for any loss of earnings and other benefits suffered as a result of all the discrimination against him, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any and all references to our unlawful refusal to consider for hire and/or refusal to hire, our unlawful isolation, our unlawful assignment to menial duties and our unlawful layoff of Michael Ram-

sey, and within 3 days thereafter notify him in writing that this has been done.

WE WILL, within 14 days from the date of this Order, offer Steve Pollack and Rick Schon immediate employment in the same positions they would have had, but for the unlawful discrimination against them, or, if those jobs no longer exist, to substantially similar positions.

WE WILL make Steve Pollack and Rick Schon whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any and all references to our unlawful refusal to consider for hire and/or refusal to hire these individuals, and within 3 days thereafter notify them in writing that this has been done.

KOEHN PAINTING COMPANY