

Jay-Lor Drains & Piping Maintenance, Inc. and District Council No. 12 of the United Association Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO, on behalf of Locals 86, 209, 299. Case 2-CA-23697

September 28, 1990

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
CRACRAFT AND OVIATT

Upon a charge filed by the Union June 22, 1989, the General Counsel of the National Labor Relations Board issued a complaint (subsequently amended) against Jay-Lor Drains & Piping Maintenance, Inc., the Respondent, alleging that it has violated Section 8(a)(5) and (1) of the National Labor Relations Act. Although properly served copies of the charge, complaint, and order amending complaint, the Respondent has failed to file an adequate answer.

On May 7, 1990, the General Counsel filed a Motion for Summary Judgment. On May 10, 1990, 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 response. The allegations in the motion are therefore undisputed.

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

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. The complaint states that unless an answer is filed within 14 days of service, "all of the allegations in the Complaint shall be deemed to be admitted to be true and shall be so found by the Board." Section 102.20 also states that an answer should specifically admit, deny, or explain each of the facts alleged in the complaint unless the respondent is without knowledge, in which case it shall so state.

The Respondent did not initially file an answer to the complaint as required by Section 102.20 of the Board's Rules and Regulations. According to the undisputed allegations in, and the attachments to, the Motion for Summary Judgment, by letters dated January 2 and March 28, 1990, counsel for the General Counsel notified the Respondent of its obligation to file an answer, extended the deadline for filing, and stated that a Motion for Summary Judgment would be filed if no answer was received.

On April 4, 1990, the Respondent mailed a letter purporting to be an answer admitting that it had not made certain union fund payments, as alleged in the complaint, but denied that it had "refused" to do so. The Respondent stated that it was "making payments as fast as possible." The Respondent also asserted that "[t]he District Council is satisfied and the attorney for the Fund is supposed to acknowledge this with your department."

On April 20, 1990, counsel for the General Counsel notified the Respondent that a sufficient answer had not been received and that failing the immediate filing of an adequate answer, a Motion for Summary Judgment would be filed.

The Respondent submitted no further document to the Regional Office and has submitted no response to the Motion for Summary Judgment. In such circumstances, we agree that summary judgment is warranted. The Respondent's letter does not constitute a proper answer under the Board's rules because it does not specifically admit, deny, or explain each of the allegations in the complaint.¹ Further, we note there is no indication that the Charging Party was served with a copy of the April 4, 1990 letter to the Regional Office.²

Accordingly, in view of the Respondent's failure to file a proper answer and in the absence of good cause being shown for the failure to do so, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a New York corporation, is engaged in business as a plumbing contractor, providing services directly to residential as well as commercial customers, at its facility in Yonkers, New York, where it annually purchases and receives products, goods, and materials valued in excess of \$50,000 from other enterprises, including Kent Supply and Consolidated Plumbing Supply, located within the State of New York, each of which other enterprises receives said products, goods, and materials 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(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

The following employees of the Respondent constitute a unit appropriate for collective-bargaining pur-

¹ See *Richardson Security Co.*, 297 NLRB 738 (1990).

² *Travelodge San Francisco Civic Center*, 242 NLRB 287 (1979).

poses within the meaning of Section 9(b) of the Act: "All journeymen plumbers and apprentices."

At all material times the Union has been the designated exclusive collective-bargaining representative in the unit and has been recognized as such by the Respondent. Such recognition has been embodied in successive collective-bargaining agreements, the two most recent of which are effective from July 1, 1986, to June 30, 1989, and from July 1, 1989, to June 30, 1992. By virtue of Section 8(f) of the Act, the Union is the exclusive representative of the employees in the bargaining unit for the purposes of collective bargaining concerning rates of pay, wages, hours of employment, and other terms and conditions of employment.

The most recent collective-bargaining agreements require the Respondent to make monetary contributions to the Welfare Fund, Pension Fund, Education Fund, Vacation and Holiday Fund, Annuity Fund, and to Locals 86, 209, and 299 for administrative costs. These terms of the collective-bargaining agreements are mandatory subjects of bargaining. Since March 1, 1989, the Respondent has failed and refused to make the contractually required monetary payments to these funds and Locals, without having afforded the Union an opportunity to bargain about such acts and conduct and the effects of such acts and conduct. By these acts and conduct, the Respondent has engaged in, and is 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 Act.

CONCLUSION OF LAW

By failing and refusing to make contractually required monetary payments to the Welfare Fund, Pension Fund, Education Fund, Vacation and Holiday Fund, Annuity Fund, and to Locals 86, 209, and 299 for administrative costs, without having afforded the Union an opportunity to bargain about such acts and conduct and the effects of such acts and conduct, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) 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.

We shall order the Respondent to make whole its unit employees by abiding by the Union fund and administrative cost provisions of the collective-bargaining agreements and making all contributions that have not been paid and that would have been paid absent the Respondent's unlawful discontinuance of the pay-

ments,³ and by reimbursing unit employees for any expenses ensuing from the Respondent's failure to make such required payments as set forth in *Kraft Plumbing & Heating*,⁴ with interest as prescribed in *New Horizons for the Retarded*.⁵

ORDER

The National Labor Relations Board orders that the Respondent, Jay-Lor Drains & Piping Maintenance, Inc., Yonkers, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with District Council No. 12 of the United Association Journeymen and Apprentices of the Plumbing Industry of the United States and Canada, AFL-CIO, on behalf of Plumbers Locals 86, 209, 299 by failing and refusing to make contractually required monetary payments to the Welfare Fund, Pension Fund, Education Fund, Vacation and Holiday Fund, Annuity Fund, and to Locals 86, 209, and 299 for administrative costs, without having afforded the Union an opportunity to bargain about such acts and conduct and the effects of such acts and conduct.

(b) 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) Make whole its unit employees by abiding by the Union fund and administrative cost provisions of the collective-bargaining agreements and making all contributions that have not been paid and that would have been paid absent the Respondent's unlawful discontinuance of the payments, and by reimbursing unit employees for any expenses ensuing from the Respondent's failure to make such required payments, in the manner set forth in the remedy section of this decision.

(b) 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.

³Because 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 rate on unlawfully withheld payments. We leave to the compliance stage the question of whether the Respondent must pay any additional amounts into the benefit fund 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 Co.*, 240 NLRB 1213 (1979).

⁴252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981).

⁵283 NLRB 1173 (1987).

(c) Post at its facility in Yonkers, New York, copies of the attached notice marked "Appendix."⁶ Copies of the notice, on forms provided by the Regional Director for Region 2, 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.

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

⁶If 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."

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 refuse to bargain with District Council No. 12 of the United Association Journeymen and Apprentices of the Plumbing Industry of the United States and Canada, AFL-CIO, on behalf of Plumbers Locals 86, 209, 299 by failing and refusing to make contractually required monetary payments to the Welfare Fund, Pension Fund, Education Fund, Vacation and Holiday Fund, Annuity Fund, and to Locals 86, 209, and 299 for administrative costs, without having afforded the Union an opportunity to bargain about such acts and conduct and the effects of such acts and conduct.

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 make whole our unit employees by abiding by the Union fund and administrative cost provisions of the collective-bargaining agreements and making all contributions that have not been paid and that would have been paid absent our unlawful discontinuance of the payments, and by reimbursing unit employees for any expenses ensuing from our failure to make such required payments.

JAY-LOR DRAINS & PIPING MAINTENANCE, INC.