

**DFV Electric Corp. and International Brotherhood of Electrical Workers, Local 166.** Case 3-CA-16393

January 15, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT  
AND RAUDABAUGH

On July 30, 1991, the General Counsel of the National Labor Relations Board issued a complaint alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act. The Respondent filed an answer admitting in part and denying in part the allegations of the complaint and submitting an affirmative defense.

The complaint alleges that the Respondent has failed, since about December 17, 1990, to abide by the provisions of its collective-bargaining agreement with the Union regarding deduction of union dues, apprenticeship and training, and fringe benefits. In its answer, the Respondent admits the above allegations, but submits the affirmative defense that it has ceased operations and that it has been unable to meet its contractual contribution obligations because of cash flow problems. The Respondent avers that it intends to meet its obligations when outstanding receivables are collected.

On October 7, 1991, the General Counsel filed a motion to strike Respondent's affirmative defense and for Summary Judgment, with exhibits attached. On October 10, 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 November 13, the Board issued a Supplemental Notice to Show Cause. The Respondent filed no response. The allegations in the motion therefore are undisputed.

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

Ruling on Motion for Summary Judgment

In its answer the Respondent admits its failure to abide by the provisions of articles III, section 3-22 (union dues deduction), V (apprenticeship and training), and VI (fringe benefits). It is well established that Section 8(a)(5) and (1) and Section 8(d) of the Act prohibit an employer that is a party to an existing collective-bargaining agreement from modifying the terms and conditions of employment established by that agreement without obtaining the consent of the union. *Nick Robilotto, Inc.*, 292 NLRB 1279 (1989). The Respondent has admitted that it failed to abide by the terms of the agreement as alleged, and thus has admitted all the facts material to a resolution of the unfair labor practice issues raised by the complaint. The Re-

spondent's claim that it is financially unable to make the required payments does not constitute an adequate defense to an allegation that an employer has violated Section 8(a)(5) and (1) of the Act by failing to abide by a provision of a collective-bargaining agreement. *Ibid.*

Nor does the Respondent's intention to meet its obligations on receipt of amounts owed it constitute an adequate defense to the complaint allegations here. The Board need not determine at the adjudicatory stage of a proceeding how much a respondent owes. We leave this matter to the compliance stage. *Ibid.*

Because we find the affirmative defenses submitted by the Respondent to be inadequate,<sup>1</sup> we grant the General Counsel's motion to strike. Because there are no material facts in dispute, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, whose principal office and place of business is in Cohoes, New York, is engaged in the business of electrical contracting. During the past 12 months, the Respondent, in the course and conduct of its business operations as an electrical contractor, derived gross revenues in excess of \$50,000, of which an amount in excess of \$50,000 was derived from providing services to other enterprises that are directly engaged in interstate commerce.

Albany Electrical Contractors Assn., NECA Chapter, Schenectady Division (the Association), comprises various employers in the electrical contracting industry, including the Respondent, which have delegated to the Association the authority to represent them for the purposes of collective bargaining. During the past 12 months, the employer-members of the Association, in the course and conduct of their business operations located in New York State, collectively purchased and received goods and materials valued in excess of \$50,000 that were transported to the businesses directly from points located outside the State of New York.

Since about March 23, 1989, and continuing to date, the Respondent has delegated authority to the Association to represent it for the purpose of collective bargaining with the Union.

We find that the Respondent and the Association are employers engaged in commerce within the meaning

<sup>1</sup> Under certain limited circumstances, Member Oviatt would not find that an employer's failure to make contractually required payments violates Sec. 8(a)(5) and (1) of the Act. See his dissent in *Zimmerman Painting & Decorating*, 302 NLRB 856 (1991). He finds, however, that the Respondent in this case has not fulfilled those requirements as there is no indication that the Respondent sought to negotiate with the Union over its claimed temporary inability to pay.

of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization with 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 purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All journeymen, foremen, and apprentices.

About March 23, 1989, the Respondent and the Union entered into an initial prehire collective-bargaining agreement within the meaning of Section 8(f) of the Act, the term of which was May 1, 1988, until April 30, 1991, and have since entered into a successor agreement covering the employees in the unit, the term of which is from May 1, 1991, until April 30, 1993. Under the principles established in *John Deklewa & Sons*, 282 NLRB 1375 (1987), enfd. 843 F.2d 770 (3d Cir. 1988), cert. denied 488 U.S. 889 (1988), the Union has been, and is, the limited exclusive representative for the employees in the unit for purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

Since about December 17, 1990, and continuing thereafter, the Respondent has failed to continue in full force and effect all the terms and conditions of the agreements referred to above by failing to abide by the following provisions:

Article III, Section 3-22 (Union Dues Deduction)  
 Article V (Apprenticeship and Training)  
 Article VI (Fringe Benefits)

Those terms and conditions of employment are mandatory subjects of collective bargaining.

By failing to observe the contractual terms and conditions of employment set forth above, the Respondent has unlawfully failed and refused, and is failing and refusing, to bargain in good faith with the Union as the representative of its employees, in violation of Section 8(a)(5) and (1) of the Act.

## CONCLUSION OF LAW

By failing and refusing to bargain with the Union in the manner set forth above, 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 de-

signed to effectuate the policies of the Act.<sup>2</sup> Specifically, with regard to apprenticeship and training and fringe benefits, we shall order the Respondent to make the contractually mandated contributions, to remit any payments it may owe to the relevant funds, and to reimburse employees for any expenses they may have incurred because of any failure of the Respondent to make those payments, in the manner prescribed in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), with interest as provided in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Amounts to be paid into the fringe benefit funds, if any, shall be determined in the manner set forth in *Merryweather Optical Co.*, 240 NLRB 1213 (1979). Concerning the authorization deduction of union dues, we shall order the Respondent to withhold moneys as provided in article III, section 3-22, of the collective-bargaining agreement, and to remit to the Union any authorized dues that it may have failed to remit since December 17, 1990, with interest as provided in *New Horizons*, supra.<sup>3</sup> As the Respondent asserts that it has ceased operations, we shall also order it to mail copies of the notice to unit employees.

## ORDER

The National Labor Relations Board orders that the Respondent, DFV Electric Corp., Cohoes, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to continue in full force and effect all the terms and conditions of its collective-bargaining agreements with the Union as the exclusive representative of its employees in the following appropriate unit:

All journeymen, foremen, and apprentices.

(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) Continue in full force and effect all the terms and conditions of employment contained in the provisions of its collective-bargaining agreement with the Union concerning deduction of union dues (art. III, sec. 3-22), apprenticeship and training (art. V), and

<sup>2</sup>The complaint does not specify the manner in which the Respondent failed to abide by its contractual obligations. (However, the Respondent in its answer clearly states that it has failed to make at least some contractually mandated contributions.) We shall leave to compliance the precise identification of the Respondent's failure to abide by the contract that must be remedied, and the individual entities to which the Respondent owes contributions.

<sup>3</sup>See *Timber Products Co.*, 277 NLRB 769, 771 (1985).

fringe benefits (art. VI). Specifically, but without limitation,<sup>4</sup> the Respondent shall:

(1) Make all fringe benefit payments mandated by article VI on behalf of unit employees.

(2) Deduct authorized union dues from the paychecks of unit employees and remit all such dues to the Union, as provided in article III, section 3-22.

(b) Remit any payments it may owe to the apprenticeship and training and fringe benefits funds, and all dues it may owe to the Union, in the manner set forth in the remedy section of this decision.

(c) Make whole all present and former unit employees for any losses they may have suffered as a result of any failure by the Respondent to make the contractually mandated fringe benefit payments, in the manner set forth in the remedy section of this decision.

(d) 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, trust fund statements, and all other documents or records necessary to analyze the amount of apprenticeship and training and fringe benefit payments or union dues due under the terms of this Order.

(e) Post at its facility in Cohoes, New York, copies of the attached notice marked "Appendix."<sup>5</sup> 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.

(f) Mail copies of the notice to present and past unit employees at their last known addresses.

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

<sup>4</sup> See fn. 2, supra.

<sup>5</sup> 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."

## 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 fail and refuse to continue in full force and effect all the terms and conditions of our collective-bargaining agreement with the Union as the exclusive representative of our employees in the following appropriate unit:

All journeymen, foremen, and apprentices.

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 continue in full force and effect all the terms and conditions of employment contained in the provisions of our collective-bargaining agreement with the Union concerning deduction of union dues, apprenticeship and training, and fringe benefits. Specifically,

WE WILL make all payments to the apprenticeship and training and fringe benefit funds on behalf of unit employees, as required by the contract.

WE WILL deduct authorized union dues from the paychecks of unit employees and remit the dues to the Union, as provided in the contract.

WE WILL remit all payments we owe to the apprenticeship and training fund and the fringe benefit funds; and reimburse our unit employees for any expenses they may have incurred because of any failure on our part to make the required payments, with interest.

WE WILL remit to the Union any authorized union dues that should have been remitted pursuant to the checkoff provision of the contract since December 17, 1990, with interest.

DFV ELECTRIC CORP.