303 NLRB No. 26

SDR

D--2026
Ludlow, MA

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

A.L.A. EXCAVATORS LTD. AND
A.J. & JOHNSON CONSTRUCTION, INC.,
A SINGLE EMPLOYER

and

Case 1--CA--26936

MASSACHUSETTS LABORERS' DISTRICT
COUNCIL, a/w LABORERS' INTERNATIONAL
UNION OF NORTH AMERICA, AFL--CIO

May 30, 1991

DECISION AND ORDER

By Chairman Stephens and Members Devaney and Raudabaugh

On January 29, 1990, the General Counsel of the National Labor Relations Board issued a complaint alleging that the Respondent has violated Section 8(a)(5) and (1) and 8(d) of the National Labor Relations Act by, inter alia, failing and refusing to pay fringe benefit amounts due under the 1988--1991 collective-bargaining agreement. The Respondent filed an answer, a first amended answer, and a second amended answer to the complaint.

On February 14, 1991, the General Counsel filed a motion to transfer case to the Board, to amend the complaint, and for summary judgment. On February 19, 1991, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent did not file a response.

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

Ruling on Motion for Summary Judgment

In its second amended answer, the Respondent admits all of the allegations in the complaint except for the allegations in paragraphs 13(b) and 14. The Respondent also admits that it owes fringe benefit payments of $16,258.28.[1] The General Counsel, together with his Motion for Summary Judgment, filed a motion to amend the complaint by deleting paragraphs 13(b) and 14. We grant the motion to amend the complaint. We find that the allegations in the amended complaint are true, and that there is no dispute as to any material fact in this case. Accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

Findings of Fact

I. Jurisdiction

At all times material, Respondent A.L.A. Excavators Ltd., a corporation, and Respondent A.J. & Johnson Construction, Inc., a corporation, have been affiliated business enterprises with common officers, ownership, directors, management, and supervision; have formulated and administered a common labor policy affecting employees of said operations; have shared common premises and facilities; have provided services for and made sales to each other; and have interchanged personnel with each other. Accordingly, A.L.A Excavators Ltd. and A.J. & Johnson Construction, Inc. constitute a single business enterprise and a single employer within the meaning of the Act. (They shall be referred to collectively as the Respondent.)

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[1] The General Counsel asserts that the $16,258.28, which the Respondent admits it owes, is for the period of June 22, 1989, through December 1, 1990.

The Respondent is engaged at various jobsites as a road construction contractor in the construction industry. It has an office and a place of business in Ludlow, Massachusetts, where during the calendar year ending December 31, 1989, in the course and conduct of its business operations, it provided services valued in excess of $50,000 for enterprises within the Commonwealth of Massachusetts which are themselves directly engaged in interstate commerce. During the calendar year ending December 31, 1989, the Respondent, in the course and conduct of its business operations, purchased and received at its Ludlow facility products, goods, and materials valued in excess of $50,000 directly from points outside the Commonwealth of Massachusetts. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

The following constitutes a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All laborers employed by members of the Associations and the employers who have authorized said Associations to bargain on their behalf, including Respondent, but excluding guards and supervisors as defined in the Act.

At all times material, the Associated General Contractors of Massachusetts, Inc., and the Building Trades Employers' Association of Boston and Eastern Massachusetts, Inc. (the Associations), have been organizations composed of various employers engaged in the construction industry, and which exist for the purpose, inter alia, of representing their employer-members in negotiating and administering collective-bargaining agreements with various labor organizations, including the Union.

On or about June 1, 1988, the Associations and the Union entered into a collective-bargaining agreement (the 1988--1991 agreement), which by its terms is effective for the period June 1, 1988, through May 31, 1991.

On or about June 16, 1988, the Respondent entered into an ''Acceptance of Agreement and Declaration of Trust'' which bound the Respondent to the terms and conditions of employment of the 1988--1991 agreement. By virtue of the 1988--1991 agreement, at all times material, the Union, by virtue of Section 9(a) of the Act, has been, and is, the exclusive representative of the employees in the unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

Since on or about June 22, 1989, the Respondent has failed and refused to pay the fringe benefit amounts which have become due under articles 11, 12, 13, 14, and 15 of the 1988--1991 agreement to unit employees. By this act, the Respondent has failed and refused, and is failing and refusing, to bargain collectively with the representative of its employees, and has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

Conclusions of Law

By failing and refusing since June 22, 1989 to pay the fringe benefit amounts that have become due under Articles 11, 12, 13, 14, and 15 of the 1988--1991 agreement, the Respondent has failed and refused to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, and by these acts has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has violated 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 purposes of the Act.

We shall order the Respondent to pay the fringe benefit amounts that have become due under articles 11, 12, 13, 14, and 15 of the 1988--1991 agreement including the amount of $16,258.28, which the Respondent in its answer acknowledges that it owes, for the period June 22, 1989, through December 1, 1990, with interest and other sums applicable.[2]

We shall also order the Respondent to make its employees whole for any losses they may have suffered as a result of the Respondent's failure to make the contractually required benefit fund payments in the manner prescribed in Kraft Plumbing & Heating, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981). This shall include reimbursing employees for any contributions they themselves may have made, with interest, for the maintenance of any fund after the Respondent ceased making the benefit fund payments. Concord Metal, 295 NLRB No. 94, slip op. at 8--9 (June 30, 1989). Interest on any money due and owing employees shall 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, A.L.A. Excavators Ltd. and A.J. & Johnson Construction, Inc., a single employer, Ludlow, Massachusetts, its officers, agents, successors, and assigns, shall

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[2] Because the provisions of employee benefit fund agreements are variable and complex the Board does not provide at the adjudicatory stage of the proceeding for the addition of interest at a fixed rate on unlawfully withheld fund payments. Any additional amounts owed with respect to the funds will be determined in accordance with the procedure set forth in Merryweather Optical Co., 240 NLRB 1213, 1216 fn. 7 (1979).

1. Cease and desist from

(a) Failing and refusing to bargain with Massachusetts Laborers' District Council, a/w Laborers' International Union of North America, AFL--CIO as the exclusive bargaining representative of the employees in the bargaining unit by failing and refusing to pay fringe benefit amounts that have become due under articles 11, 12, 13, 14, and 15 of the 1988--1991 agreement.

(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) Pay the fringe benefit amounts that have become due under articles 11, 12, 13, 14, and 15 of the 1988--1991 agreement, with interest, as set forth in the remedy section of this decision.

(b) Make whole the unit employees for any losses they may have suffered because of the Respondent's failure to pay fringe benefit amounts that have become due under articles 11, 12, 13, 14, and 15 of the 1988--1991 agreement, with interest, as set forth in the remedy section of this decision.

(c) Post at its facility in Ludlow, Massachusetts, copies of the attached notice marked ''Appendix.''[3] Copies of the notice, on forms provided by the Regional Director for Region 1, 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

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[3] 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 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.''

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.

Dated, Washington, D.C. May 30, 1991

James M. Stephens, Chairman

Dennis M. Devaney, Member

John N. Raudabaugh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The 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 Massachusetts Laborers' District Council, a/w Laborers' International Union of North America, AFL--CIO as the exclusive representative of the employees in the bargaining unit by failing and refusing to pay fringe benefit amounts that have become due under articles 11, 12, 13, 14, and 15 of the 1988--1991 agreement.

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 pay the fringe benefit amounts that have become due under articles 11, 12, 13, 14, and 15 of the 1988--1991 agreement, including the amount of $16,258.28, with interest.

WE WILL make you whole, with interest, for any losses to you resulting from our failure to pay fringe benefit amounts that have become due under articles 11, 12, 13, 14, and 15 of the 1988--1991 agreement.

A.L.A. EXCAVATORS LTD.
AND A.J. & JOHNSON
CONSTRUCTION, INC.

(Employer)

Dated ______________ By ____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Thomas P. O'Neill, Jr. Federal Building, 10 Causeway Street, Sixth Floor, Boston, Massachusetts 02222-1072, Telephone 617--565--6739.