

**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-14974

March 29, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS  
DEVANEY AND OVIATT

Upon a charge filed by the International Jai-Alai Players Association-UAW Local 8868, AFL-CIO (the Union) the General Counsel of the National Labor Relations Board issued a complaint June 5, 1992, against 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 (the Respondent), alleging that it violated Section 8(a)(5) and (1) of the National Labor Relations Act by failing to make monthly contributions to a retirement plan for amounts due for calendar year 1991. On June 18, 1992, the Respondent filed its answer to the complaint, admitting that it failed to make the payments, but asserting that it did so because it was temporarily unable to pay and lacked the intent to repudiate its contractual obligations. The Respondent denies that its conduct constitutes an unlawful refusal to bargain in good faith.<sup>1</sup>

On December 24, 1992, the General Counsel filed a Motion for Summary Judgment, asserting that the Respondent's answer to the complaint admits the allegations that it failed to make the above-described payments, that this subject is a mandatory subject for the purpose of collective bargaining, and that the Respondent failed to notify the Union or to bargain over its failure to make the payments. The General Counsel maintains that these allegations should be deemed by the Board to be admitted and that the Board should find these allegations, as well as all other allegations in the complaint, to be true. On December 30, 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. On January 13, 1993, the Respondent filed a response.

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 to the complaint and its response to the Notice to Show Cause, the Respondent admits that it

<sup>1</sup> The Respondent subsequently executed a stipulation in which it admitted that since January 1992 it failed to make the monthly contributions to the plan for calendar year 1991 without prior notice to the Union.

failed to make the above-described contractually required payments without the Union's consent. The Respondent asserts that financial conditions beyond its control have prevented it from meeting its financial obligations. The Respondent also asserts that it negotiated with the Union on other matters during the relevant time period, has been available to discuss payment terms, and on August 20 and December 29, 1992, discussed payment terms with the Union, thereby indicating that it lacked the intent to repudiate its collective-bargaining obligations. However, the Respondent does not allege that it gave advance notice to the Union of its intent not to commence payments in January 1992 or that prior to January 1992 it requested to meet with the Union over its inability to commence the agreed-upon payments. On the contrary, the Respondent stipulates that since January 1992 it failed to make the plan contributions without prior notice to the Union.

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 the agreement without obtaining the consent of the union.<sup>2</sup> Here, the Respondent has admitted that it was obligated under its agreement to commence making monthly contributions to the retirement plan for calendar years 1991 and 1992 starting in January 1992, and that it gave no notice to the Union before it failed to make the contributions. Accordingly, the Respondent has admitted all the facts material to a resolution of the unfair labor practice issues raised by the complaint.

The Respondent's claim that it was financially unable to make the required payments, even if proven, 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. *Tammy Sportswear Corp.*, 302 NLRB 860 (1991); *L. L. Plumbing Co.*, 306 NLRB 1034 (1992).<sup>3</sup> Likewise, the Respondent's claim that it has been ready and willing to discuss its contractual obligations with the Union is not a viable defense to the unilateral mid-term modification of a collective-bargaining agreement. *Zimmerman Painting & Decorating*, 302 NLRB 856, 857 (1991).<sup>4</sup> There being no material facts in dispute, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

<sup>2</sup> E.g., *Adirondack Construction Co.*, 306 NLRB 704 (1992).

<sup>3</sup> We note that although the Respondent refers to its inability to pay as "temporary," there is no evidence that any plan contributions were ever made.

<sup>4</sup> Member Oviatt notes that although the Respondent contends that it was willing to negotiate with the Union about its failure to make payments, it does not assert that it communicated its willingness to the Union until after the complaint issued.

## FINDINGS OF FACT

## I. JURISDICTION

The Respondent, a Massachusetts partnership, with places of business in Fort Pierce, Miami, Ocala, and Tampa, Florida, has been engaged in the business of operating jai-alai frontons known as Fort Pierce Jai-Alai, Miami Jai-Alai, Ocala Jai-Alai, and Tampa Jai-Alai. During calendar year 1991, the Respondent derived gross revenues in excess of \$500,000 and purchased and received at its Florida facilities goods valued in excess of \$50,000 directly from points outside the State of Florida.

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

A. *The Unit*

The following employees of Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

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 employees and professional employees, guards and supervisors as defined in the Act, and all other employees.

At all times material, based on Section 9(a) of the Act, the Union has been the designated exclusive collective-bargaining representative of the unit and has been recognized as such by the Respondent. This recognition has been embodied in a collective-bargaining agreement, which is effective from September 23, 1990, to December 31, 1993.

B. *The 8(a)(5) and (1) Violations*

Accepting the Respondent's factual assertions as true, the parties agreed during 1991 to a retirement plan under which the Respondent was to make monthly contributions for calendar years 1991 and 1992. According to the Respondent, the Union filed a grievance against the Respondent on November 20, 1991, for failing to commence making the contributions to the plan for 1991. The Respondent responded to the grievance by asserting that the Union was responsible for the delay in the establishment of a retirement plan, that the Respondent was financially unable to make contributions, and that it was not denying its obligations under its agreement with the Union. On August 20 and December 29, 1992, the Union and the Respondent discussed payment terms. On January 4, 1993, the Respondent advised the Union of its willingness to dis-

cuss the matter. The Respondent admits that it was obligated to commence making monthly contributions for 1991 and 1992 beginning in January 1992.

As mentioned above, there is no evidence that the Respondent gave advance notice to the Union that it would not commence making payments in January 1992 or that prior to January 1992 the Respondent requested to meet with the Union over its inability to commence payments, even though the Union had filed a grievance in November 1991 complaining about the Respondent's failure to make the 1991 contribution payments.

We find that on or about January 1992, the Respondent, without obtaining the Union's consent, failed to make contractually required retirement plan contributions. The terms and conditions of the agreement the Respondent has failed to continue in full force and effect are mandatory subjects of bargaining.

Accordingly, we conclude that the Respondent has failed to bargain collectively and in good faith with the Union as the exclusive representative of its employees, and that the Respondent has thereby engaged in unfair labor practices in violation of Section 8(a)(5) and (1) of the Act.

## CONCLUSION OF LAW

By refusing to bargain with the Union by failing to make retirement plan contributions, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Sections 8(a)(5) and (1) and 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 the contractually required retirement plan contributions with any additional amounts due computed in the manner set forth in *Merryweather Optical Co.*, 240 NLRB 1213, 1216 (1979). In addition, we shall also order the Respondent to make its employees whole for any losses they may have suffered because of its failure to make payments into the retirement plan, *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enf. mem. 661 F.2d 940 (9th Cir. 1981), with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). We shall also order posting of the attached notice in English and Spanish at the Respondent's facilities in Fort Pierce, Miami, Ocala, and Tampa, Florida, at the beginning of each fronton's season or at least 60 days before the end of each fronton's season.

ORDER

The National Labor Relations Board 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

1. Cease and desist from

(a) Refusing to bargain collectively with International Jai-Alai Players Association-UAW Local 8868, AFL-CIO by failing to make contributions into a contractually required retirement plan.

(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) Pay all contractually required retirement plan contributions due and make whole the employees in the unit for any losses attributable to the withholding of those contributions in the manner set forth in the remedy section of this decision.

(b) 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 backpay due under the terms of this Order.

(c) Post at its facilities in Fort Pierce, Miami, Ocala, and Tampa, Florida, the attached notice marked "Appendix"<sup>5</sup> in English and Spanish at the beginning of each fronton's season or at least 60 days before the end of each fronton's season. Copies of the notice, on

forms provided by the Regional Director for Region 12, 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 collectively with the International Jai-Alai Players Association-UAW Local 8868, AFL-CIO by failing to make contributions into a contractually required retirement plan.

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 pay all contractually required retirement plan contributions due and make whole the employees in the unit for any losses attributable to the withholding of those contributions, with interest.

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

<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."