

Mid-West Fire Protection, Debtor-in-Possession and Road Sprinkler Fitters Local Union 669, affiliated with the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO. Case 9-CA-29559

December 11, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND RAUDABAUGH

Upon a charge filed by the Union May 1, 1992, the General Counsel of the National Labor Relations Board issued an amended complaint against Mid-West Fire Protection, Inc., Debtor-in-Possession, the Respondent, alleging that it has violated Section 8(a)(3), (5), and (1) of the National Labor Relations Act.

On October 26, 1992, the General Counsel filed a Motion for Summary Judgment. On October 28, 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 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

The undisputed allegations in the Motion for Summary Judgment disclose that the Respondent withdrew its answer to the amended complaint in a conference call with the administrative law judge as memorialized in the executed stipulation attached as Exhibit B to the General Counsel's Motion for Summary Judgment. Such a withdrawal has the same effect as a failure to file an answer, i.e., the allegations in the complaint must be considered to be admitted to be true. See *Maislin Transport*, 274 NLRB 529 (1985).

Accordingly, 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, a corporation, has been engaged in the installation of automatic fire sprinkler systems for industrial and commercial customers from its facility in Columbus, Ohio. During the 12 months preceding June 26, 1992, the Respondent, in conducting its business operations, purchased and received at its Columbus, Ohio facility goods valued in excess of \$50,000 directly from points outside the State of Ohio. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(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 (the unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All journeymen, sprinkler fitters and apprentices engaged in the installation, dismantling, maintenance, repairs, adjustments and corrections of all fire protection and fire control systems including the unloading, handling by hand, power equipment and installation of all piping or tubing, appurtenances, and equipment pertaining thereto, including both overhead and underground water mains, fire hydrants and hydrant mains, standpipes and hose connections to sprinkler systems, sprinkler tank heaters, air lines and thermal systems used in connection with sprinkler and alarm systems, also all tanks and pumps connected thereto, also included shall be CO-2 and Carbox Systems, Dry Chemical Systems, Foam Systems and all other fire protection systems, but excluding steam fire protection systems [and all professional employees, guards and supervisors as defined in the Act].

Since at least October 28, 1987, and at all material times, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the unit and has been recognized as such representative by the Respondent. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which is effective from April 1, 1991, to March 30, 1994.

About March 23, 1992, the Respondent informed its employees that it would no longer honor the collective-bargaining agreement with the Union and that it would operate its business nonunion in order to discourage employees' union activities.

About March 23, 1992, the Respondent required its employees to work "nonunion." By this conduct, the Respondent caused the termination of employees Charles Fleshman and James Headlee about March 23, 1992, and the termination of employees Fred Rice and Carl Carmen about March 24, 1992. The Respondent engaged in this conduct because the Respondent's employees joined and assisted the Union and engaged in concerted activities and to discourage its employees from engaging in these activities.

About March 24, 1992, the Respondent repudiated the collective-bargaining agreement and since that date has failed to continue in effect the terms and conditions of the agreement by, inter alia, failing to remit welfare, pension, and supplemental pension trust fund payments to the Union on behalf of the employees in

the unit.¹ These terms and conditions of employment are mandatory subjects of bargaining and the Respondent failed to continue them in effect without the Union's consent.

Since about March 27, 1992, the Union, by letter requested, and the Respondent has refused to provide, certain information that is necessary for and relevant to the Union's performance of its duties as the exclusive collective-bargaining representative of the unit employees.²

CONCLUSIONS OF LAW

1. By informing its employees that it would no longer honor the collective-bargaining agreement and that it would operate its business nonunion in order to discourage employees' union activities, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

2. By causing the termination of employees Charles Fleshman, James Headlee, Fred Rice, and Carl Carmen, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

3. By failing and refusing to continue in effect the terms and conditions of its 1991-1994 collective-bargaining agreement with the Union by failing to remit welfare, pension, and supplemental pension trust fund payments, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

4. By failing to provide necessary and relevant information, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

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

¹ It is well settled that industry advancement funds are nonmandatory subjects of bargaining. Accordingly, we find that the Respondent has not, as alleged in the complaint, violated the Act by failing to make industry promotion fund contributions. See *Finger Lakes Plumbing & Heating Co.*, 254 NLRB 1399 (1981).

² In a March 27, 1992 letter, the Union requested that the Respondent provide it with the following information:

1. A list of the names, social security numbers and addresses of record for each individual employed by Mid-West who has performed and/or is performing bargaining unit work since February 1, 1992.

2. A list of dates worked, hours worked, wages paid and travel expenses paid for each individual employed by Mid-West for bargaining unit work performed since February 1, 1992.

3. A written statement concerning the status of Mid-West as far as bankruptcy, including what action has been taken thus far and what is planned for the near future.

4. Copies of any written materials distributed to bargaining unit employees concerning Mid-West's status and plans as far as bankruptcy or related matters is concerned; and/or, copies of minutes from any meetings that have taken place with bargaining unit employees at which the Company's status was discussed; or, if no such documents exist, a written statement of what has been told verbally to bargaining unit employees concerning the Company's status.

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 bargain, on request, with the Union and to provide the Union with the requested information.

Having found that the Respondent failed to continue in effect all the terms and conditions of employment set forth in the 1991-1994 collective-bargaining agreement with the Union, and to make all appropriate contributions to the welfare, pension, and supplemental pension funds, we shall order the Respondent to make whole the unit employees by making all payments that have not been made, including any additional amounts applicable to such delinquent payments as determined in accordance with the criteria set forth in *Merryweather Optical Co.*, 240 NLRB 1213 (1979). In addition, the Respondent shall reimburse unit employees for any expenses ensuing from its failure to make such required payments, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

We shall order the Respondent to offer employees Charles Fleshman, James Headlee, Fred Rice, and Carl Carmen immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed. We shall also order the Respondent to make Charles Fleshman, James Headlee, Fred Rice, and Carl Carmen whole for any loss of earnings or other benefits suffered as a result of the unlawful discharges, with backpay computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). We shall order that the Respondent remove from its records any reference to the unlawful discharges of Charles Fleshman, James Headlee, Fred Rice, and Carl Carmen, provide them with written notice of the removal, and inform them that the unlawful discharges will not be used as a basis for future personnel actions against them. See *Sterling Sugars*, 261 NLRB 472 (1982).

ORDER

The National Labor Relations Board orders that the Respondent, Mid-West Fire Protection, Inc., Debtor-in-Possession, Columbus, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Informing its employees that it will no longer honor the collective-bargaining agreement and that it will operate its business nonunion in order to discourage employees' union activities.

(b) Causing the termination of its employees because they join and assist the Union and engage in concerted activities and to discourage employees from engaging in these activities.

(c) Refusing to bargain with Road Sprinkler Fitters Local Union 669, affiliated with the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO, which is the designated exclusive bargaining representative of the Respondent's employees in an appropriate unit.

(d) Failing and refusing to continue in effect the terms and conditions of its 1991-1994 collective-bargaining agreement with the Union by failing and refusing, since about March 24, 1992, to remit welfare, pension, and supplemental pension trust fund payments to the Union on behalf of the employees in the unit.

(e) Refusing to bargain in good faith with the Union by failing to provide information that is necessary and relevant to the Union's performance of its duties as the exclusive collective-bargaining representative of the unit employees.

(f) 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) Offer employees Charles Fleshman, James Headlee, Fred Rice, and Carl Carmen immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(b) Remove from its files any reference to the unlawful discharges of Charles Fleshman, James Headlee, Fred Rice, and Carl Carmen and notify them in writing that this has been done and that the unlawful discharges will not be used against them in any way.

(c) On request, bargain with the Union as the exclusive bargaining representative of the employees in the following appropriate unit on terms and conditions of employment. The appropriate bargaining unit consists of:

All journeymen, sprinkler fitters and apprentices engaged in the installation, dismantling, maintenance, repairs, adjustments and corrections of all fire protection and fire control systems including the unloading, handling by hand, power equip-

ment and installation of all piping or tubing, appurtenances, and equipment pertaining thereto, including both overhead and underground water mains, fire hydrants and hydrant mains, standpipes and hose connections to sprinkler systems, sprinkler tank heaters, air lines and thermal systems used in connection with sprinkler and alarm systems, also all tanks and pumps connected thereto, also included shall be CO-2 and Carbox Systems, Dry Chemical Systems, Foam Systems and all other fire protection systems, but excluding steam fire protection systems [and all professional employees, guards and supervisors as defined in the Act].

(d) Continue in effect all the terms and conditions of employment set forth in the 1991-1994 agreement with the Union, and make whole unit employees by remitting all welfare, pension, and supplemental pension trust fund payments that have not been made since about March 24, 1992, and by reimbursing them for any expenses they may have incurred as a result of the Respondent's failure to continue in effect all the terms of its agreement with the Union, with interest, in the manner described in the remedy section of this decision.

(e) Provide the Union with the requested information that is necessary for and relevant to the Union's performance of its role as the exclusive bargaining representative of the unit employees.

(f) 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.

(g) Post at its facility in Columbus, Ohio, copies of the attached notice marked "Appendix."³ 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.

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

³ 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 inform you that we will no longer honor the collective-bargaining agreement and that we will operate our business nonunion in order to discourage your union activities.

WE WILL NOT cause your termination because you join and assist the Union and engage in concerted activities and to discourage you from engaging in these activities.

WE WILL NOT refuse to bargain with Road Sprinkler Fitters Local Union 669, affiliated with the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO, which is the designated exclusive bargaining representative of our unit employees.

WE WILL NOT fail and refuse to continue in effect the terms and conditions of the 1991-1994 collective-bargaining agreement with the Union by failing and refusing to remit welfare, pension, and supplemental pension trust fund payments to the Union on behalf of the employees in the unit.

WE WILL NOT refuse to bargain in good faith with the Union by failing to provide information that is necessary and relevant to the Union's performance of its duties as the exclusive collective-bargaining representative of the unit 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 offer employees Charles Fleshman, James Headlee, Fred Rice, and Carl Carmen immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and WE WILL make them whole for any loss of earnings and

other benefits suffered as a result of the discrimination against them.

WE WILL remove from our files any reference to the unlawful discharges of Charles Fleshman, James Headlee, Fred Rice, and Carl Carmen and notify them in writing that this has been done and that the unlawful discharges will not be used against them in any way.

WE WILL, on request, bargain with the Union on terms and conditions of employment for our employees in the unit. The appropriate bargaining unit consists of:

All journeymen, sprinkler fitters and apprentices engaged in the installation, dismantling, maintenance, repairs, adjustments and corrections of all fire protection and fire control systems including the unloading, handling by hand, power equipment and installation of all piping or tubing, appurtenances, and equipment pertaining thereto, including both overhead and underground water mains, fire hydrants and hydrant mains, standpipes and hose connections to sprinkler systems, sprinkler tank heaters, air lines and thermal systems used in connection with sprinkler and alarm systems, also all tanks and pumps connected thereto, also included shall be CO-2 and Cardox Systems, Dry Chemical Systems, Foam Systems and all other fire protection systems, but excluding steam fire protection systems [and all professional employees, guards and supervisors as defined in the Act].

WE WILL continue in effect all terms and conditions of employment set forth in the 1991-1994 agreement with the Union, and make you whole by remitting all welfare, pension, and supplemental pension trust fund payments that have not been made since March 24, 1992, and by reimbursing you for any expenses you may have incurred as a result of our failure to continue in effect all the terms of our agreement with the Union, with interest.

WE WILL provide the Union with the requested information that is necessary for and relevant to the Union's performance of its role as the exclusive bargaining representative of the unit employees.

MID-WEST FIRE PROTECTION, INC.,
DEBTOR-IN-POSSESSION