

**Sam Martin & Sons, Inc. and its alter ego, Martin Painting, Inc. and Richard D. Furlong for District Council No. 4, International Brotherhood of Painters & Allied Trades of America and Canada, AFL-CIO. Case 3-CA-16000**

**DECISION AND ORDER**

BY CHAIRMAN STEPHENS AND MEMBERS  
DEVANEY AND RAUDABAUGH

Upon a charge and an amended charge filed by Richard D. Furlong for District Council No. 4, International Brotherhood of Painters & Allied Trades of America and Canada, AFL-CIO, the Union, on April 30, 1993, the General Counsel of the National Labor Relations Board issued an amended complaint, order revoking informal settlement agreement, and notice of hearing against Sam Martin & Sons, Inc. (Respondent Sam Martin & Sons) and its alter ego, Martin Painting, Inc. (Respondent Martin Painting), collectively 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 charges and amended complaint, the Respondent failed to file an answer.

On June 7, 1993, the General Counsel filed a Motion for Summary Judgment with the Board. On June 10, 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 allegations in the motion are therefore undisputed.

**Ruling on Motion for Summary Judgment**

Sections 102.20 and 102.21 of the Board's Rules and Regulations provide 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. In addition, the complaint affirmatively notes that unless an answer is filed within 14 days of service, all the allegations in the complaint will be considered admitted. Further, the undisputed allegations in the Motion for Summary Judgment disclose that the Region, by letter dated May 25, 1993, notified the Respondent that unless an answer was received by June 1, 1993, a Motion for Summary Judgment would be filed.

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

**FINDINGS OF FACT**

**I. JURISDICTION**

Respondent Sam Martin & Sons, a New York State corporation, with an office and place of business in Kenmore, New York, has been engaged as a painting

and wallcovering contractor in the construction industry. During the fiscal year August 31, 1989, to September 1, 1990, Respondent Sam Martin & Sons provided services valued in excess of \$50,000 for enterprises which are directly involved in interstate commerce. During the fiscal year August 31, 1989, to September 1, 1990, Respondent Sam Martin & Sons derived gross revenues in excess of \$250,000.

Respondent Martin Painting, a New York State corporation with an office and place of business in Kenmore, New York, has been engaged as a painting and wallcovering contractor in the construction industry. Respondent Sam Martin & Sons and Respondent Martin Painting have been affiliated business enterprises with common management and supervision; engaged in the same type of business in the same labor market; have shared common premises and facilities; have provided services for each other; have interchanged personnel, materials, equipment, customers, and supplies with each other; and have held themselves out to the public as a single-integrated business enterprise. Respondent Sam Martin & Sons and Respondent Martin Painting constitute a single-integrated business enterprise and a single employer within the meaning of the Act. Respondent Sam Martin & Sons and Respondent Martin Painting are also alter egos. We find that the Respondent Sam Martin & Sons is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. By virtue of its alter ego relationship with Respondent Sam Martin & Sons, the Board has jurisdiction over Respondent Martin Painting. We also find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

**II. ALLEGED UNFAIR LABOR PRACTICES**

Painting and Decorating Contractors of Buffalo, New York, Inc., the Association, has been an organization composed of various employers primarily engaged in the building and construction industry. One of the purposes of the Association is to represent its employer-members in negotiating and administering collective-bargaining agreements with various labor organizations, including the Union. Since about 1960 to the present, Respondent Sam Martin & Sons has been an employer-member of the Association and has authorized the Association to represent it in negotiating and administering collective-bargaining agreements with the Union. About 1990, the Association and the Union entered into a collective-bargaining agreement effective from May 1, 1990, through April 30, 1993. By virtue of its membership in the Association and its authorization to the Association to represent it in negotiation, Respondent Sam Martin & Sons has been bound to the 1990-1993 collective-bargaining agreement with the Union.

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

All classifications described in Article II of the most recent collective-bargaining agreement between the Association and the Union effective May 1, 1990, through April 30, 1993, employed by members of the Association and by employers who have authorized the Association to bargain on their behalf, including Respondent Sam Martin & Sons.

About 1990 Respondent Sam Martin & Sons, an employer engaged in the building and construction industry, granted recognition to the Union as the exclusive collective-bargaining representative of the employees in the unit by entering into a collective-bargaining agreement with the Union for the period May 1, 1990, to April 30, 1993, without regard to whether the majority status of the Union had ever been established under the provisions of Section 9 of the Act. For the period May 1, 1990, through April 30, 1993, based on Section 9(a) of the Act, the Union has been the limited exclusive collective-bargaining representative of the employees in the unit.

Since about September 27, 1990, the Union, by written request, has requested that Respondent Sam Martin & Sons furnish the Union with information to process a grievance regarding diversion of unit work to an alter ego/successor, Respondent Martin Painting, Inc. The information requested by the Union is necessary for and relevant to the Union's performance of its duties as the exclusive collective-bargaining representative of the employees in the unit. Since about September 27, 1990, the Respondent Sam Martin & Sons has failed and refused to furnish the Union with the information requested by it.

Since in or about early June 1990, the Respondent has engaged in the following conduct:

- a. Unilaterally assigning and diverting the bargaining unit work of the employees of Respondent Sam Martin & Sons to the employees of Respondent Martin Painting.
- b. Refusing to apply the terms of the collective-bargaining agreement to unit employees of Respondent Martin Painting.
- c. Instituting changes in the wages, hours, and other terms and conditions of employment of its unit employees during the effective term of the collective-bargaining agreement without complying with the provisions of Section 8(d) of the Act.

These subjects relate to wages, hours, and other terms and conditions of employment of unit employees and are mandatory subjects for purposes of collective bar-

gaining. The Respondent engaged in this conduct without prior notice to the Union, without affording the Union an opportunity to bargain with the Respondent concerning this conduct and the effects of this conduct, and without the consent of the Union.

#### CONCLUSION OF LAW

By failing to furnish information to the Union, unilaterally assigning and diverting bargaining unit work, refusing to apply the terms of the collective-bargaining contract to unit employees, and instituting changes in the wages, hours, and other terms and conditions of employment of its unit employees, 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.

We shall order the Respondent to furnish the Union with the information it requested in order to process a grievance regarding diversion of bargaining unit work to Respondent Martin Painting. Having found that the Respondent has unilaterally assigned and diverted bargaining unit work, refused to apply the terms of the collective-bargaining agreement, and instituted changes in the wages, hours, and other terms and conditions of unit employees, we shall also order the Respondent to make its unit employees whole for any losses attributable to these unilateral actions as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enf. 661 F.2d 940 (9th Cir. 1981), and *Ogle Protection Service*, 183 NLRB 682 (1970), enf. 444 F.2d 502 (6th Cir. 1971) with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). To the extent that its failure to apply the terms of the collective-bargaining agreement involved failure to make contractually required payments for fringe benefits, 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 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*, supra, computed in the manner set forth in *Ogle Protection Service*, supra, with interest as prescribed in *New Horizons*, supra.

## ORDER

The National Labor Relations Board orders that the Respondent, Sam Martin & Sons, Inc. and its alter ego, Martin Painting, Inc., Kenmore, New York, its officers, agents, successors, and assigns, shall

## 1. Cease and desist from

(a) Failing to bargain in good faith with District No. 4, International Brotherhood of Painters & Allied Trades of America and Canada, AFL-CIO, the limited exclusive bargaining representative of the employees in an appropriate unit of all classifications described in article II of the collective-bargaining agreement between Painting and Decorating Contractors of Buffalo, New York, Inc. and the Union for the period May 1, 1990, to April 30, 1993, by failing to provide necessary and relevant information to the Union in order that it may process its grievance regarding diversion of unit work.

(b) Failing to bargain in good faith with the Union and/or failing to honor the terms of the collective-bargaining agreement with the Union for the period May 1, 1990, to April 30, 1993, by unilaterally assigning and diverting bargaining unit work of the employees of Respondent Sam Martin & Sons to the employees of Respondent Martin Painting, refusing to apply the terms of the collective-bargaining agreement to unit employees of Respondent Martin Painting, and instituting changes in the wages, hours, and other terms and conditions of employment of its unit employees during the effective term of the collective-bargaining agreement.

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

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

(a) Upon request, provide the information previously requested by the Union in order to process its grievance regarding diversion of bargaining unit work.

(b) Bargain in good faith with the Union as the limited exclusive representative of unit employees and honor the terms of the collective-bargaining agreement with the Union for the period May 1, 1990, through April 30, 1993, and make employees whole with interest for its failure to do so.

(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 amount of backpay due under the terms of this Order.

(d) Post at its facility in Kenmore, New York, copies of the attached notice marked "Appendix."<sup>1</sup> Cop-

<sup>1</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

ies of the notice, on forms provided by the Regional Director for Region 3, 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.

Dated, Washington, D.C. July 16, 1993

---

James M. Stephens, Chairman

---

Dennis M. Devaney, Member

---

John Neil Raudabaugh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

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 to bargain in good faith with District Council No. 4, International Brotherhood of Painters & Allied Trades of America and Canada, AFL-CIO, the limited exclusive representative of all employees described in article II of the 1990-1993 collective-bargaining agreement between Painting and Decorating Contractors of Buffalo, New York, Inc. and the Union by failing to provide the Union with necessary and relevant information in order to process a grievance regarding diversion of bargaining unit work.

WE WILL NOT unilaterally assign and divert the bargaining unit work of employees of Sam Martin & Sons to employees of Martin Painting.

WE WILL NOT refuse to apply the terms of the 1990-1993 collective-bargaining agreement to unit employees of Martin Painting.

WE WILL NOT institute changes in the wages, hours, and other terms and conditions of employment of unit employees by failure to comply with the terms of the 1990–1993 collective-bargaining agreement.

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 as the limited exclusive representative of our unit employees.

WE WILL, on request, provide the Union with the information it requested in order to process its grievance regarding diversion of unit work.

WE WILL honor the terms of the 1990–1993 collective-bargaining agreement and make our employees whole with interest for our failure to do so.

SAM MARTIN & SONS, INC. AND ITS  
ALTER EGO MARTIN PAINTING, INC.