

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES

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UTILITY SPECIALISTS, INC.,  
d/b/a CONCEPT ENGINEERING

10 and

BRETT SHERRY, An Individual

15 *Helen Gutierrez and Denise Jackson-Riley, Esqs.*  
for the General Counsel.  
*Melinda S. Burlison, Esq.*, of Countryside, IL, for the Charging Party.  
The Respondent did not appear at trial.

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Decision

Statement of the Case

25 *David L. Evans, Administrative Law Judge.* This case under the National Labor Relations Act (the  
Act) was, after due notice to the parties, tried before me in Chicago, Illinois, on July 14, 2003; the  
Respondent, however, did not appear at the trial. On December 10, 2002,<sup>1</sup>Brett Sherry, an individual, filed  
the charge in case 13-CA-40695 against Utility Specialists, Inc., d/b/a Concept Engineering (the  
30 Respondent) alleging that that entity had violated the Act in certain respects. On March 31, 2003, after  
administrative investigation of the charge, the General Counsel of the National Labor Relations Board (the  
Board) issued a complaint against the Respondent alleging that it had violated Section 8(a)(1) of the Act by  
threatening and interrogating employees because they had engaged in activities on behalf of International  
Union of Operating Engineers, Local 150, AFL-CIO (the Union). The complaint further alleges that the  
Respondent violated Section 8(a)(3) of the Act by discharging employees Brett Sherry and Ian Nemeth in  
35 order to discourage employees' membership in and activities on behalf of the Union. And the complaint  
further alleges that the Respondent violated Section 8(a)(3) by refusing to reinstate Sherry and Nemeth after  
they had made an unconditional offer to return from an unfair labor practice strike against the Respondent.<sup>2</sup>  
The Respondent filed an answer to the complaint admitting that this matter is properly before the Board but  
denying the commission of any unfair labor practices.

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Upon the testimony and exhibits entered at trial, and after consideration of the briefs that have been filed  
by the General Counsel and the Charging Party, I make the following findings of fact and conclusions of law.

I. Jurisdiction and Labor Organization Status

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The complaint alleges, and the answer admits, that the Respondent is a corporation with an office  
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<sup>1</sup> Unless otherwise indicated, all dates mentioned are in 2002.

<sup>2</sup> Section 7 of the Act provides that employees "shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Section 8(a)(1) provides that it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." Section 8(a)(3) provides that it is an unfair labor practice for an employer "by discrimination ... to encourage or discourage membership in any labor organization."

place of business in Mt. Prospect, Illinois (herein called the Respondent's facility) where it is engaged as a construction contractor in the business of underground installation of utility cables and wires. The answer further admits that, during the year preceding the issuance of the complaint, in conducting said business operations, the Respondent provided services valued in excess of \$50,000 for other enterprises located within Illinois, which enterprises meet the Board's direct standards for jurisdiction, including AT&T Broadband, an enterprise directly engaged in interstate commerce. Therefore, at all material times the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

The complaint further alleges that the Union is a labor organization within the meaning of Section 2(5) of the Act. The answer replies only that the Respondent "... neither admits nor denies the allegation." Sec. 102.20 of the Board's Rules and Regulations states in relevant part that "... any allegation in the complaint not specifically denied or explained in an answer filed ... shall be deemed to be admitted to be true and shall be so found by the Board." Upon the Respondent's failure to deny the specific allegation, and upon this provision of the Rules, and upon certain testimony that was presented by the General Counsel at trial, I find and conclude that the Union is a labor organization within Section 2(5).

## II. The Alleged Unfair Labor Practices

### A. Facts

Because the Respondent did not appear at trial, the facts as related by the General Counsel's witnesses are not in dispute.

The complaint alleges that one Karen Iacullo is the Respondent's president and that one John Augelli is the Respondent's "Administrator of Operations." The complaint further alleges that, as such, Iacullo and Augelli are the Respondent's supervisors within Section 2(11) of the Act and its agents within Section 2(13) of the Act. In the answer that was filed by Iacullo as "President" of the Respondent, the Respondent replies to these allegations only that it "denies that John Augelli is 'Administrator of Operations.'" The Respondent gives no answer to the allegations that are made under Section 2(11) and (13). Upon the Respondent's failures to deny these allegations,<sup>3</sup> and upon the evidence adduced at trial, I find and conclude that Iacullo and Augelli are supervisors and agents of the Respondent within Section 2(11) and (13). As well, upon the evidence adduced at trial, I further find that Iacullo is the Respondent's president and that Augelli is the Respondent's Administrator of Operations.<sup>4</sup>

Randy Hill is the Union's business representative. On June 12, Hill went to a project of the Respondent that was located at a downtown street in Sandwich, Illinois. At the project, Hill met with the Respondent's single crew of 6 employees. From alleged discriminatees Sherry and Nemeth, Hill secured authorization cards that clearly designated the Union as those 2 employees' collective-bargaining representative. Those 2 union authorization cards were placed in evidence by the General Counsel. Hill testified that, as well, he received authorization cards from 3 of the Respondent's 4 other employees. Neither the General Counsel nor the Charging Party, however, placed any of those 3 other cards in evidence.

As Hill was securing the cards, Augelli drove by the work site, but did not stop. A few minutes later, Augelli radioed Sherry, who was the group leader of the employees, and asked what was happening. Sherry replied that the employees were talking to Hill as a representative of the Union. Augelli told Sherry to tell the employees to get back to work. Sherry replied that Hill wanted to talk to Augelli; Augelli replied that Sherry should tell Hill that he (Augelli) was out of town and that Hill should call the Respondent's office. A few minutes later, Augelli radioed Sherry again and asked what the employees were doing; Sherry replied that they were still talking to Hill and, according to Sherry, "I told him that we wanted to go [with Local] 150." Augelli replied that the Respondent was not, and never would be, a "union" company and that the employees should get back to work.

<sup>3</sup> See Sec. 102.20 of the Board's Rules and Regulations, as quoted above.

<sup>4</sup> Augelli distributed business cards with this title; also, Augelli hired alleged discriminatees Sherry and Nemeth.

A few minutes later on June 12, Augelli radioed Sherry again. According to Sherry:

5 Mr. Augelli called me back on the Nextel [radio-type] phone and asked what was going on. And I told him that we wanted to go 150. And Randy is going to shut the job down because we all wanted to go 150.

And he said, "I'm not an F'ing union company. I'll never be an F'ing union company." ...

And he said, "... Did you sign anything?"

And I said, "Yes."

10 And he said, "Who else signed anything?"

And I said, "Everybody."

And he said ... "Whoever fucking signed any cards won't work for this company. I'm not a union company." ...

And I said, "Well, you say you're going to fire us because we want to go Union?"

15 And he said, "What the fuck don't you understand? You stupid motherfucker. I'll break your legs. Get the drill back before an hour and a half or I'm going to call the cops and report it stolen." ...

He [also] said he was going to report the truck stolen if it's not back within an hour and a half. ...

[A]nd I told him, "No. You threatened me. I'm not going to bring the truck back. I'm going to leave the radio, and the keys, and the credit card in the truck." And then the conversation ended.

20 And then I proceeded to put everything in the truck. And he called me back or told me to put everything in the truck, the radio, and the keys, and the credit card. And I told him I already did.

Because Augelli was speaking to Sherry on a radio-type facility, all 5 other employees, and Hill, could hear what he said. Hill and Nemeth corroborated Sherry's testimony; the 4 other employees did not testify.  
25 Additionally, Nemeth and Hill recalled that when Sherry told Augelli that all of the employees had signed union authorization cards, Augelli told Sherry to: "Get whatever you signed, rip it up or you can't work for me." Nemeth further recalled that Sherry told Augelli, "No. We didn't want to do that." And Nemeth further recalled that, when Sherry told Augelli that he would not return the truck to the shop because Augelli had threatened him, Sherry added, "We're on strike."  
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Later during June 12, Hill called the Respondent's office and spoke to Iacullo. Hill told Iacullo that, "[Y]our employees have chosen 150 to represent them." Iacullo responded that she did not care what the employees had chosen and that, "We're non-union and if they want to be union they need to go [to] a union company." Hill replied that the employees had rights under the law. To that statement, Iacullo replied: "I have rights too. ... I'm a minority contractor, doing very well. ... If you don't quit harassing me I'm going to call the cops." Hill then hung up.  
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By letter dated June 12, Hill informed Augelli that the Respondent's 6 employees, whom Hill named, were "on strike for unfair labor practices committed by agents and managers of Concept Engineering." Hill received no response. By letter dated June 19, Hill informed Augelli that the 6 named employees were making an unconditional offer to return to work. Hill received no reply to this letter either.  
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The undisputed testimonies of Hill, Sherry and Nemeth were credible.

## B. Analysis and Conclusions

As the complaint alleges, the Respondent violated Section 8(a)(1) when its supervisor and agent Augelli: (1) interrogated employees about their union membership and activities and the memberships and activities of other employees by asking Sherry if he had signed a union authorization card and who else had signed union authorization cards; (2) threatened employees with discharge because they had signed union authorization cards by telling Sherry that any employee who had signed a union authorization card could not work for the Respondent; (3) informed employees that it would be futile for them to select the Union as their collective-bargaining representative by telling Sherry that the Respondent was not, and would never be, a union company; (4) solicited employees to retrieve and destroy union authorization cards that they had signed by telling Sherry to tell the employees to get from the Union whatever they had signed and “rip it up”; (5) threatened employees with arrest because they had signed union authorization cards by telling Sherry that he would use a pretext of theft to get him arrested because he, and the other employees, had signed union authorization cards; (6) threatened employees with bodily harm because they had engaged in union activities by telling Sherry that he would break Sherry’s legs if he did not follow his instructions not to engage in union activities.

The complaint alleges, and the answer denies, that the Respondent discharged Sherry and Nemeth on June 12. On that date, Sherry told Augelli that he and all other employees had signed union authorization cards. Augelli then told Sherry that any employee who had signed a union authorization cards could not work for the Respondent. When Sherry asked specifically if that meant that all of the employees were fired, Augelli (in profane terms) replied that it did. I therefore find that, as alleged, the Respondent discharged Sherry and Nemeth on June 12.<sup>5</sup>

The complaint further alleges, and the Respondent further denies, that the discharges of Sherry and Nemeth violated Section 8(a)(3). In view of the Respondent’s animus toward the employees’ protected union activities, as disclosed by its many violations of Section 8(a)(1), the burden was on the Respondent to come forward with evidence that it would have discharged Sherry and Nemeth even absent their known protected union activities of signing authorization cards. *Wright Line*, 251 NLRB 1083, 1089 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). The Respondent, however, has come forward with no evidence at all. Therefore, I find and conclude that the Respondent discharged Sherry and Nemeth in violation of Section 8(a)(3).<sup>6</sup>

The complaint further alleges that “certain employees” of the Respondent began an unfair labor practice strike on June 12 and that Sherry and Nemeth offered to return to work on June 19. The complaint further alleges that the Respondent has violated Section 8(a)(3) by failing to reinstate Sherry and Nemeth pursuant to that offer. It appears, however, that Augelli discharged Sherry and Nemeth immediately upon Sherry’s telling Augelli that he and Nemeth and (all other employees) had signed union authorization cards. It was only thereafter that Sherry told Augelli that the employees were on strike. At any rate, the allegations of unlawful refusals to reinstate Sherry and Nemeth upon the Union’s unconditional offer to return to work is superfluous in view of my conclusions that Sherry and Nemeth were discharged in violation of Section 8(a)(3) on June 12. I shall therefore recommend dismissal of this allegation of the complaint.

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<sup>5</sup> Augelli thereby also discharged the other card-signers, but the complaint does not make any discharge allegations on their behalf.

<sup>6</sup> Nemeth was on layoff at the time of his discharge, but Augelli had promised him that he would recall him in the immediate future (as a crew leader). The practical effects of that status may properly be determined at the compliance stage of this proceeding.

## The Remedy

5 Having found that the Respondent has engaged in certain unfair labor practices, I find it necessary to order it to cease and desist and to take certain affirmative actions designed to effectuate the policies of the Act. Having found that the Respondent unlawfully discharged Sherry and Nemeth, I shall order it to offer Sherry and Nemeth full reinstatement to their former jobs and to make them whole for any loss of earnings or other benefits that they have 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 remove from its files any and all references to Sherry's and Nemeth's unlawful discharges and to notify Sherry and Nemeth in writing that this has been done. The Respondent shall also be required to post at its Mt. Prospect facility copies of a notice to its employees that will assure them that it will hereafter comply with the provisions of the Act. Because the Sandwich, Illinois, project has probably been completed by this point, I shall further order that the Respondent, at its own expense, mail a copy of the Notice to Employees to each employee who was, or has been, employed by it at its Sandwich, Illinois, project from and including June 12, 15 2002, the date of the unfair labor practices found herein, until the completion of that project.

20 On brief, the Charging Party (but not the General Counsel) further asks that, as part of the remedy for the Respondent's unfair labor practices, the Board issue an order that the Respondent be required to bargain with the Union. In support of this request, the Charging Party argues that the instant case falls within the category of cases described by the Supreme Court in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969) as those in which "the possibility of erasing the effects of past [unfair labor] practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through [authorization] cards would, on balance, be better protected by a bargaining order." 395 U.S. at 614-615. In this case, however, there is insufficient evidence that a majority employee sentiment was ever expressed by cards that designated the Union as the collective-bargaining representative of the employees.

30 The General Counsel offered into evidence the authorization cards of Sherry and Nemeth. Those cards clearly authorize the Union to act as those 2 employees' collective-bargaining representative, and such cards would be properly included in a count to determine the sentiment of the majority of employees in a unit of employees that is appropriate for bargaining under Sec. 9(a) of the Act. In the presumptively appropriate unit of the Respondent's 6 production and maintenance employees, however, the cards of Sherry and Nemeth constitute a number that is 2 short of a majority. Apparently the Charging Party would have the Board count the authorization cards of the 3 other employees from whom Hill testified he secured signatures. Those other cards, however, may not be properly counted because neither the General Counsel nor the Charging Party offered them into evidence and neither the General Counsel nor the Charging Party offered an explanation of why they were not doing so. Without evidence of the other cards themselves, and without a satisfactory explanation for their absence, it may not be supposed that those cards contained the same authorization language as that which was contained on the cards that Sherry and Nemeth signed. To do so would be to create a presumption that all "authorization" cards designate collective-bargaining representatives. Of course, this is not the case. Some authorization cards do no more than authorize a union to seek a Board election under Section 9(c) of the Act, and such cards are not properly counted in determining majority sentiment for a collective-bargaining representative.<sup>7</sup> Moreover, if the cards that the other 3 employees signed had contained the same authorization as that of Sherry's and Nemeth's cards, the Charging Party (who was represented by the Union's counsel) presumably would have at least asked Hill to so testify at trial. Finally on this point, the Union secured the other 3 cards and, presumably, it still possesses them. In view of the Union's failure to appear at trial and offer those other cards, and in view of its apparent failure to supply them to the General Counsel to offer in evidence, it is proper to draw, as I do, the adverse inference that, 45 had the cards been produced, they would not have been shown to contain designations of a collective-

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<sup>7</sup> See *Nissan Research And Development, Inc.*, 296 NLRB 598 (1989).

bargaining representative. Accordingly, I shall not recommend that the Respondent be required to bargain with the Union as a part of the remedy for its unfair labor practices.

5 On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended<sup>8</sup>

ORDER

10 The Respondent, Utility Specialists, Inc., d/b/a Concept Engineering, of Mt. Prospect, Illinois, its officers, agents, successors and assigns, shall

1. Cease and desist from

15 (a) Interrogating its employees about their memberships in, or activities on behalf of, the Union.

(b) Threatening its employees with discharge because they have become or remained members of the Union or because they have given assistance or support to it.

20 (c) Informing its employees that it would be futile for them to select the Union as their collective-bargaining representative.

(d) Soliciting its employees to retrieve or destroy union authorization cards that they have signed.

25 (e) Threatening its employees with arrest because they have signed union authorization cards or because they have engaged in other activities on behalf of the Union.

(f) Threatening employees with bodily injury because they have signed union authorization cards or because they have engaged in other activities on behalf of the Union.

30 (g) Discharging or otherwise discriminating against its employees because they have engaged in union activities.

(h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

35 2. Take the following affirmative actions that are necessary to effectuate the policies of the Act.

40 (a) Within 14 days from the date of this Order, offer Brett Sherry and Ian Nemeth 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) In the manner set forth in the remedy section of this decision, make Brett Sherry and Ian Nemeth whole for any loss of earnings or other benefits that they have suffered as a result of the discrimination against them.

45 (c) Within 14 days from the date of this Order, remove from its files any references to the discharges of Brett Sherry and Ian Nemeth and within 3 days thereafter notify them in writing that this has been done and that their discharges will not be used against them in any way.

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<sup>8</sup> 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.

5 (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.

10 (e) Within 14 days after service by the Region, post at its facility in Mt. Prospect, Illinois, copies of the attached notice marked "Appendix."<sup>9</sup> Copies of the notice, on forms provided by the Regional Director for Region 13, 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. Additionally, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to each  
15 current or former employee who was, or has been, employed by the Respondent at its Sandwich, Illinois, project, at any time since June 12, 2002, the date of the unfair labor practices found herein.

20 (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 had taken to comply.

Dated, Washington, D.C.

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David L. Evans  
Administrative Law Judge

<sup>9</sup> If this Order is enforced by a Judgment of the 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  
SECTION 7 OF THE NATIONAL LABOR RELATIONS ACT  
GIVES YOU THE RIGHT TO

Form, join, or assist a 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 discharge you, or otherwise discriminate against you, because of your membership in, or activities on behalf of, International Union of Operating Engineers, Local 150, AFL-CIO (the Union).

WE WILL NOT threaten you with discharge because you have become or remained members of the Union or because you have given assistance or support to it.

WE WILL NOT inform you that it would be futile for you to select the Union as your collective-bargaining representative.

WE WILL NOT solicit you to retrieve or destroy union authorization cards that you have signed.

WE WILL NOT threaten you with arrest because you have signed union authorization cards or because you have engaged in other activities on behalf of the Union.

WE WILL NOT threaten you with bodily injury because you have signed union authorization cards or because you have engaged in other activities on behalf of the Union.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce you in the exercise of rights that are guaranteed to you by Section 7 of the Act.

WE WILL, within 14 days of the Board's Order, offer Brett Sherry and Ian Nemeth immediate 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 that they previously enjoyed, and WE WILL make them whole, with interest, for any loss of earnings and other benefits resulting from our discrimination against them.

WE WILL, within 14 days of the Board's Order, remove from our files any reference to the June 12, 2002, discharges of Brett Sherry and Ian Nemeth, and WE WILL, within 3 days thereafter, notify them in writing that this

has been done and that the discharges will not be used against them in any way.

UTILITY SPECIALISTS, INC, D/B/A CONCEPT

ENGINEERING

Date

\_\_\_\_\_

By

\_\_\_\_\_

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation, and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent of the Board's Regional Office set forth below. You may also obtain information from the Board's website: [www.nlr.gov](http://www.nlr.gov).

200 West Adams Street, Suite 800, Chicago, Illinois 60606-5208,  
(312) 353-7570. Hours: 8:30 a.m. to 5 p.m.

**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE.  
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE  
OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER  
MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH  
ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S  
COMPLIANCE OFFICER, (312) 886-3036.**