

**WJA Realty Limited Partnership d/b/a Fort Pierce Jai-Alai, Miami Jai-Alai, Ocala Jai-Alai, Tampa Jai-Alai, and World Jai-Alai Players and International Jai-Alai Players Association-UAW Local 8868, AFL-CIO.** Case 12-CA-14733

August 31, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS  
DEVANEY AND OVIATT

On May 8, 1992, Administrative Law Judge Steven M. Charno issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in response.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.<sup>1</sup>

The Respondent has excepted, inter alia, to the judge's finding that it violated Section 8(a)(5) and (1) of the Act by failing to abide by the arbitration provision of the collective-bargaining agreement. For the reasons set forth below, we agree with the judge.

The parties' collective-bargaining agreement provides that a grievant or the Union may submit a grievance to arbitration and that the clear loser of the arbitration must pay the arbitrator's fees and expenses. The contract further provides that in the absence of "a clear loser," the parties share the arbitration costs.<sup>2</sup>

The arbitrator's fee and expenses shall be paid by the losing party if there is a clear loser. If the arbitrator rules partially for one party and partially for the other, the arbitrator's fees and expenses shall be paid one-half by each party.

By letters dated August 16, 1991, and by telephone conversations thereafter, the Respondent's attorney, Jesse S. Hogg, informed the two arbitrators already scheduled to hear grievances<sup>3</sup> that the Respondent was experiencing financial difficulties and might not be able to pay for their arbitration services and expenses.<sup>4</sup>

<sup>1</sup>We shall modify the judge's remedy to require that backpay be computed as prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970). In addition, we shall substitute a new notice that conforms to the judge's recommended Order.

<sup>2</sup>Specifically, at art. XVI, sec. 4(c), the collective-bargaining agreement provides:

<sup>3</sup>The hearing dates were scheduled for August 28 and September 10 and 11, 1991.

<sup>4</sup>In its exceptions, the Respondent claims that it was the Union's attorney who first conveyed the information concerning the Respondent's financial status to the arbitrators. The record shows, how-

The arbitrators responded that it would be inappropriate to go ahead with the hearings until they could be assured of complete payment. The Respondent never contacted the Union to negotiate a plan to recommence the arbitration process.<sup>5</sup> No arbitration hearing has been held since August 16, 1991. As of the date of the Board hearing, there were a minimum of 15 outstanding grievances waiting to be heard by an arbitrator.

The Respondent argues that it did not violate Section 8(a)(5) and (1) of the Act because it never refused to submit to arbitration and that it acted in good faith by not misleading the arbitrators about its ability to pay their expenses and fees. We find no merit to the Respondent's argument.

Although the Respondent acted in good faith by not misleading the arbitrators about its financial status, we do not find that the Respondent fulfilled its statutory obligation to bargain in good faith with the Union. After the Respondent effected the arbitrators' suspension of the two previously scheduled hearings by informing the arbitrators about its precarious financial condition and potential inability to pay their fees and expenses, the Respondent was obligated, at a minimum, to bargain with the Union concerning commencement of the hearings or other resolutions of the pending grievances. The record indicates that the Respondent had some options that it could have discussed with the Union. For instance, the Respondent eventually had some funds that it used to pay off its prize money obligations; it could have negotiated with the Union about apportioning some of those funds toward arbitration. Furthermore, the parties stipulated that some of the claims that were to go to arbitration were de minimis. Negotiations between the parties might have resolved some of these claims without arbitration. The Respondent, therefore, had issues and alternatives to discuss with the Union.<sup>6</sup> Accordingly, we find that the Respondent's failure to initiate negotiations concerning a plan to recommence the hearing process or otherwise resolve the grievances set for arbitration amounted to a refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.<sup>7</sup>

ever, that Hogg was the first to contact the arbitrators with the information.

<sup>5</sup>Although Hogg discussed the Respondent's financial problem with the Union's attorney, the discussion amounted to a simple relay of information. Hogg in no way indicated that the Respondent was seeking to open talks on the subject.

<sup>6</sup>In Member Oviatt's view, the Respondent did not meet its burden of defense concerning its financial inability to meet its contractual obligations. At a minimum under the standard Member Oviatt would apply, the Respondent was required to show that its inability-based failure to pay accrued prize money and to go forward with arbitration was followed by a request to meet with the Union to discuss and resolve the financial problems. See Member Oviatt's dissenting opinion in *Zimmerman Painting & Decorating*, 302 NLRB 856 (1991).

<sup>7</sup>See generally 3 *State Contractors*, 306 NLRB 711 (1992).

## ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, WJA Realty Limited Partnership d/b/a Fort Pierce Jai-Alai, Miami Jai-Alai, Ocala Jai-Alai, Tampa Jai-Alai, and World Jai-Alai Players, Fort Pierce, Miami, Ocala, and Tampa, Florida, its officers, agents, successors, and assigns, shall take the action set forth in the Order, except that the attached notice is substituted for that of the administrative law judge.

## 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 or refuse to bargain with International Jai-Alai Players Association-UAW Local 8868, AFL-CIO as the exclusive collective-bargaining representative of the employees in the bargaining unit described below by unilaterally deferring payment of contractually required prize money to jai-alai players, and by failing and refusing to guarantee payment of arbitration costs:

All full-time and regular part-time jai-alai players, including seasonal players, employed by us at our Fort Pierce, Miami, Ocala, and Tampa, Florida facilities; excluding office clerical and professional employees, guards, and supervisors as defined in the Act, and all other employees.

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 all our unit employees by making all payments of prize money that have not been paid, and by paying interest on all prize money payments that were deferred in September and October 1991.

WE WILL arbitrate the grievances formerly scheduled to be heard by Arbitrators George Bennett and George Ostrow, and any other grievances in accordance with the procedures in the collective-bargaining agreement.

WJA REALTY LIMITED PARTNERSHIP  
D/B/A FORT PIERCE JAI-ALAI, MIAMI  
JAI-ALAI, OCALA JAI-ALAI, TAMPA JAI-  
ALAI, AND WORLD JAI-ALAI PLAYERS

*Eduardo Soto, Esq.*, for the General Counsel.  
*Jesse S. Hogg, Esq. (Hogg, Allen, Norton & Blue, P.A.)*, of  
Coral Gables, Florida, for the Respondent.

## DECISION

STEVEN M. CHARNO, Administrative Law Judge. In response to charges timely filed, a complaint was issued on December 24, 1991, alleging that WJA Realty Limited Partnership, doing business as Fort Pierce Jai-Alai, Miami Jai-Alai, Ocala Jai-Alai, Tampa Jai-Alai and World Jai-Alai Players (Respondent), violated Section 8(a)(1) and (5) of the National Labor Relations Act, by failing and refusing to bargain collectively with the International Jai-Alai Players Association-UAW Local 8868, AFL-CIO (Union). Respondent's January 7, 1992 answer denied the commission of any unfair labor practice.

A hearing was held before me in Miami, Florida, on March 26, 1992.<sup>1</sup> Under due date of April 30, 1992, General Counsel and Respondent filed posthearing briefs.

## FINDINGS OF FACT

## I. JURISDICTION

Respondent is a Florida partnership engaged in the operation of jai-alai frontons in Fort Pierce, Miami, Ocala, and Tampa, Florida. In the course of its business operations in Florida, Respondent annually (1) has gross receipts in excess of \$1 million, (2) earns gross revenues in excess of \$500,000, and (3) purchases and receives goods valued in excess of \$50,000 at each of its facilities from points outside the State. It is admitted, and I find, that Respondent is an employer engaged in commerce within the meaning of the Act.

The Union is admitted to be, and I find is, a labor organization within the meaning of the Act.

## II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Certain background facts have been admitted by Respondent. Since September 1990, the Union has been the exclusive collective-bargaining representative of Respondent's jai-alai players.<sup>2</sup> Respondent's recognition of the Union in this capacity was embodied in a collective-bargaining agreement dated September 23, 1990. That agreement, which is to remain in effect until December 31, 1993, provides for the payment of (1) prize and performance-related bonus money to the players and (2) arbitrators' fees and expenses. Both types of payment relate to terms and conditions of employment and are mandatory subjects for collective bargaining.

It is uncontested that Respondent experienced significant financial hardship during the period of July 1991 through

<sup>1</sup> At the outset of the hearing, I granted General Counsel's motion to sever and remand Cases 12-CA-14825 and 12-CA-14828 to the Regional Director for Region 12.

<sup>2</sup> It was agreed that the following employees constitute an appropriate unit for the purpose of collective bargaining:

All full-time and regular part-time jai-alai players, including seasonal players, employed by Respondent at its Fort Pierce, Miami, Ocala and Tampa, Florida facilities; excluding office clerical and professional employees, guards and supervisors as defined in the Act, and all other employees.

March 1992.<sup>3</sup> During July and August 1991, Respondent lacked sufficient cash flow to pay its bills and its principal lender refused to provide further credit.<sup>4</sup> As a result, Respondent failed to meet the following obligations:<sup>5</sup>

<i>Bills Due But Unpaid</i>	<i>October 1991</i>	<i>March 1992</i>
State permit taxes for July–September 1991	\$560,000	\$0
Property taxes for 1990	500,000	500,000
Vendors and services	410,000	200,000
Interest due lenders	462,000	71,000
Management salaries	108,000	73,000
Player prize money	260,000	144,000
Total	\$2,300,000	\$988,000

#### B. Failure to Pay Accrued Prize Money

Article IX of the collective-bargaining agreement deals with the topic of prize money but does not specify the time of payment. Historically, any prize money earned during 1 month was paid on or about the 15th of the following month.<sup>6</sup> By memorandum dated September 10, 1991, Respondent's General Partner informed the partnership's jai-alai players that their "Prize & Championship money due for September and October must be deferred . . . with an expectation that all amounts due will be paid during the months of November and December, 1991."<sup>7</sup> Without prior notice to the Union and without affording the Union an opportunity to bargain,<sup>8</sup> Respondent distributed this memorandum to all players who were due prize money.<sup>9</sup> As of March 18, 1992, Respondent still owed its players at least \$143,588 in accrued prize money.<sup>10</sup> When the Union grieved the decision to defer the payment of prize money, Respondent admitted its contractual obligation to pay but asserted that it was unable to do so because of insufficient funds.

#### C. Failure to Assure the Payment of Arbitrators' Fees and Expenses<sup>11</sup>

Section 4 of article XVI of the collective-bargaining agreement provides that a grievant or the Union may submit a grievance to arbitration and that the arbitrator's fees and expenses shall be paid by the losing party if there is a clear

<sup>3</sup> Counsel for General Counsel confirmed this fact in response to a question from the bench.

<sup>4</sup> Respondent's controller so testified without controversy.

<sup>5</sup> The tabulated findings are based on the un rebutted testimony of Respondent's controller.

<sup>6</sup> The fact that the agreement does not specify the time at which prize money should be paid appears irrelevant in view of Respondent's historical practice. See *NLRB v. Northeast Oklahoma City Mfg.*, 631 F.2d 669 (10th Cir. 1980), enfg. 236 NLRB 1358 (1978).

<sup>7</sup> The memorandum was received in evidence without objection.

<sup>8</sup> This finding is based on the credited, uncontroverted testimony of the Union's grievance coordinator.

<sup>9</sup> The parties stipulated as to the scope of distribution.

<sup>10</sup> The parties so stipulated.

<sup>11</sup> The complaint alleged that Respondent had failed and refused "to pay arbitrator fees and expenses." The formulation set forth in text was adopted by counsel for General Counsel at the close of the hearing.

loser, otherwise that those expenses shall be shared.<sup>12</sup> During a telephone conversation with the Union's attorney to schedule two arbitration hearings, Respondent's attorney indicated that his client was having serious financial difficulties and suggested that the arbitrators should be made aware of the situation. The Union's attorney said that he would discuss the matter with the arbitrators when he informed them of the selected hearing dates.<sup>13</sup> On August 16, 1991, Respondent's attorney authored letters to the two arbitrators, both of which stated as follows:<sup>14</sup>

I feel obliged to make you aware that World Jai-Alai<sup>15</sup> is currently experiencing serious financial difficulties. There exists a possibility that World will be unable to pay any statement for services and expenses that you may submit as an arbitrator in this matter. Our firm does not assume responsibility for payment in that event.<sup>16</sup>

I have made the Union's attorney, Mr. Daniel Livingston, aware of World's financial situation, and have suggested that this hearing . . . be postponed until that situation is clarified. His reaction is that he will respond to you.

Both arbitrators thereafter spoke with Respondent's attorney and informed him that they felt that it was inappropriate to go ahead with the hearings until they could be assured of prompt and complete payment.<sup>17</sup> On September 11, 1991, the Union's attorney wrote to both arbitrators<sup>18</sup> as follows:

I have been informed by a representative of World Jai Alai that their financial position remains unchanged as of this date. Thus, it would not be prudent to reschedule the arbitration hearing at this time. I will keep you apprised of the situation.

No grievance has been heard by an arbitrator since August 16, 1991.<sup>19</sup> As of March 26, 1992, there were a minimum of 15 outstanding grievances waiting to be heard;<sup>20</sup> at least some of these concerned significant matters.<sup>21</sup>

#### D. Discussion

General Counsel alleges that Respondent failed to pay accrued prize money to bargaining unit members without prior notice to the Union and without giving the Union an opportunity to negotiate. This allegation is amply supported by the record, and I so find. Because Respondent's failure related

<sup>12</sup> The agreement is in evidence.

<sup>13</sup> The parties stipulated the contents of this conversation.

<sup>14</sup> The letters were received in evidence without objection.

<sup>15</sup> The parties stipulated that Respondent was generally known as "World Jai-Alai."

<sup>16</sup> The stated desire of Respondent's counsel not to be held responsible for Respondent's financial obligations appears well-founded. On August 23, 1991, Arbitrator Haemmel filed an award from an earlier arbitration and submitted a bill for \$9412 to Respondent. Respondent made a \$2662 payment on the bill on December 3, 1991, but did not pay the balance until March 9, 1992.

<sup>17</sup> The parties so stipulated.

<sup>18</sup> The Union's letters were received in evidence without objection.

<sup>19</sup> The parties so stipulated.

<sup>20</sup> The Union's grievance coordinator credibly so testified.

<sup>21</sup> Respondent's counsel stipulated that at least some of the grieved matters were not de minimis.

to the terms and conditions of employment of bargaining unit employees, I conclude that Respondent failed to bargain collectively with the exclusive bargaining representative of its employees.<sup>22</sup> I further conclude that this failure to bargain violated Section 8(a)(1) and (5) of the Act.

General Counsel contends that Respondent's failure to guarantee the payment of the arbitrators' fees and expenses constitutes a failure to abide by the arbitration provision of the collective-bargaining agreement. At the time the arbitrators called Respondent's attorney, two things were clear: (1) the communication of Respondent's financial difficulties to the arbitrators had caused the suspension of all arbitration under the collective-bargaining agreement, and (2) arbitration under the agreement would not recommence until Respondent guaranteed payment of the associated costs. I believe that this combination of facts created an obligation on the part of Respondent to take affirmative action in order to ensure effectuation of the provisions of agreement requiring arbitration. Accordingly, I find that Respondent's failure to guarantee payment of the arbitrators' fees and expenses amounted to a failure to honor the arbitration provision of the agreement. The remaining issue before me is whether the Union's letters evidence an agreement with Respondent to indefinitely postpone further arbitration under the collective-bargaining agreement. I find that they do not. Fairly read, the letters do not indicate agreement with Respondent's course of conduct, merely acceptance of a *fait accompli*. Accordingly, I find that Respondent did not bargain with the Union before taking action which constituted a failure to abide by the provisions of the collective-bargaining agreement. I conclude that this failure to bargain violated Section 8(a)(1) and (5) of the Act.

Respondent contends that the conduct complained of in this proceeding was solely the result of its adverse financial situation. While Respondent has undergone significant economic hardship, its financial condition cannot excuse its failures to notify or bargain with the Union concerning the partnership's noncompliance with the collective-bargaining agreement. "The Respondent'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) and Section 8(d) of the Act by failing to abide by a provision of a collective-bargaining agreement." *Nick Robilotto, Inc.*, 292 NLRB 1279 (1989). Similarly, the failure to honor the arbitration provision of a collective-bargaining agreement cannot be justified by a claim of financial hardship. *St. Marys Foundry Co.*, 284 NLRB 221, 233 (1987), *enfd.* 860 F.2d 679 (6th Cir. 1988).

#### CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. All full-time and regular part-time jai-alai players, including seasonal players, employed by Respondent at its Fort

<sup>22</sup> I find the settlement correspondence which took place between counsel for Respondent and counsel for the Union after the commencement of this proceeding to be irrelevant to the issue of whether Respondent failed to bargain with the Union in September 1991 concerning the terms and conditions of employment of bargaining unit employees.

Pierce, Miami, Ocala, and Tampa, Florida facilities, excluding office clerical and professional employees, guards and supervisors as defined in the Act, and all other employees, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

4. The Union is now, and at all times material has been, the exclusive representative for the purpose of collective bargaining of the employees in the aforesaid unit within the meaning of Section 9(a) of the Act.

5. By failing to give notice to and bargain with the Union concerning the failure to pay accrued prize money and the failure to assure payment of arbitrators' fees and expenses, Respondent has engaged and is engaging in unfair labor practices in violation of Section 8(a)(1) and (5) of the Act.

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

#### REMEDY

Inasmuch as Respondent has engaged in unfair labor practices, I shall order it to cease such practices and to take affirmative action designed to effectuate the purposes of the Act. Such affirmative action shall include making whole those unit employees who lost backpay due to Respondent's failure to pay accrued prize money. Backpay shall be calculated in accordance with the formula set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>23</sup>

#### ORDER

The Respondent, WJA Realty Limited Partnership d/b/a Fort Pierce Jai-Alai, Miami Jai-Alai, Ocala Jai-Alai, Tampa Jai-Alai, and World Jai-Alai Players, Fort Pierce, Miami, Ocala, and Tampa, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with the International Jai-Alai Players Association-UAW Local 8868, AFL-CIO (the Union) as the exclusive collective-bargaining representative of the employees in the bargaining unit by unilaterally deferring payment of contractually required prize money to jai-alai players, and by failing and refusing to guarantee payment of arbitration costs. The appropriate unit is:

All full-time and regular part-time jai-alai players, including seasonal players, employed by Respondent at its Fort Pierce, Miami, Ocala and Tampa, Florida facilities; excluding office clerical and professional employees, guards and supervisors as defined in the Act, and all other employees.

(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.

<sup>23</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole its unit employees by abiding by the prize money provision of the collective-bargaining agreement, by making all payments of prize money that have not been paid and by paying interest on all payments that were deferred in the manner set forth in the remedy section of this decision.

(b) Arbitrate the grievances formerly scheduled to be heard by Arbitrators George Bennett and George Ostrow, and any other grievances in accordance with the procedures in the collective-bargaining agreement.

(c) 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 amounts due under the terms of this Order.

(d) Post at its facilities in Fort Pierce, Miami, Ocala and Tampa, Florida, copies in English and Spanish of the attached notice marked "Appendix"<sup>24</sup> Copies of the notice, on

<sup>24</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

forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent at each of its frontons at the beginning of each fronton's season or at least 60 days before the end of each fronton's season,<sup>25</sup> 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.

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

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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."

<sup>25</sup> Because posting would be meaningless at a time when no unit employees are at a fronton, posting should take place during the season. See *Trident Seafoods Corp.*, 293 NLRB 1016 fn. 1 (1989).