

B&G Building Maintenance, Inc. and Service Employees International Union, Local 82, AFL-CIO. Case 5-CA-29225

May 30, 2003

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN
AND WALSH

This case is before the Board on the General Counsel's Motion to Vacate Decision and Motion for Summary Judgment. The General Counsel's motion requests that we vacate the Board's September 28, 2001 Decision and Order in the above-entitled proceeding, which granted the General Counsel's motion for summary judgment and found that B&G Building Maintenance, Inc., the Respondent, had violated Section 8(a)(1) and (3) of the Act in various respects.¹

In his instant motion, filed March 5, 2003, the General Counsel states that when the original Motion for Summary Judgment was filed on July 23, 2001, the certificate of service contained an incorrect address for the Respondent's agent, Brett Tate. As a result of this inadvertent error, when the Board issued its July 25, 2001 Order Transferring Proceeding to the Board and Notice to Show Cause why the General Counsel's motion should not be granted, the Order and notice to be served on the Respondent was returned to the Board. Therefore, the Respondent was not served with a copy of the Order and Notice to Show Cause before the Respondent's response was due.

The General Counsel filed an application for summary entry of judgment enforcing the Board's September 28, 2001 Decision and Order with the United States Courts of Appeals for the Fourth Circuit on September 5, 2002. The Respondent's response to this motion raised issues concerning the lack of service, as indicated above. Accordingly, by motion dated September 30, 2002, the General Counsel moved to withdraw his application without prejudice so that the service issues raised by the Respondent could be addressed by the Board. The court granted this motion by Order dated October 8, 2002.

The General Counsel thereafter filed the instant motion. In order to correct any prior problems with service, the General Counsel requests that we vacate the Board's September 28, 2001 Decision and Order, and issue a new Decision and Order Granting Summary Judgment with respect to the complaint allegations.

Upon consideration of the entire record in this proceeding, the Board has decided to vacate its previous

Decision and Order, and to grant the Motion for Summary Judgment, as set forth below.²

BACKGROUND

Upon a charge filed by the Union on September 8, 2000, the General Counsel issued a complaint against the Respondent on October 25, 2000, alleging that it has violated Section 8(a)(1) and (3) of the Act. On February 20, 2001, the Respondent filed an answer admitting in part and denying in part the allegations in the complaint.

Thereafter, on March 2, 2001, the Respondent entered into an informal settlement agreement, which was approved by the Regional Director on March 22, 2001. The settlement agreement provided, in pertinent part, that the Respondent would make four scheduled payments of \$7000 each on March 30, April 30, May 31, and June 30, 2001, to be distributed to eight of the discriminatees.³ The settlement agreement further provided as follows:

In consideration of the Regional Director approving this Settlement Agreement, Respondent agrees that, in the event that Respondent, for any reason other than a bona fide economic reason, lays off any of the discriminatees named above at any time during the one year following the approval of this Settlement Agreement by the Regional Director, or in the event of any non-compliance to make required payments on the dates specified, or to cure any such failure within 14 days of the specified payment date, the total amount of backpay plus interest, shall become immediately due and payable. Respondent agrees after 14 days notice from the Regional Director of the National Labor Relations Board, on motion for summary judgment by the General Counsel, Respondent's Answer to the instant Complaint shall be considered withdrawn. Thereupon, the Board may issue an order requiring Respondent to show cause why said Motion of the General Counsel should not be granted. The Board may, without necessity of trial, find all allegations of the Complaint to be true, and make findings of fact and conclusions of law consistent with those allegations adverse to respondent on all issues raised by the pleadings. The Board may then issue an Order providing full remedy as specified in the Complaint. The parties further agreed that a Board Order and U.S. Court of Appeals Judgment may be entered thereon ex parte.

² The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

³ Discriminatee Bernardo Ventura was not included in the settlement agreement.

¹ 336 NLRB No. 17 (2001) (not reported in Board volumes).

By letter dated April 5, 2001, the Respondent was advised of the approval of the settlement agreement. The Respondent was further advised that the first of four scheduled payments to be sent to the Regional Office to satisfy its backpay obligation, which it agreed to send no later than March 30, 2001, was already past due. The letter further advised the Respondent that to cure its failure to make the first scheduled payment, the payment should be received by the Regional Office by no later than April 11, 2001, and that failure to make the payment by this date would result in a recommendation to the Regional Director to find that the settlement agreement had been breached and that further action be taken.

As of April 18, 2001, no payments had been made to either the Regional Office or directly to the discriminatees. By letter of the same date, the Respondent was advised that it had breached its obligations under the settlement agreement by failing to make its first scheduled payment. The letter further advised the Respondent that pursuant to the settlement agreement, the Respondent was being given notice that a Motion for Summary Judgment would be filed 14 days from the date of the letter upon failure to make the scheduled payment or upon any unlawful layoffs of the discriminatees.

The Respondent offered reinstatement to all eight discriminatees in March 2001. However, it did not offer positions substantially equivalent to the eight discriminatees' former positions. Three of the discriminatees, Ciro Fuentes, Mabel Aparicio, and Idalia Hernandez, did not return to work for the Respondent. The Respondent laid off discriminatees Clara Cruz, Adelia Damas, and Maria Gonzalez on May 10, 2001.

Since about April 23, 2001, the Respondent made two direct payments to five of the discriminatees: Clara Cruz, Adelia Damas, Lidia Flores, Maria Gonzalez, and Julian Turcios. These discriminatees each received the pro rata share, or one-eighth, of the \$7000 due in the first and second payments. However, no payment was made to the other three discriminatees, Ciro Fuentes, Mabel Aparicio, and Idalia Hernandez.

By letter dated April 25, 2001, in response to the Board agent's April 18, 2001 letter notifying the Respondent of its obligation to make payments to these three discriminatees, the Respondent advised the Regional Office that it would make payment only to those discriminatees "deemed as deserving of the payment."

As of the date the present Motion for Summary Judgment was filed, discriminatees Ciro Fuentes, Mabel Aparicio, and Idalia Hernandez had received no backpay payment from the Respondent, nor had any payment been sent to the Regional Office for these three discriminatees. Further, no payments other than those set forth

above had been made to any of the discriminatees. The Respondent has thereby breached the March 22, 2001 settlement agreement.

On March 5, 2003, the General Counsel filed the instant Motion for Summary Judgment with the Board.⁴ On March 6, 2003, 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 timely response.⁵ The allegations in the motion are therefore undisputed.

Ruling on Motion for Summary Judgment

Section 102.20 of the Board's Rules and Regulations provides 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.

According to the uncontroverted allegations in the Motion for Summary Judgment, although the Respondent initially submitted an answer to the complaint, it subsequently entered into a settlement agreement, which provided for the withdrawal of the answer in the event of noncompliance with the settlement agreement, and such noncompliance has occurred. We therefore find that the Respondent's answer has been withdrawn by the terms of the March 22, 2001 settlement agreement, and that, as further provided in that settlement agreement, all the allegations of the complaint are true.⁶

Accordingly, 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 District of Columbia corporation with an office and place of business in Silver Spring, Maryland, has been engaged in the business of providing building maintenance and janitorial services to a variety of public and private entities, including the Walter Reed Medical Center (WRMC), located in the District of Columbia. During the 12-month period

⁴ A certificate of service showing the correct address for the Respondent is attached to the motion.

⁵ On May 14, 2003, the Board majority denied the Respondent's Motion to Accept Respondent's Response to Notice to Show Cause on the basis it was filed 1 day late and because the Respondent's explanation for the late filing did not rise to the level of excusable neglect. Chairman Battista dissented. He would not have ruled on the Respondent's motion, but would have permitted the Respondent to file a supplemental affidavit in support of its position.

⁶ See *U-Bee, Ltd.*, 315 NLRB 667 (1994).

preceding issuance of the complaint, the Respondent, in conducting its business operations, performed services valued in excess of \$50,000 at the WRMC, a facility of the United States Government, pursuant to a contract with the United States government, and purchased and received at its WRMC location goods and materials valued in excess of \$5000 directly from points outside the District of Columbia. 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 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:

Kamili Miller	Manager, Human Resources
Rita Muentes	Project Manager

On or about May 24, 2000, the Respondent, by Rita Muentes on level G, in the WRMC:

(a) Threatened its employees with discharge and told them the Union did not represent them.

(b) Informed its employees it would be futile for them to select the Union as their bargaining representative, by telling them that the Respondent would not accept or bargain with the Union.

(c) Told its employees that they had betrayed the Respondent by engaging in union activities and thus she could not forgive them.

On or about May 24, 2000, the Respondent, by Kamili Miller in a laboratory on level G, at the WRMC:

(a) Solicited employees' complaints and grievances, thereby promising its employees increased benefits and improved terms and conditions of employment if they refrained from union organizing activity.

(b) Told its employees they could not wear union buttons and threatened them with discharge if they did.

(c) Told its employees they could no longer leave the premises at lunchtime.

(d) Informed its employees it would be futile for them to select the Union as their bargaining representative.

On or about May 26, 2000, the Respondent, by oral announcements by Kamili Miller, promulgated and, since then, has maintained, the following rule: Employees may not wear union buttons at work. The Respondent promulgated this rule to discourage its employees from joining the Union or engaging in other concerted activities.

On or about May 26, 2000, the Respondent, by Kamili Miller, reduced the lunch hours of the following employees: Mabel Aparicio, Clara Cruz, Argelia Damas, Lidia Flores, Ciro Fuentes, Maria Gonzales, Idalia Hernandez, Julian Turcios, and Bernardo Ventura. The Respondent engaged in this conduct because these employees formed, joined, and/or assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities.

On or about June 1, 2000, the Respondent terminated the following employees: Mabel Aparicio, Clara Cruz, Argelia Damas, Lidia Flores, Ciro Fuentes, Maria Gonzales, Idalia Hernandez, Julian Turcios, and Bernardo Ventura. The Respondent engaged in this conduct because these employees formed, joined, and/or assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities.

On or about August 18, 2000, the Respondent offered the employees named above reinstatement to employment. However, about August 30, 2000, before any employees named above resumed employment with the Respondent pursuant to the offer of August 18, 2000, the Respondent laid off the employees.

The Respondent engaged in the conduct described above because these employees formed, joined, and/or 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 in Section 7 of the Act and has been discriminating in regard to the hire or tenure, or terms or conditions of employment of its employees, thereby discouraging membership in the labor organization in violation of Section 8(a)(1) and (3) of the Act. The unfair labor practices of the Respondent 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 terminating, and, prior to their return to work upon reinstatement, laying off employees Mabel Aparicio, Clara Cruz, Argelia Damas, Lidia Flores, Ciro

Fuentes, Maria Gonzales, Idalia Hernandez, Julian Turcios, and Bernardo Ventura, we shall order the Respondent to offer these employees 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, 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).⁷

We shall also order the Respondent to restore the lunch hours of the employees named above and make them whole for any loss of earnings attributable to its unlawful conduct. Backpay shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enf. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons*, supra.

The Respondent shall also be required to removed from its files any and all references to the unlawful discharges and layoffs, and to notify the employees in writing that this has been done.

ORDER

The National Labor Relations Board orders that the Respondent, B&G Building Maintenance, Inc., Silver Spring, Maryland, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening its employees with discharge and telling them the Union did not represent them.

(b) Informing its employees it would be futile for them to select the Union as their bargaining representative, by telling them the Respondent would not accept or bargain with the Union.

(c) Telling its employees that they had betrayed the Respondent by engaging in union activities and that it could not forgive them.

(d) Soliciting employees' complaints and grievances, thereby promising its employees increased benefits and improved terms and conditions of employment if they refrained from union organizing activity.

(e) Telling its employees they could not wear union buttons and threatening them with discharge if they did.

(f) Telling its employees they could no longer leave the premises at lunchtime.

(g) Informing its employees it would be futile for them to select the Union as their bargaining representative.

(h) Promulgating and maintaining the following rule: Employees may not wear union buttons at work.

(i) Reducing the lunch hours of employees because of their union activities.

(j) Terminating and, after making a reinstatement offer, laying off employees because of their union activities.

(k) 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 Mabel Aparicio, Clara Cruz, Argelia Damas, Lidia Flores, Ciro Fuentes, Maria Gonzales, Idalia Hernandez, Julian Turcios, and Bernardo Ventura 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 Mabel Aparicio, Clara Cruz, Argelia Damas, Lidia Flores, Ciro Fuentes, Maria Gonzales, Idalia Hernandez, Julian Turcios, and Bernardo Ventura 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 section of this decision.

(c) Restore the lunch hours of the employees named above and make them whole for any loss of earnings attributable to its unlawful conduct, in the manner set forth in the remedy section of this decision.

(d) Within 14 days from the date of this Order, remove from its files any and all references to the unlawful discharges and layoffs of Mabel Aparicio, Clara Cruz, Argelia Damas, Lidia Flores, Ciro Fuentes, Maria Gonzales, Idalia Hernandez, Julian Turcios, and Bernardo Ventura and, within 3 days thereafter, notify them in writing that this has been done and that the discharges and layoffs will not be used against them in any way.

(e) 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.

⁷ Any backpay monies already paid by the Respondent to the discriminatees shall be credited toward the Respondent's backpay obligation. The validity of the Respondent's offers of reinstatement and the reinstatements themselves shall be left for determination in a later compliance proceeding, if necessary.

(f) Within 14 days after service by the Region, post at its facility in Silver Spring, Maryland, copies of the attached notice marked "Appendix."⁸ Copies of the notice, on forms provided by the Regional Director for Region 5, 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 May 24, 2000.

(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 the Respondent has taken to comply.

IT IS FURTHER ORDERED that the Decision and Order reported at 336 NLRB No. 17 (2001), is hereby vacated.

CHAIRMAN BATTISTA, dissenting.

Contrary to my colleagues, I would deny the General Counsel's Motion for Summary Judgment. Consistent with my dissent from the Order of May 14, I would permit Respondent the opportunity to file a supplemental affidavit in support of its Motion to Accept Respondent's Response to Notice to Show Cause.

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

⁸ 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."

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 threaten our employees with discharge and tell them the Union does not represent them.

WE WILL NOT inform our employees it would be futile for them to select the Union as their bargaining representative, by telling them we will not accept or bargain with the Union.

WE WILL NOT tell our employees that they have betrayed us by engaging in union activities and that we cannot forgive them.

WE WILL NOT solicit employees' complaints and grievances, thereby promising our employees increased benefits and improved terms and conditions of employment if they refrain from union organizing activity.

WE WILL NOT tell our employees they cannot wear union buttons and threaten them with discharge if they do.

WE WILL NOT tell our employees they can no longer leave the premises at lunchtime.

WE WILL NOT inform our employees it would be futile for them to select the Union as their bargaining representative.

WE WILL NOT promulgate and maintain the following rule: Employees may not wear union buttons at work.

WE WILL NOT terminate or, after a reinstatement offer, lay off employees because they formed, joined, and/or assisted the Union and engaged in concerted activities and to discourage employees from engaging in these activities.

WE WILL NOT reduce the lunch hours of our employees because of their union 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 Mabel Aparicio, Clara Cruz, Argelia Damas, Lidia Flores, Ciro Fuentes, Maria Gonzales, Idalia Hernandez, Julian Turcios, and Bernardo Ventura 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 Mabel Aparicio, Clara Cruz, Argelia Damas, Lidia Flores, Ciro Fuentes, Maria Gonzales, Idalia Hernandez, Julian Turcios, and Bernardo Ventura whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, with interest.

WE WILL restore the lunch hours of the employees named above and WE WILL make them whole for any loss of earnings attributable to our unlawful conduct, with interest.

WE WILL within 14 days from the date of the Board's Order, remove from our files any and all references to the unlawful discharges and layoffs of Mabel Aparicio, Clara Cruz, Argelia Damas, Lidia Flores, Ciro Fuentes, Maria

Gonzales, Idalia Hernandez, Julian Turcios, and Bernardo Ventura, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the discharges and layoffs will not be used against them in any way.

B&G BUILDING MAINTENANCE, INC.