

Boddy Construction Co. and Gerald R. Bowie and Karl W. Ernest. Cases 7–CA–44065 and 7–CA–44215

April 30, 2003

DECISION AND ORDER

BY MEMBERS SCHAUMBER, WALSH, AND ACOSTA

On March 6, 2002, Administrative Law Judge John T. Clark issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

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, findings,¹ and conclusions and to adopt the recommended Order.

In reviewing the decisions of administrative law judges, the Board considers the entire record, de novo, in light of the exceptions and briefs, to determine whether the judges' rulings, findings, and conclusions are supported by the preponderance of the relevant evidence. We agree with the judge's finding that the General Counsel has proven by the preponderance of the relevant evidence that the Respondent violated Section 8(a)(3) and (1) of the Act by laying off Karl Ernest and discharging Gerald Bowie for their union support and activities. We wish to comment, however, on three aspects of the judge's decision with respect to the discharge of Bowie.

The judge found that Dave Boddy, the Respondent's president, referred to Bowie as an "instigator" in the midst of a discussion regarding the Respondent's attempt to pack the bargaining unit with truckdrivers who would vote against the Union in a decertification election. Given the context in which this characterization was made and the other record evidence, including Bowie's role in the successful 1997 union election, we believe that the judge reasonably inferred that the Respondent considered Bowie to be a disruptive influence because of his union support and activities and that the term "instigator" was a euphemism for Bowie's pronoun sentiments. See *James Julian Inc. of Delaware*, 325 NLRB 1109, 1109 (1998) (holding that employer complaints about "bad attitude" are often euphemisms for pronoun

sentiments, particularly when there is no alternative explanation for the perceived "attitude" problem).²

The judge found to be pretextual the Respondent's argument that it discharged Bowie because, immediately before the decertification election, he threatened employees Keith Glover and Samuel Wilcox with adverse financial consequences if they did not vote in favor of the Union. In so finding, the judge speculated that Glover probably did not fear Bowie's threat to turn Glover in for collecting ill-gotten unemployment benefits. We do not believe that Glover's fear, or lack thereof, of Bowie is material. Accordingly, we do not rely on this aspect of the judge's rationale.

We also believe the judge failed to properly address the seriousness of Bowie's threats to Glover and Wilcox. In its exceptions, the Respondent contends, inter alia, that Bowie's threats constituted serious, unprotected activity that interfered with the laboratory conditions necessary for a fair election. We find merit in the Respondent's exception insofar as we believe that Bowie engaged in coercive, unprotected conduct. Nevertheless, as set forth above, we agree with the judge that the Respondent failed to prove it relied on this conduct in discharging Bowie.³

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Boddy Construction Co., Marysville, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Patricia A. Fedewa, Esq., for the General Counsel.

Robert A. Day and Gayle L. Landrum, Esqs., of Detroit, Michigan, for the Respondent.

DECISION

STATEMENT OF THE CASE

JOHN T. CLARK, Administrative Law Judge. This case was tried in Port Huron, Michigan, on November 8, 2001. The charge in Case 7–CA–44065 was filed May 25, 2001,¹ and the charge in Case 7–CA–44215 was filed July 18. The consolidated complaint was issued August 31. The consolidated complaint alleges that Boddy Construction Company (the Respondent) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) when it laid off employee Karl W. Ernest, on or about February 19 and discharged employee Ge-

¹ 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. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² Member Acosta finds it unnecessary to rely on the citation to *James Julian*, supra, in agreeing with his colleagues for the reasons they set out that the Respondent's use of the term "instigator" on the facts of this case was a euphemism for Bowie's pronoun sentiments.

³ Member Walsh finds it unnecessary to assess the character of Bowie's threats, because he finds, in agreement with his colleagues, that the Respondent did not discharge Bowie because of his threats.

¹ All dates are in 2001 unless otherwise indicated.

rald R. Bowie on April 13. The Respondent denies any unlawful conduct.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, with an office and place of business in Marysville, Michigan, is engaged as a building and road contractor in the building and construction industry. During the calendar year ending December 31, 2000, the Respondent, in conducting its business operations, received at its Marysville facility materials and supplies valued in excess of \$50,000 directly from suppliers located outside the State of Michigan. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the International Brotherhood of Teamsters, Local 339, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Ernest and Bowie were truckdrivers for the Respondent until Ernest was laid off, on or about February 19, and Bowie was discharged on April 13. Ernest was hired in June 1995 and Bowie in June 1997. In 1997, Ernest contacted the Department of Labor in order to require the Respondent to pay its employees the prevailing wage rate at certain jobsites. Bowie was also a part of this action. In November 1997, Ernest was instrumental in contacting the Union and the subsequent organizing campaign. Ernest and Bowie voted to be represented by the Union in the certification election, a fact known to the Respondent because the outcome of the election was 4-0. Ernest was the union steward and a member of its bargaining team (Tr. 21 incorrectly states "unit" see Tr. 42). Bowie also attended some negotiating sessions.

During the election campaign, Horace Boddy, the Respondent's owner, and Superintendent Duke Dunn told the employees that the Respondent would "sell its trucks" and that the employees "would be picketing for two years," presumably if the Union prevailed in the election. The collective-bargaining agreement between the Union and the Respondent expired on September 27, 2000. As a result of a decertification election held on March 28, 2001, the Union was decertified by a vote of 3 for, and 2 against decertification. Ernest and Bowie voted in the election.

B. Ernest's Termination

Ernest had back surgery because of a work-related injury in May 1999. His doctor allowed him to return to work, with a 20-pound lifting restriction, on September 7, 1999. He continued to work, with that weight restriction, until his layoff.

On November 22, 2000, the Respondent, allegedly in response to poor attendance by all drivers, attached a letter to the paychecks of all drivers. The letter stressed the importance of

attendance (R. Exh. 2). The parties stipulated that Keith Glover was hired as a driver on April 2, 2000, and that for the remainder of the year his attendance was comparable to that of Ernest (Tr. 16-17).

Pursuant to a directive from Horace Boddy, Ernest underwent an independent medical evaluation on February 14, 2001 (GC Exh. 15). The examination was performed by Dr. John Corbett, an orthopedic surgeon selected by the Respondent. Based on his examination, Dr. Corbett wrote a detailed report concluding that Ernest was capable of continuing his current job, which was within his lifting restriction (R. Exh. 7). Not satisfied with this report, Dave Boddy, the Respondent's president and son of Horace Boddy, called Ernest and said that he intended to ask the doctor if getting in a truck would hurt Ernest's back. Ernest responded that the lifting restriction had not changed since he returned to work after his surgery. Dave Boddy told Ernest to remain on unemployment, claiming that the Respondent's insurer wanted Ernest to be able to work, without a restriction, when he returned.

On February 22, 2001, Ernest received a letter from Horace Boddy the subject of which was "Fitness for Duty." Boddy writes that Dr. Corbett's report is wrong but it is not the issue, "the essential problem is your daily attendance" (GC Exh. 15). He offers Ernest three options: separation, permanent layoff, or leave of absence. Although Boddy wrote that should Ernest fail to choose an option, a separation notice would be issued, no choice was made, and no notice was issued.

The Testimony of Jerry Rose

Jerry Rose is employed by a subcontractor of the Respondent. He testified pursuant to a subpoena from the General Counsel. Rose testified that during late January or early February 2001 he had an employment interview with Dave Boddy and Superintendent Duke Dunn. The interview was in the lunchroom of the Respondent's facility. Rose testified that Dave Boddy told him that there were currently four drivers and he was looking for two additional drivers to vote "no" and cancel the two union votes, in order to vote the Union out. Rose also testified that Boddy referred to Jerry Bowie as an instigator. As Rose was leaving the interview he heard either Boddy or Dunn, he was unsure which, say that he did not like Rose. The other man replied that "we will just get rid of him after the vote." A few days later Rose told the Respondent that he would not participate in "trying to vote the Union out" (Tr. 88-92). I find Rose to be a totally creditable witness. He had no apparent interest in the outcome of the case and his demeanor was that of an honest and impartial individual. Dave Boddy and Dunn deny making the statements. Neither individual had the testimonial demeanor of an honest and sincere witness, either when testifying about the Rose interview or other events which will be set forth herein. I discredit their testimony.

Analysis

Section 8(a)(3) prohibits employer "discrimination [against employees] in regard to hire or tenure or any term or condition of employment to encourage or discourage membership in any labor organization." The methodology for determining discriminatory motivation is set forth in *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied

455 U.S. 989 (1982). Under *Wright Line*, the General Counsel has the initial burden to persuade that antiunion sentiment was a substantial or motivating factor in the employer's action. To sustain the burden, the General Counsel must show that the employee was engaged in protected activity, that the employer was aware of the activity, and that the activity was a substantial or motivating reason for the employer's action. Motive may be demonstrated by circumstantial or direct evidence and is a factual issue, which the Board's expertise is peculiarly suited to determine. Proof of the protected activity, employer knowledge, and animus toward the activity supports an inference that the employee's protected conduct was a motivating factor in the employer's action. The burden of persuasion then shifts to the employer to prove that it would have taken the same action even in the absence of the protected activity. *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996); *Wright Line*, supra at 1089. The employer may rebut the General Counsel's case by proving that animus played no part in its actions or, by establishing as an affirmative defense, that it would have taken the same action even in the absence of the employee's protected conduct. The employer cannot simply present a legitimate reason for its actions but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct.

The record contains significant evidence of Ernest's union and protected concerted activity. Ernest instituted an action by the Department of Labor to require the Respondent to pay prevailing wage rates. Ernest was instrumental in contacting the Union and the subsequent organizing campaign and voted for the Union. He was the union steward and a member of the Union's bargaining committee. Horace Boddy, the Respondent's owner, admitted to antiunion animus when the Union initially appeared on the scene. Although the foregoing findings are sufficient to establish the requisite protected activity and employer knowledge, the strongest evidence of the intensity of the Respondent's antiunion sentiment is provided by Jerry Rose. Rose testified that the Respondent's president, and its owner's son, Dave Boddy, along with its superintendent, Duke Dunn, engaged in an apparent attempt to "pack the unit" by hiring extra employees into the unit in order to vote against the Union. See generally *Einhorn Enterprises*, 279 NLRB 576, 596 (1986). I also find that the Respondent was not satisfied with merely ridding itself of the Union, but was motivated to rid itself of its most senior driver because of his protected concerted activity and union membership. I conclude that the counsel for the General Counsel has met the initial burden.

Having found that counsel for the General Counsel has sustained the initial burden, the burden shifts to the Respondent to establish that its action would have taken place in the absence of Ernest's protected activity. The Respondent contends that Ernest's employment ended because of his inability to work a continuous full-time schedule. The Respondent's letter of November 22, 2000, indicates that attendance was a problem with all the drivers and not just Ernest (R. Exh. 2). Only Ernest however, was singled out. The Respondent bases its attendance argument on the percentage of time that Ernest did not work a 40-hour week. The Respondent contends that between February 28 and December 16, 2000, Ernest worked less than a 40-

hour week 52 percent of the time. The percentages that the Respondent used, however, include weeks when Ernest was sent home because of lack of work or told not to report for work (GC Exh. 16; Tr. 116-123). Although the Respondent demonstrated that it has records indicating when employees called off sick (R. Exh. 6) there is no compilation of the time Ernest missed from work by his own volition. This may have been because, as the Respondent stipulated, Ernest and employee Keith Glover, a driver who was hired on April 2, 2000, had comparable attendance records for the remainder of the year. No action was taken against Glover, or any other driver, because of their attendance. I find this disparate treatment to be additional evidence of the Respondent's motivation to terminate Ernest because of his union involvement.

The Respondent also argues that Ernest was terminated because he was not 100-percent fit for duty because of the 20-pound lifting restriction placed on him by his attending physician. I find this contention to be a disingenuous attempt to disguise the fact that the Respondent's real reason for terminating Ernest was his union membership and concerted activities. The lifting restriction that Ernest had when he returned to work on September 7, 1999, was identical to that placed on him by Dr. Corbett after he completed his examination of Ernest on February 14, 2001. I do not credit Horace Boddy's testimony to the extent that it suggests that the Respondent terminated Ernest because his job performance was not satisfactory (Tr. 123). There is no evidence, disciplinary or otherwise, to support that contention. Additionally, such a contention is inconsistent with the other reason advanced by the Respondent, that it was his poor attendance which caused it to terminate Ernest, i.e., if he was unable to perform the job, his attendance on the job would appear to be irrelevant. Moreover, I doubt that the Respondent would retain an employee, for over 5 months, if the employee was not performing satisfactorily. Dr. Corbett's initial report indicates that an accommodation was reached that did not require Ernest to lift weights greater than 20 pounds (R. Exh. 7, p. 5). I find that the Respondent was satisfied with Ernest's job performance until it saw an opportunity to rid itself of the Union and Ernest, one of the two remaining union advocates.

I also find that the Respondent has not been straightforward in its explanation of why it sent Ernest to Dr. Corbett for examination. Ernest testified that Dave Boddy told him that the Respondent's insurance carrier required the examination (Tr. 28). Dave Boddy denies this statement but for the reasons set forth above I discredit his denial. Horace Boddy also testified that the insurance carrier wanted the examination (Tr. 105). No satisfactory documentary evidence, however, was produced by the Respondent indicating that the examination was required by its insurance carrier, nor does the letter to Ernest from Horace Boddy sending him for the examination mention any such requirement (GC Exh. 15). The Respondent does not explain how a finding that Ernest was fit for duty would, in anyway, alleviate its alleged problem that Ernest did not have a satisfactory attendance record. It does not follow that a certification for full duty would result in improved attendance. In this regard I find Respondent's Exhibit 10 enlightening. This document was prepared long after the foregoing events transpired

and only shortly before the trial. The Respondent submitted to Dr. Corbett additional facts, documents, and statements indicating that Ernest had been less than truthful during his physical examination in February 2001 (R. Exhs. 8 and 9). Doctor Corbett concluded, based solely on the information submitted by the Respondent and without the benefit of another physical examination, that Ernest was incapable of working a 40-hour week even with the restriction. Although I give no weight to the doctor's opinion as to Ernest's ability to work a 40-hour week, I do find this exhibit evidence of how desperate the Respondent was to provide some explanation for its actions. Doctor Corbett's belated opinion was what the Respondent was hoping to obtain in February, just before the decertification election, and thus provide it with official documentation for terminating Ernest. The fact that the Respondent did not challenge Ernest's vote in the decertification election is not persuasive evidence, as argued by the Respondent, that it harbored no antiunion animus towards Ernest. Once the Respondent ascertained that the outcome of the election would be three to one adding a dissenting vote would not interfere with its plan.

Based on the foregoing I find the Respondent's explanation for terminating Ernest incredible and not supported by the record. I find that the Respondent has not met its burden of proving that it would have taken the same action even in the absence of his protected activity. Accordingly, I find that the Respondent violated Section 8(a)(1) and (3) of the Act when it unlawfully laid off employee Karl W. Ernest on or about February 19, 2001.

C. Bowie's Discharge

Gerald Bowie was never given a reason for his discharge. He had been a truckdriver for the Respondent since May 1997. His employment record was unblemished when he was discharged on April 13, 2001.

Notwithstanding his unblemished employment record Superintendent Dunn asked Bowie to quit sometime in February 2001. Bowie was the owner of a truck, which he intended to lease, with a driver, to the Respondent. Dunn told Bowie that if Bowie quit his employment with the Respondent, and drove his own truck, the Respondent would lease Bowie's truck for the summer (Tr. 75). Had Bowie quit he would have been ineligible to vote in the March 28 decertification election.

Dunn admits that the conversation occurred, but claims it was initiated by Bowie. He stated that Bowie asked him if he should drive his own truck and Dunn assured him that he would have work all summer if he choose to drive his truck. Dunn told Bowie that it was Bowie's choice. I have previously found that Dunn is not a believable witness. I credit Bowie's version not only because his demeanor appeared to be that of a truthful witness, but also because his testimony is consistent with the testimony of Jerry Rose. Rose testified that it was in late January or early February 2001 when the Respondent began to implement its scheme to pack the unit. Rose credibly testified that it was during that same time that Dave Boddy said Bowie was an instigator. Preventing Bowie from voting in the decertification election, for whatever reason, would further the Respondent's objective of ousting the Union.

Bowie was still employed by the Respondent on March 28, the date of the decertification election. Bowie was in the parking lot outside the voting area talking with Sam Wilcox and Tom Pittman. They were the recently hired drivers who filed the petition to decertify the Union shortly after being employed. Bowie told Wilcox that if he voted against the Union, he would report him for not reporting earnings that were paid in cash.

Keith Glover, a driver who had recently had hip replacement surgery, was also in the group. Bowie poked Glover in the chest and said he could get turned in for collecting unemployment insurance, while being off work because of his surgery, if he did not vote for the Union. Glover denied the accusation, pushed Bowie away, and threatened to burn down his house. Glover was restrained by Pittman, and shortly thereafter, they reported the incident to Superintendent Dunn. Dunn asked Glover if he wanted to remain in his office but Glover chose to return to the parking lot. After the election, Dunn called Dave Boddy, who was vacationing with Horace Boddy in Florida. Dunn reported the results of the election and told him about the incident. A few days later, but while the Boddys were still in Florida, Dunn spoke with Wilcox, as well as again speaking with Glover and Pittman, regarding the incident. Dunn never questioned Bowie about what occurred. Dunn again reported his findings to Dave Boddy, who was still in Florida. The Boddys returned from Florida during the first week in April 2001. Upon his return Dave Boddy questioned Glover, Pittman, and Wilcox. Bowie was never questioned by anyone.

On April 13, 2001, Bowie was ordered to leave the jobsite and report to the Respondent's facility. Upon his return, Dave Boddy gave him his check and told him to clean out his truck. Bowie said nothing. He had previously heard rumors that he would be discharged. He asked Horace Boddy about the rumors and was told that a decision had not been reached. Dave Boddy initially stated on direct examination that he told Bowie that he was being let go because "you guys are bumping heads." In response to being asked to give "each and every reason" that he gave Bowie, he added the parking lot incident. I have previously found Dave Boddy not to be a credible witness, I discredit his statements and find that he did not give Bowie any reason for the discharge.

Analysis

I again apply the *Wright Line* methodology to determine whether Bowie was unlawfully discharged. As I have previously found, shortly after Bowie was employed in 1997, he joined Ernest in contacting the Department of Labor in order to require the Respondent to pay the prevailing wage rate at certain jobsites. In November 1997, Bowie voted to be represented by the Union in the certification election, a fact known to the Respondent because the outcome of the election was 4-0. Bowie also attended negotiating sessions. In addition to Horace Boddy's admitted antiunion animus when the Union initially appeared on the scene, Jerry Rose credibly testified that Dave Boddy referred to Bowie as an "instigator," which is synonymous with troublemaker, a word that has long been found to be a familiar euphemistic term denoting employees who are considered disruptive elements because of their union activities. E.g., *Huntington Hospital, Inc.*, 218 NLRB 51, 57

(1975). Dave Boddy's reference to Bowie as an instigator was made at the same time the Respondent began implementing its unit packing scheme. I have found that only about 2 months earlier the Respondent had unlawfully laid off Ernest, its most senior driver and union supporter. After Ernest, Bowie was the most senior driver and remaining union supporter. He also had an unblemished work record. I find the Respondent's discharge of Bowie, without explanation, is also evidence of unlawful motivation. I conclude that counsel for the General Counsel has met the initial burden.

Having found that counsel for the General Counsel has sustained the initial burden, the burden shifts to the Respondent to establish that its action would have taken place even in the absence of Bowie's protected activity. In this regard the Respondent contends that Bowie was discharged as a result of threatening and assaulting his coworkers immediately before the decertification election. I disagree and find that the Respondent took opportunistic advantage of that incident to mask its true motive, which was to be rid of the one remaining prounion employee.

The Respondent argues that Bowie was discharged only after an "extensive investigation." I do not agree that the investigation was extensive when Bowie, one of the two protagonists, was never offered the opportunity to be interviewed. The investigation seems to have consisted solely of first Dunn, and then Dave Bowie, asking the same people the same questions.

The testimony of the four individuals regarding the incident was consistent. Glover did attempt to justify his threat to burn Bowie's house by saying that he was frightened by Bowie. No doubt at some point he was fearful. Bowie is the larger man, and Glover had recently had hip replacement surgery. I am not unmindful, however, that it was Glover who had to be restrained and who choose to return to the parking lot rather than stay in Dunn's office. Nor do I find Bowie's words to be anywhere near as threatening as Glover's. Bowie merely implied that he would report Glover for collecting unemployment compensation when Glover was unable to work. This was an accurate statement and Glover did have to return the money (Tr. 168). Based on my observations of their demeanor as they testified it was apparent that neither protagonist, nor the other participants, were even slightly traumatized by either the words or actions that took place in the parking lot. As Pittman testified, it was "verbal . . . there was no fights" (Tr. 149).

I find that the Respondent's failure to afford Bowie an opportunity to participate in the investigation, and its disparate response to the statements made by Bowie, the remaining union advocate, and Glover, as further evidence of the Respondent's unlawful motivation. *Tubular Corp.*, 337 NLRB 99 (2001).

Accordingly, as the Respondent's explanation for discharging Bowie is found to be incredible and unsupported by the record I find that the Respondent has not met its burden of proving that it would have taken the same action even in the absence of his union activity or affiliation. I therefore conclude that the Respondent violated Section 8(a)(1) and (3) of the Act by discriminatorily discharging Gerald R. Bowie.

CONCLUSIONS OF LAW

1. By unlawfully laying off employee Karl W. Ernest on or about February 19, 2001, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

2. By unlawfully discharging employee Gerald R. Bowie on April 13, 2001, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

REMEDY

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

The Respondent having discriminatorily laid off employee Karl W. Ernest, and discriminatorily discharging employee Gerald R. Bowie it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of layoff² or discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

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

ORDER

The Respondent, Boddy Construction Company, Marysville, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Laying off or otherwise discriminating against any employee for supporting International Brotherhood of Teamsters, Local 339, AFL-CIO, or any other union.

(b) Discharging or otherwise discriminating against any employee for supporting International Brotherhood of Teamsters, Local 339, AFL-CIO, or any other union.

(c) 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 employees Karl W. Ernest and Gerald R. Bowie 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.

(b) Make employees Karl W. Ernest and Gerald R. Bowie whole 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 the decision.

² The exact date of Ernest's unlawful layoff is unclear from the record and is best left to the compliance stage of this proceeding.

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.

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

(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 Marysville, Michigan, copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 7, 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 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 February 19, 2001.

(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.

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."

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 Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist any union
- Choose 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 lay off, discharge, or otherwise discriminate against any of you for supporting International Brotherhood of Teamsters, Local 339, AFL-CIO, or any other union, or for engaging in protected concerted 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, offer employees Karl W. Ernest and Gerald R. Bowie 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.

WE WILL make employees Karl W. Ernest and Gerald R. Bowie whole for any loss of earnings and other benefits resulting from our unlawful action 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 reference to the unlawful layoff of Karl W. Ernest and the unlawful discharge of Gerald R. Bowie and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the unlawful layoff and unlawful discharge will not be used against them in any way.

BODDY CONSTRUCTION CO.