Amcan, Inc. ***and*** **Massachusetts Laborers' Benefit Funds.** Case 1–CA–28989

July 10, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

Upon a charge filed by the Massachusetts Laborers' Benefit Funds, the General Counsel of the National Labor Relations Board issued a complaint on February 13, 1992, against Amcan, Inc., the Respondent, alleging that it has violated Section 8(a)(5) and (1) of the National Labor Relations Act. Although properly served copies of the charge and complaint, the Respondent has failed to file an answer.

On June 8, 1992, the General Counsel filed a Motion for Summary Judgment. On June 10, 1992, 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 filed no response. The allegations in the motion are therefore undisputed.

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

Ruling on Motion for Summary Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. The complaint states that unless an answer is filed within 14 days of service, "all the allegations in the complaint shall be considered to be admitted to be true and shall be so found by the Board." Further, the undisputed allegations in the Motion for Summary Judgment disclose that the counsel for the General Counsel, by letter dated April 29, 1992, notified the Respondent that unless an answer was received by close of business May 21, 1992, a Motion for Summary Judgment would be filed.

In the absence of good cause being shown for the failure to file a timely answer, 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, a corporation with an office and place of business in Memphis, Tennessee, has been engaged as a contractor in the construction industry performing structural concrete formwork. At all times material, the Respondent has been engaged as a subcontractor of Granger Northern, Inc. on a jobsite in Burlington, Vermont.

Annually, the Respondent, in conducting its business operations, performs services within the State of Vermont valued in excess of $50,000 for employers directly engaged in interstate commerce, including Granger Northern, Inc. Annually, the Respondent, in conducting its business operations, purchases and receives at its Burlington jobsite goods and materials valued in excess of $50,000 directly from points located outside the State of Vermont. 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 Maine, New Hampshire and Vermont Laborers' District Council on behalf of Construction and General Laborers' Local 522, Burlington, Vermont, a/w Laborers' International Union of North America, AFL–CIO, the Unions, are labor organizations within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Since about March 4, 1991, the Respondent has recognized the Unions, without regard to whether the majority status of the Unions has ever been established, as the exclusive collective-bargaining representative of the employees in the following unit which is appropriate for purposes for collective bargaining within the meaning of Section 9(b) of the Act:

> All laborers employed by the Respondent, but excluding all other employees, guards, and supervisors as defined in the Act.

This recognition is embodied in a collective-bargaining agreement effective from June 1, 1990, through May 31, 1993, between the Unions and an Association consisting of Wexler Construction Company, Patrick F. Walsh and Sons, Inc., Miri Construction Co., Inc., Innamorati Bros., Inc., and C & S Company, Inc. The Association is an organization composed of employers engaged in the construction industry which exists in part to represent its employer-members in negotiating and administering collective-bargaining agreements. On or about March 4, 1991, 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 1990–1993 agreement then in effect between the Association and the Unions. For the period March 4, 1991, through May 31, 1993, the Unions have been the limited exclusive collective-bargaining representative of the employees in the unit.

Since about July 1, 1991, the Respondent has failed and refused to make contractually required fringe benefit fund payments to the following funds: Massachusetts Laborers' Health and Welfare Fund, Massachusetts Laborers' Pension Fund, Massachusetts Laborers' Legal Services Fund, and New England Laborers' Training Fund. These subjects relate to wages, hours, and other terms and conditions of employment and are mandatory subjects of bargaining.

CONCLUSIONS OF LAW

By its failure on and after July 1, 1991, to make contractually required fringe benefit fund payments, the Respondent 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 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 all contractually required payments it failed to make since about July 1, 1991.[1]

The Respondent shall also make its employees whole for any losses attributable to its failure to make the contractually required payments, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981). All payments to employees shall be made 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, Amcan, Inc., Memphis, Tennessee, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with the Maine, New Hampshire and Vermont Laborers' District Council on behalf of Construction and General Laborers' Local 522, Burlington, Vermont, a/w Laborers' International Union of North America, AFL–CIO, as the limited exclusive collective-bargaining representative of its employees in the bargaining unit by failing to make contractually required fringe benefit fund payments to the following funds: Massachusetts Laborers' Health and Welfare Fund, Massachusetts Laborers' Pension Fund, Massachusetts Laborers' Legal Services Fund, and New England Laborers' Training Fund.

(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) Continue in full force and effect all the terms and conditions of the collective-bargaining agreement with the limited exclusive representative of the employees in the following appropriate unit:

> All laborers employed by the Respondent, but excluding all other employees, guards, and supervisors as defined in the Act.

(b) Make all payments required pursuant to the collective-bargaining agreement including contractually required fringe benefit fund payments to the following funds: Massachusetts Laborers' Health and Welfare Fund, Massachusetts Laborers' Pension Fund, Massachusetts Laborers' Legal Services Fund, and New England Laborers' Training Fund.

(c) Make unit employees whole for any loss of benefits or other expenses suffered as a result of the Respondent's failure to make the contractually required fringe benefit fund payments, in the manner prescribed in the remedy section of this decision.

(d) 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 amounts due under the terms of this Order.

(e) Post at its facility in Burlington, Vermont, copies of the attached notice marked "Appendix."[2] 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 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.

[1] Because the provisions of employee benefit fund agreements are variable and complex, we leave to the compliance stage the question of whether the Respondent must pay any additional amounts into the benefit funds in order to satisfy our "make whole" remedy. See *Merryweather Optical Co.*, 240 NLRB 1213, 1216 (1979).

[2] 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."

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

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 collectively with the Maine, New Hampshire and Vermont Laborers' District Council on behalf of Construction and General Laborers' Local 522, Burlington, Vermont, a/w Laborers' International Union of North America, AFL–CIO, as the limited exclusive representative of the employees in the following unit:

> All laborers employed by the Respondent, but excluding all other employees, guards, and supervisors as defined in the Act.

WE WILL NOT fail or refuse to make contractually required fringe benefit fund payments to the following funds: Massachusetts Laborers' Health and Welfare Fund, Massachusetts Laborers' Pension Fund, Massachusetts Laborers' Legal Services Fund, and New England Laborers' Training Fund pursuant to our 1990–1993 agreement with the Unions.

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 continue in full force and effect our 1990–1993 agreement with the Union by making contractually required fringe benefit fund payments to the following funds: Massachusetts Laborers' Health and Welfare Fund, Massachusetts Laborers' Pension Fund, Massachusetts Laborers' Legal Services Fund, and New England Laborers' Training Fund.

WE WILL make our unit employees whole for any loss of benefits or other expenses suffered as a result of our failure to make contractually required payments to the fringe benefit funds.

AMCAN, INC.