

**Art Berger, a sole proprietor d/b/a Art Berger and Detroit Area Local 67, Operative Plasterers' and Cement Masons International Association, AFL-CIO.** Case 7-CA-35151

April 28, 1994

DECISION AND ORDER

BY MEMBERS STEPHENS, DEVANEY, AND  
BROWNING

Upon a charge filed by the Union on October 28, 1993, the Acting General Counsel of the National Labor Relations Board issued a complaint on December 7, 1993, against Art Berger, a sole proprietor d/b/a Art Berger, 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 and complaint,<sup>1</sup> the Respondent failed to file an answer.

On February 14, 1994, the Acting General Counsel filed a Motion for Default Summary Judgment with the Board. On February 17, 1994, 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 Default 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 Default Summary Judgment disclose that the Region, by letter dated January 7, notified the Respondent that unless an answer was received by January 21, 1994, a Motion for Default Judgment would be filed.

<sup>1</sup> Although a copy of the complaint and notice of hearing was sent by certified mail, the Regional Office did not receive the return receipt from the Respondent nor evidence that the complaint and notice of hearing was unclaimed by the Respondent. A 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). Member Browning would also rely on the fact that correspondence subsequent to the complaint was received and acknowledged by the Respondent at the same address to which the complaint was sent, thereby presumptively establishing sufficient service on the Respondent.

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

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a sole proprietorship, doing business in Romeo, Michigan, has been engaged in the construction industry as a plastering contractor. During the calendar year ending December 31, 1992, the Respondent, in conducting its business operations, purchased and received goods valued in excess of \$50,000 at its Romeo, Michigan facility directly from points outside the State of Michigan and from other enterprises located within the State of Michigan, each of which other enterprises had received the goods directly from points outside the State of Michigan. The Detroit Association of Wall and Ceiling Contractors, Inc. (the Association) is and has been at all times material herein an organization composed of employers engaged in the construction industry and which exists, in whole or part, for the purpose of representing employer-members in negotiating and administering collective-bargaining agreements with various labor organizations, including the Union. During the calendar year ending December 31, 1992, a representative period, the employer-members of the Association collectively had gross revenues in excess of \$1 million and in the course and conduct of their business operations purchased and caused to be delivered to their facilities located within the State of Michigan products, goods, and materials valued in excess of \$50,000 received directly from points located outside the State of Michigan. 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

All journeymen and apprentice plasterers employed by the Respondent but excluding guards and supervisors as defined in the Act (the unit) constitute a unit of employees appropriate for the purposes of collective bargaining pursuant to Section 9(b) of the Act. About June 1, 1992, the Association and the Union entered into a collective-bargaining agreement (the Association Agreement), effective from June 1, 1992, through May 31, 1993. About March 9, 1993, the Respondent entered into an Agreement for Non-Association Members which at all material times bound the Respondent to the terms and conditions of employment of the Association Agreement and authorized the Association to be its collective-bargaining representative. About

March 9, 1993, the Respondent, an employer engaged in the building and construction industry, granted recognition to the Union as the exclusive collective-bargaining representative of the unit by entering into the Agreement for Non-Association Members with the Union for the period of June 1, 1992, to May 31, 1993, without regard to whether the majority status of the Union has ever been established under the provisions of Section 9 of the Act. During all times relevant herein, the Union has been the recognized exclusive collective-bargaining representative of the employees in the unit within the meaning of Section 8(f) of the Act.<sup>2</sup>

The Association Agreement provides in article V, section 5, "Payment of Benefits," that:

(a) the Respondent pay monies into various fringe benefit funds on behalf of employees in the Unit;

(b) the Respondent submit to the plan administrator monthly fringe benefit reports;

(c) the Respondent pay liquidated damages for the late payment of fringe benefit funds.

Since on or about May 15, 1993, and continuing to date, the Respondent has unilaterally and without agreement with the Union failed and refused, and continues to fail and refuse, to apply the terms of the Association Agreement to unit employees by its failure to abide by the terms described above, inter alia, by failing to make fringe benefit fund payments, to submit fringe benefit reports, and to pay any liquidated damages.<sup>3</sup> The Respondent's actions constitute unilateral modifications of the Association Agreement without compliance with the provisions of Section 8(d) of the Act.

#### CONCLUSION OF LAW

By the acts and conduct described above, the Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees within the meaning of Section 8(d), and has thereby 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. Specifi-

<sup>2</sup>In the absence of any need to determine in this proceeding whether the parties' relationship is governed by Sec. 9 or by Sec. 8(f), Member Browning would not reach that issue.

<sup>3</sup>Although not specifically alleged in the complaint, these matters are presumptively mandatory subjects for the purposes of collective bargaining inasmuch as they concern fringe benefits for employees.

cally, having found that the Respondent has violated Section 8(a)(5) and (1) by failing to make contractually required contributions to the various fringe benefit funds, submit monthly fringe benefit reports to the plan administrator, and pay liquidated damages for the late payment of fringe benefit funds, we shall order the Respondent to submit the monthly reports to pay the liquidated damages, and to make whole its unit employees by making all such delinquent contributions, including any additional amounts due the funds in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979). In addition, the Respondent shall reimburse unit employees for any expenses ensuing from its failure to make the required contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enf. 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), enf. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

#### ORDER

The National Labor Relations Board orders that the Respondent, Art Berger, a sole proprietor d/b/a Art Berger, Romeo, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Since on or about May 15, 1993, unilaterally and without agreement by the Union, or compliance with the provisions of Section 8(d) of the Act, failing and refusing to apply the terms of the Association Agreement to unit employees by failing to make fringe benefit fund payments, to submit fringe benefit reports, and to pay any liquidated damages. The unit consists of the following employees:

All journeymen and apprentice plasterers employed by the Respondent but excluding guards and supervisors as defined in the Act.

(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) Submit the monthly reports and make whole the unit employees by making all contributions it has failed to make since May 15, 1993, by reimbursing employees for their expenses, and by paying liquidated damages, and other amounts due the funds, as 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, timecards, personnel records and reports, and all other records necessary to analyze the amounts due under the terms of this Order.

(c) Post at its facility in Romeo, Michigan, copies of the attached notice marked "Appendix."<sup>4</sup> Copies of the notice, on forms provided by the Regional Director for Region 7, 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.

<sup>4</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."

WE WILL NOT unilaterally and without agreement by the Detroit Area Local 67, Operative Plasterers' and Cement Masons International Association, AFL-CIO, fail or refuse to apply the terms of the Association Agreement to unit employees by failing, since May 15, 1993, to make fringe benefit fund payments, to submit fringe benefit reports, or to pay any liquidated damages. The unit consists of the following employees:

All journeymen and apprentice plasterers employed by the Employer but excluding guards and supervisors as defined in the Act.

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 submit the monthly reports and make whole our unit employees by making all contributions we have failed to make since May 15, 1993, by reimbursing employees for any expenses ensuing from our failure to make the required contributions, and by paying liquidated damages and other amounts due the funds as set forth in a decision of the National Labor Relations Board.

ART BERGER, A SOLE PROPRIETOR D/B/A  
ART BERGER