Adirondack Construction Corporation *and* District Council of Carpenters of the United Brotherhood of Carpenters and Joiners of America, Local 229. Case 3–CA–16571

March 13, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT AND RAUDABAUGH

Upon a charge filed by the District Council of Carpenters of the United Brotherhood of Carpenters and Joiners of America, Local 229 (the Union) on September 4, 1991, and an amended charge filed on October 8, 1991, the General Counsel of the National Labor Relations Board issued a complaint on October 10, 1991, against Adirondack Construction Corporation, the Respondent, alleging that it has violated Section 8(a)(5) and (1) by discontinuing its obligations under the welfare and pension and dues-checkoff provisions of the collective-bargaining agreement. Copies of the complaint and notice of hearing were served on the Respondent. The Respondent filed a timely answer admitting all the factual allegations and asserting an affirmative defense.

On December 8, 1991, the General Counsel filed a motion to transfer proceeding to Board, to strike Respondent's affirmative defense, and for summary judgement. On December 18, 1991, the Board issued an order transferring the proceeding to the Board and Notice to Show Cause why the motion should not be granted. The Respondent filed no response.

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

On the entire record, the Board makes the following

Ruling on Motion for Summary Judgment

Although the Respondent has admitted all the factual allegations in the complaint, including its failure since March 1, 1991, to abide by ''Article 1, Section 3 (Welfare and Pension)'' and ''Article XXI, (Dues check-off Service by Employer)'' of the collective-bargaining agreement with the Union, it asserts as an affirmative defense that: ''[d]ue to cash flow problems [it] has not been able to make payments since March 1991. . . . [It] expects to make payments within the next 60 days.''[1]

It is well settled that an employer who is a party to an existing collective-bargaining agreement violates Section 8(a)(5) and (1) of the Act when it modifies the terms and conditions of employment established by that agreement without obtaining the consent of the Union. *Rapid Fur Dressing*, 278 NLRB 905, 906 (1986). Here the Respondent has admitted that it has unilaterally discontinued certain of its obligations under the contract. It attempts, however, to defend its conduct by asserting, as an affirmative defense, that it lacks the financial ability to make the required payments. Such an economic necessity claim, even if proven, does not constitute an adequate defense to an allegation that an employer has unlawfully failed to abide by the provisions of a collective-bargaining agreement. *Tammy Sportswear Corp*., 302 NLRB 860 (1991); *Raymond Prats Sheet Metal Co*., 285 NLRB 194, 196 (1987); *International Distribution Centers*, 281 NLRB 742, 743 (1986); and *Hiysota Fuel Co*., 280 NLRB 763 (1986).[2] Accordingly, we find the affirmative defense submitted by the Respondent to be inadequate, and we grant the General Counsel's motion to strike it.

Because the Respondent has admitted all the facts material to a resolution of the unfair labor practice issues raised by the complaint, there are no material facts in dispute. In the absence of good cause to the contrary having been shown by the Respondent, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent maintains its principal office and place of business at Glens Falls, New York, where it has been engaged as a general contractor in the construction business. The Respondent during the past 12 months has derived gross revenue in excess of $50,000 from providing services to other enterprises, including

[1] The record does not set forth the actual substance of art. I, sec. 3, and art. XXI of the collective-bargaining agreement. That agreement or pertinent parts of it, have not been made part of the record, and the relevant complaint allegations only identify the nature of those articles as set forth above. Nevertheless, from such terse identification of the articles and the substance of the Respondent's affirmative defense, it is apparent that art. I, sec. 3 concerns payments owing to the welfare and pension fund or funds covered by the agreement, that article XXI relates to the checkoff of authorized dues and the remission of them to the Union, and that the gravamen of the complaint is that the Respondent has stopped making the required payments and remitting dues.

[2] As Member Oviatt stated in *Tammy Sportswear Corp*., supra, he is of the opinion that there may be limited circumstances in which an employer's financial inability to pay may constitute a defense to an allegation that it unilaterally and unlawfully ceased contractually required payments to a union benefit fund. To make this defense successfully, an employer must establish that it continued to recognize—and did not repudiate—its contractual obligations. To satisfy this requirement, an employer must prove that its nonpayment was followed by its request to meet with the union to discuss and resolve the nonpayment problem. In so doing, an employer demonstrates its adherence to the contract and the bargaining process. In such circumstances, Member Oviatt would find that an employer's nonpayment of contractually required benefit fund payments would not violate Sec. 8(a)(5) of the Act. Such circumstances, however, are not present in this case.

New York Telephone Co., which are engaged in interstate commerce. The Respondent also is a member of the Glens Falls Contractors Association (the Association), an association comprising various employers in the construction contracting industry who have delegated to the Association the authority to represent them for the purposes of collective bargaining. During the past 12 months, the members of the Association, in the course and conduct of their business operations located in New York State, collectively purchased and received goods and materials valued in excess of $50,000 that were transported to the businesses directly from points located outside the State of New York. At all times material, the Respondent has delegated authority to the Association to represent it for the purposes of collective bargaining with the Union. Accordingly, we find that the Respondent is an employer engaged in commerce within the meaning of Section 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 Union represents the following employees of the Respondent who constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All journeymen, foremen and apprentices.

About June 1, 1989, the Respondent and the Union entered into a prehire collective-bargaining agreement within the meaning of Section 8(f) of the Act, effective June 1, 1989, to May 31, 1992. By virtue of the principles established by the Board in *John Deklewa & Sons, Inc*., 282 NLRB 1375 (1987), the Union has been, and is, the limited exclusive collective-bargaining representative of the employees in the unit for the purposes of bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

Although, as noted previously, the relevant contractual provisions are not in the record, we infer that article I, section 3 of the parties' collective-bargaining agreement requires the Respondent to make monetary contributions to certain welfare and pension funds[3] for and on behalf of the employees. Similarly, we infer that article XXI requires the Respondent to deduct union dues from employees' paychecks pursuant to valid checkoff authorizations and to remit them to the Union. The Respondent admits that since about March 1, 1991, it has failed to abide by the above provisions. Accordingly, we find that the Respondent has violated Section 8(a)(5) and (1) of the Act.

[3] In the event there is one fund for welfare and pension, the Decision and Order shall be amended accordingly.

CONCLUSIONS OF LAW

By ceasing during the term of the contract to abide by the contractual provisions concerning welfare and pension payments and dues checkoff on and after March 1, 1991, the Respondent has engaged in unfair labor practices 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 engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

We shall order the Respondent to make whole the unit employees by making all contributions that would have been paid into the welfare and pension funds but for the Respondent's unlawful discontinuance of payments[4] and to reimburse them for any expenses or loss of benefits they may have suffered as a result of the Respondent's discontinuing these payments, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981), the amounts to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). We shall also order the Respondent to make the Union whole for the Respondent's failure to abide by its obligations under the dues-checkoff provision in the contract, also with interest computed as described above.

ORDER

The National Labor Relations Board orders that the Respondent, Adirondack Construction Corp., Glens Falls, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain with District Council of Carpenters of the United Brotherhood of Carpenters and Joiners of America, Local 229 by failing to abide by its obligations under the welfare and pension and dues-checkoff provisions of the collective-bargaining 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) Make all contributions to the welfare and pension funds that have not been paid and that would have been paid in the absence of the Respondent's unlawful

[4] Because the provisions of employee benefit fund agreements are variable and complex, we leave to the compliance stage the question whether the Respondent must pay any additional amounts into the benefit fund in order to satisfy our ''make-whole'' remedy. *Merryweather Optical Co*., 240 NLRB 1213 (1979).

discontinuance of the payments, and make the employees whole, in the manner set forth in the remedy section of this decision.

(b) Comply with the terms of the dues-checkoff provision in the collective-bargaining agreement and remit to the Union dues checkedoff pursuant to that provision and valid authorizations and required by the agreement to be turned over to the Union by the Respondent, with interest as set forth in the remedy section of this decision.

(c) 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.

(d) Mail a copy of the attached notice marked ''Appendix''[5] to the Union and to all unit employees who were employed by the Respondent. Copies of the notice, on forms provided by the Regional Director for Region 3 after being signed by the Respondent's authorized representative, shall be mailed by the Respondent immediately upon receipt as above directed.

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

[5] 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.''

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 in good faith with District Council of Carpenters of the United Brotherhood of Carpenters and Joiners of America, Local 229, as the exclusive collective-bargaining representative of the unit by failing to abide by our obligations under the welfare and pension or dues-checkoff provisions of the collective-bargaining 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 make all contributions to the welfare and pension fund that have not been paid and that would have been paid in the absence of our unlawful discontinuance of the payments, and make unit employees whole, with interest.

WE WILL remit to the Union dues checked off pursuant to the collective-bargaining agreement and required to be turned over to the Union by us, with interest.

ADIRONDACK CONSTRUCTION CORP.