

James Donovan d/b/a Donovan & Associates and West-Central Michigan District Council, United Brotherhood of Carpenters and Joiners of America, AFL-CIO. Case 7-CA-33954

January 27, 1995

DECISION AND ORDER

BY MEMBERS BROWNING, COHEN, AND TRUESDALE

Upon a charge and an amended charge filed by West-Central Michigan District Council, United Brotherhood of Carpenters and Joiners of America, AFL-CIO (the Union) on November 24 and December 21, 1992, respectively, the Regional Director for Region 7 of the National Labor Relations Board issued a complaint on December 31, 1992, against James Donovan d/b/a Donovan & Associates, the Respondent, alleging that it has violated Section 8(a)(1) and (5) of the National Labor Relations Act.

Thereafter, on March 15, 1993, the Regional Director approved an informal settlement agreement entered into by the Respondent and the Union, disposing of the allegations in the complaint. However, on September 15, 1994, the Regional Director issued an order setting aside the settlement agreement and reissuing the complaint inasmuch as the Respondent has failed to comply with the settlement agreement.

Although properly served copies of the September 15, 1994 complaint, the Respondent failed to file an answer thereto. Accordingly, on December 19, 1994, the General Counsel filed a Motion for Default Summary Judgment with the Board. On December 22, 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 September 15, 1994 complaint affirmatively noted that unless an answer were filed within 14 days of service, all the allegations in the complaint would be considered admitted. Further, the undisputed allegations in the Motion for Default Summary Judgment disclose that the Region, by letter dated October 6, 1994, notified the Respondent that unless an answer were received by October 20, 1994, a Motion for Default Summary Judgment

would be filed. Nevertheless, as indicated above, the Respondent failed to file an answer to the September 15, 1994 complaint.¹

Accordingly, in the absence of good cause being shown for the failure to file a timely answer to the September 15, 1994 complaint, 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

At all material times, the Respondent has been owned by James Donovan, a sole proprietorship, doing business as Donovan and Associates. The Respondent has an office and place of business in Belding, Michigan, and has been engaged in the construction industry as a carpentry contractor.

During the 12-month period ending November 30, 1992, the Respondent provided services valued in excess of \$50,000 for Farnell Equipment Company, an enterprise within the State of Michigan, which company during the above-mentioned period purchased and received at its jobsites in Michigan goods valued in excess of \$50,000 directly from points 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 carpentry employees employed by the Respondent within the geographical jurisdiction set forth in the 1990-1993 collective-bargaining agreement between the Union and the Labor Relations Division, Michigan Chapter, Associated General Contractors of America, Incorporated and the Southwestern Michigan Contractors Association; but excluding guards and supervisors as defined in the Act constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act (the unit).

On about April 23, 1992, the Respondent, an employer engaged in the building and construction indus-

¹ An affidavit submitted by the Regional Director also indicates that no answer was filed to the original complaint. In any event, if an answer was filed to the original complaint, it was withdrawn by the terms of the settlement agreement. We take administrative notice that the settlement form used by the parties was NLRB Form 4775, the standard informal settlement agreement, which expressly provides that approval of the settlement agreement "shall constitute withdrawal of any Complaint(s) and Notice of Hearing heretofore issued in this case, as well as any answer(s) filed in response." (Emphasis added.) Thus, any answer that may have been filed to the original complaint would not remain extant and would not preclude summary judgment. See *Orange Data*, 274 NLRB 1018 (1985); *Ofalco Properties*, 281 NLRB 84 (1986); and *Signage Systems*, 312 NLRB 1115 (1993).

try, granted recognition to the Union as the exclusive collective-bargaining representative of the unit by entering into a collective-bargaining agreement with the Union for the period April 23, 1992, to May 31, 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 of April 23, 1992, to May 31, 1993, based on Section 9(a) of the Act, the Union has been the limited exclusive collective-bargaining representative of the unit.

Since about June 1, 1992, the Respondent has unilaterally implemented changes in the terms and conditions of employment of the employees in the unit, including changes in contractual provisions referred to below:

Since about June 1, 1992, the Respondent has unilaterally ceased making fringe benefit contributions required in the collective-bargaining agreement referred to above, including contributions to the health care and pension fund and the joint apprenticeship and training fund.

Since about June 1, 1992, the Respondent has unilaterally ceased deducting dues and/or ceased remitting dues that were deducted from employees' paychecks as required by the collective-bargaining agreement referred to above.

By letter dated November 18, 1992, the Respondent advised the Union that it was repudiating the collective-bargaining agreement referred to above in its entirety.

Although the subjects set forth above relate to wages, hours, and other terms and conditions of employment of the unit and are mandatory subjects for the purposes of collective bargaining, the Respondent engaged in the conduct described above without prior notice to the Union and without affording the Union an opportunity to bargain with the Respondent with respect to this conduct.

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, 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, we shall order the Respondent to honor the terms and conditions of the 1992-1993 collective-bar-

gaining agreement, including, among other things, the provisions concerning fringe-benefit contributions and union security, and to make whole the unit employees for any loss of earnings and other benefits suffered as a result of the repudiation of the collective-bargaining agreement on November 18, 1992. In addition, we shall order the Respondent to make whole the unit employees by making all contractually required fringe benefit contributions which have not been made since June 1, 1992, including any additional amounts due the funds in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979),² and by reimbursing the 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). All payments to employees are 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). Finally, we shall order the Respondent to reimburse the Union for any loss of dues ensuing from its failure to deduct and/or remit dues since June 1, 1992, as required by the 1992-1993 agreement, with interest as prescribed in *New Horizons for the Retarded*, supra.

ORDER

The National Labor Relations Board orders that the Respondent, James Donovan d/b/a Donovan & Associates, Belding, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively and in good faith with West-Central Michigan District Council, United Brotherhood of Carpenters and Joiners of America, AFL-CIO as the limited exclusive collective-bargaining representative of the employees in the following unit, by repudiating its 1992-1993 collective-bargaining agreement with the Union, by unilaterally ceasing to make fringe benefit contributions, including contributions to the health care and pension fund and the joint apprenticeship and training fund, and by unilaterally ceasing to deduct dues and/or remit dues deducted from employees' paychecks, as required by the 1992-1993 collective-bargaining agreement:

All carpentry employees employed by the Respondent within the geographical jurisdiction set forth in the 1990-1993 collective-bargaining agreement between the Union and the Labor Rela-

²To 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.

tions Division, Michigan Chapter, Associated General Contractors of America, Incorporated and the Southwestern Michigan Contractors Association; 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) Honor the terms and conditions of the 1992–1993 collective-bargaining agreement with the Union, including the provisions concerning fringe benefit contributions and union security, and make whole the unit employees for any loss of earnings and other benefits suffered as a result of the repudiation of the collective-bargaining agreement on November 18, 1992, as set forth in the remedy section of this decision.

(b) Make all contractually required fringe benefit contributions that have not been made since June 1, 1992, and make whole the unit employees for any expenses ensuing from its failure to make such contributions, as set forth in the remedy section of this decision.

(c) Reimburse the Union for any loss of dues ensuing from its failure to deduct dues from employees' paychecks and/or remit dues since June 1, 1992, as required by the 1992–1993 collective-bargaining agreement, as 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) Post at its facility in Belding, Michigan, copies of the attached notice marked "Appendix."³ 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.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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 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 and in good faith with West-Central Michigan District Council, United Brotherhood of Carpenters and Joiners of America, AFL–CIO as the limited exclusive collective-bargaining representative of the employees in the following unit, by repudiating our 1992–1993 collective-bargaining agreement with the Union, by unilaterally ceasing to make fringe benefit contributions, including contributions to the health care and pension fund and the joint apprenticeship and training fund, and by unilaterally ceasing to deduct dues and/or remit dues deducted from employees' paychecks, as required by the 1992–1993 collective-bargaining agreement:

All carpentry employees employed by us within the geographical jurisdiction set forth in the 1990–1993 collective-bargaining agreement between the Union and the Labor Relations Division, Michigan Chapter, Associated General Contractors of America, Incorporated and the Southwestern Michigan Contractors Association; 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 honor the terms and conditions of the 1992–1993 collective-bargaining agreement with the Union, including the provisions concerning fringe benefit contributions and union security, and WE WILL make whole the unit employees for any loss of earnings and other benefits suffered as a result of our repudiation of the collective-bargaining agreement on November 18, 1992, with interest.

WE WILL make all contractually required fringe benefit contributions that have not been made since June 1, 1992, and WE WILL make whole the unit employees for any expenses ensuing from our failure to make such contributions, with interest.

WE WILL reimburse the Union for any loss of dues ensuing from our failure to deduct and/or remit dues since June 1, 1992, as required by the 1992–1993 collective-bargaining agreement, with interest.

JAMES DONOVAN D/B/A DONOVAN &
ASSOCIATES