

Endicott Forging & Manufacturing, Inc. and Local Lodge DS-190, District Lodge 58, International Association of Machinists and Aerospace Workers, AFL-CIO. Cases 3-CA-18477 and 3-CA-19050

September 19, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING
AND COHEN

Upon a charge, Case 3-CA-18477, filed by the Union on March 25, 1994, the General Counsel issued a complaint May 9, 1994, against Endicott Forging & Manufacturing, Inc., the Respondent, alleging that it has violated Sections 8(a)(1) and (5) and 8(d) of the National Labor Relations Act. The Respondent filed an answer admitting in part and denying in part the allegations in the complaint. Upon a charge, Case 3-CA-19050, filed by the Union on December 20, 1994, the General Counsel issued an order consolidating Cases 3-CA-18477 and 3-CA-19050, and a consolidated complaint January 31, 1995, against the Respondent, alleging that it has violated Sections 8(a)(1) and (5) and 8(d) of the National Labor Relations Act. The Respondent filed an answer admitting in part and denying in part the allegations of the consolidated complaint, and asserting an affirmative defense.

The consolidated complaint alleges, and the Respondent admits, that since about October 5, 1993, the Respondent has failed to continue in effect all the terms and conditions of the September 1, 1990—August 3, 1993 collective-bargaining agreement that was extended to August 31, 1994, and continued thereafter, by failing to abide by the Pension Plan Provision of the Health and Welfare Plan on pages 25 and 26. The consolidated complaint further alleges, and the Respondent admits, that since about July 16, 1994, the Respondent has failed to continue in effect and abide by the terms and conditions of employment of the July 26, 1994 Memorandum of Agreement.¹

Although the Respondent admits in its answer the operative facts giving rise to the unfair labor practices, it attempts to explain its motivation for failing to adhere to all the contractually mandated terms and conditions of employment. The Respondent asserts that declining business conditions have prevented it from remaining current in meeting its pension obligations. The Respondent acknowledges that it is in arrears to the

I.A.M. National Pension Fund for more than \$10,000, but asserts that it intends to meet its pension obligations when it is financially able. The Respondent further acknowledges that its declining business conditions prevented it from providing the contractually required health and dental insurance coverage, but asserts that it obtained different coverage subsequent to November 1994. Finally, the Respondent asserts as an affirmative defense that it has suffered financial declines impairing its ability to meet its pension and health obligations and that it has taken steps to meet these obligations.

On July 31, 1995, the General Counsel filed a Motion to Transfer Case to Board, to Strike Affirmative Defense and for Summary Judgment and Issuance of Board's Decision and Order. The General Counsel asserts, inter alia, that the Respondent's answer essentially admits all the allegations of the consolidated complaint, raises no material issues of fact warranting a hearing, and that the Respondent's affirmative defense, even if proven, would not constitute an adequate defense to the allegations in the consolidated complaint. On August 3, 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 Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

In its answer to the consolidated complaint, the Respondent admits its failure to contribute to the Pension Fund and to maintain the contractually required health and dental insurance coverage. The Respondent's defense is one of economic necessity. It is well established that Sections 8(a)(5) and (1) and 8(d) of the Act prohibit an employer that is a party to an existing collective-bargaining agreement from modifying the terms and conditions of employment established by that agreement without obtaining the consent of the union. *Kane Systems Corp.*, 315 NLRB 355 (1994); *Nick Robilotto, Inc.*, 292 NLRB 1279 (1989). Here, the Respondent has admitted that it breached its collective-bargaining agreements with the Union without having the Union's consent. Accordingly, the Respondent has admitted all the facts material to a resolution of the unfair labor practice issue raised by the consolidated complaint. An employer's claim that it is financially unable to pay for contractually required benefits, "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, the Respondent's

¹ The July 26, 1994 Memorandum of Agreement provides:

It was agreed that health and dental insurance will be provided by MVP Health Plan. Those medical expenses incurred but not covered by Guardian (in accordance with policy provisions) will be paid on a self-insured basis.

Those employees covered by the IAM contract who elect not to be insured by MVP will be reimbursed retroactive to May 1 premium expenses incurred.

answer to these complaint allegations has raised no issues warranting a hearing.

In the absence of any material issues warranting a hearing, we grant the General Counsel's Motion for Summary Judgment.²

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a New York corporation with its principal office and place of business located in Endicott, New York, is engaged in the manufacture and sale of metal forging. During the 12-month period preceding issuance of the consolidated complaint, the Respondent, in conducting its business operations, derived gross revenues in excess of \$50,000, and purchased and received goods and materials valued in excess of \$50,000, which were shipped to its Endicott facility directly from points located outside the State of New York. 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 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 of Respondent's employees working on dies and parts of dies used in the manufacture and maintenance of and completion of forgings, otherwise known as the Die Sinking Department.

Since about 1986, and at all material times, the Union has been the designated exclusive collective-bargaining representative of the unit employees and has been recognized as the representative by the Respondent. Such recognition has been embodied in a series of collective-bargaining agreements, the most recent of which had a term of September 1, 1990, to August 3, 1993. On August 24, 1993, the agreement was extended to August 31, 1994, and continued thereafter. On July 26, 1994, the Union and the Respondent entered into the following Memorandum of Agreement:

It was agreed that health and dental insurance will be provided by MVP Health Plan. Those medical expenses incurred but not covered by Guardian

²Because we find the Respondent's affirmative defense to be inadequate, we also grant the General Counsel's motion to strike. *Nick Robilotto*, supra at 1280.

(in accordance with policy provisions) will be paid on a self-insured basis.

Those employees covered by the IAM contract who elect not to be insured by MVP will be reimbursed retroactive to May 1 premium expenses incurred.

At all times since 1986, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the unit employees.

B. *The Refusal to Bargain*

Since about October 5, 1993, the Respondent has failed to continue in effect all the terms and conditions of the collective-bargaining agreement described above by failing to abide by the Pension Plan Provision of the Health and Welfare Plan on pages 25 and 26. Since about July 16, 1994, the Respondent has failed to continue in effect and abide by the terms and conditions of employment of the Memorandum of Agreement set forth above.³ The Respondent failed to abide by those terms and conditions of employment without the Union's consent. The terms and conditions of employment described above are mandatory subjects for the purposes of collective bargaining.⁴ By this conduct, the Respondent has failed and refused to bargain collectively with the exclusive collective-bargaining representative of its employees within the meaning of Section 8(d) and in violation of Section 8(a)(1) and (5) of the Act.

CONCLUSION OF LAW

By failing since about October 5, 1993, to abide by the Pension Plan Provision of the Health and Welfare Plan on pages 25 and 26 of the collective-bargaining agreement, and by failing since about July 16, 1994, to continue in effect and abide by the terms of the Memorandum of Agreement, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1), Section 8(d), 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 the Respondent 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 make

³ The complaint's dating of the violation as of July 16, 1994, may be an inadvertent error because the Memorandum of Agreement allegedly was entered into July 26, 1994. The issue of which date the unlawful conduct began can be resolved at the compliance stage of this proceeding.

⁴ See, e.g., *Enertech Electrical*, 309 NLRB 896, 897 (1992).

contractually required contributions to the Pension Fund, we shall order the Respondent to make whole its unit employees by making all such delinquent contributions, including any amounts due the fund 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. mem. 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).⁵

Having found that the Respondent has violated Section 8(a)(5) and (1) by failing to maintain contractually required health and dental insurance for its unit employees, we shall order the Respondent to restore the employees' health and dental coverage and make the employees whole by reimbursing them for any expenses ensuing from the Respondent's unlawful conduct, as set forth in *Kraft Plumbing & Heating*, supra, with interest as prescribed in *New Horizons for the Retarded*, supra.

ORDER

The National Labor Relations Board orders that the Respondent, Endicott Forging & Manufacturing, Inc., Endicott, New York, 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 make contractually required contributions to the Pension Fund and to maintain health and dental insurance benefits.

(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) Pay all delinquent Pension Fund contributions, including any additional amounts due the fund, 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 this Decision.

(b) Restore the employees' health and dental insurance coverage and make the employees whole by reim-

bursing them for any expenses ensuing from the Respondent's failure to maintain the coverage, in the manner set forth in the remedy section of this Decision.

(c) On request, bargain with Local Lodge DS-190, District Lodge 58, International Association of Machinists and Aerospace Workers, AFL-CIO, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All of Respondent's employees working on dies and parts of dies used in the manufacture and maintenance of and completion of forgings, otherwise known as the Die Sinking Department.

(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 amounts due under the terms of this Order.

(e) Post at its facility in Endicott, New York, copies of the attached notice marked "Appendix."⁶ Copies of the notice, on forms provided by the Regional Director for Region 3, 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.

⁶If 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.

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

⁵To 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 employees, but the amount of such reimbursement will constitute a setoff to the amount that the Respondent otherwise owes the fund.

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

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 contractually required contributions to the Pension Fund and to maintain health and dental insurance benefits.

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 pay the delinquent Pension Fund contributions, including any additional amounts due the fund, and WE WILL reimburse the unit employees for any expenses ensuing from our failure to make the required payments, with interest.

WE WILL restore the employees' health and dental insurance coverage and WE WILL make them whole by reimbursing them for any expenses ensuing from our failure to maintain the coverage, with interest.

WE WILL, on request, bargain with Local Lodge DS-190, District Lodge 58, International Association of Machinists and Aerospace Workers, AFL-CIO, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All of our employees working on dies and parts of dies used in the manufacture and maintenance of and completion of forgings, otherwise known as the Die Sinking Department.

ENDICOTT FORGING & MANUFACTURING, INC.