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**Mary Beth Panetta, d/b/a Pittore and its alter ego Gerardo Panetta, d/b/a Pittore and Local Union 201, District Council 9, International Brotherhood of Painters and Allied Trades, AFL-CIO.**  
Case 3-CA-23778

February 4, 2003

## DECISION AND ORDER

BY MEMBERS LIEBMAN, SCHAUMBER, AND ACOSTA

The General Counsel seeks summary judgment in this case on the ground that the Respondent has failed to file an answer to the complaint. Upon a charge filed by the Union on August 20, 2002, the General Counsel issued the complaint on September 30, 2002, against Mary Beth Panetta, doing business as Pittore (Pittore I) and its alter ego Gerardo Panetta, also doing business as Pittore (Pittore II), collectively the Respondent, alleging that it has violated Section 8(a)(5) and (1) of the Act. The Respondent failed to file an answer.

On November 13, 2002, the General Counsel filed a Motion for Summary Judgment with the Board. On November 15, 2002, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

### Ruling on Motion for Summary Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the complaint affirmatively states that unless an answer is filed within 14 days of service, all the allegations in the complaint will be considered admitted. Further, the undisputed allegations in the Motion for Summary Judgment disclose that the Region, by letter dated October 18, 2002, notified the Respondent that unless an answer was received by October 28, 2002, a Motion for Summary Judgment would be filed.<sup>1</sup>

<sup>1</sup> The complaint and letter, which were sent by certified mail, were returned marked "unclaimed." Respondent's failure or refusal to claim certified mail or to provide for receiving appropriate service cannot serve to defeat the purposes of the Act. *A.S.B. Cloture, Ltd.*, 313 NLRB 1012 fn.1 (1994); *Michigan Expediting Service*, 282 NLRB 210 fn. 6 (1986). The letter was also sent by regular mail and was never returned. The failure of the Postal Service to return documents sent by

In the absence of good cause being shown for the failure to file a timely answer, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

## FINDINGS OF FACT

### I. JURISDICTION

At all material times, Respondent Pittore I has been owned by Mary Beth Panetta, a sole proprietorship, doing business as Pittore, with its principal place of business located at 3 Lisa Court, Albany, New York, and at various jobsites, and has been engaged in the building and construction industry as a painting contractor.

At all material times since on or about June 4, 2001, Respondent Pittore II has been owned by Gerardo Panetta, a sole proprietorship, also doing business as Pittore, with its principal place of business located at 3 Lisa Court, Albany, New York, and at various jobsites, and has been engaged in the building and construction industry as a painting contractor.

Since on or about June 4, 2001, Respondent Pittore II has been engaged in the same business operations as those engaged in by Respondent Pittore I, and has been operating under the same name, with the same management, location, business purpose, equipment, and supervisors as Respondent Pittore I.

On or about June 4, 2001, Respondent Pittore II was established by Gerardo Panetta as a disguised continuation of Respondent Pittore I.

Based on the operations and conduct described above, Respondents Pittore I and Pittore II are, and have been at all material times, alter egos and a single employer within the meaning of the Act.

During the 12-month period preceding the issuance of the complaint, Respondent Pittore II, in conducting its business operations as described above, performed services valued in excess of \$50,000 for Zandri Construction Corp., an enterprise directly engaged in interstate commerce.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

### II. ALLEGED UNFAIR LABOR PRACTICES

At all material times, Gerardo Panetta has been a supervisor of Respondent within the meaning of Section 2(11) of the Act and an agent of Respondent within the meaning of Section 2(13) of the Act.

regular mail establishes actual receipt. *Lite Flight*, 285 NLRB 647, 650 (1987).

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

All journeypersons and apprentice painters, wall coverers, drywall finishers, wood finishers, sandblasters, skim coaters and lead abatement workers employed by Respondent, excluding guards and supervisors as defined in the Act and all other employees.

On or about July 19, 2000, Respondent Pittore I, an employer engaged in the building and construction industry as described above, granted recognition to the Union as the exclusive collective-bargaining representative of the unit, by executing a collective-bargaining agreement by and between the Union and Eastern Contractors Association, Inc., without regard to whether the majority status of the Union was ever established under the provisions of Section 9(a) of the Act. The collective-bargaining agreement is effective by its terms from May 1, 2000 to April 30, 2003. At all material times, based on Section 9(a) of the Act, the Union has been the limited exclusive representative of the unit.<sup>2</sup>

Since about February 20, 2002, and continuing to date, Respondent has ceased to continue in force and effect the collective bargaining agreement and has unilaterally abrogated, rescinded and repudiated said collective-bargaining agreement.

#### CONCLUSION OF LAW

By the acts and conduct described above, the Respondent has been failing and refusing to bargain collectively with the limited exclusive collective-bargaining representative of the employees in the unit in violation of Section 8(a)(5) and (1) of the Act, and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

#### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, we shall order the Respondent to honor the terms and conditions of the 2000–2003 agreement between the Union and the Association, and any automatic renewal or extension of it, and to make whole the unit employees for any loss of

<sup>2</sup> The complaint alleges that the Respondent is a construction industry employer and that it granted recognition to the Union without regard to whether the Union had established majority status. Accordingly, we find that the relationship was entered into pursuant to Sec. 8(f) and that the Union is therefore the limited 9(a) representative of the unit employees for the period covered by the contract. See, e.g., *A.S.B. Closure, Ltd.*, 313 NLRB 1012 (1994).

earnings and other benefits they may have suffered as a result of the Respondent's failure to abide by the agreement since February 20, 2002. In addition, we shall order the Respondent to make whole the unit employees by making any contractually required fringe benefit fund contributions that have not been made on behalf of employees since February 20, 2002, including any additional amounts applicable to such delinquent payments in accordance with *Merryweather Optical Co.*, 240 NLRB 1312, 1316 (1979).<sup>3</sup> Further, the Respondent shall reimburse the unit employees for any expenses ensuing from its failure to make the required contributions since February 20, 2002, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enf. mem. 661 F.2d 940 (9th Cir. 1981). All payments to unit employees shall be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enf. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

#### ORDER

The National Labor Relations Board orders that the Respondent, Mary Beth Panetta, doing business as Pittore and its alter ego Gerardo Panetta, also doing business as Pittore, Albany, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to comply with its May 1, 2000–April 30, 2003 collective-bargaining agreement, and any automatic renewal or extension of the agreement, with Local Union 201, District Council 9, International Brotherhood of Painters and Allied Trades, AFL–CIO, as the limited exclusive collective-bargaining representative of the employees in the following unit, by unilaterally abrogating, rescinding, and repudiating the agreement. The unit is: All journeypersons and apprentice painters, wall coverers, drywall finishers, wood finishers, sandblasters, skim coaters and lead abatement workers employed by Respondent, excluding guards and supervisors as defined in the Act and all other employees.

(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.

<sup>3</sup> To the extent that an employee has made personal contributions to a benefit or other fund that have been accepted by the fund in lieu of the Respondent's delinquent contributions during the period of the delinquency, the Respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the Respondent otherwise owes the fund.

(a) Honor the terms of its May 1, 2000–April 30, 2003 written agreement with the Union, and any automatic renewal or extension of it.

(b) Make whole the unit employees for any loss of earnings and benefits incurred as a result of its failure to honor the written agreement with the Union, or any automatic renewal or extension of it, since February 20, 2002, with interest, as described in the remedy section of this decision.

(c) Make all the contractually required benefit fund contributions, if any, that have not been made on behalf of unit employees since February 20, 2002, and reimburse unit employees for any expenses ensuing from its failure to make the require payments, in the manner set forth in the remedy section of this decision.

(d) 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 reports, and all other records including an electronic copy of such records if stored in electronic form, 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 Albany, New York, copies of the attached notice marked “Appendix.”<sup>4</sup> 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 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 February 20, 2002.

(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.

<sup>4</sup> 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.”

Dated, Washington, D.C., February 4, 2003

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Wilma B. Liebman, Member

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Peter C. Schaumber, Member

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R. Alexander Acosta, Member

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

#### FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist any union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to comply with our May 1, 2000–April 30, 2003 collective-bargaining agreement, and any automatic renewal or extension of the agreement, with Local Union 201, District Council 9, International Brotherhood of Painters and Allied Trades, AFL–CIO, as the limited exclusive collective-bargaining representative of the employees in the following unit, by unilaterally abrogating, rescinding, and repudiating the agreement. The unit is: All journeypersons and apprentice painters, wall coverers, drywall finishers, wood finishers, sandblasters, skim coaters and lead abatement workers employed by Respondent, excluding guards and supervisors as defined in the Act and all other employees.

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.

## DECISIONS OF THE NATIONAL LABOR RELATIONS BOARD

WE WILL honor the terms of our May 1, 2000–April 30, 2003 written agreement with the Union, and any automatic renewal or extension of it.

WE WILL make whole unit employees for any loss of earnings and benefits incurred as a result of our failure to honor the written agreement, and any automatic renewal or extension of it, since February 20, 2002, with interest.

WE WILL make all the contractually required benefit fund contributions, if any, that have not been made on behalf of unit employees since February 20, 2002, and reimburse unit employees for any expenses ensuing from its failure to make the require payments, with interest.

MARY BETH PANETTA, D/B/A PITTORE AND ITS  
ALTER EGO GERARDO PANETTA, D/B/A PITTORE