

ASA Construction Co. and International Brotherhood of Painters and Allied Trades, Local Union No. 891. Case 11-CA-14809

September 30, 1992

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND
RAUDABAUGH

Upon a charge and amended charge filed by the International Brotherhood of Painters, and Allied Trades, Local Union No. 891 (the Union), the General Counsel of the National Labor Relations Board issued a complaint against ASA Construction Company (the Respondent), alleging that it has violated Section 8(a)(1) and (5) of the National Labor Relations Act. Although properly served copies of the charge, amended charge, and complaint, the Respondent has failed to file an answer.

On September 14, 1992, the General Counsel filed a Motion for Summary Judgment. On September 15, 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

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 the allegations in the above complaint shall be deemed to be admitted to be true and may be so found by the Board." Further, the undisputed allegations in the Motion for Summary Judgment disclose that the region, by letters dated July 13 and August 28, 1992, notified the Respondent that unless an answer was received immediately, a Motion for Summary Judgment would be filed.¹

In the absence of good cause being shown for the failure to file a timely answer, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

¹ Copies of the June 4, 1992 letter withdrawing conditional approval of a prior settlement agreement and of the July 13, 1992 letter sent by certified mail were returned to the Regional Office marked "unclaimed." The Respondent's failure or refusal to claim certified mail cannot serve to defeat the purposes of the Act. See, e.g., *Michigan Expediting Service*, 282 NLRB 210 fn. 6 (1986). The August 28, 1992 letter was sent by regular mail and was not returned to the Board's office. The failure of the Postal Service to return documents served by regular mail indicates actual receipt of those documents by the Respondent. *Lite Flight*, 285 NLRB 649, 650 (1987).

Findings of Fact

I. JURISDICTION

The Respondent, a sole proprietorship, has been owned by Abdul S. Ahmad doing business as ASA Construction Company, with its principal place of business at 2113 Holly Road, NE, Roanoke, Virginia, where it is engaged in providing construction, renovation, and painting services to customers at various jobsites. During the calendar year ending December 31, 1991, the Respondent provided construction, renovation, and painting services valued in excess of \$50,000 for James Madison University, Avis Construction Company, Inc., and DeBusk and Shelor, Inc.

James Madison University is an entity of the Commonwealth of Virginia operating as a public university. During the 12-month period preceding issuance of the complaint, the university had gross revenues in excess of \$1 million and purchased and received products, goods, and materials valued in excess of \$50,000 from points located outside the Commonwealth of Virginia. Avis Construction Company, Inc. is a Virginia corporation with a facility located in Roanoke, Virginia, where it is engaged as a general contractor. During the 12-month period preceding issuance of the complaint, the company received products, goods, and materials valued in excess of \$50,000 directly from points located outside the Commonwealth of Virginia.

DeBusk and Shelor, Inc. is a Virginia corporation with a facility located in Dublin, Virginia, where it is engaged as a general contractor. During the 12-month period preceding issuance of the complaint, the company received products, goods, and materials valued in excess of \$50,000 from points located outside the Commonwealth of Virginia. 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 purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All painters, glaziers, tapers, paperhangers, sign painters, and employees in similar or related classifications of work employed by the Respondent.

Southwest Virginia Contractors Association (SVCA) is an employer association which represents employers in collective bargaining with the Union. On March 26, 1991, the Respondent met with the Union and agreed to be bound by all the terms and provisions of the collective-bargaining agreement then in effect between SVCA and the Union, the expiration date of the agreement being May 31, 1991. On May 31, 1991, SVCA

and the Respondent entered into a collective-bargaining agreement with the Union effective June 1, 1991, to May 31, 1992. At all times since March 26, 1991, and continuing to date, the Union has been the limited exclusive representative for the purposes of collective bargaining of the employees in the unit and by virtue of Section 8(f) of the Act, has been, and is now, the limited exclusive representative of the employees in the unit for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

Commencing on or about March 26, 1991, the Union requested that the Respondent bargain collectively with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment of the employees in the unit. Commencing on or about March 26, 1991, the Respondent refused to bargain collectively with the Union as the exclusive collective-bargaining representative of the employees in the unit by (a) on or about July 10, 1991, the Respondent unilaterally, without notice to or consultation with the Union, failed and refused to deduct and remit union dues on behalf of employees in the unit; and (b) on or about March 26, 1991, the Respondent unilaterally, without notice to or consultation with the Union, failed and refused to remit hospital and health benefits, pension benefits, apprenticeship and training fund, and industry advancement contributions on behalf of the employees in the unit.²

On or about January 29, 1992, the Respondent and the Union entered into a private settlement agreement which was to dispose of the alleged unfair labor practices set forth above. Pursuant to the settlement agreement with the Respondent, on January 29, 1992, the Union submitted a request that the unfair labor practice charge in this case be withdrawn. On February 7, 1992, the Regional Director informed the Respondent and the Union that he had, on January 30, 1992, conditionally approved the withdrawal request submitted by the Union based on the representation of the Union that a private settlement had been reached between the parties. The Acting Regional Director, by letter dated June 4, 1992, on application by the Union supported by evidence that the Respondent had not complied with the undertakings of the private settlement, revoked the Regional Director's conditional approval of the withdrawal request of the Union.

CONCLUSION OF LAW

By failing to honor the terms of its collective-bargaining agreement with the Union by failing and refusing to deduct and remit union dues and failing and re-

fusing to make contractually required payments for hospital and health benefits, pension benefits, and apprenticeship and training fund contributions, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) 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.

Specifically, having found that the Respondent has violated Section 8(a)(1) and (5) by failing to make contractually required payments for hospital and health, pension, and apprenticeship and training, we shall order the Respondent to make whole its unit employees by making all payments that have not been made and that would have been made but for the Respondent's unlawful failure to make them, 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), enf. 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).

Finally, we shall order the Respondent to deduct from employees' pay and remit to the Union deducted union dues and fees owed for those unit employees who had authorized the Respondent to deduct and remit them to the Union pursuant to the parties' collective-bargaining agreement, with interest as computed under *New Horizons for the Retarded*, supra.

ORDER

The National Labor Relations Board orders that the Respondent, ASA Construction Company, Roanoke, Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to honor the terms of its collective-bargaining agreement with the Union by failing to make contractually required payments for hospital and health benefits, pension benefits, and apprenticeship and training fund contributions, and failing and refusing to deduct and remit union dues to the Union.

(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.

²It is well settled that industry advancement funds are nonmandatory subjects of bargaining. Accordingly, we find that the Respondent has not violated the Act by failing to make industry advancement fund contributions. See *Finiger Lakes Plumbing & Heating Co.*, 254 NLRB 1399 (1981).

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

(a) Honor the terms of its collective-bargaining agreement with the Union by making contractually required payments for hospital and health benefits, pension benefits, apprenticeship and training fund, and industry advancement contributions and deducting and remitting union dues to the Union.

(b) Make unit employees whole for any loss of benefits or other expenses suffered as a result of the Respondent's failure to make the contractually required fringe benefit fund payments.

(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 amounts due under the terms of this Order.

(d) Post at its facility in Roanoke, Virginia, copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 11, 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.

(e) 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 fail and refuse to bargain in good faith with International Brotherhood of Painters, and Allied Trades, Local Union No. 891 as the limited exclusive representative of our employees in the following bargaining unit:

All painters, glaziers, tapers, paperhangers, sign painters, and employees in similar or related classifications of work employed by the Employer.

WE WILL NOT fail and refuse to honor the terms of our collective-bargaining agreement with the Union by failing to make contractually required payments for hospital and health benefits, pension benefits, and apprenticeship and training fund, or by failing to deduct and remit to the Union dues and fees owed for those unit employees who had authorized such deductions pursuant to the contract.

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 bargain in good faith with the Union by honoring all the terms of our agreement including making all contractually required payments for hospital and health benefits, pension benefits, and apprenticeship and training fund and WE WILL deduct and remit to the Union dues and fees owed for those unit employees who had authorized such deductions pursuant to the contract.

WE WILL make our employees whole by reimbursing them for any expenses ensuing from our failure to make such contractually required payments.

ASA CONSTRUCTION COMPANY