Ace Masonry, Inc. *and* **International Union of Bricklayers and Allied Craftsmen, Local No. 1 of Tucson, Arizona,** *and* **Southern Arizona Masonry Association and International Union of Bricklayers and Allied Craftsmen Local No. 1, of Tucson, Arizona, Health and Welfare Trust Fund and Tucson Bricklayers Pension Trust Fund.** Cases 28-CA-5763-1, -2

September 22, 1980

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS JENKINS AND PENELLO

Upon charges filed on March 13, 1980, by International Union of Bricklayers and Allied Craftsmen, Local No. 1 of Tucson, Arizona, herein called the Union, and by Southern Arizona Masonry Association and International Union of Bricklayers and Allied Craftsmen, Local No. 1, Tucson, Arizona, Health and Welfare Trust Fund and Tucson Bricklayers Pension Trust Fund, herein called the Funds, and duly served on Ace Masonry, Inc., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 28, issued a consolidated complaint and notice of hearing on April 25, 1980, against Respondent, alleging that Respondent had engaged in and was 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 complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that Respondent has failed and refused to bargain collectively with the Union by unilaterally discontinuing certain reports, payments, and remittances it was required to make under the effective collective-bargaining agreement with the Union. Respondent did not file an answer to the complaint.

On June 23, 1980, the General Counsel filed directly with the Board motions to transfer and continue matters before the Board and for summary judgment based on Respondent's failure to file an answer as required by Section 102.20 of the National Labor Relations Board Rules and Regulations, Series 8, as amended. Subsequently, on July 7, 1980, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's motions should not be granted. Respondent did not file a response to the Notice To Show Cause.

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:

> 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 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 served on Respondent specifically stated that, unless an answer to the complaint was filed 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." Further, Respondent was notified by letter dated May 12, 1980, that an answer to the complaint had not been received, and that summary judgment would be sought unless an answer was received forthwith. As noted above, Respondent has not filed an answer to the complaint, and did not respond to the Notice To Show Cause. No good cause to the contrary having been shown, in accordance with the Rules set forth above, the allegations of the complaint are deemed to be admitted and are found to be true. Accordingly, we grant the General Counsel's Motion for Summary Judgment.[1]

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

1. At all times material herein, Respondent, an Arizona corporation with its office and place of business at 3820 East Bellevue, Tucson, Arizona, has been engaged in business as a masonry contractor in the building and construction industry. During the past 12 months, which period is repre-

[1] See *Eagle Truck and Trailer Rental Division of E. T. & T. Leasing, Inc.*, 211 NLRB 804 (1974).

sentative of its annual operations generally, Respondent, in the course and conduct of its business operations, performed services valued in excess of $50,000 for other enterprises located within the State of Arizona, including, but not limited to, Al Macias, a sole proprietor (herein called Macias), Olmeca Construction Co., Inc. (herein called Olmeca), Willmeng Homes, Inc. (herein called Willmeng), and David Thomas Tyson, a sole proprietor, d/b/a the Indigo Company (herein called Tyson).

2. At all times material herein, Macias, with an office and place of business at 4244 Avenida Don Porfirio, Tucson, Arizona, and Olmeca, an Arizona corporation with an office and place of business at 4850 East Broadway, Tucson, Arizona, have been engaged in the construction and retail sale of homes. At all times material herein, Macias and Olmeca have been affiliated business enterprises with common officers, ownership, management, and supervision; have formulated and administered a common labor policy affecting employees of the operations; and have interchanged personnel with each other. By virture of their operations described above Marcias and Olmeca constitute a single integrated business enterprise and a single employer within the meaning of the Act.

During the past 12 months, which period is representative of the operations generally, Macias and Olmeca, collectively, derived gross revenue in excess of $500,000. During the same period of time, Macias and Olmeca, collectively, purchased and received at their Arizona operations products, goods, and materials valued in excess of $2,000 from other enterprises, including Del Mar Builders Supply Co., located within the State of Arizona, each of which other enterprises had received the products, goods, and materials directly from points outside the State of Arizona.

Macias and Olmeca, collectively, are now, and have been at all times material herein, a single integrated enterprise and an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

3. At all times material herein, Willmeng, an Arizona corporation with an office and place of business at 1801 West Rudasill, Tucson, Arizona, has been engaged in the construction and retail sale of homes. During the past 12 months, which period is representative of its annual operations generally, Willmeng, in the course and conduct of its business operations, derived gross revenue in excess of $500,000. During the same period of time, Willmeng purchased and received at its Arizona operations products, goods, and materials valued in excess of $2,000 from other enterprises, including Del Mar Builders Supply Co., located within the State of Arizona, each of which other enterprises had received the products, goods, and materials directly from points outside the State of Arizona.

Willmeng is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

4. At all times material herein, Tyson, an individual proprietorship with an office and place of business at 2301 East Broadway, Tucson, Arizona, has been engaged in the construction and retail sale of homes. During the past 12 months, which period is representative of its annual operations generally, Tyson, in the course and conduct of its business operations, derived gross revenue in excess of $500,000. During the same period of time, Tyson purchased and received at its Arizona operations products, goods, and materials valued in excess of $5,000 directly from points outside the State of Arizona.

Tyson is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

International Union of Bricklayers and Allied Craftsmen, Local No. 1 of Tucson, Arizona, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

Since 1973 Respondent and the Union have entered into a series of collective-bargaining agreements, the most recent of which is effective from July 1, 1979, through June 30, 1982, and, more particularly, described as the agreement between the International Union of Bricklayers and Allied Craftsmen, Local No. 1 of Tucson, Arizona, and the Southern Arizona Masonry Association, to which Respondent was signatory, herein called the Agreement.

The Agreement provides, among other things, for the recognition of the Union as the exclusive collective-bargaining representative of Respondent's masonry employees described in the following manner:

> That the Employers hereby recognize the Union signatory hereto as the sole exclusive

collective bargaining representative for all Trade Employees of the Employers signatory hereto over whom the Union has jurisdiction as such jurisdiction is defined by the Building and Construction Trades Department of the AFL-CIO.

The unit of employees thus described in the Agreement constitutes a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act. Further, at all times material herein, the Union has been the representative of Respondent's employees in that unit, and by virtue of Section 9(a) of the Act, has been, and is now, the exclusive representative of all the unit employees with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

The Agreement establishes the wages, hours, and other conditions of employment for Respondent's unit employees and provides that Respondent shall make certain reports, payments, and remittances. Pursuant to article X of the Agreement, Respondent is required to make monthly payments based on the hours worked by its unit employees to the various trust funds established thereunder, including health and welfare, pension, apprenticeship training, and industry promotion, as well as payments for fees to administer the industry promotion program. Pursuant to article X of the Agreement, Respondent is also required to file certain monthly reports with the applicable trust funds, indicating the number of hours covering the amount of money due to such trust funds. Pursuant to article XI of the Agreement, Respondent is required to make monthly remittances to the depository designated by the Union for the receipt of union dues deducted by Respondent from the wages of its unit employees pursuant to checkoff authorizations executed by the employees.

Commencing on or about November 15, 1979, Respondent unilaterally discontinued the reports, payments, and remittances required by articles X and XI of the Agreement. Specifically, at all times since on or about November 15, 1979, and continuing to date, Respondent, without notice to the Union or without affording the Union an opportunity to bargain with respect thereto, unilaterally discontinued payments to the fringe benefit trust funds and otherwise failed to pay the administrative fees described above; unilaterally discontinued filing the monthly reports described above; and unilaterally discontinued remitting the sums deducted from its employees for union dues to the depository designated by the Union.

We find that by the conduct described above Respondent has since November 15, 1979, failed and refused to bargain collectively with the Union as the representative of its employees in the appropriate unit, and thereby has engaged in and is engaging in, unfair labor practices affecting commerce 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 its 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 has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and take certain affirmative action designed to effectuate the policies of the Act.

We have found that Respondent violated Section 8(a)(5) of the Act by unilaterally discontinuing making reports, payments, and remittances as required by articles X and XI of the Agreement between the Union and Respondent. In order to remedy these unfair labor practices, we shall order Respondent to make whole its employees by making the payments which should have been made pursuant to article X of the Agreement, retroactive to November 15, 1979, and remitting to the designated repository the sums deducted from employees for union dues, with interest on the dues to be computed in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).[2] We shall also order Respondent to make the monthly reports required by article X of the Agreement.

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

[2] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). 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, additional administrative costs, etc., but not collateral losses. *Merryweather Optical Company*, 240 NLRB 1213 (1979).

CONCLUSIONS OF LAW

1. Ace Masonry, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Union of Bricklayers and Allied Craftsmen, Local No. 1 of Tucson, Arizona, is a labor organization within the meaning of Section 2(5) of the Act.

3. All trade employees of the employers signatory to the agreement between International Union of Bricklayers and Allied Craftsmen, Local No. 1 of Tucson, Arizona, and Southern Arizona Masonry Association, over whom the Union has jurisdiction as such jurisdiction is defined by the Building and Construction Trades Department of the AFL–CIO, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times material herein, the Union has been the exclusive representative of all the employees in the aforesaid appropriate unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. Since on or about November 15, 1979, by unilaterally discontinuing making payments and reports to trust funds and remitting dues deducted from employees as required by articles X and XI of the agreement between International Union of Bricklayers and Allied Craftsmen, Local No. 1 of Tucson, Arizona, and Southern Arizona Masonry Association, effective from July 1, 1979, through June 30, 1982, Respondent has refused to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate bargaining unit described above, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce 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 Respondent, Ace Masonry, Inc., Tucson, Arizona, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with International Union of Bricklayers and Allied Craftsmen, Local No. 1 of Tucson, Arizona, by unilaterally discontinuing making payments and reports to trust funds and remitting dues deducted from employees as required by articles X and XI of the agreement between International Union of Bricklayers and Allied Craftsmen, Local No. 1 of Tucson, Arizona, and Southern Arizona Masonry Association, effective from July 1, 1979, through June 30, 1982.

(b) In any like or related manner interfering with, restraining, or coercing 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) Honor articles X and XI of the agreement between International Union of Bricklayers and Allied Craftsmen, Local No. 1 of Tucson, Arizona, and Southern Masonry Association, effective from July 1, 1979, through June 30, 1982.

(b) Make whole its employees by making reports and payments to trust funds in the manner set forth in the section of this Decision entitled "The Remedy."

(c) Remit the sums deducted from its employees for union dues to the depository designated by the Union in the manner set forth in the section of this Decision entitled "The Remedy."

(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary or useful in checking compliance with this Order.

(e) Post at its facility in Tucson, Arizona, copies of the attached notice marked "Appendix."[3] Copies of said notice, on forms provided by the Regional Director for Region 28, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

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

[3] 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

WE WILL NOT refuse to bargain collectively with International Union of Bricklayers and Allied Craftsmen, Local No. 1 of Tucson, Arizona, by unilaterally discontinuing making reports and payments to trust funds and remitting dues deducted from employees as required by articles X and XI of the agreement between International Union of Bricklayers and Allied Craftsmen, Local No. 1 of Tucson, Arizona, and the Southern Arizona Masonry Association, effective from July 1, 1979, through June 30, 1982.

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

WE WILL honor articles X and XI of the agreement with the Union.

WE WILL make our employees whole by paying to the trust funds the payments which should have been made pursuant to the terms of the agreement with the Union; WE WILL make the required reports to the funds; and WE WILL remit the sums deducted from employees for union dues, plus interest, to the depository designated by the Union.

ACE MASONRY, INC.