

**Demun Incorporated d/b/a Demun Market and Meatcutters Union Local No. 88, affiliated with United Food and Commercial Workers International Union, AFL-CIO.** Case 14-CA-22659

August 15, 1994

DECISION AND ORDER

BY MEMBERS DEVANEY, BROWNING, AND COHEN

Upon a charge and amended charge filed August 25 and September 22, 1993, respectively, the General Counsel of the National Labor Relations Board issued a complaint against Demun Incorporated d/b/a Demun Market, alleging that it has violated Section 8(a)(1) and (5) of the National Labor Relations Act.

On October 1, 1993, the Respondent filed an answer admitting all the allegations of the complaint, except subparagraphs 1, 2C and D, 6E, 7, and 8. The Respondent denied the allegations in subparagraphs 1, 2C, 6E, and 7; with respect to subparagraphs 2D and 8, the Respondent stated that it had insufficient knowledge to admit or deny the allegations.

On October 25, 1993, the General Counsel issued an amendment to the complaint which deleted subparagraphs 2A, B, C, and D from the complaint and substituted new subparagraphs 2A, B, C, D, and E.

On December 16, 1993, the Respondent filed an answer to the amendment to the complaint admitting the allegations in subparagraphs 2A and B and neither admitting nor denying the other new allegations in the amendment.<sup>1</sup>

On January 4, 1994, the General Counsel filed a Motion for Summary Judgment. In the motion, the General Counsel argued that the only issues raised by the complaint, the amendment to the complaint, and the answers are legal in nature and that there is no issue of disputed fact warranting or requiring a hearing in this matter.

On January 6, 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 National Labor Relations Board has delegated its authority in this proceeding to a three-member panel. Ruling on Motion for Summary Judgment

The Respondent admits the operative facts giving rise to the unfair labor practices alleged in the complaint. It acknowledges that it has, since June 16, 1992, recognized the exclusive representative status of the Union, that recognition was embodied in a collective-

bargaining agreement which was effective from June 16, 1992, through September 18, 1993, and that the unit alleged in the complaint is appropriate for collective bargaining. It also admits that, on the dates alleged in the complaint, it has failed to remit payments to the welfare fund and pension fund to which it was obligated to contribute under the collective-bargaining agreement.

As an explanation for its unilateral failure to adhere to the contract, the Respondent claims financial hardship and that the business "was not there" to pay employee benefits. However, a claim of financial difficulty, "even if proven, does not constitute an adequate defense to an allegation that an employer has unlawfully failed to abide by provisions of a collective-bargaining agreement." *Zimmerman Painting & Decorating*, 302 NLRB 856, 857 (1991).

Therefore, we find that the Respondent has not raised any issue properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a Missouri corporation, operates a retail grocery store in St. Louis, Missouri. During the 12-month period ending August 31, 1993, the Respondent derived gross revenues in excess of \$500,000 from its operations, and purchased and received at its St. Louis, Missouri facility goods valued in excess of \$50,000 from other enterprises located within the State of Missouri, each of which enterprises had received these goods directly from points outside the State of Missouri. 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 Representative Status of the Union*

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

All meat, seafood, poultry, barbecue, cooked meat and delicatessen department employees, including head meat cutters, journeymen, apprentices, wrappers and clean-up employees employed by the Respondent, EXCLUDING office clerical and professional employees, guards, and supervisors as defined in the Act and all other employees.

Since about June 16, 1992, and at all material times, the Union has been the exclusive collective-bargaining

<sup>1</sup> Subpar. 2C of the original complaint, which set forth a standard for asserting jurisdiction over the Respondent, and which was denied, has been supplemented by subpar. 2D of the complaint amendment, which sets forth the separate standard on which we rely to assert jurisdiction here. We therefore find it unnecessary to rely on the allegations of subpar. 2C of the complaint.

representative of the unit under Section 9(a) of the Act. Recognition has been embodied in a collective-bargaining agreement which was effective by its terms from June 16, 1992, to September 18, 1993. At all times since June 16, 1992, the Union, by virtue of Section 9(a) of the Act, has been the exclusive representative of the Respondent's employees for the purpose of collective bargaining.

#### B. Refusal to Comply with the Contract

The Respondent has failed and refused to continue in effect all the terms and conditions of the collective-bargaining agreement by (1) since February 25, 1993, failing to remit payments to the contractually established pension fund; and (2) since about March 1, 1993, failing to remit payments to the contractually established welfare fund.

The contractual provisions by which the Respondent failed to abide relate to wages, hours, and other terms and conditions of employment in the unit and are mandatory subjects for purposes of collective bargaining.

#### CONCLUSIONS OF LAW

1. By the acts described above in section II,B, paragraph 1, the Respondent has failed and refused, and is failing and refusing, to bargain collectively and in good faith with the representative of its employees, and the Respondent thereby has been engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

2. The unfair labor practices of the Respondent, described above, affect commerce within the meaning of 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.<sup>2</sup>

We shall order the Respondent to make whole unit employees by making the required pension fund payments it failed to make since February 25, 1993, and the welfare fund contributions it failed to make since March 1, 1993.<sup>3</sup> We shall further order the Respondent to reimburse employees for any expenses ensuing from the Respondent's unlawful failure to make such contributions, 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 man-

ner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), with interest prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

#### ORDER

The National Labor Relations Board orders that the Respondent, Demun Incorporated d/b/a Demun Market, St. Louis, Missouri, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing to bargain with the Union by failing to make required contributions on behalf of its unit employees to the welfare and pension funds.

(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) On request, bargain with Meatcutters Union Local No. 88, affiliated with United Food and Commercial Workers International Union, AFL-CIO, as the exclusive representative of the employees in the following unit:

All meat, seafood, poultry, barbecue, cooked meat and delicatessen department employees, including head meat cutters, journeymen, apprentices, wrappers and clean-up employees employed by Respondent, EXCLUDING office clerical and professional employees, guards, and supervisors as defined in the Act and all other employees.

(b) Pay into the funds, on behalf of its unit employees, those welfare and pension fund contributions it failed to make as a result of the unlawful discontinuation of fund payments, in the manner set forth in the remedy section of this decision.

(c) Make whole the unit employees for any expenses suffered as a result of the Respondent's failure to make the required fund contributions, 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, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Mail a copy of the attached notice marked "Appendix"<sup>4</sup> to the Union and to all unit employees who were employed at the St. Louis, Missouri facility at the time of the closure. Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the Respondent's authorized rep-

<sup>2</sup>Because it appears from the Respondent's answer that it may have ceased operations, we shall require the Respondent to mail copies of the notice to all unit employees employed at the time of the closure. See, e.g., *Print-Quic*, 262 NLRB 857, 862 fn. 19 (1982).

<sup>3</sup>Any additional amounts owed with respect to these fund contributions shall be calculated in the manner set forth in *Merryweather Optical Co.*, 240 NLRB 1213 (1979).

<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."

resented, shall be mailed by the Respondent immediately upon receipt.

(f) 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.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT fail to make contributions on behalf of our unit employees to the contractual welfare and pension 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, on request, bargain with the Union as the exclusive representative of our employees in the bargaining unit:

All meat, seafood, poultry, barbecue, cooked meat and delicatessen department employees, including head meat cutters, journeymen, apprentices, wrappers and clean-up employees employed by us, excluding office clerical and professional employees, guards, and supervisors as defined in the Act and all other employees.

WE WILL adhere to the terms of our collective-bargaining agreement with the Union by making the welfare and pension fund contributions that we failed to make.

WE WILL make whole our unit employees for any expenses they suffered as a result of our failure to make required contributions to employees' welfare and pension funds.

DEMUN INCORPORATED D/B/A DEMUN  
MARKET