

Traffic Control Services, Inc., and its Trustee in Bankruptcy, Albert Rau and Laborers' District Council of the State of Arizona, including its Local Union Nos. 383 and 479. Case 28-CA-5558

May 14, 1980

DECISION AND ORDER

**BY CHAIRMAN FANNING AND MEMBERS
JENKINS AND PENELLO**

Upon a charge filed on October 15, 1979, and amended charge filed on February 15, 1980, by Laborers' District Council of the State of Arizona, including its Local Union Nos. 383 and 479, herein referred to as the Union, and duly served on Traffic Control Services, Inc., and its Trustee in Bankruptcy, Albert Rau, herein referred to as Respondent Traffic Control and Respondent Trustee, respectively, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 28, issued a complaint on November 21, 1979, and an amended complaint on February 22, 1980, against Respondents, alleging that Respondents had engaged in and were engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charges and complaints and notices of hearing before an administrative law judge were duly served on the parties to this proceeding. With respect to the unfair labor practice, the complaint alleges in substance as follows: At all times material herein, Respondent Traffic Control has been a member of the Associated General Contractors, Arizona Chapter, herein referred to as AGC, an association of employers which exists for the purpose of, *inter alia*, engaging in collective bargaining on behalf of its members with the Union and other labor organizations. Also at all times material herein, Respondent Traffic Control, by virtue of its membership in AGC and execution of a construction memorandum agreement, and the Union have been bound to successive collective-bargaining agreements, known as Master Labor Agreements, which by their terms have been effective from July 9, 1976, to May 31, 1979, and from June 1, 1979, to May 31, 1982. Each Master Labor Agreement provided, *inter alia*, for the recognition by Respondent Traffic Control of the Union as the exclusive representative of its laborers in the following described appropriate bargaining unit:

All employees over whom the Unions have jurisdiction, as such jurisdiction is defined by the Building and Construction Trades Department of the American Federation of Labor-Con-

gress of Industrial Organizations and the International Brotherhood of Teamsters, Chauffeurs, and Warehousemen of America as of the date of this Agreement, excluding executives, superintendents, assistant superintendents, civil engineers and their helpers, master mechanics, all supervisory employees such as general foremen, timekeepers, messenger boys, and office workers.

The complaint also alleges in substance that on or about January 21, 1980, Respondent Traffic Control was adjudicated a bankrupt by order of the United States District Court for the District of Arizona, and that, since on or about that date, Respondent Trustee has been duly designated by said court as the Trustee in Bankruptcy of Respondent Traffic Control, with full authority to continue operations and exercise all powers necessary to the administration of the business of Respondent Traffic Control. Accordingly, by virtue of these events, Respondent Trustee was at all times material herein, and is, a successor in bankruptcy to Respondent Traffic Control.

The complaint further alleges in substance that since on or about April 15, 1979, and continuing to date, Respondent Traffic Control, and since on or about January 21, 1980, and continuing to date, Respondent Traffic Control and Respondent Trustee, have unilaterally, without prior consultation and bargaining with the Union, ceased making contributions on behalf of unit employees to the Arizona Laborers, Teamsters and Cement Masons Local No. 395 Trust Funds, which contributions are required under the provisions of the aforementioned Master Labor Agreements. Respondents failed to file a timely answer to the complaint.

On March 14, 1980, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment with exhibits attached. Subsequently, on March 18, 1980, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondents have filed no response to the Notice To Show Cause and, accordingly, the allegations of the Motion for Summary Judgment stand uncontroverted.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

Section 102.20 of the Board's Rules and Regulations, Series 8, as amended, provides as follows:

The respondent shall, within 10 days from the service of the complaint, file an answer thereto. The respondent shall specifically admit, deny, or explain each of the facts alleged in the complaint, unless the respondent is without such knowledge, in which case the respondent shall so state, such statement operating as a denial. 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.

The complaint and notice of hearing issued on November 21, 1979, and duly served on Respondent the same day, and the amended complaint and notice of hearing issued on February 22, 1980, and duly served on Respondent the same day, specifically state that unless an answer to the complaint is filed by Respondent within 10 days from the service thereof "all of the allegations in the complaint shall be deemed to be admitted to be true and shall be so found by the Board." According to the record herein, and the uncontroverted allegations of the Motion for Summary Judgment, Respondents failed to file any answers to the complaint or amended complaint within 10 days from their service. On March 12, 1980, counsel for the General Counsel issued the Motion for Summary Judgment herein, and on March 18, 1980, the Board issued a Notice To Show cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondents did not file a response to the Notice To Show Cause. No good cause to the contrary having been shown, in accordance with the rule set forth above, the allegations of the complaint are deemed to be admitted and found to be true. Accordingly, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent Traffic Control, an Arizona corporation with its principal place of business at Phoenix, Arizona, is and has been at all times material herein engaged in business as a general contractor in the building and construction industry. During the 12-

month period preceding January 21, 1980, which period is representative of all times material herein, Respondent Traffic Control performed construction services valued in excess of \$50,000 for the Ashton Company, Inc., an Arizona corporation engaged in business as a general contractor in the building and construction industry. During the past 12 months, which period is representative of its annual operations generally, the Ashton Company, Inc., purchased and caused to be transported in interstate commerce and delivered to its places of business in Arizona goods and materials valued in excess of \$50,000 directly from suppliers located in States of the United States other than the State of Arizona.

We find, on the basis of the foregoing, that Respondent Traffic Control and its successor in bankruptcy, Respondent Trustee, are, and have been at all times material herein, employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the purposes of the Act to assert jurisdiction.

II. THE LABOR ORGANIZATIONS INVOLVED

Each of the labor organizations comprising the Union is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Unit*

At all times material herein, the Union has been, and is now, the lawfully designated exclusive collective-bargaining representative of the following appropriate unit of Respondent Traffic Control's laborer employees:

All employees over whom the Unions have jurisdiction, as such jurisdiction is defined by the Building and Construction Trades Department of the American Federation of Labor-Congress of Industrial Organizations and the International Brotherhood of Teamsters, Chauffeurs, and Warehousemen of America; excluding executives, superintendents, assistant superintendents, civil engineers and their helpers, master mechanics, all supervisory employees such as general foremen, timekeepers, messenger boys, and office workers.

B. *The 8(a)(5) and (1) Charge*

Since on or about April 15, 1979, and continuing to date, Respondent Traffic Control, and since on or about January 21, 1980, and continuing to date, Respondent Traffic Control and Respondent Trustee, have unilaterally and without prior consultation

or bargaining with the Union ceased making contributions on behalf of unit employees to the Arizona Laborers, Teamsters and Cement Masons Local No. 395 Trust Funds, which contributions are required under the provisions of the applicable Master Labor Agreements.

Accordingly, we find that by the aforementioned conduct Respondent Traffic Control has since on or about April 15, 1979, and Respondent Traffic Control and Respondent Trustee have since on or about January 21, 1980, and at all times thereafter, refused to bargain collectively with the Union as the representative of their employees in the appropriate unit described above, and that by such conduct Respondents have engaged in and are engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with the operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent Traffic Control and Respondent Trustee have engaged in and are engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that they cease and desist therefrom and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit. We shall further order that Respondents make whole the employees in the unit found appropriate herein by paying all contributions to the Arizona Laborers, Teamsters and Cement Masons Local No. 395 Trust Funds as provided in the 1976-79 and 1979-82 Master Labor Agreements, which have not been paid and which would have been paid absent Respondents' unlawful discontinuance of such payments; and to post the attached notice.¹ See *Haberman Construction*

¹ Because the provisions of employee benefit fund agreements are variable and complex, the Board does not provide at the adjudicatory stage of a proceeding for the addition of interest at a fixed rate on unlawfully withheld fund payments. We leave to the compliance stage the question whether Respondent must pay any additional amounts into the benefit funds in order to satisfy our "make-whole" remedy. These additional amounts may be determined, depending on the circumstances of each case, by reference to provisions in the documents governing the funds at issue and, where there are no governing provisions, to evidence of any loss directly attributable to the unlawful withholding action, which might include the loss of return on investment of the portion of funds withheld,

Company, 236 NLRB 79 (1978); *Vin James Plastering Company*, 226 NLRB 125 (1976). Respondents will be required to preserve and, upon request, make available to authorized agents of the Board all records necessary or useful in determining compliance with the Order.

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. Traffic Control Services, Inc., and its Trustee in Bankruptcy, Albert Rau, are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Laborers' District Council of the State of Arizona, including its Local Union Nos. 383 and 479, is a labor organization within the meaning of Section 2(5) of the Act.

3. All employees over whom the Unions have jurisdiction, as such jurisdiction is defined by the Building and Construction Trades Department of the American Federation of Labor-Congress of Industrial Organizations and the International Brotherhood of Teamsters, Chauffeurs, and Warehousemen of America; excluding executives, superintendents, assistant superintendents, civil engineers and their helpers, master mechanics, all supervisory employees such as general foremen, timekeepers, messenger boys, and office workers, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. By virtue of its membership in the Associated General Contractors, Arizona Chapter, and execution of a construction memorandum agreement, Traffic Control Services, Inc., has been bound by successive collective-bargaining agreements, known as Master Labor Agreements, which by their terms have been effective from July 9, 1976, to May 31, 1979, and from June 1, 1979, to May 31, 1982.

5. Traffic Control Services, Inc., violated Section 8(a)(5) of the Act by ceasing on or about April 15, 1979, and thereafter refusing, to make contributions on behalf of its unit employees to the Arizona Laborers, Teamsters and Cement Masons Local No. 395 Trust Funds, as required by the provisions of the applicable Master Labor Agreements.

6. Traffic Control Services, Inc., and its Trustee in Bankruptcy, Albert Rau, violated Section 8(a)(5) of the Act by ceasing on or about January 21, 1980, and thereafter refusing, to make contributions on behalf of their unit employees to the Arizona Laborers, Teamsters and Cement Masons Local No. 395 Trust Funds, as required by the provisions of the applicable Master Labor Agreement.

additional administrative costs, etc., but not collateral losses. See *Merryweather Optical Company*, 240 NLRB No. 169 (1979).

7. By the aforesaid acts and conduct, Respondents have interfered with, restrained, and coerced, and are interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and thereby have engaged in and are engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

8. The aforesaid unfair labor practices are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondents, Traffic Control Services, Inc., and its Trustee in Bankruptcy, Albert Rau, Phoenix, Arizona, their officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Failing or refusing upon request to bargain collectively and in good faith with Laborers' District Council of the State of Arizona, including its Local Union Nos. 383 and 479, as the exclusive bargaining representative of the employees in the aforesaid unit.

(b) Unilaterally changing terms and conditions of employment of the employees in the aforesaid unit without notice to and consultation with said Union.

(c) In any like or related manner interfering with, restraining, or coercing their employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, recognize and bargain collectively with said Union as the exclusive bargaining representative of the employees in the aforesaid unit with respect to rates of pay, wages, hours of work, and other terms and conditions of employment.

(b) Make such payments to Arizona Laborers, Teamsters and Cement Masons Local No. 395 Trust Funds as were previously made on behalf of those employees in the aforesaid unit, and would have continued to be made had the Respondents not unlawfully discontinued such payments.

(c) Make whole all of their employees for any loss of benefits suffered by reason of Respondents' conduct, as provided in the section hereof entitled "The Remedy."

(e) Preserve and, upon request, make available to authorized agents of the Board, for examination and copying, all payroll records, social security payment records, timecards, personnel records, and

reports, and all other records necessary to analyze the moneys due under the terms of this Order.

(f) Post at their facility in Phoenix, Arizona, copies of the attached notice marked "Appendix."² Copies of said notice, on forms provided by the Regional Director for Region 28, after being duly signed by Respondents' representative, shall be posted by them immediately upon receipt thereof, and be maintained by them for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondents to insure that said notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director for Region 28, in writing, within 20 days from the date of this Order, what steps the Respondents have taken to comply herewith.

² In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The Act gives employees the following rights:

- To engage in self-organization
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To engage in activities together for the purpose of collective bargaining or other mutual aid or protection
- To refrain from the exercise of any or all such activities.

WE WILL NOT fail or refuse upon request to bargain collectively and in good faith with said Union as exclusive bargaining representative of the employees in the following appropriate unit.

All employees over whom the Unions have jurisdiction, as such jurisdiction is defined by the Building and Construction Trades Department of the American Federation of Labor-Congress of Industrial Organizations and the International Brotherhood of Teamsters, Chauffeurs, and Warehousemen of America; excluding executives, superintendents, assistant superintendents, civil engineers and their helpers, master mechanics,

all supervisory employees such as general foremen, timekeepers, messenger boys, and office workers.

WE WILL NOT unilaterally change terms and conditions of employment of the employees in the above unit without prior notice to and consultation with said Union.

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

WE WILL make such payments to Arizona Laborers, Teamsters and Cement Masons Local No. 395 Trust Funds as were previously made on behalf of employees in the aforesaid

unit, and would have continued to be made had we not unlawfully discontinued such payments.

WE WILL make whole all employees for any loss of benefits suffered by reason of our conduct.

WE WILL, upon request, recognize and bargain collectively with said Union as the representative of the employees in the above unit with respect to rates of pay, wages, hours of work, and other terms and conditions of employment.

TRAFFIC CONTROL SERVICES, INC.,
AND ITS TRUSTEE IN BANKRUPTCY,
ALBERT RAU