**Cosmo Electric Company and its alter ego Cosmo Electric Services, a single employer *and* International Brotherhood of Electrical Workers, Local 60, AFL–CIO**. Case 16–CA–23396

October 28, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS WALSH AND MEISBURG

The General Counsel seeks a default judgment in this case on the ground that the Respondent has failed to file an answer to the complaint. Upon a charge and an amended charge filed by the Union on February 2 and April 26, 2004, respectively, the General Counsel issued the complaint on July 30, 2004, against Cosmo Electric Company and its alter ego Cosmo Electric Services, collectively referred to as the Respondent, alleging that it has violated Section 8(a)(1) and (5) of the Act. The Respondent failed to file an answer.

On September 1, 2004, the General Counsel filed a Motion for Default Judgment with the Board. On September 8, 2004, 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 Default 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 stated that unless an answer was filed by August 13, 2004, all the allegations in the complaint would be considered admitted. Further, the undisputed allegations in the General Counsel's motion disclose that the Region, by letter dated August 16, 2004, notified the Respondent that unless an answer was received by August 23, 2004, a Motion for Default Judgment would be filed.

In the absence of good cause being shown for the failure to file a timely answer, we grant the General Counsel's motion for default judgment.[1]

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

About February 2004, the exact date being unknown to the General Counsel but particularly within the knowledge of the Respondent, Respondent Cosmo Electric Services (Respondent Services) was established by Respondent Cosmo Electric Company (Respondent Company) as a subordinate instrument to and a disguised continuation of Respondent Company.

At all material times, Respondent Company and Respondent Services have been affiliated business enterprises with common officers, ownership, directors, management, and supervision; have shared common premises and facilities; have provided services for each other; and have interchanged personnel with each other and have held themselves out to the public as a single-integrated business enterprise.

Based on their conduct described above, Respondent Company and Respondent Services are, and have been at all material times, alter egos and a single employer within the meaning of the Act.

At all material times, Respondent Company and Respondent Services, both Texas sole proprietors with a common office and place of business at 9251 Ridge Wind, San Antonio, Texas (the Respondent's facility), have been engaged in the construction industry as electrical contractors.

During the 12-month period preceding issuance of the complaint, the Respondent, in conducting its business operations described above, purchased goods and materials valued in excess of $50,000 from other enterprises, including Consolidated Electrical Distributors, Inc. and Graybar Electric Company, Inc., both located within the State of Texas, and both of which received these goods and materials directly from points outside the State of Texas.

We find that Respondent Company and Respondent Services have been employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that International Brotherhood of Electrical Workers, Local 60, AFL–CIO, 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, the following individuals held the positions set forth opposite their respective names and have been supervisors of the Respondent within the

[1] The General Counsel's motion indicates that the Respondent may be involved in bankruptcy proceedings. It is well established that the institution of bankruptcy proceedings does not deprive the Board of jurisdiction or authority to entertain and process an unfair labor practice case to its final disposition. See, e.g., *Cardinal Services*, 295 NLRB 933 fn. 2 (1989), and cases cited there. Board proceedings fall within the exception to the automatic stay provisions for proceedings by a governmental unit to enforce its police or regulatory powers. See id., and cases cited therein; *NLRB v. 15th Avenue Iron Works, Inc.*, 964 F.2d 1336, 1337 (2d Cir. 1992). Accord: *Aherns Aircraft, Inc. v. NLRB*, 703 F.2d 23 (1st Cir. 1983).

meaning of Section 2(11) of the Act and agents of the Respondent within the meaning of Section 2(13) of the Act:

| | |
|---|---|
| Michelle Bratton | Owner |
| Jesse Bratton | Owner |

At all material times, the South Texas Chapter, National Electrical Contractors Association, Inc. (NECA) has been an organization composed of various employers engaged in the electrical industry, one purpose of which is to represent employer-members in negotiating and administering collective-bargaining agreements with the Union.

At all material times, Respondent Company has been an employer-member of NECA and has authorized NECA to represent it in negotiating and administering collective-bargaining agreements with the Union.

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

> Included: All employees performing electrical work within the jurisdiction of the Union for the purposes of collective bargaining in respect to rates of pay, hours of employment and other conditions of employment.
>
> Excluded: All guards and supervisors as defined in the Act.

On April 12, 1996, Respondent Company entered into a "Letter of Assent-A" whereby it agreed to comply with and be bound by all the provisions contained in the then current approved labor agreement between the Union and NECA, and agreed to be bound to such future agreements unless timely notice (90 days prior to the then current anniversary date of the applicable approved labor agreement) was given to NECA and the Union. The most recent collective-bargaining agreement is effective from June 2, 2003, to June 6, 2005 (the Agreement).

About April 12, 1996, the Respondent, 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 and since that date the Union has been recognized as the representative by the Respondent without regard to whether the majority status of the Union had ever been established under the provisions of Section 9(a) of the Act.[2]

About November 26, 2003, Respondent Company untimely notified the Union by letter that it was terminating the Agreement.

The Union, by letters dated December 4, 2003, and February 2, 2004, requested to bargain with Respondent Company.

Since about November 26, 2003, the Respondent has failed and refused to bargain with the Union and has not responded to the Union's letters identified above.

Since about November 26, 2003, Respondent Company unilaterally repudiated the Agreement and refused to apply the terms and conditions of the Agreement by failing to deduct employee union dues and by failing to use the Union's hiring hall.

The subjects set forth above relate to wages, hours, and other terms and conditions of employment and are mandatory subjects of collective bargaining.

## CONCLUSION OF LAW

By the conduct described above, the Respondent has been failing and refusing to bargain collectively and in good faith with the limited exclusive collective-bargaining representative of its employees within the meaning of Section 8(d) of the Act, and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.[3]

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[2] 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) of the Act 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. Cloture, Ltd.,* 313 NLRB 1012 (1994).

[3] The complaint also alleges that the Respondent violated Sec. 8(a)(5) and (1) of the Act by failing to make payments to "the Union's fringe benefit funds" as required by the Agreement. However, neither the complaint nor the motion describe what those funds are. The Board has held that certain types of benefit funds are permissive subjects of bargaining for which no remedy would be warranted. See, e.g., *Finger Lakes Plumbing & Heating Co.*, 254 NLRB 1399 (1981) (industry advancement fund). There is no indication here as to the nature of the funds involved. In these circumstances, we decline to find that the Respondent violated the Act by refusing to make contributions to these unspecified funds. Accordingly, the motion is denied with respect to this allegation, and the matter is remanded to the Regional Director for further appropriate action. Nothing herein will require a hearing if, in the event of an appropriate amendment to the complaint, the Respondent again fails to answer, thereby admitting evidence that would permit the Board to find the alleged violation. In such circumstances, the General Counsel may renew the motion for default judgment with respect to the amended complaint allegations. See *VMI Cabinets & Millwork*, 340 NLRB 1196 fn. 2 (2003) (default judgment denied as to allegation that respondent failed to bargain over decision to close business); *St. Regis Hotel*, 339 NLRB 143, 144 fn. 3 (2003) (default judgment denied as to information request for "other matters important to the Union."); see also *Michigan Inn*, 340 NLRB 983, 989 (2003) (complaint not well pleaded if too vague to determine whether a violation occurred).

Member Walsh notes that although the complaint does not describe the Union's fringe benefit funds, it alleges that they are mandatory subjects of bargaining. By failing to file an answer, the Respondent has

## 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. Having found that the Respondent violated Section 8(a)(5) and (1) of the Act by repudiating the provisions of its 2003–2005 collective-bargaining agreement with the Union by failing to deduct employee union dues and by failing to use the Union's hiring hall, we shall order the Respondent to honor the terms and conditions of that agreement, and any automatic renewal or extension of it.

In order to remedy the Respondent's failure to deduct employee union dues as required by the Agreement, we shall order the Respondent to deduct and remit union dues pursuant to valid check-off authorizations that have not been deducted since November 26, 2003, with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Finally, in order to remedy the Respondent's failure to utilize the Union's hiring hall as required by the Agreement, we shall order the Respondent to offer immediate and full employment to those applicants who would have been referred to the Respondent for employment by the Union were it not for the Respondent's unlawful conduct, and to make them whole for any losses suffered by reason of the Respondent's failure to hire them.[4] Backpay is to be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, supra. Reinstatement and backpay issues will be resolved by a factual inquiry at the compliance stage of the proceeding. *J. E. Brown Electric*, supra.

## ORDER

The National Labor Relations Board orders that the Respondent, Cosmo Electric Company and its alter ego, Cosmo Electric Services, a single employer, San Antonio, Texas, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Failing and refusing to bargain collectively and in good faith with the International Brotherhood of Electrical Workers, Local 60, AFL–CIO, as the limited exclusive collective-bargaining representative of the employees in the following unit during the term of its 2003–2005 collective-bargaining agreement with the Union, and any automatic renewal or extension of it. The unit is:

> Included: All employees performing electrical work within the jurisdiction of the Union for the purposes of collective bargaining in respect to rates of pay, hours of employment and other conditions of employment.
>
> Excluded: All guards and supervisors as defined in the Act.

(b) Repudiating the terms and conditions of the 2003–2005 collective-bargaining agreement, and any automatic renewal or extension of it, including by failing to deduct employee union dues and failing to use the Union's hiring hall.

(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.

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admitted this complaint allegation. Therefore, Member Walsh would grant default judgment with respect to the Respondent's uncontested failure to make the fund contributions. However, he would leave to compliance the issue of whether any of the funds are permissive subjects of bargaining for which no remedy would be warranted.

[4] We leave to the compliance stage the determination of which, if any, employees fall into this category. In this regard, we do not now decide issues concerning the validity of *J. E. Brown Electric*, 315 NLRB 620 (1994). See concurring opinions in *J. E. Brown*, and in *Coulter's Carpet*, 338 NLRB 732 (2002). See also dissenting opinions in *M. J. Wood*, 325 NLRB 1065, 1068 fn. 9 (1998), and *Baker Electric*, 317 NLRB 335, 336 fn. 4 (1995).

Contrary to our dissenting colleague, we are not leaving to compliance the fashioning of a remedy. As noted, the remedial order requires the Respondent to offer employment to those applicants who would have been referred to the Respondent for employment by the Union were it not for the Respondent's unlawful conduct, and to make them whole for any losses suffered by reason of the Respondent's failure to hire them. The only issue left to compliance is the determination of which, if any, employees fall into this category. It is not uncommon or inappropriate to leave such issues to compliance.

Member Walsh does not agree that it is appropriate for the Board to "not now decide issues concerning the validity of *J. E. Brown Electric*, 315 NLRB 620 (1994)." As the courts have admonished the Board, the scope of the remedy must be resolved in the unfair labor practice proceeding and cannot be litigated in compliance. *Starcon, Inc. v. NLRB*, 176 F.3d 948, 952 (7th Cir. 1999) ("The Board may intend to cut down the order in compliance proceedings that are the normal sequel to such orders. But that would be a confusion of scope with compliance. The scope of the order must be determined before the order is entered, not afterwards."); *Ultrasystems Western Constructors, Inc. v. NLRB*, 18 F.3d 251, 259 (4th Cir. 1994) ("[I]t would not be consistent with the Act for the Board to enter an order finding only that the employer violated the Act and reserving for later determination, in a compliance proceeding, the nature of the remedy to be imposed.")

Unlike his colleagues, and in accordance with the courts' directive, Member Walsh would determine the scope of the order now. He would do so by reaffirming *J. E. Brown*, noting that its reinstatement and make-whole remedy has been repeatedly provided by the Board, with court approval, in hiring hall repudiation cases. E.g., *M. J. Wood & Associates, Inc.*, 325 NLRB 1065, 1068 (1998); *Baker Electric*, 317 NLRB 335, 336 (1995), enfd. mem. 105 F.3d 647 (4th Cir. 1997), cert. denied 522 U.S. 1046 (1998); *Williams Pipeline Co.*, 315 NLRB 630, 633 (1994). Indeed, as recently as September 30, 2004, the Board unanimously provided the *J. E. Brown* remedy in *Energy Services International*, 343 NLRB No. 6, slip op. at 4 (2004).

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

(a) Honor and comply with the terms and conditions of the 2003–2005 collective-bargaining agreement, and any automatic renewal or extension of it, including by deducting employee union dues for employees who have executed valid dues-checkoff authorizations and by utilizing the Union's hiring hall.

(b) Deduct all dues for employees who have executed valid dues-checkoff authorizations and remit them to the Union that have not been deducted and remitted since November 26, 2003, as required by the 2003–2005 collective-bargaining agreement, and reimburse the Union for its failure to do so, with interest as set forth in the remedy section of this decision.

(c) Offer immediate and full employment to those applicants who would have been referred to the Respondent for employment by the Union were it not for the Respondent's unlawful conduct, and make them whole for any loss of earnings and other benefits suffered as a result of the Respondent's failure to hire them, with interest, 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 San Antonio, Texas, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 16, 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 November 26, 2003.

(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.

## 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 bargain collectively and in good faith with the International Brotherhood of Electrical Workers, Local 60, AFL–CIO, as the limited exclusive collective-bargaining representative of the employees in the following unit during the term of our 2003–2005 collective-bargaining agreement with the Union, and any automatic renewal or extension of it. The unit is:

> Included: All employees performing electrical work within the jurisdiction of the Union for the purposes of collective bargaining in respect to rates of pay, hours of employment and other conditions of employment.
>
> Excluded: All guards and supervisors as defined in the Act.

WE WILL NOT repudiate the terms and conditions of our 2003–2005 collective-bargaining agreement with the Union, and any automatic renewal or extension of it, including by failing to deduct employee union dues and failing to use the Union's hiring hall.

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 honor the terms of our 2003–2005 collective-bargaining agreement with the Union and any automatic

[5] 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."

renewal or extension of it, including by deducting employee union dues and using the Union's hiring hall.

WE WILL deduct all dues for employees who have executed valid dues-checkoff authorizations and remit them to the Union, that have not been deducted and remitted since November 26, 2003, as required by our 2003–2005 collective-bargaining agreement with the Union, and reimburse the Union for our failure to do so, with interest.

WE WILL offer immediate and full employment to those applicants who would have been referred to us for employment by the Union were it not for our unlawful conduct, and make them whole for any loss of earnings and other benefits suffered as a result of our failure to hire them, with interest.

COSMO ELECTRIC COMPANY AND ITS ALTER EGO, COSMO ELECTRIC SERVICES, A SINGLE EMPLOYER