

**Stevens & Associates Construction Co. and William Cochran and United Brotherhood of Carpenters and Joiners of America, AFL-CIO.**  
Cases 9-CA-29099 and 9-CA-29175

July 20, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS  
DEVANEY AND RAUDABAUGH

On charges filed by William Cochran (Cochran) on November 20, 1991, and by the United Brotherhood of Carpenters and Joiners of America, AFL-CIO (Union) on December 23, 1991, the General Counsel of the National Labor Relations Board issued a consolidated complaint on December 27, 1991,<sup>1</sup> against Stevens & Associates Construction Co., the Respondent, alleging that it violated Section 8(a)(5) and (1) of the National Labor Relations Act by failing to make contractually required contributions to employee benefit funds and by failing to remit dues to the Union as contractually required.

The Respondent's answers to the consolidated complaint and the amended consolidated complaints admit all factual allegations in the complaints, and assert affirmative defenses.

On April 20, 1992, the General Counsel filed a Motion for Summary Judgment. On April 22, 1992, 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 a response.

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

On the entire record, the Board makes the following

Ruling on Motion for Summary Judgment

The Respondent's admissions to the factual allegations in the second consolidated complaint establish that (1) at all material times, the Southwest Ohio District Council of Carpenters of the United Brotherhood of Carpenters and Joiners of America (Council) was the recognized and exclusive collective-bargaining representative of the Respondent's employees in an appropriate bargaining unit composed of all the Respondent's nonsupervisory carpenters in 15 counties in the State of Ohio; (2) the Respondent was obligated under the terms of its collective-bargaining agreement with the Council to make payments to the Council's benefit funds, and to remit dues to the Council; and (3) the Respondent stopped making those contractually required contributions and remittances of dues without the consent of the Council.

<sup>1</sup> First and second amended consolidated complaints issued on February 26, 1992, and April 7, 1992, respectively.

It is well established that an employer which is a party to an existing collective-bargaining agreement refuses to bargain collectively within the meaning of Section 8(d) in violation of Section 8(a)(5) and (1) of the Act when it modifies the terms and conditions of employment established by that agreement without obtaining the consent of the union. *Rapid Fur Dressing*, 278 NLRB 905, 906 (1986); *General Split Corp.*, 284 NLRB 418 (1987). Here, the Respondent has admitted that it has unilaterally discontinued making its contractually required payments to the Council's benefit funds, and failed to remit dues to the Council.

The Respondent raises the affirmative defense that it lacks the financial ability to make the required payments. Such a claim of economic necessity, even if proven, does not constitute an adequate defense to an allegation that an employer has unlawfully failed to abide by the provisions of a collective-bargaining agreement. *Tammy Sportswear Corp.*, 302 NLRB 860 (1991); *C & H Moving & Storage Co.*, 299 NLRB No. 62, slip op. at 4 (Aug. 15, 1990); *International Distribution Centers*, 281 NLRB 742, 743 (1986). Likewise, the Respondent's offer to negotiate with the Council over its failure to adhere to the agreement is not a viable defense to the unilateral midterm modification of a collective-bargaining agreement. *Zimmerman Painting & Decorating*, 302 NLRB 856, 857 (1991).

The Respondent's next asserted defense that its inability to make the payments constitutes at most a breach of contract, and not an unfair labor practice, has been consistently rejected by the Board. *Zimmerman*, supra. Such midterm modifications of collective-bargaining agreements violate Section 8(a)(5) and (1) of the Act. *Papercraft Corp.*, 212 NLRB 240, 241 fn. 3 (1974); *Manley Truck Line*, 271 NLRB 679, 681 (1984), enf. 779 F.2d 1327 (7th Cir. 1985).

The Respondent also asserts that the Board should defer this case to the contractual arbitration procedure, relying on *Collyer Insulated Wire*.<sup>2</sup> In *Collyer*, the Board found that the case was well-suited to resolution by arbitration because the contract and its meaning were at the center of the dispute. In this case, however, the Respondent does not claim that its refusals to adhere to the agreement are privileged by any provision of the contract. Because the Respondent recognizes its obligation to make the payments to the funds and to remit the dues to the Council, there is no bona fide issue of contract interpretation and deferral is inappropriate.

Finally, the Respondent's assertion that the making of contributions to benefit funds and the remittance of dues are not mandatory subjects of collective bargaining under the Act is clearly without merit. See *International Distribution Centers*, 281 NLRB 742 (1986).

<sup>2</sup> 192 NLRB 837 (1971).

Thus, the Respondent has admitted all the facts material to a resolution of the unfair labor practice issues raised by the complaint and has not raised an adequate defense to the complaint's allegations.

Because we find the affirmative defenses submitted by the Respondent to be inadequate, and because there are no material facts in dispute, in the absence of any cause to the contrary having been shown by the Respondent, 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 is a corporation with a place of business in Cincinnati, Ohio, where it has been engaged as a general contractor in the construction industry doing commercial, industrial, and office construction. During the 12 months prior to issuance of the complaint, the Respondent performed services valued in excess of \$50,000 for various enterprises located in States other than the State of Ohio and for other enterprises within the State of Ohio, which, in turn, performed services valued in excess of \$50,000 in States other than the State of Ohio. 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 Council 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 purposes within the meaning of Section 9(b) of the Act:

All carpenters employed by Respondent in the following counties in the State of Ohio: Darke, Shelby, Logan, Champaign, Clark, Green, Miami, Montgomery, Preble, Butler, Clermont, Hamilton, Brown, Warren and Clinton excluding all other employees and all professional employees, guards and supervisors as defined by the Act.

At all material times the Council has been the designated exclusive collective-bargaining representative of the employees in the unit and has been recognized as such by the Respondent. Recognition has been embodied in a collective-bargaining agreement, effective from July 27, 1989, to June 1, 1992. By virtue of Section 9(a) of the Act, the Council is the exclusive representative of 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 parties' collective-bargaining agreement requires the Respondent to make monthly monetary contributions to the Southwest Ohio District Council of Car-

penters Benefit Funds, and to remit dues to the Council. Since about May 20, 1991, the Respondent has failed and refused to make these monthly payments to the above funds and to remit dues to the Council, and has not obtained the Council's consent. By such 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), Section 8(d), and Section 2(6) and (7) of the Act.

#### CONCLUSION OF LAW

By ceasing during the term of the contract to make contractually required payments to the Southwest Ohio District Council of Carpenters Benefit Funds, and ceasing to remit dues to the Council on and after May 20, 1991, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1), Section 8(d), 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 the Southwest Ohio District Council of Carpenters Benefit Funds for all contributions that would have been paid but for the Respondent's unlawful discontinuance of payments<sup>3</sup> and to make unit employees whole as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), *enfd.* 661 F.2d 940 (9th Cir. 1981), the amounts to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). We shall also order the Respondent to make the Council whole for the Respondent's failure to abide by its obligation under the dues-checkoff provision in the contract, also with interest computed as described above.

#### ORDER

The National Labor Relations Board orders that the Respondent, Stevens & Associates Construction Co., Cincinnati, Ohio, its officers, agents, successors, and assigns, shall

##### 1. Cease and desist from

(a) Failing and refusing to bargain with Southwest Ohio District Council of Carpenters of the United Brotherhood of Carpenters and Joiners of America by failing and refusing to make contractually required

<sup>3</sup> Because the provisions of employee benefit funds agreements are variable and complex, we leave to the compliance stage the question whether the Respondent must pay any additional amounts into benefit funds in order to satisfy our "make-whole" remedy. *Merryweather Optical Co.*, 240 NLRB 1213 (1979).

monetary payments to the Council's benefit funds and failing to remit dues to the Council.

(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 all contributions to the benefit funds that have not been paid and that would have been paid in the absence of the Respondent's unlawful discontinuance of the payments, and make unit employees whole, in the manner set forth in the remedy section of this decision.

(b) Comply with the terms of the dues-checkoff provision in the collective-bargaining agreement and remit to the Council dues checked off pursuant to that provision and valid authorizations and required by the agreement to be turned over to the Council by Respondent, with interest as set forth in the remedy section of this decision.

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

(d) Post at its facility in Cincinnati, Ohio, copies of the attached notice marked "Appendix."<sup>4</sup> Copies of the notice, on forms provided by the Regional Director for Region 9, 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.

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 Southwest Ohio District Council of Carpenters of the United Brotherhood of Carpenters and Joiners of America by failing and refusing to make contractually required monetary payments to the benefit funds and failing and refusing to comply with the dues-checkoff provisions of the collective-bargaining agreement.

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 all contributions to the benefit funds that have not been paid and that would have been paid in the absence of our unlawful discontinuance of the payments, and make unit employees whole, with interest.

WE WILL remit to the Council dues checked off pursuant to the collective-bargaining agreement and required to be turned over to the Council by us, with interest.

STEVENS & ASSOCIATES CONSTRUCTION CO.

<sup>4</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."