

M & H Electrical Contractors, Inc. and International Brotherhood of Electrical Workers, Local Union No. 134. Case 13-CA-32494

May 12, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS
AND BROWNING

Upon a charge filed by the International Brotherhood of Electrical Workers, Local Union No. 134 (the Union) on May 11, 1994, the General Counsel of the National Labor Relations Board issued a complaint on June 30, 1994, against M & H Electrical Contractors, Inc. (the Respondent) alleging that it has violated Section 8(a)(5) and (1) of the National Labor Relations Act. The complaint alleges that since approximately December 16, 1993, and through the issuing date of the complaint, the Respondent has failed to pay wages owed to six specified employees for work performed and has failed to make payments to the Union's fringe benefit funds in violation of terms and conditions set out in the parties' collective-bargaining agreement. Although properly served copies of the charge and complaint, the Respondent has failed to file an answer.

On March 27, 1995, the General Counsel filed a Motion for Summary Judgment. On March 29, 1995, 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

Section 102.20 of the Board's Rules and Regulations provides 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. The complaint states that unless an answer is filed within 14 days of service, "all the allegations in the complaint shall be considered to be admitted to be true and shall be so found by the Board." Section 102.20 also states that the answer should specifically admit, deny, or explain each of the facts alleged in the complaint unless the respondent is without knowledge, in which case it shall so state.

The undisputed allegations in the Motion for Summary Judgment disclose that counsel for the General Counsel, by letter dated August 1, 1994, notified the Respondent that unless an answer was received by August 8, 1994, a Motion for Summary Judgment would be filed. Receiving no response to her original letter, counsel for the General Counsel again advised the Re-

spondent by telephone on August 25, 1994 and by letter dated August 26, 1994, that she would file a Motion for Summary Judgment unless the Respondent immediately filed an answer. Thereafter, the Respondent, through counsel, advised counsel for the General Counsel by telephone on August 30, 1994, and by letter dated August 31, 1994, that it intended to pay back wages owed to its employees as soon as it received a substantial sum of money owed to it.

Through the fall of 1994, the parties attempted to resolve the issues raised in the complaint, but settlement efforts were unsuccessful. As a result, counsel for the General Counsel again advised the Respondent by letter dated January 10, 1995, that unless the Respondent filed an answer to the outstanding complaint by January 20, 1995, a Motion for Summary Judgment would be filed immediately with the Board. By letter dated January 11, 1995, the Respondent, through counsel, again conceded that it owed unspecified sums in back wages to its employees but asserted that it had no assets in its possession to make such payments. The Respondent's counsel further advised counsel for the General Counsel that because of the Respondent's dire financial condition and inability to pay its attorneys, counsel could not "handle answering Petitions, Motion for Summary Judgments or Consent Orders for the N.L.R.B." on behalf of the Respondent. Accordingly, counsel for the General Counsel advised the Respondent by letter dated January 25, 1995, that she would file a Motion for Summary Judgment unless she received an answer to the complaint by February 3, 1995. The Respondent has failed to answer the complaint.

The Respondent's August 31, 1994, and January 11, 1995 letters to counsel for the General Counsel concerning its financial distress do not constitute a proper answer to the complaint, because the letters do not address the facts alleged in the complaint. Moreover, it is well established that 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.'" *Demun Market*, 314 NLRB 714 (1994), quoting *Zimmerman Painting & Decorating*, 302 NLRB 856, 857 (1991). Therefore, even if the August 31, 1994, and January 11, 1995 letters constituted an adequate answer to the complaint, the Respondent has raised no issues warranting a hearing.

In the absence of good cause being shown for the failure to file a proper and timely answer, and in the absence of any material issues warranting a hearing, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation with an office and place of business in Lincolnshire, Illinois, has been engaged in the building and construction industry as an electrical contractor. During the year preceding the issuance of the complaint, a representative period, the Respondent, in the course and conduct of its business operations, purchased and received at its Lincolnshire, Illinois facility goods and materials valued in excess of \$50,000 directly from points outside the State of Illinois and from other enterprises located within the State of Illinois, which other enterprises, in turn, received those goods and materials directly from points located outside the State of Illinois. 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

A. *The Unit and the Union's Representative Status*

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

All employees performing electrical work which is encompassed within the Union's scope of work and jurisdiction as defined in the Union's Principal Agreement by and between the Electrical Contractor's Association of City of Chicago, Inc. and the Union, the most recent said agreement effective by its terms June 1, 1992 to May 31, 1994.

The Respondent, an employer engaged in the building and construction industry, granted recognition on or about April 30, 1991, to the Union as the exclusive collective-bargaining representative of the unit employees, without regard to whether the majority status of the Union had been established under the provisions of Section 9(a) of the Act. Recognition has been embodied in a series of collective-bargaining agreements, the most recent of which is effective by its terms for the period from June 1, 1992, to May 31, 1994.

B. *The Refusal to Bargain*

The collective-bargaining agreement described above contains provisions requiring the Respondent to pay its employees wages for work performed and to make regular contributions to the Union's fringe benefit funds on behalf of its employees in the unit described above. Since about December 16, 1993, the Respondent has failed and refused to pay wages owed to employees Thomas Bruhns, Donald Dewitt, Ronald Moran, Boyd

R. Lessman, Frank Rokos, and James Czyznikiewicz, and has failed and refused to make pension, health, and welfare payments to the Union's fringe benefit funds as required by the collective-bargaining agreement. These provisions 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 these acts and conduct without prior notice to the Union, and without having afforded the Union an opportunity to negotiate and bargain with the Respondent with respect to such acts and conduct and the effects thereof. By these acts and conduct, the Respondent has refused, and is refusing, to bargain collectively with the representative of its employees, and has thereby been engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing and refusing to pay contractually mandated wages to employees Thomas Bruhns, Donald Dewitt, Ronald Moran, Boyd R. Lessman, Frank Rokos, and James Czyznikiewicz for work performed and by failing and refusing to make contractually mandated pension, health and welfare contributions to the Union's fringe benefit funds, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) 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 to pay employees Thomas Bruhns, Donald Dewitt, Ronald Moran, Boyd R. Lessman, Frank Rokos, and James Czyznikiewicz contractually mandated wages for work performed, we shall order the Respondent to make whole these employees for any losses of earnings attributable to its unlawful conduct. Backpay shall be computed in accordance with *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).

Furthermore, having found that Respondent has violated Section 8(a)(5) and (1) by failing to make contractually required contributions to the Union's fringe benefit funds, we shall order the Respondent 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), enfd. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection Service*, supra, with interest as prescribed in *New Horizons for the Retarded*, supra. 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. *Donovan & Associates*, 316 NLRB 169 (1995).

ORDER

The National Labor Relations Board orders that the Respondent, M & H Electrical Contractors, Inc., Lincolnshire, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with the Union as the exclusive collective-bargaining representative of the unit employees by failing and refusing to pay employees Thomas Bruhns, Donald Dewitt, Ronald Moran, Boyd R. Lessman, Frank Rokos, and James Czyznikiewicz contractually mandated wages for work performed.

(b) Refusing to bargain with the Union as the exclusive collective-bargaining representative of the unit employees by failing and refusing to make required pension, health and welfare contributions to the Union's fringe benefit funds as required by the parties' collective-bargaining agreement.

(c) 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) Remit to employees Thomas Bruhns, Donald Dewitt, Ronald Moran, Boyd R. Lessman, Frank Rokos, and James Czyznikiewicz all wages owed for work performed under the terms of the collective-bargaining agreement, in the manner set forth in the remedy section of the decision.

(b) Remit the delinquent pension, health and welfare to the Union's fringe benefit funds, including any additional amounts due the funds, and reimburse the unit employees for any expenses ensuing from the Respondent's failure to make the required payments, in the manner set forth in the remedy section of the decision.

(c) On request, bargain with International Brotherhood of Electrical Workers, Local Union No. 134, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All employees performing electrical work which is encompassed within the Union's scope of work and jurisdiction as defined in the Union's Principal Agreement by and between the Electrical Contractor's Association of City of Chicago, Inc. and the Union, the most recent said agreement effective by its terms June 1, 1992 to May 31, 1994.

(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 Lincolnshire, Illinois, copies of the attached notice marked "Appendix."¹ Copies of the notice, on forms provided by the Regional Director for Region 13, 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.

¹ 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."

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 with the Union as the exclusive collective-bargaining representative of our unit employees by failing and refusing to pay wages owed to employees for work performed pursuant to the collective-bargaining agreement.

WE WILL NOT refuse to bargain with the Union as the exclusive collective-bargaining representative of our unit employees by failing and refusing to make required pension, health and welfare contributions to the Union's fringe benefit 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 make whole employees Thomas Bruhns, Donald Dewitt, Ronald Moran, Boyd R. Lessman, Frank Rokos, and James Czynnikiewicz by paying to them all wages owed under the terms of the collective-bargaining agreement, with interest.

WE WILL remit the delinquent pension, health and welfare contributions to the Union's fringe benefit funds, including any additional amounts due the funds, and WE WILL reimburse the unit employees for any expenses ensuing from our failure to make the required payments, with interest.

WE WILL, on request, bargain with the International Brotherhood of Electrical Workers, Local Union No. 134, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All employees performing electrical work which is encompassed within the Union's scope of work and jurisdiction as defined in the Union's Principal Agreement by and between the Electrical Contractor's Association of City of Chicago, Inc. and the Union, the most recent said agreement effective by its terms June 1, 1992 to May 31, 1994.

M & H ELECTRICAL CONTRACTORS,
INC.