

**501 Post Investors d/b/a Hotel Donatello and Teamsters Local 665, International Brotherhood of Teamsters, AFL-CIO. Case 20-CA-24605**

**DECISION AND ORDER**

BY CHAIRMAN STEPHENS AND MEMBERS  
DEVANEY AND RAUDABAUGH

Upon a charge filed by the Union on April 20, 1992, the General Counsel of the National Labor Relations Board issued a complaint on June 16, 1992, against 501 Post Investors d/b/a Hotel Donatello, the Respondent, alleging that it has violated Section 8(a)(5) and (1) of the National Labor Relations Act by failing and refusing to make contractually mandated wage increases and payments to the Union's health and welfare and pension fringe benefit fund. On June 29, 1992, the Respondent filed a timely answer admitting in part and denying in part the allegations of the complaint and asserting an affirmative defense.

The complaint alleges, and the Respondent admits, that it is a party to a collective-bargaining agreement effective for the period December 1, 1990, to November 30, 1992, and that on December 1, 1991, and June 1, 1992, it failed to pay to its unit employees contractually scheduled wage increases. The Respondent also admits to the allegation that from October 20, 1991, and continuing thereafter it has failed to make the contractually required health and welfare payments to the Bay Area Automotive Group Welfare Fund and the Supplemental Income Plan Trust Fund. The Respondent further admits to the allegation that from January 1, 1992, and continuing thereafter it has failed to make payments on behalf of its employees to the Western Conference of Teamsters Pension Trust Fund. The Respondent denies, however, that this conduct constitutes an unlawful refusal to bargain in good faith because of its inability to pay. The Respondent also asserts that the Union made no affirmative effort to resolve this situation with the Respondent.

On February 16, 1993, the General Counsel filed a Motion for Summary Judgment with exhibits attached. On February 24, 1993, 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 National Labor Board has delegated its authority in this proceeding to a three-member panel.

**Ruling on Motion for Summary Judgment**

It is well established that Section 8(a)(5) and (1) of the Act prohibits an employer that is party to a collective-bargaining agreement from modifying the terms and conditions of employment established by that agreement without obtaining the consent of the union. *Nick Robilotto, Inc.*, 292 NLRB 1279 (1989), and cases cited there. The Respondent has admitted that it

unilaterally failed to abide by the terms and conditions of employment in the collective-bargaining agreement by failing to pay to its unit employees the contractually agreed-upon wage increases and payments to the respective health and welfare and pension trust funds. 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 defense that it is financially unable to make the required payments, even if proven, does not constitute an adequate defense to the allegation that it has violated Section 8(a)(5) and (1) of the Act. *Nick Robilotto, Inc.*, supra. Nor does its contention that the Union made no affirmative effort to resolve this matter with the Respondent constitute an adequate defense because the Act does not impose an affirmative duty on the Union, in these circumstances, to request bargaining following a respondent's unilateral breach of its contractual obligations.<sup>1</sup> Therefore, because we find the Respondent's affirmative defenses to be inadequate, and because there are no material facts in dispute, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

**FINDINGS OF FACT**

**I. JURISDICTION**

The Respondent, 501 Post Investors d/b/a Hotel Donatello, a California corporation, is engaged in the business of operating a hotel at 501 Post Street in San Francisco, California. During the 12-month period ending March 31, 1992, the Respondent derived gross revenues in excess of \$500,000 and purchased and received goods valued in excess of \$5000 directly from points outside the State of California.

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 full-time and regular part-time employees covered by the collective-bargaining agreement described below, excluding all other employees, managers, guards and supervisors as defined in the Act.

Since about 1980, the Union has been the designated exclusive collective-bargaining representative of the employees in the unit and since then the Union has

<sup>1</sup> See generally *Walker Construction Co.*, 297 NLRB 746 fn. 1 (1990).

been recognized as the representative by the Respondent. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which was effective by its terms for the period December 1, 1990, to November 30, 1992. The Union continues to be the exclusive representative under Section 9(a) of the Act.

Since about October 20, 1991, and continuing thereafter, the Respondent has failed to continue in full force and effect all the terms and conditions of the December 1, 1990–November 30, 1992 collective-bargaining agreement by failing on December 1, 1991, and June 1, 1992, respectively, to pay contractually required wage increases, and since about the dates listed below, by ceasing to make health and welfare and pension fringe benefit payments on behalf of its unit employees to: on October 20, 1991, the Bay Area Automotive Group Welfare Fund (welfare fund) and the Supplemental Income Plan Trust Fund (trust fund), and on January 1, 1992, the Western Conference of Teamsters Pension Trust Fund (pension fund).

The terms and conditions of employment set by the applicable contract provisions are mandatory subjects for the purposes of collective bargaining. The Respondent has engaged in the conduct described above without the Union's consent.

We find that by the conduct described above, the Respondent has failed and refused to bargain collectively with the Union in violation of Section 8(a)(5) and (1) of the Act.

#### CONCLUSION OF LAW

By unilaterally ceasing to continue in effect all the terms and conditions of the collective-bargaining agreement by failing on December 1, 1991, and June 1, 1992, to pay scheduled wage increases to unit employees, and by failing on October 20, 1991, and January 1, 1992, as the case may be, to make payments on behalf of unit employees to the welfare fund, the trust fund, and the pension fund, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

#### REMEDY

Having found that the Respondent violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist and to take affirmative action designed to effectuate the policies of the Act. We shall order that the Respondent abide by the terms of the collective-bargaining agreement, and to make whole the unit employees by making the contractually required wage increases owed to them, and the contractually required health and welfare and pension payments owed to the welfare, trust, and pension funds, including any additional amounts applicable to delinquent fringe benefit

payments as determined in accordance with the Board's decision in *Merryweather Optical Co.*, 240 NLRB 1213, 1216 (1979). We shall also order the Respondent to reimburse its unit employees for any expenses or losses incurred as a result of the Respondents' failure to make the required benefit payments to the welfare, trust, and pension funds, as provided in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981). All backpay shall be computed in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971). Interest on amounts owing employees shall be paid as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

#### ORDER

The National Labor Relations Board orders that the Respondent, 501 Post Investors d/b/a Hotel Donatello, San Francisco, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing and failing to bargain with Teamsters Local 665, International Brotherhood of Teamsters, AFL–CIO (the Union), by failing to pay the unit employees contractually scheduled wage increases. The appropriate unit is:

All full-time and regular part-time employees covered by the collective-bargaining agreement effective from December 1, 1990 to November 30, 1992, excluding all other employees, managers, guards and supervisors as defined in the Act.

(b) Refusing and failing to bargain with the Union by failing to make contractually required health and welfare and pension payments to the Bay Area Automotive Group Welfare Fund, the Supplemental Income Plan Trust Fund, and the Western Conference of Teamsters Pension Trust Fund (collectively, the funds).

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

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

(a) Abide by the applicable clauses of the December 1, 1990 to November 30, 1992 collective-bargaining agreement with the Union concerning wage increases and payments to the respective funds, and adhere to the terms and conditions of that agreement insofar as they remain in effect and in force under the Act, and to any subsequent collective-bargaining agreement entered into with the Union.

(b) Make the contractually required payments owed to the respective funds, in the manner set forth in the remedy section of this decision.

(c) Make the unit employees whole by paying them their contractually scheduled wage increases and for any expenses or losses they incurred because of the

Respondents' failure to make the contractually required payments to the respective funds, with interest, in the manner set forth in the remedy section of this decision.

(d) 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.

(e) Post at its facility in San Francisco, California, copies of the attached notice marked "Appendix."<sup>2</sup> Copies of the notice, on forms provided by the Regional Director for Region 20, 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.

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

Dated, Washington, D.C. May 28, 1993

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James M. Stephens, Chairman

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Dennis M. Devaney, Member

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John Neil Raudabaugh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

<sup>2</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."

## 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 and fail to bargain with Teamsters Local 665, International Brotherhood of Teamsters, AFL-CIO (the Union) by failing to pay our unit employees contractually scheduled wage increases. The appropriate unit is:

All full-time and regular part-time employees covered by the collective-bargaining agreement effective from December 1, 1990 to November 30, 1992, excluding all other employees, managers, guards and supervisors as defined in the Act.

WE WILL NOT refuse and fail to bargain with the Union by failing to make contractually required health and welfare and pension payments to the Bay Area Automotive Group Welfare Fund, the Supplemental Income Plan Trust Fund, and the Western Conference of Teamsters Pension Trust Fund (collectively, the funds).

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 abide by the applicable clauses of our December 1, 1990 to November 30, 1992 collective-bargaining agreement with the Union concerning wage increases and payments to the respective funds, and WE WILL adhere to the terms and conditions of employment of that agreement insofar as they remain in effect and in force under the Act, and to any subsequent collective-bargaining agreement entered into with the Union.

WE WILL make the contractually required payments owed to the respect funds, plus any additional amounts that may be applicable.

WE WILL make our unit employees whole by paying them their contractually scheduled wage increases and for any expenses or losses they incurred because of our failure to make the contractually required payments to the respective funds, with interest.

POST INVESTORS D/B/A HOTEL DONATELLO