

New Associates d/b/a Hospitality Care Center and 1115 Nursing Home and Service Employees Union-New Jersey A, A Division of 1115 District Council, H.E.R.E., AFL-CIO. Case 22-CA-18606

August 25, 1994

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS
AND DEVANEY

On February 3, 1994, Administrative Law Judge Steven B. Fish issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief and the Charging Party filed a brief in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions¹ and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and

¹ In its exceptions, the Respondent argues that, in light of the stipulation of settlement and judgment entered into before the United States District Court, District of New Jersey, "it would be inappropriate, and a waste of the National Labor Relations Board scarce resources to further pursue this matter." Initially, we note that the stipulation of settlement and judgment was set aside by the District Court in its subsequent judgment dated January 3, 1994, in which the District Court found that the Respondent failed to adhere to the stipulation of settlement and therefore rendered a judgment in favor of the Union. To the extent that the Respondent is arguing that the Board should be collaterally estopped from deciding the instant unfair labor practice case because the issues have already been decided by the District Court's judgment, we disagree. The Board "as a public agency asserting public rights should not be collaterally estopped by the resolution of private claims asserted by private parties." *Field Bridge Associates*, 306 NLRB 322 (1992), *enfd.* 982 F.2d 845 (2d Cir. 1993). Accordingly, the Board is not estopped from deciding the instant unfair labor practice issues. We note, however, that the District Court's judgment may be relevant, in the compliance stage of this proceeding, for the purpose of determining the amounts of contributions now due. The Respondent will not be required to make duplicate payments to the Union or the funds for any particular objection.

orders that the Respondent, New Associates d/b/a Hospitality Care Center, Newark, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

William E. Milks, Esq., for the General Counsel.
Elliot J. Mandel, Esq. (Kaufman, Naness, Schneider & Rosenzweig, P.C.), of Melville, New York, for the Respondent.
Stuart Weinberg, Esq. (Richard Greenspan, P.C.), of White Plains, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

STEVEN B. FISH, Administrative Law Judge. Pursuant to charges filed by 1115 Nursing Home and Service Employees Union, New Jersey A, a Division of 1115 District Council H.E.R.E., AFL-CIO (the Union), the Regional Director for Region 22 issued a complaint and notice of hearing on September 25, 1992,¹ alleging that New Associates d/b/a Hospitality Care Center (Respondent) has violated Section 8(a)(1) and (5) of the Act by failing to make required contributions to the Union's Legal and Welfare Funds and failing to remit dues and initiation fees to the Union.

The trial regarding the issues raised by the complaint was held before me in Newark, New Jersey, on April 1, 1993.

Based on the entire record, including my observation of the witnesses, and after due consideration of the briefs filed by the General Counsel and the Charging Party, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

The Respondent is a health care institution engaged in the operation of nursing home providing inpatient medical and professional care services, with a facility located in Newark, New Jersey. During the past year, Respondent derived gross revenues in excess of \$100,000 and purchased and received at its Newark, New Jersey facility, products, goods, and materials valued in excess of \$5000 directly from points located outside the State of New Jersey.

It is admitted and I so find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and is a health care institution within the meaning of Section 2(14) of the Act.

It is also admitted and I so find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

¹ All dates hereinafter are in 1992, unless otherwise indicated.

Facts

The Union has been for a number of years the recognized collective-bargaining representative of Respondent's employees in an appropriate unit consisting of all employees excluding registered nurses, licensed practical nurses, supervisors, watchmen, office employees, clerical workers, first cook, dietitian, telephone operator, professional employees, guards, and recreational personnel. The Union and Respondent entered into a collective-bargaining agreement, covering the employees in the unit, which was effective from December 24, 1991, to December 23, 1995. The agreement provides that Respondent is required to make monthly payments into the Union's welfare fund, and to deduct from its employees salaries, union dues and initiation fees and remit same to the Union promptly.

The contract also contains a broad grievance and arbitration clause, which culminates in an agreement to arbitrate all disputes not satisfactorily resolved.

General Counsel's evidence, which is undisputed and based on the testimony of Harry Veras, controller of the Union and its affiliated funds, corroborated by fund records, establishes that Respondent, from May 1992 to the date of the hearing, made no payments into the Union's legal fund, and only one payment into the Union's welfare fund. That payment, which was made on December 28 for \$759, represented only moneys that employees contributed towards their health insurance for the period May to November, which were deducted from their salaries by Respondent. Respondent also failed to make any remittance of dues or initiation fees from May to December 1992. On December 28, 1992, Respondent made a lump-sum payment for dues and initiation fees owed to the Union, covering the period from May through November. No payments of any kind were made by Respondent to any of the funds or to the Union for dues or initiation fees, since December 1992 up to the date of the instant hearing, April 1, 1993.

At some point, undisclosed by the record, the Union filed a grievance under its collective-bargaining agreement concerning Respondent's failure to make payments to the Union's welfare and legal funds, and its failure to remit dues. A hearing was held before Arbitrator Roger Maker on November 24, with respect to this grievance.

After briefs were filed, the arbitrator issued a decision on December 12, awarding the Union a grand total of \$202,614.35, which comprised the total amounts due to the Union plus interest, for moneys owed to the welfare and legal funds, and for dues. No award was made for initiation fees owed, as it does not appear that the Union made a claim for such payments in that proceeding. The arbitrator also ordered, pursuant to the Union's request, that Respondent post a cash bond of \$157,000, equivalent to 6 months of contractually obligated dues and contributions to be deposited with the Union on receipt of the award, as well as payment of the entire arbitrator's fee of \$825. As of the time of the trial, the Union was in the process of seeking to enforce this arbitration award.

Respondent's answer did not raise the defense of deferral to this arbitration award, or alleged that any portion of the complaint be deferred to the arbitration process. However, Respondent raises the issue of the arbitration award at the trial, and introduced the award into evidence. Moreover, Respondent's attorney stated that it was asserting that the arbi-

tration award should be deferred to arbitration, insofar as it is related to allegations in the complaint, and that the remainder of the complaint allegations should be deferred to the arbitration process.

II. ANALYSIS

The only significant issue for consideration herein is the question of deferral to arbitration. Respondent asserts that the portion of the complaint covered by the arbitration award should be dismissed, *Spielberg Mfg.*, 112 NLRB 1080 (1955), *Olin Corp.*, 268 NLRB 573 (1984), and the remaining portions of the complaint, which were not the subject of the award, should be deferred to the parties collective-bargaining process. *Collyer Insulated Wire*, 197 NLRB 837 (1971); *United Technologies Corp.*, 268 NLRB 557 (1984).

The General Counsel initially argues that Respondent, not having raised the issue as an affirmative defense in its answer, is precluded from raising deferral as a defense to any of its conduct. I do not agree. While it is true that deferral is an affirmative defense that can be waived if not raised timely, it is sufficient if the defense is raised either in the answer or at the hearing. *15th Avenue Iron Works*, 301 NLRB 878, 879 fn. 12 (1991). Here, since I have found above that Respondent raised the issues of deferral during the course of the hearing, the defense is properly and timely raised for my consideration.

The General Counsel and the Charging Party also assert that deferral is inappropriate, since Respondent has not claimed that its refusals to make any of the payments were privileged by any contractual provision, and therefore there is no bona fide issue of contract interpretation warranting deferral to the arbitration process. *Stevens & Associates Construction Co.*, 307 NLRB 1403 (1992). I agree with these contentions, but only insofar as they relate to the portions of the complaint that were not covered by the arbitration award. As to those allegations, which include the failure to remit initiation fees from May 1992 to date, and the failure to make welfare and legal fund payments or to remit dues for the months of December 1992 through the end of March 1993, deferral to prospective arbitration under *Collyer*, supra, is not warranted, since no bona fide contractual issue has been raised. *Stevens*, supra.

However, the question of deference to the existing arbitration award, which resolved the alleged delinquencies to the welfare and legal funds, and the failure to remit dues, for the periods from May through November, must be evaluated under the standards of *Spielberg*, supra, and *Olin*, supra. As to this issue, the General Counsel relies on *SQL Roofing*, 271 NLRB 1 (1984); and *Sheet Metal Workers Local 17 (George Koch Sons)*, 199 NLRB 166, 168 (1972); where the Board declined to defer under *Collyer*, supra, because of the interrelationship between the allegations on which deferral is sought and other allegations which the Board must decide, and the Board's policy of resolving the entire dispute in a single proceeding. The General Counsel and the Charging Party argue that since the arbitration award did not cover the failure to make payments and remit dues for the periods from December 1992 to date, and made no reference to the failure to remit initiation fees, it is not possible to resolve the entire dispute, as these delinquencies must be resolved by the Board, and therefore it is not appropriate to defer to the

award, even with respect to the issues that the award did resolve.

I cannot agree with these contentions of the General Counsel and the Charging Party, since the standards for deferral under *Collyer* and *Spielberg* are not the same. The dispositive precedent on this issue is *15th Avenue Iron*, supra. Here, the standards set forth in *Spielberg* and *Olin* have been met, and the General Counsel has not offered any evidence nor made any assertion to the contrary. While it is true that Respondent has not complied with the arbitration award, it is well settled that noncompliance with an arbitral award is not a sufficient basis to avoid deferral of such an award. *15th Avenue Iron*, supra; *Malrite of Wisconsin*, 198 NLRB 241, 242 (1972), enfd. in relevant part 494 F.2d 1136, 1139 (D.C. Cir. 1974); see also *Ad-Art, Inc.*, 290 NLRB 590, 607 (1988). Indeed as the Board observed in *Malrite*, supra.

If the Board's deference to arbitration is to be meaningful, it must encompass the entire arbitration process including the enforcement of arbitration process. It appears that the desirable objective of encouraging the voluntary settlement of labor disputes through the arbitration process will best be served by requiring that parties to a dispute, after electing to resort to arbitration, proceed to the usual conclusion of that process—judicial enforcement—rather than permitting them to invoke the intervention of the Board. [198 NLRB at 241–242.]

Accordingly, based on the foregoing I shall recommend dismissal of the complaint insofar as it alleges that Respondent failed to make payments to the Union's welfare and legal funds, and to remit dues to the Union, for the period from May to November, since these matters were resolved and fully remedied by the arbitration award.

That leaves for determination Respondent's alleged failure to make fund payments and remit dues for periods of time from December 1992 through the end of March 1993, and its alleged failure to remit initiation fees from May 1992 to date. With respect to the latter issue, Respondent did make a payment on December 28, 1992, to the Union, covering initiation fees that it had deducted from the salaries of its employees, which covered a 6-month period, from May to November. However, since the contract specifies that these remittances be made promptly, a 7-month delay in making the required contractual payments is more than a de minimis failure to adhere to contractually mandated terms and conditions of employment and is therefore violative of Section 8(a)(1) and (5) of the Act. *King Manor Care Center*, 308 NLRB 884, 887 (1992); *Zimmerman Painting & Decorating*, 302 NLRB 856, 857 (1991). Additionally, Respondent has failed to make any further remittances of initiation fees since December 1992, thereby not making any required payments of initiation fees for a 4-month period, which is further violative of the Act.

As for the payments to the welfare and legal funds, and the remittances of dues, I have found that Respondent has failed to make any such contractually required payments of these items for a similar 4-month period. By this conduct, Respondent has again violated Section 8(a)(1) and (5) of the Act, and I so find. *Stevens*, supra; *Zimmerman*, supra.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. At all times material, the Union has been, and is now, the exclusive bargaining representative of all employees of Respondent for purposes of collective bargaining within the meaning of Section 9(a) of the Act, in the following appropriate unit:

All employees excluding registered nurses, licensed practical nurses, supervisors, watchmen, office employees, clerical workers, first cook, dietitian, telephone operator, professional employees, guards and recreational personnel.

4. By ceasing to make contractually required payments to the Union's welfare and legal funds, and ceasing to remit dues and initiation fees to the Union for the periods covering the months of December 1992 and January, February, and March 1993, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

5. By failing to remit on a timely basis initiation fees to the Union as required by the collective-bargaining agreement between it and the Union, for the period between May and November 1992, Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

7. The allegations in the complaint that Respondent failed to make contractual payments to the Union's welfare and legal funds, and failed to remit dues to the Union, for periods from May through November 1992 shall be deferred to the arbitration decision, and must therefore be dismissed.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

I shall recommend that Respondent transmit contributions not made on behalf of its employees to the Union's welfare and legal funds, with any interest or other sums applicable to the payments to be computed in accordance with the Board's decision in *Merriweather Optical Co.*, 240 NLRB 1213 (1979).

It is also appropriate to recommend that Respondent make whole the unit employees for any losses that they may have suffered as a result of Respondent's failure to make the contractually required contributions, in the manner set forth in *Ogle Protection Service*, 83 NLRB 683 (1970), enfd. 444 F.2d 502 (6th Cir. 1971); and *Kraft Plumbing & Heating*, 252 NLRB 891 (1980), enfd. 661 F.2d 940 (9th Cir. 1981).

I shall also recommend that Respondent remit to the Union dues and initiation fees as required under the collective-bargaining agreement. Interest shall also be paid to the Union on the amounts owed to the Union for the failure to remit dues and initiation fees, including the failure to timely remit initiation fees for the periods from May to November

1992, *King Manor*, supra at 890, as well as to the employees on the losses that they may have suffered as a result of Respondent's failure to make fund contributions, in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987); *Stevens*, supra at 1404.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²

ORDER

The Respondent, New Associates d/b/a Hospitality Care Center, Newark, New Jersey, its officers, agents, successors, and assign, shall

1. Cease and desist from

(a) Failing and refusing to bargain collectively with the Union by failing and refusing to make contractually required monetary payments to the Union's welfare and legal funds, and by failing to remit or by failing to make timely payments to the Union, of dues and initiation fees as required by the collective-bargaining agreement.

(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) Make all contributions to the Union's welfare and legal funds that have not been paid and that would have been paid in the absence of Respondent's unlawful discontinuance of the payments, and make whole employees with interest in the manner set forth in the remedy section of this decision.

(b) Remit to the Union dues and initiation fees that were not forwarded to the Union as required by the collective-bargaining agreement, with interest to the Union on these sums, and make whole the Union by the payment of interest for its failure to make timely payments of initiation fees, as described in the remedy section of this decision.

(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 Newark, New Jersey facility, copies of the attached notice marked "Appendix."³ Copies of the notice,

²If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

³If 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

on forms provided by the Regional Director for Region 22, 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.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges violations not found herein.

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 to bargain collectively with 115 Nursing Home and Service Employees Union—New Jersey A, a Division of 1115 District Council, H.E.R.E., AFL—CIO, by failing and refusing to make contractually required monetary payments to the Union's welfare and legal funds, and by failing to remit or by failing to make timely payments to the Union of dues and initiation fees as required by the 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 make all contributions to the Union's welfare and legal funds that have not been paid and that would have been paid in the absence of our unlawful discontinuance of the payments, and make unit employees whole with interest.

WE WILL remit to the Union dues and initiation fees that were not forwarded to the Union as required by the collective-bargaining agreement, with interest to the Union on these sums, and make whole the Union, by the payment of interest, for our failure to make timely payments of initiation fees to the Union.

NEW ASSOCIATES D/B/A HOSPITALITY CARE
CENTER