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Jerry L. Rhodes and Donald Floreske d/b/a Rhodes & Associates and Detroit Area Local 67, Operative Plasterers' and Cement Masons International Association, AFL-CIO. Case 7-CA-36377

January 30, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS
AND COHEN

Upon a charge and amended charge filed by Detroit Area Local 67, Operative Plasterers' and Cement Masons International Association, AFL-CIO, the Union, on September 15 and 19, 1994, respectively, the General Counsel of the National Labor Relations Board issued a complaint on October 26, 1994, against Jerry L. Rhodes and Donald Floreske d/b/a Rhodes & Associates, 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, the Respondent failed to file an answer.

On December 12, 1994, the General Counsel filed a Motion for Summary Judgment with the Board. On December 14, 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 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 November 16, 1994, notified the Respondent that unless an answer were received by November 25, 1994, 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

At all material times, the Respondent has been owned jointly by Jerry L. Rhodes and Donald Floreske, partners, doing business as Rhodes & Associates. At all material times, the Respondent, with an office and current place of business in Livonia, Michigan, has been engaged as a subcontractor providing plastering, painting, and carpentry services for construction contractors. The Respondent's prior office and place of business, until about late July or early August 1994, was located at 31805 Middlebelt Road, Suite 304, Farmington Hills, Michigan (the Farmington Hills facility). During the 12-month period ending July 31, 1994, a representative period, the Respondent, in conducting its business operations, provided plastering, painting, and carpentry services valued in excess of \$50,000 to American Quality Homes, Inc., a retail homebuilding contractor enterprise located within the State of Michigan. During this same 12-month period, American Quality Homes, Inc. had gross revenues in excess of \$50,000, and purchased from points outside the State of Michigan, and caused to be shipped directly to its Michigan facilities and jobsites, products, goods and materials valued in excess of \$50,000. 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 full-time and regular part-time journeymen and apprentice plasterers employed by the Respondent at or out of its Farmington Hills facility and/or Livonia facility, but excluding all office clerical employees, guards, and supervisors as defined in the Act constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act.

About August 11, 1993, the Respondent entered into an Agreement for nonassociation members which bound the Respondent to the terms and conditions of employment of the collective-bargaining agreement (the 1993-1994 Association Agreement) entered into by the Union and the Detroit Association of Wall and Ceiling Contractors (the Association), which was effective by its terms from June 1, 1993, through May 31, 1994. About June 2, 1994, the Respondent entered into an Agreement for nonassociation members which bound the Respondent to the terms and conditions of employment of the collective-bargaining agreement (the 1994-1997 Association Agreement) entered into by the Union and the Association, which is effective by its terms from June 1, 1994, through May 31, 1997.

About August 11, 1993, the Respondent, an employer engaged in the building and construction indus-

try, granted recognition to the Union as the exclusive collective-bargaining representative of the unit by entering into the 1993-1994 Association Agreement and the 1994-1997 Association Agreement with the Union 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 material times, the Union has been the recognized limited exclusive collective-bargaining representative of the unit within the meaning of Section 8(f) of the Act.

The 1993-1994 Association Agreement and the 1994-1997 Association Agreement each obligate the Respondent to:

(a) Make timely and complete contributions on behalf of the unit employees to the Union and/or the fringe benefit funds provided for in the Association Agreements for union dues and various fringe benefit funds including, inter alia, vacation, apprenticeship, health and welfare, and local pension.

(b) Submit to the Union and/or the fringe benefit funds timely and complete monthly reports.

(c) Pay liquidated damages for late payments to the fringe benefit funds.

(d) Submit to an audit upon request.

Since about March 15, 1994, the Respondent has employed unit employees at various jobsites, including, inter alia, the Main Street Square project in Royal Oak, Michigan, Ruby Tuesdays Restaurant in Sterling Heights, Michigan, Murray's Discount Auto Parts in Detroit, Michigan, and the Sound Warehouse in Rochester, Michigan. Since about March 15, 1994, the Respondent has failed and refused to make timely and complete contributions to the Union and the fringe benefit funds, to submit to the Union and the fringe benefit funds timely and complete monthly reports, and to pay liquidated damages for late payments to the fringe benefit funds.

About August 23, 1994, the Union, by an agent of the fringe benefits funds, requested in writing, pursuant to the Association Agreements, that a payroll audit of the Respondent's record be arranged. Since about August 24, 1994, the Respondent has failed and refused to allow the Union, by an agent of the fringe benefit funds, to conduct a requested payroll audit.

The Respondent's above-described actions constitute unilateral modifications of the Association Agreements 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 limited exclusive collective-bargaining representative of its employees within the meaning of Section 8(d) of the Act, 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. Specifically, having found that the Respondent has violated Section 8(a)(5) and (1) by failing and refusing, since about March 15, 1994, to make timely and complete contractually required contributions to the various fringe benefit funds and to pay liquidated damages thereon, we shall order the Respondent to make whole its unit employees by paying all such delinquent contributions and liquidated damages, 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), enfd. 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), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).¹

Further, having found that the Respondent has also violated Section 8(a)(5) and (1) by failing to remit to the Union, since about March 15, 1994, dues that were deducted from the pay of unit employees pursuant to valid dues-checkoff authorizations, we shall order the Respondent to remit such withheld dues to the Union as required by the Agreements, with interest as prescribed in *New Horizons for the Retarded*, supra.

In addition, having found that the Respondent violated Section 8(a)(5) and (1) by failing and refusing, since about March 15, 1994, to submit to the Union and the fringe benefits funds timely and complete monthly reports, and by failing and refusing, since about August 24, 1994, to allow an agent of the fringe benefit funds to conduct a requested payroll audit, we will order the Respondent to submit the monthly reports in a timely and complete manner and to allow the requested payroll audit.

ORDER

The National Labor Relations Board orders that the Respondent, Jerry L. Rhodes and Donald Floreske

¹ To the extent that an employee has made personal contributions to a fund that are accepted by the fund in lieu of the employer's delinquent contributions during the period of the delinquency, the Respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the Respondent otherwise owes the fund.

d/b/a Rhodes & Associates, Livonia, Michigan, its agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing or refusing to bargain in good faith with Detroit Area Local 67, Operative Plasterers' and Cement Masons International Association, AFL-CIO, as the limited exclusive bargaining representative of the employees in the following unit, by failing and refusing to make timely and complete contributions to the Union and/or the fringe benefit funds for union dues and various fringe benefits, to pay liquidated damages for late payments to the fringe benefit funds, to submit to the Union and the fringe benefit funds timely and complete monthly reports, and to allow the Union, by an agent of the fringe benefit funds, to conduct a payroll audit, as provided by the 1993-1994 and 1994-1997 Association Agreements:

All full-time and regular part-time journeymen and apprentice plasterers employed by the Respondent at or out of its Farmington Hills facility and/or Livonia facility, but excluding all office clerical employees, 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) Honor the terms and conditions of the 1993-1994 and 1994-1997 Association Agreements by making all contractually required benefit fund contributions and payments for liquidated damages that have not been made since March 15, 1994, and make whole the unit employees for any expenses resulting from its failure to do so, as set forth in the remedy section of this decision.

(b) Remit to the Union, with interest, dues that were deducted from the pay of unit employees pursuant to valid dues-checkoff authorizations that have not been remitted since March 15, 1994, as required by the 1993-1994 and 1994-1997 Association Agreements.

(c) Submit to the Union and the fringe benefits funds in a timely and complete manner all required monthly reports that have not been submitted since March 15, 1994, as provided in the 1993-1994 and 1994-1997 Association Agreements.

(d) Allow an agent of the fringe benefit funds to conduct the payroll audit requested on August 23, 1994, as provided by the 1993-1994 and 1994-1997 Association Agreements.

(e) 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.

(f) Post at its facility in Livonia, Michigan, copies of the attached notice marked "Appendix."² 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.

(g) 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. January 30, 1995

William B. Gould IV, Chairman

James M. Stephens, Member

Charles I. Cohen, Member

(SEAL) 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 or refuse to bargain in good faith with Detroit Area Local 67, Operative Plasterers' and Cement Masons International Association, AFL-CIO, as the limited exclusive bargaining representative of the employees in the following unit, by failing and refusing to make timely and complete contributions to the Union and/or the fringe benefit funds for union dues and various fringe benefits, to pay liquidated damages for late payments to the fringe benefit funds, to submit to the Union and the fringe benefit funds timely and complete monthly reports, and to allow the Union, by an agent of the fringe benefit funds, to con-

²If 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."

duct a payroll audit, as provided by the 1993–1994 and 1994–1997 Association Agreements:

All full-time and regular part-time journeymen and apprentice plasterers employed by us at or out of our Farmington Hills facility and/or Livonia facility, but excluding all office clerical employees, guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL honor the terms and conditions of the 1993–1994 and 1994–1997 Association Agreements by making all contractually required benefit fund contributions and payments for liquidated damages that have not been made since March 15, 1994, and WE WILL make whole the unit employees for any expenses resulting from our failure to do so, with interest.

WE WILL remit to the Union, with interest, dues that were deducted from the pay of unit employees pursuant to valid dues-checkoff authorizations that have not been remitted since March 15, 1994, as required by the 1993–1994 and 1994–1997 Association Agreements.

WE WILL submit to the Union and the fringe benefits funds in a timely and complete manner all required monthly reports that have not been submitted since March 15, 1994, as provided in the 1993–1994 and 1994–1997 Association Agreements.

WE WILL allow an agent of the fringe benefit funds to conduct the payroll audit requested on August 23, 1994, as provided by the 1993–1994 and 1994–1997 Association Agreements.

JERRY L. RHODES AND DONALD
FLORESKE D/B/A RHODES & ASSOCI-
ATES