

**A.B.C. Drywall Company, Inc. and Painters District Council No. 35, a/w International Brotherhood of Painters and Allied Trades, AFL-CIO. Case 1-CA-10360**

October 30, 1975

**DECISION AND ORDER**

BY CHAIRMAN MURPHY AND MEMBERS  
JENKINS AND PENELLO

On July 14, 1975, Administrative Law Judge Herbert Silberman issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the Administrative Law Judge's Decision.

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.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

**ORDER**

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, A.B.C. Drywall Company, Inc., Woburn, Massachusetts, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

**DECISION**

**STATEMENT OF THE CASE**

HERBERT SILBERMAN, Administrative Law Judge: Upon a charge and an amended charge filed on January 8 and February 19, 1975, respectively, by Painters District Council No. 35, a/w International Brotherhood of Painters and Allied Trades, AFL-CIO, herein called the Union, a complaint was issued on February 26, 1975, alleging that A.B.C. Drywall Company, Inc., herein called the Company, has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the National Labor Relations Act, as amended. In substance, the complaint, as amended, alleges that since July 1, 1974, the Union and the Company have been parties to a collective-bargaining agreement; that in September 1974 the Company made an unprivileged modification of the agreement by refusing to make payments to the Union's health and welfare, pension,

and other funds, and by refusing to transmit union dues deducted from employee's wages,<sup>1</sup> and that in December 1974 the Company unlawfully terminated the agreement and withdrew recognition from the Union. The Company filed an answer denying that it has engaged in the unfair labor practices alleged in the complaint. A hearing in this proceeding was held in Boston, Massachusetts, on May 13 and 14, 1975. Pursuant to leave granted the parties at the hearing, General Counsel, Charging Party, and the Company filed briefs with the Administrative Law Judge which have been carefully considered.

Upon the entire record in this proceeding, and from my observation of the witnesses and their demeanor, I make the following:

**FINDINGS OF FACT**

**I. THE BUSINESS OF THE COMPANY**

The Company, a Massachusetts corporation, which maintains an office in Woburn, Massachusetts, does drywall installations, painting, and carpentry. It performs such work as a subcontractor to general contractors in the building and construction industry. During the year preceding the issuance of the complaint, the Company purchased building materials valued in excess of \$50,000 which were shipped to its jobsites in Massachusetts from points outside the Commonwealth of Massachusetts and during the same period the Company provided services valued in excess of \$50,000 to business organizations which are in commerce and do sufficient business to meet the Board's jurisdictional standards. The complaint alleges, the answer as amended admits, and I find that the Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

**II. THE LABOR ORGANIZATION INVOLVED**

The Union is a labor organization within the meaning of the Act.

**III. THE UNFAIR LABOR PRACTICES**

The principal issue in this case is whether in August 1974 the Company entered into a written collective-bargaining agreement with the Union which by its terms was effective retroactively from July 1, 1974.

The Company has had collective-bargaining relations with the Union for more than 5 years. During the term of the agreement which expired on June 30, 1974, a dispute developed between the Company and the trustees of the funds established under the contract. The Company had been late in making certain payments and for this reason the trustees fined the Company a total of \$60. This action infuriated Vincent Porciello, president of the Company, who refused to pay the fine. The further efforts of the trustees to collect the fine only aggravated the situation. Ultimately, Vincent Porciello decided to sever all dealings with the Union. According to Vincent Porciello, "The dispute was over being three days late [in making a payment to the trustees of the funds established pursuant

<sup>1</sup> See *South Burlington Mechanical and Electrical Contractors, Inc.*, 203 NLRB 807 (1973).

to the subsisting collective-bargaining agreement] and that was on one monthly payment . . . [W]hen [the Union] can't override a three day late payment [fine] and when I have paid \$96,000 last year in payments [to the trust funds]. I believe that is being unreasonable. And I don't want to deal with any organizations that are being unreasonable."

Vincent Porciello is the sole stockholder and the president and treasurer of the Company. The only other officer of the Company is his wife, Rita Porciello. Vincent Porciello's brother, Gabriel Porciello, is the general superintendent of the Company, but is not an officer or a stockholder. However, Gabriel Porciello signs business correspondence as vice president and several times mailed letters to the Union signed by himself as vice president of the Company. In this respect, Gabriel Porciello testified:

Q. And were you accustomed to signing all of your letters and correspondence with the title of vice president?

A. Yes.

Q. So you held yourself out to be vice president, even though you have testified that you have no official capacity?

A. Right . . . I sign it vice president, just for a matter of . . . if you want to call it prestige or what. But when I correspond with general contractors, I do have an authority . . . to make minor monetary changes in contracts and so on and so forth.

Gabriel Porciello further testified that his brother Vincent knew that he signed correspondence as vice president and never directed him to discontinue the practice.<sup>2</sup> So far as the record shows, the only person who has authority to act for the Company in the absence of Vincent Porciello is his brother Gabriel. As general superintendent he is responsible for supervising and coordinating the fieldwork performed by the Company, he corresponds with the general contractors, he orders materials, he supervises the men, and he deals with the Union with respect to on-the-site problems.

The collective-bargaining procedure between the Union and the contractors with whom it has bargaining relationships has been for the Union first to negotiate an agreement with the Painting and Decorating Contractors of Eastern Massachusetts, Inc., on behalf of the membership of the Association, and thereafter to offer the same agreement to independent contractors who are not members of the Association but whose employees are represented by the Union. The Company is not a member of the Association but, in accordance with the described practice, entered into agreements with the Union in 1969 and 1973. The 1969 agreement between the Company and the Union is signed on behalf of the Company by Vincent Porciello as president. The 1973 agreement, however, instead of being signed by Vincent Porciello bears a signature stamp with his name, which Vincent Porciello testified he authorized his secretary, Genevieve Connors, to affix.

The 1973 contract expired by its terms on June 30, 1974. Although negotiations for its renewal were in progress, a strike was called by the Union against the contracting employers, including the Company, which lasted from July 1 until July 10.<sup>3</sup> The practice of the Union is to refuse to furnish employees to contractors with whom it does not have a contractual relationship. This was known to Vincent Porciello. In order to permit certain work to continue during the strike Vincent Porciello arranged, with the consent of James Damery, business manager of the Union, to have his employees transferred temporarily to the payroll of another contractor whose employees were not on strike. The arrangement was discontinued when the strike ended on July 10 and the Company's employees returned to work.

The negotiations between the Union and the Association were successfully concluded on July 9, 1974. The two parties entered into an agreement for a term effective from July 1, 1974, through June 30, 1976. It took about a week for the contract to be reproduced. Thereafter, Dominic Seretto, the Union's business agent who services the Company's employees, delivered two unsigned copies of the contract to the Company; one for the Company to retain and the other for the Company to execute and to return to the Union. Twice during July and early August Seretto stopped at the premises of the Company to pick up the executed agreement but it was not given to him. On another occasion Seretto in a telephone conversation asked Vincent Porciello when he was going to sign the contract. The latter merely replied that he had been out of town. According to Vincent Porciello, "I had made up my mind that at the start of this year [1974] that I was not signing any labor organization contracts whatsoever." However, there is no evidence in the record that he communicated his intention to the Union or even to his brother, Gabriel.

The Union's business manager, James Damery, testified that on August 12 he had a telephone conversation with Gabriel Porciello who informed him that the contract has Vincent Porciello's signature on it and that it is in the mail. The contract, which under the Employer's signature bears the date August 11, 1974, was received at the Union's office about August 15. With respect to the execution and delivery of the 1974 collective-bargaining agreement by the Company, Gabriel Porciello testified as follows: He had a telephone conversation with Damery wherein Damery informed him that unless the contract was signed by the Company the union men would immediately stop working for the Company. This posed a serious problem as the Company was engaged in a project which it was obliged to complete on schedule. Gabriel Porciello instructed the Company's secretary, Genevieve Connors, to affix Vincent Porciello's signature stamp to the contract and cause it to be delivered to the Union. Gabriel Porciello explained, "I believe that I took it upon myself at that time, because I did feel an obligation to the contractor and to the owners. That, because Vince [Vincent Porciello] was away and out of the country, I felt that my obligation at that time was greater to the general contractor and owners, that I

testimony conflicts with the testimony of Gabriel Porciello or with the testimony of James Damery.

<sup>3</sup> Unless otherwise indicated all dates refer to 1974.

<sup>2</sup> As a witness Vincent Porciello was evasive, muddily combative, and uncertain in his recollection of events. I find that Vincent Porciello was an unreliable witness. I do not credit Vincent Porciello to the extent that his

continued the work. Because I did only have like a week to ten days left to complete the project."<sup>4</sup>

Gabriel Porciello testified that in his conversation with Damery he told Damery that he was not authorized to sign the contract and Damery made it clear that unless the contract was signed immediately the men would not be permitted to work. Gabriel Porciello further testified that he also told Damery that only Vincent Porciello had authority to execute the union agreement. It is noted that Gabriel Porciello did not testify that he informed Damery that Vincent Porciello was unavailable to sign the agreement. Furthermore, even if Vincent Porciello was in Puerto Rico at the time the contract was executed, it was quite possible for Gabriel Porciello to have reached Vincent Porciello by telephone and to have obtained his permission to affix Vincent Porciello's signature stamp to the contract. Thus, the record does not establish any reason why Damery or anyone else acting for the Union should have suspected that the signature of Vincent Porciello on the contract was not affixed pursuant to the direction of Vincent Porciello.

Within 3 to 5 days after Vincent Porciello returned from Puerto Rico, according to Gabriel Porciello, he informed his brother "that I took it upon myself to stamp his signature to the agreement" in order that the painters would not leave the job. Vincent Porciello gave no instructions to his brother Gabriel about the matter and did not communicate with the Union in any manner to inform the Union that his signature had been affixed to the contract without his authority.

When the strike was settled and the union employees returned to work on July 10, the Company put into effect the wage rates called for by the terms of the newly negotiated agreement and for the months of July and August, as required by the contract, union dues were deducted from the wages of its employees and remitted to the Union, contributions to the trustees for the various funds established under the 1974 contract were made, and the Company filled out and sent to the Union and the trustees appropriate report forms with respect to these payments. Vincent Porciello testified, "it was a necessity in order for me to stay in business [to abide by the terms of the newly negotiated agreement], because the men seemed to know before the Employer as when they get their raises and when they don't get their raises." Although the Company continued to employ members of the Union until sometime in December, beginning with September it ceased making contributions to the funds as required by the terms of the 1974 contract and also ceased remitting checked-off dues to the Union.

Between February 26 and November 25 the manager of the trust funds established under the contract sent the Company a series of letters. The first letters requested payment of the fines which totaled \$60. The succeeding letters became more importunate about the matter until the Company finally was notified that it was being placed in the "Risk Pool" established under the contract, which, among other detriments, requires the Company to post

\$5,000 to guarantee its future payments to the funds. The letter also threatened the Company that its employees might be removed from their jobs. On December 9 the fund manager wrote to the Company's employees advising that their employer was delinquent in its contributions to the funds and notifying them that they may be removed from their jobs until the Company meets its obligations to the funds. The Company did not send any reply to the fund manager, but on December 17, 1974, Vincent Porciello sent the following letter to the Union:

In the past 15 years we have had fairly good relations, and I hope it will continue for the next 15 years.

If you insist on Demanding the fines against A.B.C. Drywall Co. Inc., we will be forced to terminate our agreement with the Painters Union and seek Employees from other Organizations.

Last year we paid in excess of \$87,000.00 to Painters, Carpenters, and Laborers Health and Welfare Benefits. Our books were audited by some Unions and found to be in 100% order.

If you wish to resolve this matter by removing the fines, I will bring H & W payments up to date. I think your fining A.B.C. Drywall Co. Inc. for being a few days late in making a few payments is ridiculous regarding our past record.

Six days later, on December 23, Vincent Porciello wrote to the Union:

On Friday December 20, 1974 Mr. Pat. Santo, of Painters D.C. #35 told my men to leave the job they were working on; and if they continued working they would have their books taken away from them.

We have not received any answer to the letter we sent Painter's D.C. #35 December 17, 1974. (Copy Inclosed)

We are considering your act of removing men without notifying A.B.C. Drywall Co., Inc. to be your answer. If you do not notify A.B.C. Drywall Co., Inc. by Jan. 2, 1975 that the Painters D.C. #35 will supply us with men, we will seek others Employees to do our Taping.

This Decision will be final.

#### Conclusions

It is hornbook law that "[o]ne may be bound by an agreement to which his signature is affixed by procurement, adoption, or ratification, as well as though it had been written by his own hand. . . . A person may, by reason of his act or conduct, be estopped to assert that he did not sign a contract or to deny that his signature is genuine."<sup>5</sup>

<sup>4</sup> Gabriel Porciello also testified that the Company's union employees returned to work on July 10 when the strike ended. Thereafter, at various times, Business Agent Seretto, informed him that unless the collective-

bargaining agreement was executed by the Company the men would not be permitted to work.

<sup>5</sup> 17 *Corpus Juris Secundum* 737.

Likewise, “[s]ilence with full knowledge of the facts may manifest affirmation and thus operate as ratification.”<sup>6</sup>

Vincent Porciello knew that the union employees would not work unless the Company executed the contract which had been negotiated between the Union and the Association. With this knowledge he continued to employ members of the Union from July 10 when the strike ended until mid-December. Initially, the Company observed the terms of the newly negotiated agreement, and for the months of July and August submitted to the Union and to the trustees of funds established under the contract the “Employer’s Report Form” detailing the amounts due under the terms of the contract, and remitted to the Union the dues that had been checked off from the employees’ wages and to the trustees the contributions to the funds. This conduct signified an intention on the part of the Company to accept the contract. In mid-August Vincent Porciello was advised by his brother Gabriel that in order to keep the men on the job Gabriel had caused Vincent’s signature stamp to be affixed to the contract and the executed contract to be delivered to the Union. Vincent Porciello did not repudiate his brother’s action. Vincent Porciello did not inform the Union that the executed contract had been delivered without his authority. By accepting the benefits of the contract, by observing the terms of the agreement, at least until mid-October,<sup>7</sup> thereby signifying an intention to become a party to the contract, and by failing timely to repudiate Gabriel Porciello’s action in causing the contract to be executed with the signature of Vincent Porciello and delivered to the Union, the Company is estopped to assert that the contract had not been validly executed and is deemed to have ratified the execution of the agreement. I find, therefore, that the Company is a party to and is bound to the terms of the collective-bargaining agreement with the Union effective as of July 1, 1974, a copy of which is in evidence as General Counsel’s Exhibit 4.

Respondent has repudiated the July 1, 1974, contract with the Union and has ceased recognizing the Union as the representative of the employees in the unit covered by the agreement. By so doing Respondent has refused to bargain collectively, as defined by Section 8(d), and thereby has violated Section 8(a)(5) of the Act. Such conduct interferes with and restrains employees in the exercise of the rights guaranteed in Section 7 to engage in self-organization, to form, join, and assist labor organizations, and to bargain collectively through representatives of their own choosing and thereby violates Section 8(a)(1).

While it is of minimal significance because it will not affect the remedy recommended in this case, there is a question as to when the Company’s violations of the Act began. As of about October 15, 1974, the Company suspended payments to the trust funds established under the contract and to the Union for dues checked off from employees’ wages. Initially this was done to put pressure on the Union and the trustees to rescind the \$60 fine and did not reflect an intention to alter, modify, or repudiate the agreement. Although the suspension of the described

payments may have constituted a breach of the contract, it was not a refusal to bargain collectively as the term is defined in Section 8(d). On December 17 the Company threatened the Union that if the fine is not rescinded the Company will terminate the agreement. Then on December 23 the Company wrote to the Union complaining that a business agent had instructed its employees to leave the job and stating that “[i]f you do not notify A.B.C. Drywall Co., Inc. by Jan. 2, 1975 that the Painters D.C. #35 will supply us with men, we will seek other Employees to do our Taping.” The evidence shows that, as the dispute over the fine intensified, threats and counterthreats were exchanged until finally Respondent took the position that it was not bound by the July 1, 1974, contract. Respondent’s position evolved gradually starting from October 15, 1974, when the Company first suspended payments under the contract. While there is no act which precisely fixes the date and time when Respondent declared itself free of the contract, I am of the opinion that its December 23 letter effectively severed its contractual relations with the Union and I find, therefore, that Respondent’s unfair labor practices began as of said date.

#### IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Company 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 the Company has engaged in unfair labor practices, I shall recommend that it cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act.

I have found that the Company has failed to bargain collectively with the Union as the representative of an appropriate collective-bargaining unit of its employees by unlawfully repudiating the collective-bargaining agreement it had entered into with the Union and by withdrawing recognition from the Union. The copy of the contract in evidence in this case as General Counsel’s Exhibit 4 correctly reflects the agreement between the Company and the Union. In order to remedy the violations of the Act committed by the Company, I shall recommend that it shall cease and desist from refusing to recognize the Union as the representative of the employees in the unit covered by the contract, and from refusing to observe and to comply with the terms of the contract. Also, I shall recommend that Respondent make its employees whole for any losses they may have suffered by reason of Respondent’s unlawful repudiation of the July 1, 1974, agreement and that Respondent make all payments required to be made by it under the terms of the agreement, including

month. The Company made the required payments for the months of July and August. The payments for September, which were the first payments the Company failed to make, became due on October 15.

<sup>6</sup> Williston, on Contracts, 3d ed., § 278, pp. 256-257, 262-265

<sup>7</sup> It would appear from the exhibits in evidence that checked-off dues and trust fund contributions became due 15 days after the end of each

payments to the Union of union dues required to have been deducted from the wages of its employees and payments to the trustees of the funds, established under the terms of the agreement, of contributions as set forth therein.

Upon the basis of the foregoing findings of fact, and upon the entire record in this case, I make the following:

#### CONCLUSIONS OF LAW

1. By failing to observe and to comply with the terms of the collective-bargaining agreement that it entered into with the Union effective as of July 1, 1974, by repudiating said agreement, and by withdrawing recognition from the Union as the representative of its employees covered by said contract thereby refusing to bargain collectively with the Union, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

2. The appropriate collective-bargaining unit is composed of all painters and tapers of Respondent employed at its 11 Grant Street, Woburn, Massachusetts, office, exclusive of all other employees, guards and supervisors as defined in Section 2(11) of the Act.

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

Upon the basis of the foregoing findings of fact, conclusions of law, and the entire record in this proceeding, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

#### ORDER<sup>8</sup>

Respondent A.B.C. Drywall Company, Inc., Woburn, Massachusetts, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to recognize the Union as the duly selected collective-bargaining representative of the employees in the appropriate collective-bargaining unit described above.

(b) Refusing to observe and to comply with the terms and provisions of the collective-bargaining agreement entered into between the Company and the Union which is effective from July 1, 1974, through June 30, 1976.

(c) 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 is deemed necessary to effectuate the policies of the Act:

(a) Make whole its employees for any losses suffered by them by reason of Respondent's failure and refusal to observe and to comply with the terms of the collective-bargaining agreement entered into with the Union effective July 1, 1974.

(b) Promptly remit to the Union and to the trustees of the funds established under the aforesaid collective-bargaining agreement all sums due to the Union pursuant to the checkoff provisions of the agreement and all sums due to the trustees pursuant to the appropriate provisions of the agreement.

(c) 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 to analyze the amounts due under the terms of this recommended Order.

(d) Post at its place of business in Woburn, Massachusetts, copies of the attached notice marked "Appendix."<sup>9</sup> Copies of said notice, on forms provided by the Regional Director for Region 1, after being duly signed by Respondent's representative, shall be posted by it 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.

(e) Notify the Regional Director for Region 1, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

<sup>8</sup> In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

<sup>9</sup> In the event that the Board's 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 recognize Painters District Council No. 35, a/w International Brotherhood of Painters and Allied Trades, AFL-CIO, as the collective-bargaining representative of all painters and tapers employed by us, exclusive of all other employees, guards and supervisors as defined in Section 2(11) of the National Labor Relations Act.

WE WILL observe and will comply with the terms and provisions of the collective-bargaining agreement which we have entered into with Painters District Council No. 35, a/w International Brotherhood of Painters and Allied Trades, AFL-CIO, which is effective from July 1, 1974, through June 30, 1976.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their choosing, and to engage in any other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities.

WE WILL make whole our employees for any losses suffered by them by reason of our unlawful repudiation of the aforesaid contract.

WE WILL remit to the above-named Union all dues required to have been checked off by us pursuant to the terms and provisions of said agreement and we will remit to the trustees of the various funds established under the terms of the agreement all sums of money

owing to them from us in accordance with the terms and the provisions of the agreement.

A.B.C. DRYWALL COMPANY,  
INC.