UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

AMERICAN DIRECTIONAL BORING, INC. d/b/a ADB UTILITY CONTRACTORS,	)	
Employer/Respondent,	)	
and	)	Cases 14-CA-27386
	)	14-CA-27570
LOCAL 2, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,	)	14-CA-27677
Petitioner/Charging Party.	)	

PETITIONER/CHARGING PARTY'S SUPPLEMENTAL BRIEF RELEVANT TO THE BARGAINING ORDER OR ALTERNATIVE REMEDIES

COMES NOW Local 2, International Brotherhood of Electrical Workers, AFL-CIO (the "Union") and, upon the request of the Board, files this supplemental brief relevant to the bargaining order in this case or alternative remedies. The Union submits that a Gissel bargaining order is still appropriate regardless of any changed circumstances. In the alternative, the Union requests numerous special notice and access remedies.

I. A Gissel Bargaining Order is Still Appropriate Regardless of Any Changed Circumstances.

There is no question that a bargaining order, as recommended by the ALJ, was proper in this case in the first place. ADB's violations were severe and pervasive. Among other things, its managers, including general manager Chris Eirvin, threatened job losses and plant closure in all-employee speeches, stated that ADB would never recognize the Union, solicited the resignation of union

members, created the impression of surveillance, and vowed that the Company would spend $100,000 to fight the Union. (G.C. Exs. 23, 37, 45; Tr. 90, 1521; ALJ Dec. at pp. 2-3, 6-8.) Respondent also discharged 13 union supporters – 22% of the unit. (G.C. Ex. 114; ALJ Dec. at p. 31-32.) The record shows that it targeted employee leaders, and then systematically picked them off, at times fabricating pre-textual evidence (including fake discipline reports and photographs) to make a case. Respondent continued this campaign as long as it sensed that any employee supported the union. It fired a slew of union supporters early on. It then fired two more after the unfair labor practice trial had started. (ALJ Dec. at p. 32, l. 22.)

In light of these widely communicated threats, the size of the unit, Respondent's outrageous behavior, management involvement, and the mass discharges, the ALJ and the two-person Board properly found, and this Board should find, this case to be an exceptional Category I case. Notably, ADB never excepted to the ALJ's Section 8(a)(1) findings that it threatened and coerced employees, and dropped its defenses to the 13 unlawful terminations in the Eighth Circuit.[1] It cannot legitimately deny its conduct.

Respondent argues changed circumstances, but the Board should not consider them. The established practice is for the Board to evaluate the

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[1] ADB also no longer challenges the credibility determinations against it. The ALJ found that Company witnesses had "no regard for the truth" and were not believable, (ALJ Dec. at pp. 4-5), and that ADB's actions against employees "were purposely fabricated in order to rid [ADB] of the union threat," (ALJ Dec. at p. 4, ll. 35-36), and that its explanation for some of the discharges were "false and concocted," (ALJ Dec. at p. 19, l. 6), including "a carefully fabricated, fictitious scenario" that employee Rodney Hanephin placed a 90-degree bend on the wrong side of an electrical pole as an act of sabotage, (ALJ Dec. at p. 5, ll. 28-30), and "blatant and unconscionable fabrications of customer complaints" concerning employee Jason Lohman's restoration work, (ALJ Dec. at p. 23, ll. 4-5).

appropriateness of a Gissel bargaining order at the time the unfair labor practices are committed. *See Evergreen-America Corp.*, 348 NLRB No. 12 (2006). The Board should continue to follow this policy despite the criticism it has received from some courts. To rule otherwise would create an incentive for employers to manufacture delay in order to beat a bargaining order. *NLRB v. Bakers of Paris, Inc.*, 929 F.2d 1427 (9th Cir. 1991). In fact, that is exactly what happened in this case. At the unfair labor practice trial, Respondent argued that 8 of the 13 discriminatees were statutory supervisors. But, at the prior representation hearing (May 6, 2003), which was held around the same time as the first 11 discharges (April 15, April 25, April 28, and May 8, 2003), ADB included the discriminatees in the unit and even contended that some of their supervisors were employees. (G.C. Ex. 64 at p. 13.) There is no seeming explanation for this complete reversal of position other than Respondent needing to create some sort of defense to its conduct. As a result, the parties spent the first five years of this case (2003 to 2008) litigating a manufactured issue.[2] Were the Board to now count this passage of time against a bargaining order, it would be rewarding Respondent for the delay it created. This undermines the Board's remedial authority.

Even considering changed circumstances, a bargaining order is still appropriate. In its 2008 decision, the two-person Board held that Respondent's evidence of management turnover, employee turnover, and the passage of time

[2] The ALJ found that the discriminatees were employees, and not statutory supervisors. The Board ordered remand in light of *Oakwood Healthcare*. A second ALJ then again found that the discriminatees were employees, but the remand required further briefing and resulted in additional delay. But for ADB litigating its two-sided position on the discriminatees, the Board would not have needed to remand the case and could have decided this case earlier.

did not render a bargaining order inappropriate. The only substantial change since then is the further passage of time. The fact that the general manager, Chris Eirvin, voluntary left the Company is unavailing where other managers who participated in the campaign are still there. It appears that at least one of these others managers -- Ernie Nanney -- was not truthful in his testimony at the unfair labor practice hearing and was beholden to the Company's campaign to fire union supporters. (ALJ Dec. at p. 5, ll. 49-51.) Additionally, ADB's owner, Rusty Keeley, still runs the company. The record shows that Keeley condoned, as well as certainly financed, Respondent's virulent anti-union campaign.[3] There is no indication that ADB or he has admitted any wrong-doing. In fact, Respondent has continued to spend money to fight the Union through the appeal process as threatened. *NLRB v. Grieg's Dump Truck*, 137 F.3d 939 (7th Cir. 1998) (affirming bargaining order even though a key manager involved in the unfair labor practices at issue no longer actively managed the company, where company's ownership and control had not meaningfully changed).

Nor does employee turnover negate the need for a bargaining order. The Board must include the terminated employees who will return to work. Even accounting for new hires, the discriminatees will be a substantial percentage of the unit. *NLRB v. Intersweet*, 125 F.2d 1064 (7th Cir. 1997) (upholding bargaining order where only 20% of the workforce remained); *see also Evergreen America Corp. v. NLRB*, 531 F.3d 321 (4th Cir. 2008) (upholding

[3] Manager Ernie Nanney admitted in his testimony that Keeley did not want union employees at ADB. (Tr. 1163.) Keeley then used Respondent's managers as his agents to implement this objective. When Keeley told company managers that he would help pro-union employees to find work at other companies, (Tr. 1160); general manager Eirvin unlawfully solicited union supporters to quit and get work at union companies, (G.C. Exs. 37, 45; ALJ Dec. at p. 6, ll. 12-13).

bargaining order despite evidence from employer that it added 100 new employees to unit). Respondent's Category I violations are also the type to live on in the "lore of the shop." New hires are likely to know of them; and, the discriminatees will certainly tell their stories when they return. *See California Gas Transport, Inc. v. NLRB*, 507 F.3d 847, 856 (5th Cir. 2007) (upholding bargaining order where Board considered changed circumstances and found that the effects of the unlawful conduct are unlikely to be sufficiently dissipated by turnover); *Dunkin' Donuts Mid-Atlantic Distr. Center v. NLRB*, 363 F.3d 437, 442 (D.C. Cir. 2004) (upholding bargaining order despite employee turnover where a "core group of steady employees with whom the experience of [the companies'] unlawful conduct will remain"); *NLRB v. Q-1 Motor Express, Inc.*, 25 F.3d 473, n.6 (7th Cir. 1994) (affirming bargaining order even though all but one of the original employees of the bargaining unit had left where Board found that employer's misconduct was pervasive and likely to persist); *Garvey Marine, Inc.*, 328 NLRB 991, 996 (1991) (serious violations will most likely be shared with new hires). Respondent has also shown continuing hostility as evidenced by its firing of union supporters during the course of the hearing. Newer employees have no reason to believe that they are any less expendable. They perform the same work, for the same customers, and can be fired based on the same type of fabricated evidence.

In 2007, the two-person Board found the passage of time – approximately five years since Respondent's unfair labor practices -- to not dissipate the coercive effects of Respondent's conduct. The three years since then has not

changed things. First, as already noted, the initial five year delay is attributable to Respondent's reversal in position on the supervisory status of some of the discriminatees. A three-person Board could have issued this decision years ago absent this issue. Second, the delay since 2007 is not unjustifiable. The Board could not act quicker, even though it tried, because it lacked a quorum for reasons beyond its control. Employees should not suffer because the Board could not exercise its authority. Third, the record shows severe violations that are likely to persist even after seven years so as to continue the need for a bargaining order. Respondent vowed to "fight all attempts to bring a union into our company, even if it takes years," that it would "never recognize a union," and that "you can chisel it in stone, ADB will not go union." It threatened job loss, subcontracting, and plant closure, and swore that "[t]his place will never be Union," and told employees that the Company would reallocate "$100,000 of their bonus money to fight the Union." (G.C. Ex. 23, 37, 45; Tr. 412, 1954; ALJ Dec. at p. 7, ll. 17-18, 31, 35, 43.) It also continued to fire union supporters – John Shipp and Wayne Schaeffer -- after the start of the unfair labor practice hearing and months after the first terminations. (ALJ Dec. at p. 32, l. 22.) These violations show a culture of lawlessness. ADB is willing to go to any lengths, for as long as necessary, to achieve its unlawful objectives. "[E]ven if it takes years" and "never," as the Company vowed, is a long, long time. *See Power, Inc. v. NLRB*, 40 F.3d 409, 423 (D.C. Cir. 1994) (Board has shown detrimental effects of unfair labor practices will persist over time based on findings of repeated, numerous, and persistent threats that reached every employee in the unit and

layoff of 13 union supporters); *Amazing Stores, Inc. v. NLRB*, 887 F.2d 328, 330-331 (D.C. Cir. 1989) (affirming bargaining order in category I case based on Board findings that unfair labor practices were committed by highest management officials, that they were directed at virtually every employee, and that it was foreseeable that new employees would learn of past practices; Board is permitted to draw reasonable inferences from the extreme and pervasive conduct of the employer that effects of unfair labor practices will not dissipate over time).[4]

II. In the Event the Board Finds that a Gissel Bargaining Order is No Longer Appropriate, Which it Should Not, the Board Should Order Special Notice and Access Remedies.

If the Board should find that a Gissel bargaining order is no longer warranted, despite the fact that the delay in this case was not unjustified, Respondent's severe and pervasive violations still warrant certain extraordinary remedies. Specifically, the Board should order a number of special "notice" and "access" remedies as a proper response to Respondent's conduct and to give employees a free choice in an election. Neither the Union nor employees are at fault for any delay in this case. The Board's Order should therefore "afford the Union an opportunity to participate in this restoration and reassurance of employee rights by engaging in further organizational efforts, if it so chooses, in

[4] ADB cited *NLRB v. Cell Agricultural Mfg. Co.*, 41 F.3d 389 (8th Cir. 1994) in the appeal in the Eighth Circuit, and contented that its ULPs were not as bad. This is incorrect. The violations in *Cell Agricultural* were category II violations. Here, they are category I. Additionally, the employer in *Cell Agricultural* only fired three employees (8.6% of the unit) while ADB fired 13 employees (22% of the unit). *Cell Agricultural Mfg. Co.*, 41 F.3d at 392.

an atmosphere free of restraint and coercion." *United Dairy Farmers Cooperative Ass'n*, 242 NLRB 1026, 1029 (1979)).[5]

Based on the record in this case, the Board should order the following remedies:

(1) supply the Union, on request, at all times within one year of the date of the Decision, the names, addresses, and phone numbers of ADB's current employees;

(2) On request, and for one year, grant the Union reasonable access to ADB's facilities in nonwork areas during employees' nonworktime. In addition, on request, at all times within one year of the date of this Decision, supply the Union the names and addresses of all current job locations.

(3) On request, at all times within one year of the date of this Decision, grant the Union and its representatives reasonable access to Respondent's bulletin boards, radios, e-mails, and all places or means where or by which notices to employees are customarily posted or sent;

(4) afford the Union, at its request, the right to deliver two 30 minute speeches to employees on working time at ADB's facilities;

(5) order the Employer to mail notices to all employees employed at any time since its first violation and order a high-level manager or owner to read the notice to current employees in the presence of a Board agent and a Union representative;

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[5] The Union withdrew its representation petition in this case when Counsel for the General Counsel indicated that she would seek a Gissel bargaining order. Respondent's conduct nipped the Union's organizing campaign in the bud and made a free and fair election impossible. The Union now seeks notice and access remedies so it and employees can mount an organizing campaign again.

(6) give advance notice of, and equal time and facilities for the Union to respond to, any letter, communications, or address made by the Respondent to its employees on the question of union representation;

As the D.C. Circuit recognized in *Teamsters Local 115 v NLRB*, 640 F.2d 392 (D.C. Cir. 1981), special remedies fall into "two classes: access remedies and notice remedies." *Id.* at 399. These two classes of remedies are "designed to accomplish two objectives in the restoration of employee rights." *United Dairy Farmers*, 242 NLRB at 1029. The objective of the "notice remedies" is "as directly and emphatically as possible, [to] inform employees of their Section 7 rights and assure employees that Respondent will respect those rights." *Id.* The objective of the "access remedies" is that "the Union must be afforded an opportunity to participate in th[e] restoration and reassurance of employee rights by engaging in further organizational efforts, if it so chooses, in an atmosphere free of further restraint and coercion." *Id.* In particular, the Board orders access remedies "to assist the Union in communicating with the employees, and to assist the employees in hearing the Union's side of the story without fear of retaliation." *Teamsters, Local 115*, 640 F.2d at 340. They are structured to carry into effect the understanding that "organization rights are not viable in a vacuum; their effectiveness depends in some measure on the ability of employees to learn the advantages of organization from others," *Central Hardware Co. v. NLRB*, 407 U.S. 539, 543 (1972), and, that the most "effective" location "to communicate ... regarding self-organization [is] at the jobsite." *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 491 (1978).

The above listed notice remedies give Respondent's employees the chance to learn about their rights where they work without fear of retaliation. ADB managers hounded employees with threats of job loss, subcontracting, and plant closure, and told them that ADB would never recognize the Union. ADB's managers and/or ownership now need to personally tell employees, by reading them a notice in the presence of a Board agent and a Union representative, that they misled them and that ADB will respect their choice to select a union.

The Board should also order special access remedies. Employees need the right to talk to the Union at the very places where the Company coerced and threatened them – its facilities and at job sites. Granting the Union access will restore rights by giving employees a fair opportunity to hear the Union's side of the story and reassure employees in free choice. This includes giving the Union the right to make two all-employee speeches and access to Respondent's facilities, bulletin boards, and places where communications are posted in response to ADB's speeches and the letter it sent employees. (G.C. Exs. 23, 37, 45; Tr. 1062, 1521, 2587-88.) The Union also needs to know the location of job sites. Employees generally work at sites during the day, (Tr. 759, 1254, 1262, 1537, 1663, 1746-1748, 1978, 2156), and the Union and co-workers can most effectively communicate with them there. In addition, Respondent has shown a propensity to fabricate job-site related reasons to terminate union supporters. Among other things, it made-up customer complaints about Jason Lohman's restoration work and claimed that Rodney Hanephin engaged in sabotage. (ALJ Dec. at p. 5, ll. 28-30 & p. 23, ll. 4-5). Employees at job sites should know that

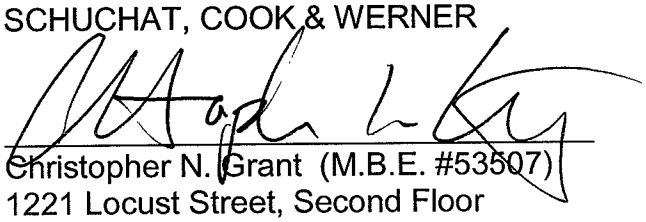
they can speak to a union representative during a break without the Company manufacturing a false reason relating to their performance for their termination. In this regard, a mere list of employee names and addresses is insufficient. It does not give the Union an effective opportunity to talk to employees. It does not adequately address the extent of ADB's past communications and properly consider that employees work in the field. And, it does not go, so to speak, to the scene of the crime.

The Board has ordered extraordinary remedies in past cases where employers engaged in serious violations. *See, e.g., Charlotte Amphitheater Corp.*, 331 NLRB 1274 (2000) (ordering production of employee information, public reading of notice, and access to places where communications to employees are posted); *Audubon Regional Medical Center*, 331 NLRB 374 (2000) (granting public reading of notice and access remedies); *Monfort of Colorado, Inc.*, 298 NLRB 73 (1990) (ordering special notice and access remedies where employer committed severe and pervasive violations). The facts in this case, if anything, are worse. Respondent has repeatedly threatened employees, discharged numerous union supporters, and lied about its conduct. The record shows that after Respondent began its campaign of threats and terminations, employees expressed fear and stopped talking to the Union. (Tr. 1231, 2072, 2218, 2577, 2590; ALJ Dec. at p. 32, ll. 25-29.) If the Board is not going to issue a bargaining order, it must at least give employees and the Union a fighting chance at an election.

Finally, in addition to the above remedies, the Board should order Respondent to pay compound interest on all backpay amounts due the 13 discriminatees. The Board is considering making compound interest routine consistent with normal bank procedures and IRS rules. *See, e.g., Basha's Food City*, Case No. 28-CA-21425. If it does so, it should apply that remedy to all pending cases, including this one.

Respectfully submitted,

SCHUCHAT, COOK & WERNER



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing was filed electronically with the National Labor Relations Board, Office of the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570 and a true copy of the foregoing was sent by electronic mail this 5th day of August 2010 to the following:

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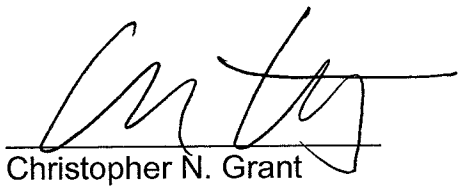

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