

Jaflo, Inc. and International Brotherhood of Electrical Workers, Local 94, AFL-CIO. Case 22-CA-21512

October 30, 1998

DECISION AND ORDER

BY MEMBERS FOX, HURTGEN, AND BRAME

On October 23, 1997, Administrative Law Judge Raymond P. Green issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a letter brief in response to the Respondent's exceptions.

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 exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order.²

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Jaflo, Inc., Orefield, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

William E. Milks Esq. and *Carolyn B. McCollum, Esq.*, for the General Counsel.

Dennis Engle, Business Administrator, for the Respondent.

Paul A. Montalbano, Esq., for the Charging Party.

¹ The Respondent excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's reliance on *Greenhoot, Inc.*, 205 NLRB 250 (1973), we note the limited proposition for which he cited the case.

² The Respondent, inter alia, relies on *Universal Enterprises*, 291 NLRB 670 (1988), to justify its conduct. Contrary to the Respondent's analysis, however, that case is distinguishable. In that case, after the multiemployer association (which the Board found consisted of approximately seven employer-members) reached tentative agreement with the union on a contract which was to be executed following ratification by the union's membership, the union's parent International intervened and directed that the only agreement that could be signed was a master agreement known as "the Charleston agreement." The association initially balked at signing this agreement, and the union proceeded to get two employer-members to submit their resignations to the association and sign the agreement as separate entities. Over the objections of the respondent employer, the association representative then signed the Charleston agreement "under protest." The issue was whether the respondent was then bound by that agreement. The Board found it was not, because "unusual circumstances" within the meaning of *Retail Associates* had fragmented the bargaining association and undermined the integrity of the multiemployer unit. No such "unusual circumstances" exist here.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. This case was tried before me in Newark, New Jersey, on September 24, 1997. The charge in this case was filed on July 26, 1996, and the complaint was issued on June 17, 1997. In substance, the complaint alleged

(1) That the Respondent has been an employer member of the Line Clearance Contractors, a multiemployer association that bargains with the Union on behalf of its members.

(2) That on or about April 4, 1996, the Union and the Association reached complete agreement on the terms and conditions of a collective bargaining agreement.

(3) That on or about June 13, 1996, the Union requested the Respondent to execute the aforesaid agreement and since that date the Respondent has failed to do so.

The Respondent denies that it ever delegated authority to bargain to an employer association and argues alternatively, that even if it did, the Union consented to separate bargaining after negotiations commenced.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. It is also admitted and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED VIOLATIONS

Jaflo, Inc. is located in Orefield, Pennsylvania, and performs tree trimming services for various companies including Public Service Electric & Gas and Jersey Central Power and Light Company. These services are performed on land owned by the utilities and Jaflo assigns anywhere from about 5 to 10 employees to do this work.

There are also a number of other companies offering the same services and employing tree trimming employees who, until 1994, had been represented by Local 1774, International Brotherhood of Electrical Workers. In that regard, the employees concerned were covered by a multiemployer contract between that labor organization and their respective employers, one of whom was Jaflo. That contract was set to expire on December 31, 1995. The bargaining unit as described in the agreement was as follows:

All employees engaged in tree trimming work, brush cutting work, or chemical spraying work on the property of the Public Service Electric and Gas company and the property of the Jersey Central Power and Light Company employed by members of the Line Clearance Contractors and the employers who have authorized the Line Clearance Contractors to bargain on their behalf.

In 1994, the Charging Party, International Brotherhood of Electrical Workers, Local 94, AFL-CIO, came into existence as a result of the merger of a number of locals of the International Union. At the end of 1994, Local 1774, also merged into Local

94, which thereupon became its successor. *Control Services*, 303 NLRB 481 (1991).¹

On September 12, 1995, Local 94, by its president, Charles D. Wolfe, sent letters to the contractors, including Jaflo, which expressed the desire to modify the existing contract and which asked that negotiations commence on November 6, 1995.

On October 16, 1996, Dennis Engle, on behalf of Jaflo, wrote to the Union and stated:

I am in receipt of your September 12, 1995 letter notifying us as to your desire to amend the Agreement and scheduling the first negotiation session for November 6, 1995 at 9:00 AM at your office.

I will be the representative for Jaflo, Inc. at these negotiations. As the representative for Jaflo I would like to confirm that I will be in attendance at the November 6, 1995 session at your office.

The first bargaining session was held on November 6, where according to Wolfe, there were eight employers in attendance and where two of them (Lou Nekola and Ed Marks) were designated as the employers' spokesmen. Engle attended this meeting, albeit he states that he came late. Contract proposals were thereupon exchanged between the Union and the employers. Engle did not at this meeting, or at any time before March 5, 1996, express any reluctance in having the group negotiate on behalf of his company. And there is no credible evidence to suggest that until March 5, 1996, he sought to withdraw from the group and bargain separately.

After November 6, 1995, the group of employers and the Union had a series of meetings in November, December, and into 1996.

According to Wolfe, the negotiators reached an agreement on March 5, 1996, which included an agreement to provide health insurance through a company called Lineco which is operated by the International Brotherhood of Electrical Workers. However, when the agreement was presented to Lineco, it was rejected because some of the provisions relating to health insurance were not acceptable.

March 5 1996, was the last time that Jaflo appeared at the bargaining sessions. During this meeting, Engle spoke to Wolfe and said that he couldn't afford the way the health insurance benefit was set up. According to the credited testimony of Wolfe, when Engle requested that Jaflo be allowed to bargain separately, he responded that the Union could not agree to that.

On March 18, 1996, Engle wrote to Wolfe and requested separate bargaining. This letter was sent by Engle after he asserts that Wolfe agreed to separate bargaining. The letter on its face clearly contradicts that assertion because instead of confirming an alleged agreement to bargain separately, it merely requests separate bargaining. The letter states:

This letter is to inform you that Jaflo, Inc. at this point would like to negotiate separately and arrive at a separate labor agreement with Local 94. It is our intent to provide better health insurance benefits than the benefits provided by the Lineco plan. This is also the reason for our wanting separate negotiations.

This is the message I wanted to convey to you over the telephone but our busy schedules have prevented us from engaging in this telephone conversation. I look forward to arranging a meeting with you to negotiate a separate labor agreement.

On April 8, 1996, Engle sent another letter to the Union again requesting separate negotiations. This read:

Jaflo Inc. is not in agreement with the terms and conditions under group negotiations as of April 4, 1996. Accordingly, as per our earlier written request for separate negotiations in a letter dated March 18, 1996, we would like to request again to negotiate a separate labor agreement with Local 94. I will be available for the following dates for such negotiations.

The letters from Engle were forwarded to the Union's attorney who, on April 24, 1996, responded as follows:

With the contracts scheduled to expire in December 1995, Local 94 issued the required Section 8D letter notifying your company, as well as the other tree trimming companies of the intent to negotiate modifications and amendments to the collective bargaining agreement which was soon scheduled to expire. As in the past, all bargaining had been conducted through multiemployer participation. You, on behalf of your company, participated with the other employers throughout the negotiations. By letter of March 18, 1996, you announced to Local 94 your company's desire to withdraw from the multiemployer bargaining and bargain separately.

Please be advised that Local 94 rejects your attempts to separate from the multiemployer bargaining group. Please be clear on this matter that in order for your company to have successfully and lawfully withdrawn from the multiemployer bargaining group, such notice of intention would have been required to be given prior to the commencement of bargaining. This means such notice would have been due in 1995. Your company's current attempts to unilaterally withdraw from the multiemployer bargaining is hereby objected to by Local 94. You may wish contact your company's legal counsel.

After further bargaining, the agreement was modified and on June 13, 1996, the Union sent out the new agreement for execution by the employees. The agreement was also sent to Jaflo.

On August 22, 1996, Wolfe wrote to Jaflo requesting that the Company sign and return the copy of the agreement that was negotiated between the Union and the Association. (The contract was reached on or about June 1, 1996, and runs until December 31, 1998.)

The Respondent has not executed the contract described above and has not made any payments into the contractually provided health insurance fund. In the latter regard, the agreement requires that payments be made in the amount of \$2.35 per hour for all hours worked by covered employees.

¹ At no time did the Respondent or the other members of the Line Clearance Contractors ever assert to Local 94, IBEW, that they questioned the validity of the merger. The evidence shows that they entered into negotiations with the new organization as the representative of their employees in November 1995 for the purpose of negotiating for a new contract to replace the expiring contract that had existed with Local 1774. Accordingly, the Respondent would be legally estopped from contesting the validity of the Unions' merger and could not raise this issue as a defense to the refusal-to-bargain allegation. *El Torito-La Fiesta Restaurants*, 284 NLRB 518, 520 (1987), aff'd in part and remanded in part in unpublished decision 852 F.2d 571 (9th Cir. 1988); *Knapp-Sherrill Co.*, 263 NLRB 396 (1982).

III. ANALYSIS

The establishment of a multiemployer bargaining unit, in which each of the members is bound to execute whatever agreement is reached between the group and a union, is determined by whether there has been an unequivocal manifestation by the members of the group, that they will be bound by group bargaining rather than by individual action. *Kroger Co.*, 148 NLRB 1078 (1974). A multiemployer association does not require a formal structure and an employer's membership in it may be shown either by express delegation or by actual participation in the group bargaining process. *Greenhoot, Inc.*, 205 NLRB 250 (1973); *Rock Springs Retail Merchants Assn.*, 188 NLRB 261 (1971); and *Van Eerden Co.*, 154 NLRB 496 (1965).

Once a multiemployer bargaining unit is established, an employer-member may withdraw only on timely written notice made prior to the contractually established date for modification of the collective-bargaining agreement or to the agreed-on date for the commencement of negotiations. *Retail Associates*, 120 NLRB 338 (1958). Once bargaining begins, either party can withdraw from group bargaining only under "unusual circumstances" or by the mutual consent of the party seeking to withdraw, the union and the association. *Teamsters Local 378 (Capital Chevrolet Co.)*, 243 NLRB 1086 (1979).

"Unusual circumstances" has generally been defined by the Board to mean cases where the withdrawing employer faced dire economic circumstances that its existence as a viable business entity has ceased or is about to cease. *Hi-Way Billboards, Inc.* 206 NLRB 22 (1973), enf. denied 500 F.2d 181 (5th Cir. 1974). The Board has held that an employer may withdraw from group negotiations after they have begun where (1) the employer is subject to extreme economic difficulties resulting in an arrangement under the bankruptcy laws. *U.S. Lingerie Corp.*, 170 NLRB 750 (1968); (2) where the employer is faced with the imminent prospect of closing, *Spun-Jee Corp.*, 171 NLRB 557 (1968); and (3) where the employer is faced with the prospect of being forced out of business for lack of qualified employees and the union refuses to assist the employer by providing employees. *Atlas Electrical Service Co.*, 176 NLRB 827 (1969). Moreover, an assertion of dire economic circumstances will not justify withdrawal from the unit after an agreement is reached. *Co-Ed Garment Co.*, 231 NLRB 848 (1977); and *Arco Electric Co. v NLRB*, 618 F.2d 698, (10th Cir. 1980).

In the present case, the evidence demonstrates that for a period of time there has existed a multiemployer bargaining group that has negotiated on behalf of its members with the predecessor union, Local 1774, IBEW, which was merged into Local 94 in October 1994.

When the previous collective-bargaining agreement was soon to expire, (on December 31, 1995), the Union, in September 1995, notified the Association's members that it desired to negotiate for modifications in the contract. The initial meeting took place on November 6, 1995, and Jaflo by its letter dated October 13, 1995, and by its participation during group negotiations thereafter, indicated its unequivocal intent to be bound by group bargaining.

Although, it is evident that Engle sought, from March 5, 1996, to withdraw from group bargaining, it is my opinion that the Union did not consent to this attempted withdrawal. Thus, in the absence of timely notice to withdraw and in the absence of any showing of "unusual circumstances," it is my opinion

that the Respondent's attempt to withdraw was legally ineffectual.

As the Respondent's attempt to withdraw was legally insufficient and as the Union and the Association reached an agreement, the Respondent is legally obligated to execute and abide by its terms. *Acme Wire*, 251 NLRB 1567, 1571 (1980). This includes the obligation to make payments to the contractually required health fund on behalf of the employees covered by the agreement.

CONCLUSIONS OF LAW

1. By refusing to execute a collective-bargaining agreement that was mutually agreed to between Local 94, IBEW and the Line Clearance Contractors, the Respondent has violated Section 8(a)(1) and (5) and Section 8(d) of the Act.

2. By failing to abide by the aforesaid contract and by failing to make contributions to the contractually required health care fund, the Respondent has violated Section 8(a)(1) and (5) of the Act.

3. The aforesaid violations affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

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

Inasmuch as I have concluded that the Respondent has violated the Act by refusing to execute the collective-bargaining agreement reached with the Line Clearance Contractors, it shall be ordered to execute this agreement forthwith and to abide by its terms and conditions.

It is further recommended that the Respondent be ordered to make the required payments to the health insurance fund which it failed to make. Moreover, it is recommended that such payments be made with interest to be computed according to the practice set forth in *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).

Finally, the Respondent will be ordered to make employees covered by the aforesaid agreement whole for any loss of wages or benefits including any payments to health providers that would have been paid for by the health insurance fund under the terms of the contract.

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

ORDER

The Respondent, Jaflo, Inc., Orefield, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain collectively with International Brotherhood of Electrical Workers, Local 94, AFL-CIO by refusing to sign the contract that was agreed to between that Union and the Line Clearance Contractors on June 1, 1996.

(b) Refusing to abide by the terms and conditions of the aforesaid agreement and by refusing to make payments to the IBEW, Local 94 Health Fund as required by the agreement.

² If 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.

(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) On request of the Union, execute the contract that was agreed to between the Union and the Line Clearance Contractors in accordance with the terms of the Remedy Section of this opinion.

(b) Pay into the IBEW Local 94, Health Fund, on behalf of its unit employees, those contributions it failed to make since the effective date of the aforesaid agreement in the manner set forth in the remedy section of this decision.

(c) Make whole any employees or the Union for any losses suffered by reason of its unlawful failure to abide by the terms of the aforesaid agreement and by its discontinuance of payments to the welfare fund in the manner 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) Within 14 days after service by the Region, post at its facility in Orefield, Pennsylvania, and at any facilities where bargaining unit employees do work, copies of the attached notice marked "Appendix."³ Copies of the notice, 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. In the event that, during the tendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall

³ 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."

duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 26, 1996.

(f) Within 21 days after service by the Region, filed with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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 form, join, or assist any union

To bargain collectively through representatives of their own choice

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 collectively with Local 94, International Brotherhood of Electrical Workers, AFL-CIO by refusing to sign the contract that was agreed to on June 1, 1996, between the Union and the Line Clearance Contractors.

WE WILL NOT fail to bargain with the Union by failing to make required contributions on behalf of our unit employees to the IBEW, Local 94 Health Fund.

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

WE WILL, on request of the Union, execute the contract that was agreed to on June 1, 1996.

WE WILL make whole any employees or the Union for any losses suffered by reason of our unlawful failure to abide by the terms of the aforesaid agreement and by our discontinuance of payments to the IBEW, Local 94 Health Fund.

JAFLO, INC.