

Made 4 Film, Inc., and International Alliance of Theatrical Stage Employees, AFL-CIO, Local 477, Petitioner. Case 12-CA-21148

August 1, 2002

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS
LIEBMAN AND COWEN

On January 31, 2002, Administrative Law Judge Margaret G. Brakebusch issued the attached decision. The General Counsel filed an exception and a supporting brief.

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 exception and brief and has decided to affirm the judge's rulings, findings, and conclusions as modified below and to adopt the recommended Order as modified and set forth in full below.

The judge found that, after March 19, 2000, the Respondent, a film and video set design and construction company, failed to make benefit fund contributions as required in its collective-bargaining agreement with the Union. In her remedial Order, the judge ordered the Respondent to make the benefit fund contributions owed under the contract up to April 14, 2001, the contract expiration date. The General Counsel excepted to the judge's remedial Order, arguing that the Respondent's obligation to pay benefit fund contributions continues beyond the expiration date of the contract until a successor agreement or lawful impasse is reached. We agree and modify the judge's Order accordingly. See *R.E.C. Corp.*, 296 NLRB 1293 (1989) ("Generally, an employer has a statutory obligation to continue to follow the terms and conditions of employment governing the employer-employee relationship in an expired contract until a new agreement is concluded or good-faith bargaining leads to impasse.")¹

The judge found a unilateral modification of the contract and ordered Respondent to adhere to the contract for its term. However, the General Counsel's complaint alleged, and the evidence established, that the Respondent's action was also a unilateral change in terms and conditions of employment. Accordingly, the remedy should also include a provision that, after expiration of

¹ We shall modify the judge's recommended Order in accordance with our decision in *Ferguson Electric Co.*, 335 NLRB 142 (2001). Further, we shall delete from the Order and notice the provision that information be furnished to the Union "on request," in accordance with our decision in *I & F Corp.*, 322 NLRB 1037 fn. 1 (1997).

the contract, Respondent must continue the status quo unless and until an impasse or agreement is reached.²

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Made 4 Film, Inc., North Miami, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain with the Union by unilaterally failing to make the contributions to the Union Health and Welfare and Annuity Funds since April 14, 2000.

(b) Refusing to bargain collectively with the Union as the exclusive representative of all the employees in the unit described below, by refusing to furnish or by delaying in furnishing the Union with information showing the names, addresses, and telephone numbers of all employees who have performed bargaining unit work after April 14, 2000, as well as all payroll records, including time sheets, showing the hours worked by bargaining unit employees after April 14, 2000.

All employees classified as Coordinator, Foreman, Gang Boss, Model Makers, Prop-Maker-Set Construction, Construction Drivers, Utility Maintenance Technicians, Buyer, Welder, Riggers, Paint Foreman, Plasterers, Set Painters, Lead Scenic, Scenic Artist, Sign Painters/Writers, Standby Painters, Sculptors, Fork-Lift/Crane/Hi-Lift and Operators.

(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 Member Cowen raises an issue not raised by the Respondent. He argues that the Respondent cannot be required to make payments beyond the expiration of the contract because such payments would be prohibited by Sec. 302(c)(5), which requires that employer payments into union trust funds be detailed in a "written agreement." In *Hinson v. NLRB*, 428 F.2d 133, 138-139 (8th Cir. 1970), however, the court held that the terms of an expired contract, together with the underlying trust agreements, are sufficient to satisfy the requirements of Sec. 302(c)(5). See also *Peerless Roofing Co. v. NLRB*, 641 F.2d 734, 736 (9th Cir. 1981). Here, addendum A of the parties' 2000-2001 collective-bargaining agreement specifies that Respondent must make a \$20-per-day-per-employee contribution to the Union Health and Welfare and Annuity Funds, and that Respondent agrees "to be bound by the Trust Agreement establishing such Funds and the respective benefit plans." Although the actual Trust Agreement is not included in the record, it is clear from the terms laid out in addendum A that such a document exists. The judge discredited Wills' testimony that he was unaware of the terms of addendum A at the time he signed the agreement, and Wills does not deny the existence of the trust agreement referred to in the addendum. Although we do not need to reach the issue, we conclude, contrary to our dissenting colleague, that the "written agreement" requirement of Sec. 302(c)(5) is met.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Pay to the Union Health and Welfare and Annuity Funds the payments that are due since April 14, 2000, and continue to make the required contribution until such time as the Respondent bargains with the Union in good faith to an impasse or to an agreement.

(b) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze and determine the amounts owed to the Union Health and Welfare and Annuity Funds since April 14, 2000.

(c) Reimburse any employee for losses or extra expenses the employee incurred due to the Company's failure to make these payments to the Union Health and Welfare and Annuity Funds.

(d) Furnish to the Union in a timely manner the information requested by the Union on July 24, 2000.

(e) Within 14 days after service by the Region, post at its North Miami, Florida facility copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 12, 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 pendency of these proceedings the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall 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 April 14, 2000.

(f) Within 21 days after service by the Region, file 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.

MEMBER COWEN, concurring in part and dissenting in part.

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."

The Respondent filed no exceptions to the judge's finding that it violated Section 8(a)(5) of the Act in various respects.¹ The General Counsel excepts, however, to the remedy the judge entered for one of those 8(a)(5) violations. Noting that the Respondent had a contract with the Union, the judge found that the Respondent unlawfully failed to pay to the Health and Welfare and Annuity Funds the amounts due them. As a remedy for this violation, she ordered that the Respondent make whole the funds for moneys due until the expiration date of the parties' contract. My colleagues, granting the General Counsel's exception, extend that remedy and find the Respondent's liability to pay into the funds continues until either a successor agreement or a lawful impasse in negotiations is reached. The rub in this extended remedy is Section 302(c)(5) of the Act which prohibits all payments to an employee representative unless there is a specific written agreement covering the payments, and the money is for the sole and exclusive benefit of the employees. It is true that the courts have indicated that "[t]he reference in Sec. 302(c)(5)(B) to 'written agreement with the employer' does not comprehend solely a collective-bargaining agreement to the exclusion of any other possible written agreement," and they have added that "a trust fund agreement separate and apart from the collective bargaining agreement would surely satisfy the statutory prerequisite."² Nonetheless, no trust agreement was made a part of this record. In the absence of such, the latitude allowed by Section 302(c)(5)(B) cannot come into play, and I would not grant the remedy that the General Counsel seeks based on the state of the present record.

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 Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

¹ Therefore, I adopt these findings in the absence of exceptions.

² *Henson v. NLRB*, 428 F.2d 133, 138 (8th Cir. 1970).

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain collectively with the Union as your exclusive collective-bargaining representative in an appropriate unit, by delaying in furnishing or by failing to furnish information it requested concerning the identity of employees who have worked after April 14, 2000 and information concerning the hours worked by employees after April 14, 2000. The unit is:

All employees classified as Coordinator, Foreman, Gang Boss, Model Makers, Prop-Maker-Set Construction, Construction Drivers, Utility Maintenance Technicians, Buyer, Welder, Riggers, Paint Foreman, Plasterers, Set Painters, Lead Scenic, Scenic Artist, Sign Painters/Writers, Standby Painters, Sculptors, Fork-Lift/Crane/Hi-Lift and Operators.

WE WILL NOT fail and/or refuse to make contributions to the Union Health and Welfare and Annuity Funds of the Union.

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 furnish the Union the requested information concerning the names, addresses, and telephone numbers of all employees who performed bargaining unit work after April 14, 2000, and the payroll records, including time sheets, showing the hours worked by the bargaining unit employees after April 14, 2000.

WE WILL make all unpaid contributions to the Union Health and Welfare and Annuity Funds that are due and owing since April 14, 2000, and will continue to make the required contribution until such time as we bargain with the Union in good faith to an impasse or to an agreement.

WE WILL reimburse you for any expenses resulting from our failure to make the required contributions to the Union's funds.

MADE 4 FILM, INC.

John King and Jennifer Burgess-Solomon, Esqs., for the General Counsel.

Homer Wills, Pro Se, for the Respondent.

Robert S. Giolito, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARGARET G. BRAKEBUSCH, Administrative Law Judge. The original charge was filed on October 20, 2000,¹ and amended on June 29, 2001, by International Alliance of Theatrical Stage Em-

ployees, AFL-CIO, Local 477 (the Union). A complaint issued on July 31, 2001, alleging that Made 4 Film, Inc. (the Company) violated Section 8(a)(1) and (5) of the Act by failing and refusing to make benefit fund contributions² and failing and refusing to provide the Union with necessary and relevant information. A hearing on these matters was conducted before me in Miami, Florida, on November 29, 2001, at which all parties had the opportunity to present testimony and documentary evidence, to examine and cross-examine witnesses and to argue orally. Its owner and president, Homer Wills, represented the Company. Although advised of his right to legal counsel, Wills declined, and chose to appear and proceed pro se.

Both the General Counsel and the Charging Party have filed timely briefs in this matter.³ Based upon all of the evidence of record, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Company is a corporation with an office and place of business in North Miami, Florida, where it is engaged in the business of designing sets for film and video productions. The July 31, 2001 complaint includes the Board's jurisdictional allegations in paragraphs 2(a) through (f). In its undated answer, received by the Regional Director on October 12, 2001, the Company does not deny meeting the Board's jurisdictional standards as alleged in paragraphs 2(a) through (f). The Company was given the opportunity to supplement or amend its answer at hearing and declined to do so. Based upon the Company's answer and Section 102.20 of the Board's Rules and Regulations,⁴ I find that it 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.

² General Counsel's motion to amend the complaint to change the date of par. 8(a) to reflect April 14, 2000, and to include annuity fund contributions, was granted at the hearing.

³ The Company's posttrial brief was untimely. The due date for filing was December 31, 2001. As shown by the United States Postal Service record, the document was sent by Express Mail on January 2, 2002. The Atlanta office of the Judges Division received the brief on January 4, 2002. The filing of briefs is governed by 29 CFR §102.11(b). Under that rule, for the mailing to be timely it must be postmarked, or tendered to the delivery service on or before "the day before the due date." The envelope for the brief contains a handwritten note stating "Tried to mail or Fed Ex 12/29/01 But no holiday pickups!!! Please accept!!!" There is no indication that a copy of the Company's brief has been served on any other party. In light of my decision in this case, no prejudice is apparent from the Company's failure to submit a timely brief or its failure to serve the other parties. I have taken into consideration the fact that this respondent appears pro se and I have considered the text of the Company's brief.

⁴ Sec. 102.20 of the Board's Rules and Regulations provides: "All allegations in the complaint, if no answer is filed, or any allegation in the complaint not specifically denied or explained in an answer filed, unless the respondent shall state in the answer that he is without knowledge, shall be deemed to be admitted to be true and shall be so found by the Board, unless good cause to the contrary is shown."

¹ All dates are in 2000 unless otherwise stated.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Issues Involved in this Case

Counsel for the General Counsel alleges the Company entered into a collective-bargaining agreement (CBA) with the Union on April 14, 2000, and thereafter unlawfully failed to make contributions on behalf of its employees to health and welfare and annuity funds. General Counsel also alleges the Company has failed to provide the Union with requested information regarding payroll records, which would reflect the employees working for the Company on any given day. General Counsel contends these records were relevant and necessary to establish the amount of fund contributions owed by the Company for its employees.

B. The Agreement

1. Background

Homer Wills has been owner and president of the Company for the past 6 years and has been in the business of building scenery and props for the entertainment industry for a period of 12 to 13 years. Wills testified that he had wanted a union contract because there were movies and other work that would only be available to him if he were a union shop. Although he had initially anticipated having a union contract by September 1999, he was unable to do so. Wills contends that although an agreement was not signed with the Union until April, he began operating as a union shop and advertising as a union shop in January 2000.⁵

2. The Union's evidence

a. Reaching the agreement

Michael McCarthy has been business manager and business agent for the Union since May 25, 1999. As a business agent, McCarthy is responsible for policing the International Union's agreements and negotiating local agreements with employers. McCarthy went to Wills' office in January 2000 because employees told him that Wills was interested in getting a contract. McCarthy met with Wills and his secretary, Janine Presley, and explained the obligations that attached with having a contract. These obligations included overtime, recognition of certain holidays, wage requirements, and contributions to the health and welfare and annuity funds. McCarthy testified that while commercials require health and welfare⁶ contributions of \$52 a day per employee, he knew that Wills would never be able to afford this amount. McCarthy tried to work out an amount that Wills could afford. McCarthy suggested that Wills might be able to pay \$10 for health and welfare and \$10 for annuity contributions. McCarthy explained to Wills that he (McCarthy) would have to check with the Union's executive board because the amount was so much less than normally required. McCarthy testified that he told Wills that health and welfare

⁵ McCarthy recalled the Company's ad in the January 2000 issue of the Miami Production Guide, advertising, as South Florida's only union scenery shop.

⁶ For the remainder of this decision, any generalized reference to health and welfare includes annuity as well.

would be included in a side letter to the agreement, as would the negotiated wage scale.⁷ The International union agreements would also be attached to the local agreement because the Company would automatically go under the terms of the International agreement if the work involved a feature or movie.

McCarthy submitted a draft of the proposed agreement to the International's president and secured the approval of the International to set the health and welfare contribution at \$20 per employee per day. McCarthy met again with Wills and his secretary approximately a week later. McCarthy brought with him the redraft of the contract and went over the terms with Wills. On April 14, 2000, McCarthy met again with Wills and Presley and the final contract was signed.

The agreement, introduced as General Counsel's Exhibit 2, includes the signatures of Wills and McCarthy and Janine Presley as a witness to both signatures.⁸ McCarthy testified that when the agreement was signed on April 14, the agreement included addenda A and B. McCarthy did not have copies of addenda C and D, as they were copies of the contracts with the International and Local 829 that are referenced in the agreement. Addendum A sets out the requirement for the Company to pay \$10 per day per employee to the IASTE National Health and Welfare Fund and \$10 per day per employee to the Annuity Plan of the IASTE Annuity Fund. The one-page addendum also provides for the Company to withhold 3 percent of the gross wages for each employee for union-dues assessment. Addendum B provides that a minimum of \$20 per hour must be paid to all employees who are listed under the employee classification section on page 1 of the agreement. Employees in the classifications of coordinator, foreman, gang boss, lead scenic, and paint foreman may negotiate their wage scale above the minimum of \$20 per hour.

b. After the signing of the agreement

After April 14, 2000, McCarthy met again with Janine Presley to give her the health and welfare forms that were to be completed and submitted to the Union. The Union later received completed health and welfare forms from the Company covering the payroll period ending March 19, 2000. The forms were accompanied by the requisite checks for the contributions and the checks were dated April 25, 2000. The forms show that the contributions were calculated at a rate of \$20 per employee per day. McCarthy testified that during the contract negotiations, Wills also agreed to pay health and welfare contributions for the period prior to the effective date of the contract. While this was not a part of the contract, Wills agreed to do so in a verbal agreement. McCarthy explained that for Wills and the employees to have health insurance benefits coverage for the second quarter of the year, coverage had to be established in the first quarter with contributions covering back to January. The

⁷ McCarthy explained the wage scale is set at a minimum and anything above that amount may be negotiated between the Company and the employees. McCarthy confirmed that Wills usually paid wages over scale.

⁸ McCarthy testified that while the agreement signed on April 14 contains a line designated for the International, the International's signature is not required on a local agreement.

Union contends, and the Company admits, that the Company made no further contributions to health and welfare.

c. The Union's request for information

On July 24, 2000, Union Attorney Robert S. Giolito sent the Company a letter concerning the Company's failure to make the required health and welfare contributions. In its letter, the Union asserts that the Company failed to pay negotiated wages and to make benefit contributions. The Union also referenced the Company's failure to remit union dues since January 1, 2000. The Union demanded immediate payment of all wages that were due under the contract as well as immediate payment of all health and welfare and annuity benefit contributions due since April 1, 2000.⁹ The Union requested the Company provide a list showing the name, address, and telephone number of all employees who had performed bargaining unit work since April 14, 2000. Additionally, the Union requested all payroll records, including timesheets, showing the hours worked by bargaining unit employees since April 14, 2000. McCarthy testified that after the Union's letter of July 24, 2000, he continued to make verbal requests for the information to both Wills and his secretary.

The Company did not respond to the Union's July 24, 2000 request for information until Wills sent a letter to McCarthy dated June 22, 2001.¹⁰ In the letter, Wills stated that he had enclosed reports showing each employee's number of shifts from April 17 to September 24, 2000. Wills went on to explain that after September 24, 2000, all labor was performed by subcontractors and paid by invoice. Wills maintained in his letter that because individuals were paid by the job, there were no timesheets or information on days (shifts) worked. Wills included a report showing subcontractor payments through April 14, 2001, for anyone who was a member of Local 477. McCarthy testified that while Wills had provided some of the information requested, the information was not complete.¹¹ McCarthy also explained that the information provided by Wills was not responsive to the Union's request because Wills did not identify the gross wages for each individual nor did he identify the number of days worked by each individual. McCarthy explained that the number of days worked is neces-

⁹ In its July 24, 2001 letter, the Union also requests immediate payment of union dues deducted and withheld from employee paychecks since on or about January 1, 2000. The letter states, "The Union's records show that, for the period January 1 through March 19 (the last date for which the Union has records), Made 4 Film owes the Union \$2,126.32 in deducted dues." The letter does not specify whether the period referenced for dues is 2000 or 2001.

¹⁰ Wills' letter of June 22, 2001, and the accompanying data were provided after the Union's charge of October 20, 2000.

¹¹ The attachments to the Company's letter contain completed health and welfare contribution forms for the payroll periods ending August 25, 2000, September 10, and 24, 2000. No forms are provided for any period prior to August 25. No checks or proof of contribution accompany the forms. The remainder of the attachments includes pages entitled "Transactions by Vendor" for the period October 10, 2000, to April 17, 2001. Each page identifies the individual subcontractor with specific dates and the amount of payment for each date and invoice number.

sary to determine the appropriate contribution amount based upon the \$20-per-day rate.

McCarthy also received payroll sheets from March 19 through September 24, 2000. This information was hand-delivered to McCarthy's office by Homer Wills on June 8, 2001. The information provided by Wills documented that he had deducted the requisite union dues for the wages paid during those pay periods. McCarthy testified that this was the only time period for which dues were deducted and forwarded to the Union. McCarthy estimated that the Union received these dues sometime around October 2000.

d. The Company's treatment of other contract provisions

McCarthy testified that until the time of the expiration of the contract in April 2001, the Company continued to use employees referred by the Union.¹² The individuals listed in Wills' letter of June 22, 2001, were all employees covered by the collective-bargaining agreement. McCarthy testified that while these employees were not receiving any benefit contributions working for the Company as subcontractors, he told the employees that the decision to work was up to them individually. McCarthy also stated that he did not tell the employees not to work for the Company as subcontractors because the union employees were working on some big shows for the Company. If he had pulled the union crew from the jobs, the Company would have been unable to continue the shows. McCarthy testified, "I wouldn't do that."

3. The Company's evidence

a. The failure to make health and welfare contributions

Homer Wills presented no witnesses other than himself to testify in this proceeding. Wills does not deny that he entered into a collective-bargaining agreement with the Union on April 14, 2000, nor does he deny that he made no health and welfare contributions for employees for any period of time after the signing of the contract. Wills testified that while health and welfare contributions were discussed with McCarthy prior to signing the agreement, he was not aware that he would be required to make health and welfare contributions once he signed the contract. He admits page five of the agreement directs the reader to addendum A for health, welfare and annuity benefits. Wills takes the position that while the contract referenced addendum A and B; the contract did not mandate that he had to pay any benefits. Wills further argues that although he signed the agreement on April 14, 2000, the rates for addendum A and B were left for further negotiation. Additionally, Wills argues that when he signed the contract in April, addenda A and B were not even attached to the agreement. Wills maintains that the Union created these documents and simply added them to the back of the contract without his knowledge. At the hearing, Wills asserted, "If the Board accepts that this addendum is a true, original part of this contract, then there's no question whatsoever that I'm in violation of the contract, and owe all this money."

¹² One of the individuals who worked for the Company after Wills stopped paying health and welfare contributions, and after he converted the employees to subcontractors, was McCarthy's son, Mark McCarthy.

As proof that the contract did not include addenda A and B, Wills submitted a copy of a fax that he received from the International in October 2000. Wills recalled that he contacted the President of the Union and asked for a copy of the contract. The contract was faxed to him, but did not include any attached addenda.¹³ Wills also submitted a copy of a letter that he received from the Union's benefit fund in August 2000. In the letter, the fund administrator explained the law requires the fund to have complete copies of all contracts that mandate contributions to any of the Union's benefit funds. The administrator requested that he submit a copy of the contract to the fund's new contract administrator. Wills interpreted the letter as evidence that the fund had received contributions without a contract. Wills explained that this letter was consistent with his having submitted contributions for the period prior to April 14, 2000, when there was no contract. At hearing, Wills argued that this letter is the Union's admission that contributions made in April were made without a contract in effect.

Wills acknowledged that he made the health and welfare contributions for a period beginning in January and continuing until the payroll period ending March 19, 2000. Wills was asked on cross-examination why he made the contributions at a rate of \$20 a day for each employee. Wills explained that the \$20 rate was the one discussed with McCarthy in preparation for signing the contract. Wills testified that he and McCarthy came to an agreement for him to pay \$20 and "they" would see if Wills would be profitable at paying the wages that he was paying and the \$20 per shift for health and welfare contributions. Wills testified that he made the health and welfare payments as a voluntary gesture to see if he could do so and remain profitable. Wills testified that he stopped making the health and welfare contributions because he lost \$80,000 on a job and there was no way that he could continue to stay in business if he paid the contributions. Wills further confirmed that if he had received sufficient income to show a reasonable profit, he would have continued to make the contributions. Wills admitted the Company stopped making health and welfare contributions after April 2000 because it was not profitable for the Company. Wills also maintained that his arrangement with McCarthy had been a very amiable one and the Union had wanted to do whatever possible to keep him working. Wills described his arrangement with McCarthy by stating, "He told me whatever rate that they could work out, for me to tell him what rate I would be able to pay, wage and benefits." Wills further asserted that after the signing of the contract, McCarthy

had even suggested that Wills lower what he was paying in wages as a way to be able to pay the health and welfare payments.¹⁴ Wills recalled McCarthy's suggesting that he might be able to pay a lower wage scale because he paid very high wages.¹⁵ Wills recalled McCarthy's volunteering the fact that the Union had negotiated contracts for a lot less wages than what he was paying. McCarthy suggested that if Wills paid the employees \$2 less an hour, he would be able to cover the annuities.

Following McCarthy's suggestion, Wills went to his employees and asked them their choice on his paying wages or paying the annuity. Wills recalled, "They all said we don't care about the annuities, we want our money now. It was their decision." When Wills met with the employees, they told him that they would rather have the wage scale remain the same and not have the annuities if he were unable to pay both. Wills testified that he had no work in June, July, and August and he had to layoff all the employees. He added, "Basically, we became really close at going bankrupt at that point."

b. The failure to provide requested information

Wills admits that he never replied to the union counsel's letter of July 24, 2000. He testified that he had declined to respond to the Union's letter because "in reality I never signed an agreement saying that I would pay those."

c. Failure to pay remit dues deductions

On cross-examination, Counsel for the Union asked Wills if he had also discussed deduction of union dues with the employees. Wills responded:

A. The dues deduction was never a question. That was part of the contract,¹⁶ and that's something that they had no choice over. That was a Union rule, and that, honestly, I deducted those from their, they didn't have any questions to not deduct them.

Q. What did you do with the dues deductions?

A. Actually, I paid their wages with them. I didn't have the money to pay the Union.

Wills confirmed that while dues were deducted, they were never remitted to the Union and instead, remained in his checking account. He used that checking account to pay the expenses of the business, including the wages of the employees. Wills admitted that he never told the employees that he was doing so.

¹³ In its brief, the Company attaches a two-page document dated August 17, 2000, asserting that it was faxed with the April 14, 2000 Memorandum of Agreement. The document dated August 17, 2000, contains a proposed amendment to the agreement because of the Company's default in paying the negotiated wages, benefits, and dues deductions. The proposed amendment provides for the Company's paying all required wages and tendering all required benefit contributions no later than three calendar days after the Friday of each workweek in which employees perform any work covered by the agreement. The proposed amendment also provides for the Company's obtaining an acceptable security bond to cover the amount of any anticipated wages or benefit contributions prior to the Company's employing any bargaining unit employees on any work covered by the agreement.

¹⁴ On rebuttal, McCarthy denied having any discussions with Wills about his reducing the amount of the benefit contributions during the term of the contract. He was not specifically asked about whether he had any discussions about lowering the wage rate for the employees. McCarthy testified that any discussions about changes in rates were geared to the end of the contract and renegotiations for a new contract period.

¹⁵ Wills did not deny that he usually paid wage rates above scale.

¹⁶ In later testimony, Wills explained that he considered dues deduction to be a part of the contract because it was not solely included in an addendum.

III. FACTUAL AND LEGAL CONCLUSIONS

A. *The Company's Failure to Remit Health and Welfare Contributions*

General Counsel asserts that by admitting that it has failed to remit contributions to the health and welfare and annuity funds for its employees for the entire 1-year contract period, the Company is therefore in violation of Section 8(a)(1) and (5) of the Act. Wills even agrees that if his testimony is not credited, there is no question that he is in violation of the contract and he owes all the money due.

Undeniably, Wills wanted to have an affiliation with the Union and to hold himself out as a union shop. He does not dispute that he advertised himself as a union shop in the trade publications and he testifies that as early as January 2000, he operated as a union shop. At the hearing, he explained his frustration in not getting a union contract as early as September 1999. Based upon the testimony of both Wills and McCarthy, the Union approached Wills only after Wills' outspoken interest in the Union. Clearly, Wills wanted the Union contract as it provided the opportunity to work on movies and features, which were otherwise unavailable to him.

Wills' relationship with the Union is a very unique one. He sought out the Union, intent upon getting a union contract. Even before he signed the contract, he represented himself as a union shop in the trade publications. Based upon his testimony, he discussed the terms of the contract, including a health and welfare contribution rate within a range that he could pay. Admittedly, in order to get the coverage and personal benefits of the contract, he voluntarily paid the health and welfare contributions for a portion of the first quarter of 2000. After signing the contract, he determined that his business was not making sufficient profit for him to make any additional contributions for health and welfare and he stopped making contributions. Admittedly, if he had received the income to show a reasonable profit, he would have continued to make health and welfare contributions. He deducted union dues from wages paid to employees because "that was a part of the contract." Some of the dues were remitted to the Union and other dues were simply retained by the Company and used to pay employee wages and other business expenses. Despite the fact that Wills was not making health and welfare contributions and was "pocketing" part of the dues that he had deducted from employee wages, he continued to hold himself out as a union shop. He continued to employ individuals referred from the Union, even including McCarthy's son. He abandoned paying any hourly wage rates and converted all the employees to sub-contractors, paid by invoice for specific work performed.

Wills defends all of the above-described unilateral changes by arguing that he signed the April 14, 2000 CBA without any agreement on wages and health and welfare contributions. He contends that he signed the contract without having any attached addenda. Wills contends that the Union simply made up the addenda and added them to the contract without his knowledge. Even assuming that the addenda were not physically attached to the contract on April 14, the language of the contract clearly notes that wages as well as health and welfare are covered in addenda to the contract. Wills admits that as presi-

dent of the company, he has entered into many different types of agreements with various entities. It is incomprehensible that even the most novice businessman would sign a contract committing payment for an unknown amount for a full calendar year. Yet, this is what Wills is asking the Board to believe.

Wills argues that the health and welfare contribution rate was left for further negotiations when he signed the contract on April 14. He nevertheless makes voluntary contributions in the amount of \$20 per employee per day for the period of time prior to the contract. Admittedly, he made the contributions at this rate because this is the rate discussed with McCarthy prior to signing the contract. McCarthy testified without contradiction, that the \$20 rate was a much lower rate than what is normally required in these kinds of contracts. Wills maintains that wage and contribution rates were left for further negotiation after the signing of the contract, however he does not explain what remained for negotiation. The Union had already agreed to a rate at less than half of \$52 rate normally required for commercial work. While Wills makes this assertion of anticipated further negotiation, he does not explain what was to have happened if he couldn't afford to pay the \$20 rate. Wills describes the Union as flexible and willing to work with him on the contract amounts.¹⁷ Was the Union so flexible that McCarthy signed a contract with the expectation that Wills could hold himself out as a union shop and pay whatever rate he felt that he could afford? It is beyond belief that either Wills or McCarthy as experienced businessmen would sign a contract with virtually no agreement on these major points.

The Company argues that the Union's October 20, 2000 fax is evidence that the addenda were not a part of the April 14, 2000 agreement. In its untimely brief, the Company submits a further attachment to the Union's fax. While I do not consider this document as additional evidence, I must point out that such document does not enhance the Company's position. On its face, the August 17 document reiterates the Union's position that the Company has failed to abide by the terms of the April 14 agreement and proposes a means of curing the Company's default. The Company submitted nothing at hearing or in the official record to reflect that the Company and the Union entered into any bargaining to modify the agreement in relation to this document or any other document.

It is without question that the Board has authority to interpret collective-bargaining agreements in order to determine whether unfair labor practices have been committed. *NLRB v. C & C Plywood Corp.*, 385 U.S. 421, 428-430 (1967). However, Board precedent clearly prohibits the use of parol evidence to vary the terms of unambiguous terms of collective-bargaining agreements. See *American Piles, Inc.*, 333 NLRB 1118 (2001), *NDK Corp.*, 278 NLRB 1035 (1986). As stated by the Ninth Circuit, "Where contractual provisions are unambiguous, the

¹⁷ Wills asserted that McCarthy talked with him after the signing of the contract about his paying less in wages as a means of covering the health and welfare contributions. I do not find that this constitutes any midcontract bargaining. McCarthy denies additional negotiation on contract rates after the signing of the contract. Because it is undisputed that Wills usually paid wages above scale, it is likely that McCarthy may have suggested lowering the excess wages to cover the contractually obligated contribution amounts.

NLRB need not consider extrinsic evidence. Parol evidence is therefore not only unnecessary but irrelevant.” *NLRB v. Electric Workers Local 11*, 772 F.2d 571, 575 (9th Cir. 1985). In this case, I find no basis to consider parol evidence to vary the clear terms of the collective-bargaining agreement. Assuming that Wills chose to sign a collective-bargaining agreement with portions unattached, such an action does not render a document ambiguous, requiring interpretation. The only thing that this is ambiguous is why Wills would commit himself to an agreement under the circumstances that he describes.

Although Wills asks that I consider parol evidence outside the four corners of the agreement, he does not even submit the best evidence that the circumstances were as he alleged. It is undisputed that Wills’ secretary, Jannie Presley, attended each of the bargaining meetings with McCarthy and Wills. She was present on April 14, 2000, and signed as a witness to each of their signatures. If Wills signed the agreement without any addenda or if the agreement was signed with the parties’ intention to further negotiate the wages and health and welfare contributions, Presley would have known. The fact that she was not presented to corroborate the testimony of Wills leads me to conclude that she would not have done so. In determining whether an adverse inference may be drawn from a party’s failure to call a potential witness, the Board looks to “whether the witness may reasonably be assumed to be favorably disposed to that party.” *International Automated Machines*, 285 NLRB 1122, 1123 (1987). I can only assume that as secretary to Wills, Presley is more favorably disposed to the Company’s interests than to the Union’s. The absence of corroboration of Wills’ testimony significantly impacts upon his credibility. I must conclude that Presley’s testimony regarding the negotiations for, and signing of the collective-bargaining agreement, would be adverse to the interests of the Company. *Desert Pines Golf Club*, 334 NLRB 263 (2001).

Having found that the Company entered into a contract requiring contributions to the health and welfare and annuity funds, and based upon the undisputed facts that it has failed to do so, I find the Company in violation of Section 8(a)(1) and (5) of the Act. It is well established that Section 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). Wills testified that he would have continued to make the health and welfare contributions if the Company’s profits would have allowed him to do so. I have no doubt the Company’s financial status was a pivotal factor in Wills’ decision to cease health and welfare contributions. “An employer’s claim that it is financially unable to pay for contractually required benefits is not an adequate defense to an allegation that an employer has unlawfully failed to abide by provisions of a collective bargaining agreement.” *Navigator Communications Systems*, 331 NLRB 1056 (2000); *Zimmerman Painting & Decoration*, 302 NLRB 856, 857 (1991). Thus, the Company’s rationale for ceasing any further health and welfare contributions provides no defense to its unilateral modification of the collective-bargaining agreement. Based upon the record before me, I find the Company has violated Section 8(a)(1) and

(5) of the Act by its unilateral modification of the terms of the collective-bargaining agreement and its failure to make health and welfare contributions as provided by the April 14, 2000 agreement. See *Eldorado, Inc.*, 335 NLRB 952 (2001); *Isratex, Inc.*, 316 NLRB 135 (1995).

B. The Company’s Failure to Provide Information

It is well settled that an employer has a statutory obligation to provide, on request, relevant information the union needs for the proper performance of its duties as a collective-bargaining representative. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152 (1956); *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435–436 (1967); *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979).

The standard for determining the relevance of the requested information is a liberal one, and it is necessary only to show that it would be of use to the union in carrying out its statutory duties and responsibilities. *Acme Industrial Co.*, supra at 437.

Admittedly, Wills did not respond to union counsel’s July 24, 2000 written request for information. Almost a year later, Wills sent the Union a letter dated June 22, 2001, providing some of the requested information. In his letter, Wills explained that after September 24, 2000, all labor was performed by subcontractors and paid by invoice. He further explained there were no timesheets or information on days (shifts) worked, as the individuals were paid by the job. Pursuant to subpoena issued by the General Counsel, just prior to the November 29, 2001 hearing, Wills produced a check register and benefit contributions forms for pay periods ending April 2, 16, 30, and May 14, 2000. (GC Exhs. 12 and 13.) The contribution forms showed contributions due in the amount of \$4430. Wills admitted these documents were never provided to the Union. Thus, it appears that while some of the information was provided to the Union, it was not provided in a timely manner. The Board has held that the delayed and untimely submission of information does not fulfill the duty to bargain under the Act or obviate the need for a remedy. *Association of D.C. Liquor Wholesalers*, 300 NLRB 224, 229 (1990). In this case, the Company does not deny that it unduly delayed in providing information or that it failed to provide the full information as requested. Accordingly, I find the Company’s response to the Union’s request for relevant information is violative of Section 8(a)(1) and (5) of the Act. With respect to any information that has now been provided to the Union, the remedy would be limited to a cease-and-desist order. *U. S. Postal Service*, 332 NLRB 635 (2000).

C. The Company’s Failure to Remit Dues to the Union and Other Unilateral Modifications of the Contract

The Company does not deny that while dues were deducted pursuant to the April 14, 2000 collective-bargaining agreement, only a portion of these dues were actually remitted to the Union. The remainder of the dues was kept by the Company to pay employee wages and for other business expenses. The original complaint includes no allegation involving this failure to remit deducted dues. At no point in these proceedings has the General Counsel requested to amend the complaint to include the Company’s failure to remit the union dues. During the hearing, Wills also admitted that he met with employees

and asked them whether they wanted him to pay wages or make contributions to the benefits fund. While he mentions that the union steward was present, there is no evidence that he provided any notice to the Union or gave the Union any opportunity to bargain about the substance of the meeting. The Board has consistently found that an employer violates Section 8(a)(1) and (5) of the Act when it bypasses the Union and deals directly with employees in the unit about their wages and terms and conditions of employment. See *JPH Management, Inc.*, 331 NLRB 1032 (2000); *Harris-Teeter Super Markets*, 310 NLRB 216 (1993). The Company also admits that it unilaterally changed the recognized bargaining unit to subcontractors and changed the method of compensation from an hourly rate to compensation for specific jobs performed. As the Board has recently reiterated, "a unilateral change not only violates the plain requirement that the parties bargain over 'wages, hours, and other terms and conditions,' but also injures the process of collective bargaining itself." *Priority One Services*, 331 NLRB 1527 (2000). See also *NLRB v. McClathy Newspapers*, 964 F.2d 1153, 1162 (D.C. Cir. 1992).

The Board has previously held that the General Counsel may add complaint allegations that would otherwise be barred from litigation by Section 10(b) of the Act if the allegations are closely related to allegations of a timely filed charge. *Redd-I, Inc.*, 290 NLRB 1115 (1988). The Board's test for relatedness was summarized in *Nickles Bakery of Indiana*, 296 NLRB 927, 928 (1989):

First the Board will look at whether the otherwise untimely allegations involve the same legal theory as the allegations in the pending timely charge. Second, the Board will look at whether the otherwise untimely allegations arise from the same factual circumstances or sequence of events as the pending timely charge. Finally, the Board may look at whether a respondent would raise similar defenses to the allegations.

In determining whether a respondent would raise the same or similar defenses, consideration is given to whether a reasonable respondent would have preserved similar evidence and prepared a similar case in defending against the otherwise untimely allegations as it would in defending against the allegations in the timely pending charge. *Columbia Textile Service*, 293 NLRB 1034 (1989). The Board has also typically shown some leniency toward a pro se respondent's efforts to comply with the Board's procedural rules. *A.P.S. Production*, 326 NLRB 1296, 1297 (1998). Although such leniency is normally discussed in circumstances involving a respondent's failure to file a timely or adequate answer, it is reasonable that such leniency would be extended to situations where the Government may seek to broaden the scope of the complaint. In the instant case, it is questionable that this pro se respondent has any appreciation that he may have engaged in unlawful direct dealing with employees or that his unilateral conversion of employees to subcontractors falls within the scope of Section 8(a)(1) and (5) of the Act. I cannot determine that in litigating his case, he would have raised the same defenses. Accordingly, while the

General Counsel has not previously sought to amend the complaint to include these additional potential violations, such an amendment does not appear to meet the criteria of *Nickles Bakery*, supra.

CONCLUSIONS OF LAW

1. The Company, Made 4 Film, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union has been a labor organization within the meaning of Section 2(5) of the Act.

3. Since on or about April 14, 2000, the Union has been the collective-bargaining representative of the Company's employees in the following appropriate unit within the meaning of Section 9 (a) of the Act:

All employees in the following classifications: Coordinator, Foreman, Gang Boss, Model makers, Prop Maker-Set Construction, Construction Drivers, utility Maintenance Technicians, Buyer, Welder, Riggers, Paint Foreman, Plasterers, Set Painters, Lead Scenic, Scenic Artist, Sign Painters/Writers, Standby Painters, Sculptors, and Fork-Lift/Crane/Hi-Lift Operators.

4. By failing to pay to the Health and Welfare and Annuity Funds for the amounts due for the period from April 14, 2000, to April 14, 2001, the Company has violated Section 8(a)(1) and (5) of the Act.

5. By delaying the furnishing of certain information, set forth in the decision herein, and by failing and refusing to furnish other information, requested by the Union, the Company has violated Section 8 (a)(1) and (5) of the Act.

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. In this regard, I shall recommend that that the Company be ordered to reimburse the Health and Welfare and Annuity Funds for the amounts that it failed to pay for the period of time from April 14, 2000, to April 14, 2001. The interest owing to the funds should be computed as set forth in *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979). I shall also recommend that the Company be ordered to make whole any employees for any losses or expenses they incurred due to the Company's unilateral cessation of payments to the Health and Welfare and Annuity Funds. *Stone Boat Yard*, 264 NLRB 981 (1982).

With respect to such information, which was ultimately, but unlawfully furnished to the Union in an untimely manner, it is recommended that the Company be ordered to cease and desist from such conduct. With respect to such information not furnished to the Union, it is recommended that the Company furnish such information, upon request by the Union.

[Recommended Order omitted from publication.]