Artesia Ready Mix Concrete, Inc. *and* Operating Engineers Local 3, International Union of Operating Engineers, AFL–CIO. Case 32–CA–19268–1

June 3, 2002

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND COWEN

The General Counsel in this case seeks summary judgment on the ground that the Respondent has failed to file an answer to the complaint. Upon a charge filed by Operating Engineers Local 3, International Union of Operating Engineers, AFL–CIO, the Union, on December 3, 2001, the Acting Regional Director issued the complaint on February 15, 2002, against Artesia Ready Mix Concrete, Inc., the Respondent. The complaint alleges that the Respondent has violated Section 8(a)(1) and (5) of the Act. The Respondent failed to file an answer.

On April 18, 2002, the General Counsel filed a Motion for Summary Judgment with the Board. On April 19, 2002, 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 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 states 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 March 13, 2002, notified the Respondent that unless an answer was received by March 19, 2002, a Motion for Summary Judgment would be filed.

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

At all material times, the Respondent, a California corporation, with an office and place of business in Tulare, California, has been engaged in the manufacture and nonretail and retail distribution of ready mix concrete and related products. During the 12-month period preceding the issuance of the complaint, the Respondent, in the course and conduct of its business operations, sold and shipped goods valued in excess of $50,000 directly to customers or business enterprises inside the State of California who themselves meet one of the Board's jurisdictional standards, other than the indirect inflow or indirect outflow standards. 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 following employees of the Respondent (the unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time production and maintenance employees and drivers employed at Respondent's Farmersville, Lemoore, Pixley, Porterville, Tulare, and Woodlake, California facilities; excluding all other employees, guards, and supervisors as defined in the Act.

Since at least June 19, 1998, and at all times material, the Union has been the designated exclusive collective-bargaining representative of the employees in the unit, and since that date has been recognized as such representative by the Respondent. Such recognition has been embodied in a collective-bargaining agreement, which was effective for the period June 19, 1998, through December 31, 2000.

At all times since at least June 19, 1998, the Union, by virtue of Section 9(a) of the Act, has been, and is, the exclusive representative of the employees in the unit for the purposes of collective bargaining with respect to pay, wages, hours of employment, and other terms and conditions of employment.

On about August 21, 2001, the Respondent demoted unit employee Ray Dietz from the position of night maintenance foreman to a general plant worker position. As a result, employee Dietz' hourly pay rate was reduced from $15.80 to $12.70 and his work schedule was altered so that he no longer worked a set shift schedule as he had prior to the demotion.

The Respondent's demotion of employee Dietz relates to the wages, hours, and other terms and conditions of employment of the employees in the unit and is a mandatory subject of collective bargaining. The Respondent demoted Dietz without prior notice and/or adequate prior notice to the Union and without affording the Union an opportunity to bargain with the Respondent over the demotion and its effects.

CONCLUSION OF LAW

By the acts and conduct described above, the Respondent has failed and refused, and is failing and refusing, to bargain collectively and in good faith with the representative of its employees, and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) 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 has violated Section 8(a)(1) and (5) by demoting unit employee Ray Dietz from his position as night maintenance foreman to a general plant worker position, thereby reducing his hourly wage from $15.80 to $12.70 and altering his work schedule so that he no longer works a set shift schedule, we shall order the Respondent to offer Ray Dietz full reinstatement to his former position as night maintenance foreman, at his former hourly wage and on his former schedule, 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 him 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 *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).[1]

ORDER

The National Labor Relations Board orders that the Respondent, Artesia Ready Mix Concrete, Inc., Tulare, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain in good faith with Operating Engineers Local 3, International Union of Operating Engineers, AFL–CIO, as the exclusive representative of the employees in the following unit, by unilaterally demoting employee Ray Dietz, and reducing his pay and altering his schedule, without giving the Union prior notice and/or adequate prior notice and an opportunity to bargain over the demotion and its effects:

> All full-time and regular part-time production and maintenance employees and drivers employed at Respondent's Farmersville, Lemoore, Pixley, Porterville, Tulare, and Woodlake, California facilities; excluding all other employees, guards, and supervisors as defined in the Act.

(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) On request, bargain in good faith with the Union over the decision to demote employee Ray Dietz, and reduce his hourly wage and alter his schedule, and the effects of this decision.

(b) Within 14 days from the date of this Order, offer employee Ray Dietz full reinstatement to his former position as night maintenance foreman, at his former hourly wage and on his former schedule, 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.

(c) Make employee Ray Dietz whole for any loss of earnings and other benefits suffered as a result of his demotion, with interest as described in the remedy section of this decision.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records including an electronic copy of such records if stored in electronic form, 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 Tulare, California, copies of the attached notice marked "Appendix."[2] Copies of the notice, on forms provided by the Regional Director for Region 32, 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 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 August 21, 2001.

[1] The complaint also requested as part of the remedy that the Board order the Respondent to reimburse Dietz for any extra Federal and/or State income taxes that would or may result from a lump-sum backpay award. The General Counsel's motion expressly abandons this request.

[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."

(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. June 3, 2002

Peter J. Hurtgen, Chairman

Wilma B. Liebman, Member

William B. Cowen, 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 Federal labor law and has ordered us to post and obey by this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Chose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to bargain in good faith with Operating Engineers Local 3, International Union of Operating Engineers, AFL–CIO, as the exclusive representative of the employees in the following unit, by unilaterally demoting employee Ray Dietz, and reducing his pay and altering his schedule, without giving the Union prior notice and/or adequate prior notice and an opportunity to bargain over the demotion and its effects:

> All full-time and regular part-time production and maintenance employees and drivers employed at our Farmersville, Lemoore, Pixley, Porterville, Tulare, and Woodlake, California facilities; excluding all other employees, guards, and supervisors as defined in the Act.

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, on request, bargain in good faith with the Union over the decision to demote employee Ray Dietz, and reduce his hourly wage and alter his schedule, and the effects of this decision.

WE WILL, within 14 days from the date of the Board's Order, offer employee Ray Dietz full reinstatement to his former position as night maintenance foreman, at his former hourly wage and on his former schedule, 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.

WE WILL make employee Ray Dietz whole for any loss of earnings and other benefits suffered as a result of his demotion, with interest.

ARTESIA READY MIX CONCRETE, INC.