Yates Drywall, Inc. *and* Painters District Council No. 22, International Brotherhood of Painters and Allied Trades, AFL-CIO. Case 7-CA-18480

June 16, 1981

DECISION AND ORDER

Upon a charge filed on November 5, 1980, by Painters District Council No. 22, International Brotherhood of Painters and Allied Trades, AFL-CIO, herein called the Union, and duly served on Yates Drywall, Inc., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 7, issued a complaint and notice of hearing on December 30, 1980, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing before an administrative law judge were duly served on the parties to this proceeding. Respondent failed to file an answer to the complaint.

On February 25, 1981, counsel for the General Counsel filed directly with the Board a motion to transfer the case to and continue the proceedings before the Board and a Motion for Summary Judgment based on Respondent's failure to file an answer as required by Sections 102.20 and 102.21 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended. Subsequently, on March 3, 1981, the Board issued an order transferring proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent did not file a response to the Notice To Show Cause and, accordingly, the allegations of the complaint stand uncontroverted.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

Section 102.20 of the Board's Rules and Regulations, Series 8, as amended, provides:

> The respondent shall, within 10 days from the service of the complaint, file an answer thereto. The respondent shall specifically admit, deny, or explain each of the facts alleged in the complaint, unless the respondent is without knowledge, in which case the Respondent shall so state, such statement operating as a denial. All allegations in the complaint, if no answer is filed, or any allegation in in the complaint not specifically denied or explained in an answer filed, unless the respondent shall state in the answer that he is without knowledge, shall be deemed to be admitted to be true and shall be so found by the Board, unless good cause to the contrary is shown.

The complaint and notice of hearing served on Respondent on April 11, 1979, specifically stated that unless an answer to the complaint was filed within 10 days from the service thereof "all of the allegations in the Complaint shall be deemed to be admitted true and may be so found by the Board." Further, Respondent was notified by letter dated January 30, 1981, that an answer to the complaint had not been received, and that summary judgment would be sought unless an answer to the complaint was filed by February 12, 1981. As noted above, Respondent has not filed an answer to the complaint, nor did it respond to the Notice To Show Cause. No good cause to the contrary having been shown, in accordance with the rules set forth above, the allegations of the complaint are deemed to be admitted and are found to be true. Accordingly, we grant the General Counsel's Motion for Summary Judgment.[1]

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

At all times material herein, Respondent, a Michigan corporation with its office and place of business at 1215 Shady Oaks, in the city of Ann Arbor, Michigan, has been engaged in the construction industry as an installer of interior drywall. During the 12 months ending November 30, 1980, Respondent, in the course and conduct of its business operations, provided services valued in excess of $50,000 to Oxford Development Corporation as a subcontractor on F.H.A. project No. 047-35121-PM-PAH-L8. Oxford Development Corporation is located in Okemos, Michigan, and is a subsidiary of the Oxford group which has offices located in Indianapolis, Indiana, and Washington, D.C. During the period mentioned above, Oxford Development Corporation purchased supplies and materials valued in excess of $50,000 from suppliers located outside the State of Michigan and caused such supplies and materials to be transported directly from said out-of-state sources directly to its construction sites located within the State of Michigan.

[1] *Eagle Truck and Trailer Rental Division of E. T. & T. Leasing, Inc.*, 211 NLRB 804 (1974).

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

Painters District Council No. 22, International Brotherhood of Painters and Allied Trades, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All drywall and taping journeymen, apprentices, foremen, and acting foremen employed by the Respondent at its various construction projects; but excluding guards and supervisors as defined in the Act.

At all times material herein, the Union has been the designated exclusive collective-bargaining representative of the above-described employees. Such recognition has been embodied in successive collective-bargaining agreements, with the most recent agreement effective by its terms from June 1, 1978, to May 31, 1980. This most recent agreement provides, *inter alia*, that it will remain in effect for said term and from year to year thereafter unless either party desires a change, in which case it is to notify the opposite party in writing at least 60 days prior to May 31, 1980, or 60 days prior to the anniversary date of any extension thereof. Neither Respondent nor the Union served on the other any notice of modification prior to May 31, 1980. This most recent agreement further provides, in pertinent part, that Respondent shall maintain accurate and complete payroll records for all employees covered by the agreement, that Respondent shall make regular monthly or weekly contributions to the trustees of the Painters Union Deposit Fund on behalf of its unit employees covered by the agreement for purposes of certain insurance, vacation, and other benefits, and that accountants selected by the trustees of the Deposit Fund may make regular audits of Respondent's payroll records to ascertain compliance with construction requirements of the agreements.

Since December 1979, and continuing to date, Respondent has failed and refused, despite continuing requests by administrators of the fringe benefit funds to submit the contractually required monthly fringe benefit reports and contributions on behalf of the unit employees to the trustees of the fringe benefit funds. Since June 26, 1980, agents of the fringe benefit funds described in the contract have requested that Respondent furnish them payroll and other records to determine Respondent's compliance with the benefit contribution provisions of the applicable agreement. Respondent, by its agent, Loren Yates, has failed and refused to comply with the foregoing requests.

We find that by the aforesaid conduct Respondent has refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit and that such conduct violated Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and take certain affirmative action designed to effectuate the policies of the Act.

We have found that Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally, and without notice to or discussion with the Union, failing and refusing to make monthly fringe benefit reports and contributions on behalf of unit employees to the trustees of the fringe benefit funds as required by the applicable agreement in effect between the Union and Respondent. In order to dissipate the effect of these unfair labor practices, we shall order Respondent to furnish payroll and other records to the administrators of the fringe benefit fund as provided in the applicable agreement and to make whole its employees by paying to the Union's fringe benefit funds the contributions which should have been made pursuant to the applicable agreement, retroactive to December 1979.[2]

[2] Because the provisions of employee benefit fund agreements are variable and complex, the Board does not provide at the adjudicatory stage of a proceeding for the addition of interest at a fixed rateon unlawfully withheld fund payments. We leave to the compliance stage the question whether Respondent Yates Drywall, Inc., must pay any additional

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The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. Yates Drywall, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Painters District Council No. 22, International Brotherhood of Painters and Allied Trades, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All drywall and taping journeymen, apprentices, foremen, and acting foremen employed by Respondent at its various construction projects, but excluding guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times material herein, the Union has been the exclusive representative of all the employees in the aforesaid appropriate unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By unilaterally, and without notice to or discussion with the Union, failing and refusing since on or about December 1979, to contribute to the Union's fringe benefit fund the sums of money required by the written agreement entered into between the Union and Respondent and by failing and refusing to furnish payroll and other records in accordance with the applicable agreement, Respondent has refused to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate bargaining unit described above, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Yates Drywall, Inc., Ann Arbor, Michigan, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Painters District Council No. 22, International Brotherhood of Painters and Allied Trades, AFL-CIO, by unilaterally, and without notice to or discussion with the aforesaid Union, failing and refusing to submit monthly fringe benefits reports and contributions on behalf of unit employees as required pursuant to the applicable written agreement between the Union and Respondent.

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

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain collectively with Painters District Council No. 22, International Brotherhood of Painters & Allied Trades, AFL-CIO, with respect to rates of pay, wages, hours, and other terms and conditions of employment. The appropriate unit for the purposes of collective bargaining is:

> All drywall and taping journeymen, apprentices, foremen, and acting foremen at its various construction projects, but excluding guards and supervisors as defined in the Act.

(b) Make whole its employees by making contributions into the Union's fringe benefit funds and furnish delinquent fringe benefit contribution reports in the manner set forth in the section of this Decision entitled "The Remedy."

(c) Preserve and, upon 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 or useful in checking compliance with this Order.

(d) Post at its facility in Ann Arbor, Michigan, copies of the attached notice marked "Appendix."[3] Copies of said notice, on forms provided by the Regional Director for Region 7, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

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amounts into the benefit funds in order to satisfy our "make whole" remedy. These additional amounts may be determined, depending on the circumstances of each case, by reference to provisions in the documents governing the funds at issue and, where there are no governing provisions, to evidence of any loss directly attributable to the unlawful withholding action, which might include the loss of return on investment of the portion of funds withheld, additional administrative costs, etc., but not collateral losses. *Merryweather Optical Company*, 240 NLRB 1213 (1979).

[3] In the event that 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."

(e) Notify the Regional Director for Region 7, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

APPENDIX

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

WE WILL NOT refuse to bargain collectively with Painters District Council No. 22, International Brotherhood of Painters and Allied Trades, AFL-CIO, by unilaterally making fringe benefit reports and contributions as required by the terms of the applicable agreement between the Union and ourselves.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL, upon request, bargain with the above-named Union as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment. The bargaining unit is:

All drywall journeymen, apprentices, foremen, and acting foremen, employed by the Employer at its various construction projects; but excluding guards and supervisors as defined in the Act.

WE WILL make our employees whole by paying to the Union's fringe benefit funds the contributions which should have been made pursuant to the terms of our written agreement with the above-named Union. WE WILL furnish delinquent fringe benefit reports as required by our agreement with the Union.

YATES DRYWALL, INC.