American Distributing Company, Inc. *and* General Teamsters, Chauffeurs, Warehousemen & Helpers, Local 386, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 32-CA-3293

September 30, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On March 3, 1982, Administrative Law Judge David G. Heilbrun 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,[1] 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, American Distributing Company, Inc., Modesto, California, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

[1] We hereby disavow the gratuitous comments made by Administrative Law Judge Heilbrun in the penultimate paragraph of the fact section of his Decision, entitled "Findings of Fact and Resultant Conclusions of Law," regarding the bureaucratic operation of the Union's pension trust fund.

DECISION

STATEMENT OF THE CASE

DAVID G. HEILBRUN, Administrative Law Judge: This case was heard at Modesto, California, on September 16 and 17, 1981, based on a complaint alleging that American Distributing Company, Inc., herein called Respondent, violated Section (8)(1) and (5) of the Act by unilateral discontinuance of contributions to a pension plan, assertedly done without notification to or bargaining with General Teamsters, Chauffeurs, Warehousemen & Helpers, Local 386, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union.

Upon the entire record,[1] my observation of witnesses, and consideration of post-hearing briefs,[2] I make the following:

FINDINGS OF FACT AND RESULTANT CONCLUSIONS OF LAW

These parties have had a collective-bargaining relationship since about 1954, which led to the establishment of a typical pension plan for employees funded by company contributions.[3] The rate of such contributions is contractually geared to hours worked by employees, ranging from a monthly amount for full-time service down to mere hourly amounts for limited part-time employment. The most recent collective-bargaining agreement between the parties was effective from May 1, 1977, through April 30, 1980.[4] This agreement was actually reached in September 1977, but to have retroactive effect. Contemporaneously Respondent executed a union pension certification,[5] this having already been done by the Union. The signature of plant manager Bart Perdue appeared below words of protest "as per the previous agreement." Merle Mensinger, Respondent's credit/-personnel manager and joint owner, and August Sommerfeld, Respondent's negotiator at the time as a representative of the Sequoia Employers Council, each testified that they had harbored longstanding dissatisfaction with the Teamsters pension plan at this point in 1977 of again yielding to it, and that this opposition was expressed most clearly at the time to Union Representatives Norbert Miller and John Souza.

On February 21, 1980, Respondent sent the Union a standard notice of desire to terminate "any written, expressed or implied agreements, and any agreements by reference or otherwise," and to meet for single-employer bargaining pursuant to Section 8(d). This letter was signed by Robert Lee who, with Kenneth Huggins, both as Sequoia Employers Council representatives, would chiefly negotiate for Respondent. By this time Sommerfeld was removing himself from regular negotiations for clients, and Souza was to primarily represent the Union.[6]

[1] I grant the General Counsel's unopposed motion to correct the transcript in six particulars.

[2] At pp. 2 and 19 of Respondent's brief I read the date May 1, 1981, as May 1, 1980.

[3] Respondent maintains its office and place of business in Modesto, California, where it is engaged in the nonretail wholesaling of lumber and other building materials, annually purchasing and receiving goods or services valued in excess of $50,000 directly from suppliers located outside California. On these admitted facts, I find that Respondent is an employer engaged in commerce within the meaning of Sec. 2(6) and (7) of the Act, and otherwise that the Union is a labor organization within the meaning of Sec. 2(5).

[4] The appropriate unit which this case concerns is one of all full-time and regular part-time truckdrivers, lift truck operators, lumber handlers, clerks and tallymen, combination yard and servicemen, leadermen and/or working foremen, employed at Respondent's Kansas Avenue location, with customary exclusions.

[5] As to economics the certification simply called for a 55-cent contribution for all hours worked, with 5-cent increases to this amount on each anniversary date of the contract.

[6] All dates and named months hereafter are in 1980, unless shown otherwise.

Souza soon telephoned Sommerfeld and the two met preliminarily and informally. On the conflict of testimony as to what was said during this meeting, I credit Sommerfeld that he essentially groused about the pension plan as long abhorred by the Company, and he verbalized the spectre of Respondent refusing to pay into the fund beyond termination date of the existing contract. Lee then chancedly met Souza in early April, and again a conflict exists about the brief discussion of that time. As with the Sommerfeld exchange above, I am not convinced that Souza was sufficiently attuned to remarks made, nor that his recollection is particularly reliable. Here, too, I credit Lee to the extent of believing that he commented about the Teamsters pension plan versus a long-sought company-sponsored profit-sharing plan, and made at least verbal reference to inevitably discontinuing contribution toward the former.

The parties commenced formal negotiations on May 1 by Lee and Huggins meeting with Souza, who presented a brief list of union demands including one for increase in pension contributions. Numerous meetings followed this, in which Respondent's representatives pressed for acceptance of a profit-sharing plan in lieu of the Teamsters pension plan. In fact Respondent did cease any contributions from and after May 1, and this was first openly disclosed in a letter dated September 23 from Mensinger to the pension trust in which he referred to the absence of a contract with the Teamsters since May 1 and that contributions had not been made nor did Respondent "intend to . . . as long as this condition exists."

Governance of this pension plan is, as typically so, by trustees of the Western Conference of Teamsters. The trust in turn engages Northwest Administrators as an administrative agent, one of whose functionaries is Judie Turner, a contract supervisor. Respondent's failure to pay was first documented by the trust office issuing notice of delinquency, a mailgram and a form letter, all sent to Respondent within a 10-day period in late July. The summarizing letter of July 28 noted lack of pension contributions for May and June, which warranted referral of the matter to collection attorneys. A copy of this letter went to the Union.

As a separate line of correspondence, and in accordance with policies of the time, a contract review clerk with Northwest Administrators issued form letters on August 7 and again September 9 advising the Union that no new labor contract had been received in reference to American Distributing, and this was increasingly tending to conflict with the fund's ability to accept, retain, and invest any contributions as might have come in since last contract expiration date. Such letters also alluded to the necessity of a pension certification pertaining to any new labor agreement. A letter of similar import was sent to the parties on October 21, this time with more insistent request for advice on the status of things.

On November 21, Turner sent the following to both parties by certified mail:

> Our records indicate that your Labor Agreement, covering the employees reported under the employer account number listed above, expired as of April 30, 1980. As of this date, we have not received a copy of the renewed agreement. (Please note that if you have already forwarded a written Labor Agreement and a signed Employer-Union Pension Certification to this office for the above-referenced account, please disregard this letter.)
>
> This letter is to notify you that if a written agreement is not furnished to us within thirty (30) days from the date of this letter, no further contributions will be accepted, all contributions received by the Trust during the period when no written Labor Agreement was in effect shall be deposited in a separate account, and any annuities inadvertently purchased during that period will be cancelled or adjusted. Additionally, the Employer Pension Account will be dropped.
>
> We would appreciate it if you would send us a copy of all written Labor Agreements covering the time period May 1, 1980 through this date.

Souza testified that this came to his attention on November 24, and in an exchange of telephone calls shortly following he learned, assertedly for the first time, that contributions had not been made to the pension fund since May. Confirming the last of these contacts, Souza advised Turner in writing that the parties were in negotiations. He thereupon sent Respondent a certified letter dated December 8 requesting that the delinquency be cured within 5 days, without which Souza would seek NLRB relief. A negotiating session also took place that day, at which time certain modified proposals of the Union were presented that included a continuing demand for increase in the Teamsters pension plan contributions but did not rule out consideration of profit-sharing on which the Union needed more information. When matters did not appreciably change, Souza filed the charge upon which this proceeding is based on December 29.

On this fact situation, the General Counsel contends that plainly an unlawful unilateral change in terms and conditions of employment has been made, and no anticipated defense can avoid finding a violation of the Act. Respondent does raise all and more of the anticipated defenses, arguing as follows:

> 1. Contract Law—that events contemporaneous with reaching the 1977–80 contract created a condition causing the entire pension plan dynamics to expire with the contract.
>
> 2. Section 302(c)(5)—that policies of the trust, and correspondence relative thereto, taken in connection with the provisions of Section 302(c)(5) of the Act,[7] removed any entitlement of the trust to accept and retain contributions after May 1.
>
> 3. Waive—by the Union's inaction in the face of employer advice.
>
> 4. Consent—by the Union's unconcern with whether or not contributions were suspended.

[7] This provision of the statute makes lawful the payment into a trust fund established by a representative of employees (in an industry affecting commerce), which fund exists for the sole and exclusive benefit of employees of such a paying employer, and their families and dependents.

5. Section 10(b)—that expiration of six months from May 1 made the unfair labor practice charge untimely when filed in December.

In *Harold W. Hinson, d/b/a Hen House Market No. 3*, 175 NLRB 596 (1969), enfd. 428 F.2d 133 (8th Cir. 1970), the Board held that pension fund plans once part of a collective-bargaining agreement constitute an aspect of employee wages and terms and conditions of employment which survives expiration of the contract. For this reason an employer may not unilaterally alter the payments into such a plan unless: (1) The changes are made subsequent to the parties reaching a bargaining impasse and the union has rejected the changes prior to the impasse, (2) the employer demonstrates that, at the time the changes were made, the union did not represent a majority of the unit employees or that the employer had a good-faith doubt, based upon objective considerations, of the union's continuing majority status, or (3) the union has waived its right to bargain regarding the changes. Here Respondent did not even present its profit-sharing plan until transmitting it by letter in early July, while the Union's stance on modified proposals showed that as late as December it was still willing to consider this alternative. Thus, the first exception to *Hinson* is not present, and no good-faith doubt of the Union's continuing majority status. The matter of waiver is what remains, and here Respondent points both to circumstances of the 1977 contract wrap-up and to verbal exchanges of spring 1980.

Mensinger and Sommerfeld each testified that Respondent had agreed to contributions for the pension plan and over the years 1977–80 because of strike threat at the time of reaching that contract, but their remarks to Souza indicated they meant only to agree for the coming 3-year period. I credit their recollections on this subject over Souza's inability to remember whether or not such verbalisms passed. I have previously found that connective remarks emanated from Sommerfeld and Lee prior to the advent of negotiations, but more importantly Lee and Huggins testified that there was express reaffirmation of Respondent's intention to discontinue the contributions, a contrary course being termed "like throwing money out the window." I find such a remark to have been made by again crediting Respondent's witnesses over Souza, who on general demeanor grounds and from standpoints of hesitancy or evasiveness did not impress as a particularly reliable witness. I temper this belief with the further observation that it does not seem an intent to deceive is at work with Souza, simply that he did not give particular attention to dialogue that was not directly in point to reaching a renewal contract in terms of the subjects he had first presented for bargaining. Notably profit-sharing was not among these, and Souza would be more aptly concerned with fundamental lanaguage matters and economics, rather than extending a sensitive or sympathetic ear to a matter of mere total disconcern or irrelevance to him.[8] However, the law has settled that technical waiver of a substantial subject for bargaining must occur in clear and unequivocal fashion. The loose verbalisms of 1977 and early 1980 do not approach this level, and the fact that Souza brushed them off without designing to argue back, resist, or protest does not permit the concept of waiver to attach to his conduct or inaction. This conclusion subsumes Respondent's contentions as literally also raised from contract law principles and from the assertion that Souza, on behalf of the Union, consented to the discontinuance. Neither is it established that the pension certification executed in 1977 is a basis of finding waiver. Pertinent language from this document reads:

> The undersigned employer and Union hereby certify that a *written* pension agreement (in most cases a Teamsters collective bargaining agreement) is in effect between the parties providing for contributions to the Western Conference of Teamsters pension trust fund and that such pension agreement conforms to the trustee policy on acceptance of employer contributions (as reproduced on the reverse of this form) and is not otherwise detrimental to the plan. A complete copy of the pension agreement (labor contract) is attached or, if not yet available, will be furnished to the area administrative office as soon as available. The undersigned further certify that the following information is true and correct and accurately reflects the provisions of the pension agreement. . . .

Such language does no more than ministerially attach to the enabling collective-bargaining agreement for verification and collection purposes, without doing more than make reference to a contract termination date and decidedly not as to constitute a clear or unequivocal waiver of the policy basis upon which such a benefit should survive the contract expiration. See *Wayne's Olive Knoll Farms, Inc., d/b/a Wayne's Dairy*, 223 NLRB 260 (1976). Finally Respondent points to excised language in the 1977–80 agreement by which, but for agreed nullifying action by the parties, the trust would have had to consent to any discontinuance of payments. Here, too, there is a failing of unequivocalness, for striking this certain Section 704 had to do only with the nature and mechanics of the relationship between Respondent and the trust, but not as to create a waiver of employee rights. Cf. *Henry Cauthorne, an Individual, t/a Cauthorne Trucking*, 256 NLRB 721 (1981).

It is also unavailing for Respondent to raise Section 10(b). It was not Souza's obligation to speculate on whether or not Respondent would follow through on its grumblings and avoid a financial obligation to which it was committed by operation of labor-management relations law. The monolithic workings of the trust and its administrative arm does not admit to convenient or natural inquiry by a business representative for one of the

[8] Souza had canvassed his membership following the employer's reopener notice of February 21, and it would be the expressed objectives of this group that would most fully motivate his awarenesses going into negotiations. Notably he had opened bargaining with a demand for a $1-per-hour pay increase in each of the proposed 3-year terms, and by December 1980 was still seeking half this amount. Such mainstream goals are more than enough to divert the Union's chief negotiator, apart from the jaded reaction that would exist upon hearing opposition rhetoric on the long-festering topic.

locals served, and while I am satisfied that correspondence as early as July would have at least come to Souza's passing attention, even this did not expressly show that contributions were being missed. Indeed it is Respondent that failed to do the simple act of officially advising Souza in writing of such a critical step when taken in May, or of even providing his office a copy of their notifying letter to the trust on September 23. The sheer inflexibility, bureaucratic inertia, and lack of cross-communication among and between the large entities involved is nowhere better illustrated than by seeing how almost fully a month after Respondent boldly assumed their position, and did so in writing, that the contract review clerk for Northwest Administrators would still ploddingly do the futile act represented by her letter of October 21. I see no reason to fix a date of commission of unfair labor practices, for 10(b) purposes, any earlier than November 24, and thus hold the charge to be timely.

Accordingly I render a conclusion of law that Respondent, by unilaterally discontinuing contributions to the Western Conference of Teamsters Pension Trust Fund, without prior notification to or bargaining with the Union, has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

Disposition

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

ORDER[9]

The Respondent, American Distributing Company, Inc., Modesto, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Unilaterally ceasing payments into the Union's pension trust fund.

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

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

(a) Make its employees whole by paying all pension fund contributions, as provided in the expired collective-bargaining agreement, which have not been paid, and which would have been absent Respondent's unlawful unilateral discontinuance of such payments, and continue such payments until such time as Respondent negotiates in good faith to a new agreement or to an impasse.[10]

(b) Post at its Modesto, California, place of business copies of the attached notice marked "Appendix."[11] Copies of said notice, on forms provided by the Regional Director for Region 32, after being duly signed by Respondent's authorized representative, shall be posted 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 ensure that said notices are not altered, defaced, or covered by any other material.

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

[9] 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.

[10] I do not provide for interest on such amounts, nor does this recommended Order contemplate that further proceedings might not be necessary to fully remedy any losses attributable to this unlawful action. See *Henry Cauthorne, supra.*

[11] In the event 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 unilaterally cease making payments into the Western Conference of Teamsters Pension Trust Fund as established in a past collective-bargaining agreement between us and General Teamsters, Chauffeurs, Warehousemen & Helpers, Local 386, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

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

WE WILL make employees whole by paying all pension trust fund contributions which were stopped in May 1980, and continue such payments until such time as we negotiate a new agreement with the Union or bargain to an impasse.

AMERICAN DISTRIBUTING COMPANY, INC.