

Gary Zimmerman, a Sole Proprietorship d/b/a Zimmerman Painting and Decorating and Trustees of the Central Valley Painting and Decorating Industry Health and Welfare Trust Fund and Brotherhood of Painters, Decorators, and Paperhangers of America, Local No. 294, International Brotherhood of Painters and Allied Trades, AFL-CIO, Party to the Contract. Case 32-CA-10206

May 9, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND OVIATT

Upon a charge filed on March 10, 1989, by the Trustees of the Central Valley Painting and Decorating Industry Health and Welfare Trust Fund, the General Counsel of the National Labor Relations Board issued a complaint on April 14, 1989, alleging that the Respondent has violated Section 8(a)(5) and (1) by failing and refusing to make contractually mandated fringe benefit trust fund payments. Copies of the complaint were served on the Respondent. The Respondent filed a timely answer denying the commission of any unfair labor practices and asserting certain affirmative defenses.

On June 13, 19, and 23, 1989, the parties jointly moved the Board to transfer the proceeding to the Board without benefit of a hearing before an administrative law judge and submitted a proposed record consisting of formal papers and the parties' stipulation of facts with attached exhibits. On August 29, 1989, the Board issued an order approving the stipulation, granting the motion, and transferring the proceeding to the Board. The Acting General Counsel and the Respondent have filed briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

On the record, the Board makes the following findings.

I. JURISDICTION

The Respondent is a California sole proprietorship with an office and place of business in Sacramento, California, where it provides painting and decorating services on a nonretail basis. During the 12 months preceding the execution of the stipulation of facts, the Respondent, in the course and conduct of his business operations, provided services valued in excess of \$50,000 to the Department of Corrections for the State of California, an exempt entity which but for its exempt status would meet one of the Board's jurisdictional standards, other than the indirect inflow or indirect outflow standards. Accordingly, we find that the

Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. LABOR ORGANIZATION

The General Counsel alleged, the Respondent admits, and we find that the Brotherhood of Painters, Decorators, and Paperhangers of America, Local No. 294, International Brotherhood of Painters and Allied Trades, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICE

A. Issue

The issue presented is whether the Respondent violated Section 8(a)(5) and (1) by failing and refusing to make trust fund payments required by the collective-bargaining agreement for its employees represented by the Union.

B. Facts

The Respondent provides painting and decorating services. In April 1987, the Respondent entered into an individual "me-too" collective-bargaining agreement with the Union that incorporated by reference, and bound the Respondent to, the terms of a master collective-bargaining agreement between the Union and the Fresno County Chapter of the Painting and Decorating Contractors Association of California. As a result of this action the Respondent and the Union have been parties to a collective-bargaining agreement of the type permitted under Section 8(f) of the Act. The Union, by virtue of Sections 8(f) and 9(a) of the Act, has been the exclusive bargaining representative of employees in the following unit:

All full-time and regular part-time employees employed by Respondent in Fresno, Madera, Kings and Tulare counties, California, performing work within the jurisdiction of The Brotherhood of Painters, Decorators and Paperhangers of America, Local No. 294, International Brotherhood of Painters and Allied Trades, AFL-CIO, herein called the Union, including journeymen and apprentice painters, tapers, and texturers, excluding office clerical employees, guards, and supervisors as defined by the Act.

Under the terms of this agreement, the Respondent was obligated to make certain monthly fringe benefit trust fund contributions on behalf of unit employees to the Fund for the term of the individual agreement.

At all times material, the Respondent has been experiencing financial difficulties, including but not limited to cash-flow problems. Between September 1, 1988, and December 31, 1988, the Respondent employed unit employees for whom it was obligated to make

monthly fringe benefit trust fund contributions due during the month following accrual and totaling \$32,708. The Respondent did not make these payments. During the period October 1, 1988, to June 1989, the Respondent has paid creditors a total amount exceeding \$33,000. At various times from September 1988 through January 1989, the Respondent negotiated with the Fund alternative methods of satisfying its obligation, through deferment of payments and assignment to the Fund of payments due the Respondent from a general contractor, but none of these methods were successful. At least as of September 1989, when the parties submitted briefs in this case, the Respondent had not yet paid any part of the \$32,708 owed to the Fund, and the Respondent had not gone out of business or filed a petition pursuant to Chapter 11 of the Bankruptcy Code. At all material times, the Respondent has been willing to discuss and has discussed with the Fund its continuing obligation and current temporary problems in making the Fund contributions.

C. Contentions of the Parties

The Respondent acknowledges and concedes that it owes the amounts set forth in the stipulation but that it is simply unable to pay such amounts at this time. Relying on the dissent in *Rapid Fur Dressing*, 278 NLRB 905 (1986), the Respondent contends that its financial inability to pay is a temporary situation that constitutes a breach of the collective-bargaining agreement but does not amount to a repudiation of the agreement in violation of Section 8(a)(5) and (1) of the Act. The Respondent urges the Board to adopt that dissent and find that where, as here, an alleged refusal to bargain is based simply on financial inability to pay, the Board should not act “to enforce the contract and serve as [the Charging Party’s] collection agency for the Respondent’s financial arrearages” *Id.* at 909. The Respondent further urges the Board to adopt the criteria set forth in the dissent in *Hiysota Fuel Co.*, 280 NLRB 763 (1986), that “when an employer’s actions are temporary . . . necessitated by forces beyond the employer’s control (e.g., financial problems), do not precipitate a strike, and the employer further continues to acknowledge and discuss its contractual obligations, the employer has not acted to undermine or obstruct bargaining.” *Id.* at 764. The Respondent asserts that it has been willing to discuss its financial inability to meet its payments and is willing to bargain with the Charging Party concerning repayment. Thus, it argues, there has been no repudiation of the contract and, therefore, it has not violated Section 8(a)(5) and (1) of the Act.

The General Counsel, relying, inter alia, on *Rapid Fur Dressing* and *Hiysota Fuel*, argues that the Respondent is bound to the terms and conditions of the contract and that its alleged poor financial condition is

not an adequate defense to its failure to make monthly fringe benefit trust fund contributions. For these reasons, the General Counsel contends that the Respondent violated Section 8(a)(5) and (1) of the Act.

D. Analysis and Conclusions

The Respondent admittedly failed to make a series of contractually required fringe benefit trust fund contributions without prior notice to, or the consent of, the Union. The Respondent’s first affirmative defense for not making these payments is its claim that its conduct constitutes only a breach of contract and not an unfair labor practice. The Board has consistently rejected this theory and we continue to do so here. See *Rapid Fur Dressing*, supra; *Capitol City Lumber Co. v. NLRB*, 721 F.2d 546 (6th Cir. 1983), enfg. 263 NLRB 784 (1982). In adhering to this view, we agree that not every contract breach necessarily constitutes an unfair labor practice. Thus, we do not mean to say that every instance of a delayed payment rises to the level of a violation of Section 8(a)(5). On the basis of the parties’ submissions, here, however, we can properly find that the Respondent, beginning in September 1988, failed to make at least four successive contractually required payments into the trust fund, and that none of these payments had been made at least as late as September 1989, when the parties submitted briefs to the Board. This is more than a de minimis failure to adhere to contractually mandated terms and conditions of employment. See *Hiysota Fuel Co.*, supra at 763 fn. 4. The Respondent’s second affirmative defense is its claim that it is unable to make the payments because of its poor financial condition. However, a claim of economic necessity, even if proven, does not constitute an adequate defense to an allegation that an employer has unlawfully failed to abide by provisions of a collective-bargaining agreement. See *Raymond Prats Sheet Metal Co.*, 285 NLRB 194 (1987); *Air Convey Industries*, 292 NLRB 38, 39 (1988); *NLRB v. Manley Truck Line*, 779 F.2d 1327 (7th Cir. 1985), enfg. 271 NLRB 679 (1984).

Contrary to our dissenting colleague, we would not find that the Respondent’s offer to negotiate with the Union over its failures to adhere to the agreement warrants a finding that the Respondent did not violate the Act. The collective-bargaining agreement required that payments be made according to a given formula at given times. The Respondent’s offer to negotiate was essentially an offer to make payments on a schedule other than that specified in the agreement. The duty to bargain in good faith, however, requires that the parties honor the agreement without demanding bargaining over changes until the period specified in Section 8(d).

Finally, we are unable to see how our dissenting colleague’s test would not logically apply also to contract terms such as wages or medical insurance. It

would appear to immunize an employer who, during the term of an agreement, cuts employees' wages by one-half or ceases paying health insurance premiums, so long as he does not state that he is repudiating the agreement and can show (1) that temporary financial difficulties make it advisable for him to use the money to pay other creditors and (2) that he offered to negotiate with the union over how he might pay the employees and reimburse their medical expenses at some later time. We do not agree that such conduct should be dismissed as a mere breach of contract.

Accordingly, we find that the Respondent has violated Section 8(a)(5) and (1) by failing to make the contractually required fringe benefit trust fund contributions.

CONCLUSIONS OF LAW

1. Gary Zimmerman, a Sole Proprietorship d/b/a Zimmerman Painting and Decorating is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Brotherhood of Painters, Decorators and Paperhangers of America, Local No. 294, International Brotherhood of Painters and Allied Trades, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. The appropriate collective-bargaining unit is:

All full-time and regular part-time employees employed by Respondent in Fresno, Madera, Kings and Tulare counties, California, performing work within the jurisdiction of The Brotherhood of Painters, Decorators and Paperhangers of America, Local No. 294, International Brotherhood of Painters and Allied Trades, AFL-CIO, including journeymen and apprentice painters, tapers, and texturers, excluding office clerical employees, guards, and supervisors as defined by the Act.

4. Since on or about April 1987, the above-named labor organization has been and is now the exclusive bargaining representative of all employees in the appropriate unit for the purposes of collective bargaining by virtue of Sections 8(f) and 9(a) of the Act.

5. The Respondent has committed unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act by failing and refusing to remit fringe benefit trust fund contributions for September through December 1988 totaling \$32,708.

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

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices in violation of Section 8(a)(5) and (1) of the Act, we shall order it to cease

and desist, and to take certain affirmative action designed to effectuate the policies of the Act.

We have found that the Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to transmit fringe benefit trust fund contributions. In order to remedy these unfair labor practices, we shall order the Respondent to transmit the fringe benefit trust fund contributions on behalf of the unit employees to the Central Valley Painting and Decorating Industry Health and Welfare Trust Fund, with any interest or other sums applicable to the payments to be computed in accordance with the Board's decision in *Merryweather Optical Co.*, 240 NLRB 1213 (1979). We shall also order the Respondent to make the unit employees whole for any losses they may have suffered as a result of its failure to make the contractually required fringe benefit trust fund contributions, *Kraft Plumbing & Heating*, 252 NLRB 891 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), and with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

ORDER

The National Labor Relations Board orders that the Respondent, Gary Zimmerman, a Sole Proprietorship, d/b/a Zimmerman Painting and Decorating, Sacramento, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with the Union by failing and refusing to make contributions into contractually required fringe benefit trust funds.

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

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

(a) Transmit all fringe benefit trust fund contributions which have been unlawfully withheld, with interest pursuant to the collective-bargaining agreement and make whole the employees in the unit for any losses directly attributable to the withholding of those contributions, with interest.

(b) Preserve and, on 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 amount of backpay due under the terms of this Order.

(c) Post at its facility in Sacramento, California, copies of the attached notice marked "Appendix."¹ Cop-

¹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Rela-

ies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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

MEMBER OVIATT, dissenting.

The issue in this case is whether the Respondent's failure to make contractually required fringe benefit trust fund contributions violated Section 8(a)(5) and (1) of the Act. I disagree with the majority and find that the Respondent's actions constitute only a breach of the parties' contract and not a violation of the Act.

In *Hiysota Fuel Co.*, 280 NLRB 763 (1986), Board Member Johansen, in dissent, argued that under certain limited circumstances, unilateral action by an employer which changes employees' terms and conditions of employment should, at most, be deemed a breach of contract and not an unfair labor practice. Specifically, this would occur when the employer's actions were temporary in nature, necessitated by forces beyond the employer's control such as financial problems, did not precipitate a strike, and where the employer continued to acknowledge and discuss its contractual obligations.

In the instant case, the General Counsel and the Charging Party concede that the Respondent has experienced numerous financial difficulties which have caused a severe cash-flow problem. Although it is undisputed that the Respondent failed to make contractually required trust fund payments from September through December 1988, it is also clear that the Respondent applied the money it would have paid into the union trust funds to other pressing debts in an attempt, albeit unsuccessful, to solve its financial problems. The Respondent has also attempted in good faith to bargain with the Union over alternative methods of satisfying its obligations. Based on the foregoing, I cannot find that the Respondent violated the Act. I would find, contrary to my colleagues, that where an

employer has offered and sought to bargain with the union over its temporary inability to make payments, that conduct constitutes, at most, a breach of its contract and not a repudiation of its contractual obligations in violation of the Act. Therefore, I would dismiss the complaint.

APPENDIX

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

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with the Brotherhood of Painters, Decorators, and Paperhangers of America, Local No. 294, International Brotherhood of Painters and Allied Trades, AFL-CIO by failing to make contractually required fringe benefit trust fund contributions.

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

WE WILL transmit the fringe benefit trust fund contributions which we have unlawfully withheld, with interest, pursuant to the collective-bargaining agreement between ourselves and the Union.

WE WILL make whole our employees in the unit for any losses directly attributable to our withholding of the contributions, with interest. The appropriate unit is:

All full-time and regular part-time employees employed by Respondent in Fresno, Madera, Kings and Tulare counties, California, performing work within the jurisdiction of the Brotherhood of Painters, Decorators and Paperhangers of America, Local No. 294, International Brotherhood of Painters and Allied Trades, AFL-CIO, including journeymen and apprentice painters, tapers, and texturers, excluding office clerical employees, guards, and supervisors as defined by the Act.

GARY ZIMMERMAN, A SOLE PROPRIETORSHIP D/B/A ZIMMERMAN PAINTING AND DECORATING

tions Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."