XMGM Refrigeration, Inc. *and* Automobile Mechanics' Local 701, Union & Industry Pension & Welfare Funds. Case 13–CA–29824

May 21, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

Upon a charge filed on November 6, 1990, by Automobile Mechanics' Local 701, Union & Industry Pension & Welfare Funds (the Charging Party), the General Counsel of the National Labor Relations Board issued a complaint on December 17, 1990, alleging that the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) and Section 8(d) 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 April 15, 1991, the parties jointly filed with the Board a motion 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 June 4, 1991, the Board issued an order granting the motion, transferring the proceeding to the Board, and approving the stipulation. Thereafter, the General Counsel and the Respondent filed briefs.

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

On the entire record in this case, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, an Illinois corporation with an office and place of business in Chicago, Illinois, is engaged in the sale and distribution of refrigerated carrier units. During the calendar or fiscal year preceding the issuance of the complaint, a representative period, the Respondent, in the course and conduct of its business operations, derived gross revenues in excess of $500,000. During the same period, the Respondent also sold and shipped from its Chicago, Illinois facility products, goods, and materials valued in excess of $50,000 directly to points outside the State of Illinois. 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 Automobile Mechanics' Local 701, International Association of Machinists & Aerospace Workers, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICE

The issue presented is whether the Respondent engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) and Section 8(d) of the Act by failing and refusing to make trust fund payments required by the collective-bargaining agreement for its unit employees represented by the Union.

A. *Facts*

The Respondent is engaged in the sale and distribution of refrigerated carrier units. The Respondent and the Union are parties to a collective-bargaining agreement effective by its terms from July 1, 1989, to June 30, 1992.[1] During the period of July 1, 1989, to December 21, 1990, the Respondent employed unit employees who worked under the contract.[2]

> All employees including mechanics, apprentices, helpers, and service maintenance employees, excluding office clerical employees, professional employees, guards and supervisors as defined in the Act.

Articles 6 and 7 of the contract require the Respondent to make employer contributions on behalf of unit employees to the health and welfare fund and the pension fund, respectively. Consistent with these contractual provisions, the Respondent made the employer contributions on behalf of unit employees beginning July 1, 1989. The Respondent submitted payments to the Charging Party, the administrator of the trust agreements which established the funds. Since June 1 and August 1, 1990, respectively, the Respondent, however, ceased making the required payments to the pension fund and the health and welfare fund without giving prior notice to the Union or the Charging Party.[3] Neither the Union nor the Charging Party consented to the Respondent's cessation of the required payments to the funds. In addition, there were no oral or written modifications to Articles 6 and 7 of the parties' contract.

In about early July 1990, the Respondent informed the Union's business representative that it was experiencing financial difficulties, but its intent was to pay

[1] The Charging Party is not signatory to this agreement.

[2] Since 1989, by virtue of Sec. 9(a) of the Act, the Union has been, and is, the exclusive representative of the employees in the following appropriate unit:

[3] The Respondent employed unit employees when it ceased making these payments.

all amounts due to the funds.[4] By a letter dated September 26, 1990, the Union proposed an agreement setting out terms for the closing of the Respondent's business operations, including a request that the Respondent ''pay any health insurance and pension through the date of shutdown.'' The Respondent did not execute the Union's proposed agreement. There have been no other written or oral proposals exchanged between the parties concerning the Respondent's payment of employer contributions to the funds.

By a letter dated August 2, 1990, counsel for the Charging Party notified the Respondent that it was ''seriously delinquent'' in making the required contributions to the funds and that past efforts by the Charging Party and the Union to obtain payment have been ''unsuccessful.'' Counsel for the Charging Party then requested immediate payment from the Respondent. Sometime after August 2, 1990, the Respondent made a partial payment of the employer contributions it owed the funds. The Respondent, however, still owes some employer contributions, the exact amounts of which are reflected by the Charging Party's records. No payments from the Respondent have been received by the Charging Party since October 1990.

B. *Contentions of the Parties*

The General Counsel contends that under Board law an employer violates Section 8(a)(5) and (1) of the Act by failing to pay the contractually required employer contributions to the pension and health and welfare funds without giving notice to or affording the union an opportunity to bargain. The General Counsel further argues that without the union's consent such employer action constitutes an unlawful modification of the terms and conditions of employment of unit employees established by the existing contract. The General Counsel seeks a finding of a violation of Section 8(a)(5) and (1) against the Respondent and requests that the remedy include the mailing of appropriate Board notices to employees.

The Respondent admits that it ceased making the required employer contributions to the funds. The Respondent, however, contends that it provided notice to the Union and afforded the Union an opportunity to bargain over the delinquent contributions. The Respondent also argues that the evidence shows that it reaffirmed and acknowledged to the Union its continuing obligation to make the required contributions and that it neither repudiated its contractual obligations nor proposed or implemented any changes in the contract terms. The Respondent further argues that the evidence shows that it told the Union that it intended to make full payment as soon as the money became available after the shutdown of its operations and that it notified the Union and the Charging Party of its inability to make timely payments to the funds because of financial difficulties. As an alternative argument, the Respondent urges the Board to reexamine and reject well-established Board precedent which holds that an employer's claim of financial inability to pay does not constitute an adequate defense to an allegation that an employer has violated Section 8(a)(5) and (1) of the Act by failing to abide by a provision of a collective-bargaining agreement.

C. *Discussion*

The record clearly shows that during the term of the contract the Respondent admittedly ceased making the required employer contributions to the health and welfare and pension funds for unit employees without prior notice to, or the consent of, the Union. The Respondent, however, asserts that the Union's September 26 proposed agreement concerning the shutdown establishes that the Respondent afforded the Union an opportunity to negotiate and bargain over these delinquent contributions. We disagree. The September 26 proposal merely indicates that the Union wanted the Respondent, inter alia, to make good on all of its outstanding financial obligations regarding unit employees in view of the purported impending shutdown of operations. Contrary to the Respondent's claim, the fact that the Union tendered a proposal for the shutdown does not establish that the Respondent offered to negotiate with the Union over the nonpayment of benefits.[5]

The Respondent also asserts that its failure to make these payments should be excused because it was then experiencing financial difficulties, but intended to pay the amounts due later. ''Neither a claim of economic necessity nor a lack of subjective bad-faith intent, even if proven, constitutes an adequate defense to an allegation that an employer has violated Section 8(a)(5) of the Act by failing to abide by provisions of a collective-bargaining agreement.''[6]

Accordingly, we find that the Respondent engaged in unfair labor practices within the meaning of Section

[4] Contrary to the Respondent's claim, par. 11 of the parties' stipulation of facts does not state that the Respondent told the Union that it intended to make full payment ''as soon as the funds became available after the shutdown of its business.'' We also reject that portion of the Respondent's brief indicating that ''Respondent is still in the process of negotiating with the company for which it was a distributor regarding the funds owed to Respondent for inventory returned by Respondent for reimbursement.'' This information was not included in the parties' stipulation of facts or the record.

[5] In fact, the record does not indicate whether the Union's proposal was solicited or that the Respondent even responded to it in any way. Indeed, the stipulation and the document, Exh. 6, merely establish that the Respondent did not execute the agreement.

[6] *Flood City Brass & Pump Co.*, 296 NLRB No. 28, slip op. at 2–3 (Aug. 22, 1989) (not reported in Board volumes), citing *International Distribution Centers*, 281 NLRB 742, 743 (1986); *Westinghouse Electric Corp.*, 278 NLRB 424, 432 (1986). See also *Tammy Sportswear Corp.*, 302 NLRB 860 (1991); *Martin & Keller Roofing Co.*, 297 NLRB 787 (1990).

8(a)(5) and (1) and Section 8(d) of the Act when it failed to make the contractually required fringe benefit trust fund contributions.

CONCLUSION OF LAW

By ceasing during the term of the contract to make contractually required payments to the pension fund and the health and welfare fund on and after June 1 and August 1, 1990, respectively, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) and Section 8(d) 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 pension fund and the health and welfare fund for all contributions that would have been paid but for the Respondent's unlawful discontinuance of payments[7] and to make unit employees whole for losses suffered as a result of the unlawful discontinuance of payments as set forth in *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). In addition, in view of the apparent shutdown of the Respondent's operations, we shall also order the Respondent to mail copies of an appropriate Board notice to all unit employees. See *P. J. Hamill Transfer Co.*, 277 NLRB 462, 463 (1985).

ORDER

The National Labor Relations Board orders that the Respondent, XMGM Refrigeration, Inc., Chicago, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Automobile Mechanics' Local 701, International Association of Machinists & Aerospace Workers, AFL–CIO by failing and refusing to make contractually required contributions to the pension and health and welfare 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) Make all contributions to the pension fund and the health and welfare fund that have not been paid since June 1 and August 1, 1990, respectively, and that would have been paid but for the Respondent's unlawful discontinuance of the payments, and make whole unit employees for any losses resulting from the Respondent's failure to pay the employer contributions to these funds, with interest, in the manner set forth in the remedy section of this decision.

(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 payment due under the terms of this Order.

(c) Mail a copy of the attached notice marked ''Appendix''[8] to the Union and to all unit employees employed by the Respondent on or after June 1, 1990. Such notice shall be mailed to the last known address of each employee. Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be mailed immediately upon receipt by the Respondent, as directed above. This notice shall not be 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.

[7] 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 funds in order to satisfy our ''make-whole'' remedy. *Merryweather Optical Co.*, 240 NLRB 1213 (1979).

[8] 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 mail and abide by this notice.

WE WILL NOT refuse to bargain with Automobile Mechanics' Local 701, International Association of Machinists & Aerospace Workers, AFL–CIO by failing and refusing to make contractually required contributions to the pension and health and welfare funds.

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 pension fund and the health and welfare fund that have not been

paid since June 1 and August 1, 1990, respectively, and that would have been paid but for our unlawful discontinuance of the payments, with interest.

WE WILL make whole unit employees for any losses resulting from our failure to pay the employer contributions to the pension fund and the health and welfare fund since June 1 and August 1, 1990, respectively, with interest.

XMGM REFRIGERATION, INC.