Patterson-Stevens, Inc. *and* International Union of Operating Engineers Local No. 17, AFL–CIO. Case 3–CA–17908

May 16, 1994

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS AND DEVANEY

Upon a charge filed by the Union on June 8, 1993, and an amended charge on July 26, 1993, the General Counsel of the National Labor Relations Board issued a consolidated complaint on July 30, 1993, and a corrected consolidated complaint on August 3, 1993, against Patterson-Stevens, Inc. (the Respondent) in Cases 3–CA–17899 and 3–CA–17908, alleging that it has violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act. On August 7, 1993, the Respondent filed a timely answer to the corrected consolidated complaint. On September 13, 1993, an order severing cases was issued. On September 13, 1993, an amended complaint in 3–CA–17908 was issued against the Respondent alleging that it has violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act. On September 17, 1993, the Respondent filed a timely answer to the amended complaint. On January 26, 1994, the Respondent filed a withdrawal of answer and consent to entry of judgment.

On February 2, 1994, the General Counsel filed a Motion for Summary Judgment with the Board. On February 4, 1994, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. On February 14, 1994, the Respondent's counsel filed an affidavit in response to the Notice to Show Cause. On February 28, 1994, counsel for the Acting General Counsel filed a motion in opposition to the Respondent's response.

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

Ruling on Motion for Summary Judgment

Sections 102.20 and 102.21 of the Board's Rules and Regulations provide that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the amended complaint affirmatively notes 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 Further, the undisputed allegations in the Motion for Summary Judgment disclose that the Respondent has withdrawn its answer to the amended complaint and has consented to an entry of judgment against it in those proceedings in accordance with the facts alleged in the amended complaint. Such a withdrawal has the same effect as a failure to file an answer, i.e., the allegations in the amended complaint must be considered to be admitted to be true.[1]

In its response to the Notice to Show Cause, the Respondent's counsel asserts that the General Counsel has argued before an administrative law judge in Case 3–CA–17899 that the Respondent's withdrawal of its answer in the instant case could be used as an evidentiary admission that the Respondent deliberately violated the Act in the instant case. The Respondent contends, however, that because it did not litigate the violations in the instant case, the General Counsel cannot rely in Case 3–CA–17899 on the default in the instant case. The Respondent requests that if the Board concludes otherwise that the Respondent be granted an opportunity to reinstate its answer and to litigate the matter on the merits in the instant case.

As noted above, a withdrawn answer has the same effect as a failure to file an answer. The Respondent does not contend that, in withdrawing its answer, it relied on any express representations or assurances by the Acting General Counsel that the default would not be used as evidence in a collateral proceeding. We find that the Respondent has not established good cause within the meaning of Section 102.20 of the Board's Rules and Regulations for failure to file a timely answer.[2] 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

The Respondent, a corporation, with an office and place of business in Tonawanda, New York, has been engaged as a contractor in the construction industry. During the 12-month period ending June 30, 1993, the Respondent, in conducting its business operations, purchased and received at its Tonawanda, New York facility goods valued in excess of $50,000 from other enterprises located in New York, each of which other enterprises had received these goods directly from points outside the State of New York. 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 Labor Relations Division, Western New York, Associated General Contractors of America, New York State Chapter, Inc. (the AGC) has

[1] See *Maislin Transport*, 274 NLRB 529 (1985).

[2] We express no view about the evidentiary use in Case 3–CA–17899 of our Decision and Order in the present case.

been an organization composed of various employers engaged in the construction industry, one purpose of which is to represent its employer-members and other employers in negotiating and administering collective-bargaining agreements with various labor organizations, including the Union. About April 1, 1990, the AGC and the Union entered into a collective-bargaining agreement (the AGC agreement), nominally effective from April 1, 1990, to March 31, 1993, which agreement continues in effect by its terms until March 31, 1994. About October 7, 1992, the Respondent entered into a written agreement which at all material times bound the Respondent to the terms and conditions of employment of the AGC agreement.

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 employees described in Article III, Union Recognition and Security, of the collective-bargaining agreement between AGC and the Union, effective April 1, 1990 to March 31, 1994.

At all times, the Union has been the designated exclusive collective-bargaining representative of the unit, and at all material times the Union has been recognized as the representative by the Respondent. This recognition has been embodied in successive prehire collective-bargaining agreements, the most recent of which is effective from April 1, 1990, to March 31, 1994. By virtue of Section 8(f) of the Act and the principles established by the Board in *John Deklewa & Sons*, 282 NLRB 1375 (1987), the Union has been, and is the limited exclusive collective-bargaining representative for the employees in the unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment. By virtue of its authorization to be bound by the AGC's collective-bargaining agreement described above, the Respondent is bound to the most recent prehire collective-bargaining agreement described above. Since on or about May 31, 1993, the Respondent has failed and refused to adhere to the terms and conditions of the most recent prehire collective-bargaining agreement described above and has thereby repudiated that agreement.

About May 28, 1993, the Respondent laid off its employees Michael Muscarella and Merle Schrechergest. Respondent engaged in this conduct because these employees are members of the Union, assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities.

CONCLUSIONS OF LAW

By the acts and conduct described above, the Respondent has been failing and refusing to bargain collectively with the exclusive collective-bargaining representative of its employees in violation of Section 8(a)(1) and (5) of the Act, and has been discriminating in regard to the hire or tenure or terms or conditions of employment of its employees by laying off its employees, thereby discouraging membership in a labor organization in violation of Section 8(a)(1) and (3) of the Act, and has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1), (3), 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 repudiated the collective-bargaining agreement, we shall order it to abide by the agreement and to make unit employees whole for any losses suffered as a result of the failure to adhere to the terms of the collective-bargaining agreement since May 31, 1993. Backpay, if any, 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).

Having found that the Respondent has violated Section 8(a)(3) and (1) by laying off Michael Muscarella and Merle Schrechergest, we shall order the Respondent to offer these discriminatees immediate and 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*, supra. The Respondent shall also be required to expunge from its files any and all references to the unlawful layoffs, and to notify the discriminatees in writing that this has been done.

ORDER

The National Labor Relations Board orders that the Respondent, Patterson-Stevens, Inc., Tonawanda, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Laying off or otherwise discriminating against any employee because of their membership in or ac-

tivities on behalf of International Union of Operating Engineers Local No. 17, AFL–CIO or any other labor organization.

(b) Failing and refusing to adhere to the collective-bargaining agreement in effect with respect to the unit employees and thereby repudiating that agreement. The unit includes the following employees:

> All employees described in Article III, Union Recognition and Security, of the collective-bargaining agreement between the AGC and the Union, effective April 1, 1990 to March 31, 1994.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Michael Muscarella and Merle Schrechergest immediate and 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 and privileges previously enjoyed, and make them 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 this decision.

(b) Remove from its files any reference to the unlawful layoffs and notify the employees in writing that this has been done and that the layoffs will not be used against them in any way.

(c) Abide by all terms and conditions of the collective-bargaining agreement with the Union.

(d) Make whole unit employees for any losses in wages or benefits they may have suffered because of the Respondent's refusal, since May 31, 1993, to abide by the terms of the collective-bargaining agreement, as set forth in the remedy section of this decision.

(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Post at its facility in Tonawanda, New York, copies of the attached notice marked ''Appendix.''[3] Copies of the notice, on forms provided by the Regional Director for Region 3, 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.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT layoff or otherwise discriminate against any employee because of their membership in or activities on behalf of International Union of Operating Engineers Local No. 17, AFL–CIO or any other labor organization.

WE WILL NOT fail or refuse to adhere to the collective-bargaining agreement in effect with respect to the unit employees and thereby repudiate that agreement. The unit includes the following employees:

> All employees described in Article III, Union Recognition and Security, of the collective-bargaining agreement between the Labor Relations Division, Western New York, Associated General Contractors of America, New York State Chapter, Inc. and the International Union of Operating Engineers Local No. 17, AFL–CIO, effective April 1, 1990 to March 31, 1994.

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 offer Michael Muscarella and Merle Schrechergest immediate and 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 and privileges previously enjoyed, and WE WILL make them whole for any loss of earnings and other benefits suffered as a result of their layoffs, with interest.

WE WILL remove from our files any reference to the unlawful layoffs and notify the employees in writing that this has been done and that the layoffs will not be used against them in any way.

WE WILL abide by all terms and conditions of the collective-bargaining agreement with the Union, and WE WILL make whole unit employees for any losses in wages or benefits they may have suffered because of our refusal, since May 31, 1993, to abide by the terms of the collective-bargaining agreement, with interest.

PATTERSON-STEVENS, INC.

[3] 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.''