Adolph's Construction Co., Inc. *and* Laborers International Union of North America Local No. 113, AFL-CIO. Case 30-CA-8639

18 April 1986

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS DENNIS AND JOHANSEN

Upon a charge filed by the Union on 4 January 1985, the General Counsel of the National Labor Relations Board issued a complaint on 15 February 1985 against the Company, the Respondent, alleging that it has violated Sections 8(a)(5) and (1) and 8(d) of the National Labor Relations Act. Although properly served copies of the charge and complaint, the Company has failed to file an answer.

On 17 April 1985 the General Counsel filed a Motion for Summary Judgment. On 25 April 1985 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 Company 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 10 days from service of the complaint, unless good cause is shown. The complaint states that unless an answer is filed within 10 days of service, "all of the allegations in the Complaint shall be deemed 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 Respondent filed an answer to the complaint on 27 February 1985 and that the Respondent withdrew its answer on 10 April 1985.

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 Company, a Wisconsin corporation, is engaged as a masonry contractor in the building and construction industry at its facility in Greenfield, Wisconsin. During the past calendar year ending 31 December 1984,[1] a representative period, the Respondent, in the course and conduct of its business operations, purchased and received products, goods, and materials valued in excess of $50,000 from suppliers located within the State of Wisconsin who received the products, goods, and materials directly from points outside the State of Wisconsin. 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 following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> Those employees described in Article I of the collective-bargaining agreement of 1 June 1982-31 May 1985.

Since at least 1980 the Respondent has been an employer-member of the Allied Construction Employers Association (ACEA), an organization composed of employers engaged in the building and construction industry, and which exists for the purpose, inter alia, of representing its employer-members in negotiating and administering collective-bargaining agreements with various labor organizations, including the Union. ACEA was authorized by the Respondent to bargain collectively on its behalf with the Union concerning wages, hours, and other terms and conditions of employment of the employees in the unit described above. Throughout this same period of time the Union has been recognized by ACEA and the Respondent as the exclusive collective-bargaining representative of the employees in the unit described above.

The Respondent and the Union were parties to a collective-bargaining agreement in effect for the period 1 June 1982 to 31 May 1985 covering the wages, hours, and working conditions of the employees in the unit described above. The Respondent has failed to continue in full force and effect the terms and conditions of the collective-bargaining agreement described above by failing at all times since 1 June 1984 to make contributions to various benefit funds on behalf of its employees as required by that collective-bargaining agreement. By letter dated 13 September 1984 the Respondent notified the Union of its action to withhold its contributions to the various benefit funds. Additionally, since 1 June 1984 the Respondent has failed to

[1] The complaint inadvertently refers to 21 December 1984

continue in full force and effect all the terms and conditions of the 1982–1985 agreement described above.[2] Since 1 June 1984 the Respondent has failed to bargain collectively and in good faith with the Union about these actions.

CONCLUSIONS OF LAW

1. By failing and refusing from 1 June 1984 to make the contributions to the various benefit funds that the 1982–1985 collective-bargaining agreement with the Union requires, the Company 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.

2. By failing and refusing from 1 June 1984 to continue in full force and effect all the terms and conditions of the 1982–1985 collective-bargaining agreement with the Union the Company 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.

3. By failing and refusing from 1 June 1984 to bargain collectively and in good faith with the Union about these modifications and abrogations of the 1982–1985 collective-bargaining agreement, the Company has engaged in unfair labor practices affecting commerce within the meaning of Sections 8(a)(5) and (1) and 8(d) 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 have found that the Respondent has refused and still refuses to make benefit contributions to various funds set forth in the 1982–1985 collective-bargaining agreement with the Union. We shall therefore order the Respondent to remit all contributions withheld from the various benefit funds, as required by the 1982–1985 agreement described above,[3] and to give effect retroactively to the agreement from 1 June 1984. The Respondent shall also reimburse its employees for any expenses ensuing from its unlawful failure to make such payments as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981).

ORDER

The National Labor Relations Board orders that the Respondent, Adolph's Construction Co., Inc., Greenfield, Wisconsin, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to remit contributions to various benefit funds, refusing to abide by the terms and conditions of the 1982–1985 collective-bargaining agreement, and from failing and refusing to bargain about modifications in the 1982–1985 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 contributions to the various benefit funds as required by the terms of the 1982–1985 collective-bargaining agreement; make whole unit employees for any expenses ensuing from its failure to make such contributions as provided in the remedy section of this decision; honor the 1982–1985 collective-bargaining agreement with the Union; and bargain about modifications of the 1982–1985 collective-bargaining agreement.

(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 benefit funds contributions due under the terms of this Order.

(c) Post at its facility in Greenfield, Wisconsin, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 30, 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

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[2] Unlike our dissenting colleague, we see no need to examine or discuss the extent of the Respondent's repudiation of its contractual and bargaining obligations in this case As the Respondent has filed no answer to the complaint or the Board's Notice to Show Cause, the allegations that the Respondent violated the Act are deemed admitted, and any other matters are not in issue

[3] Because the provisions of employee benefit fund agreements are variable and complex, the Board does not provide at the adjudicatory stage of a proceeding for the addition of interest at a fixed rate on unlawfully withheld fund payments 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 These additional amounts may be determined, depending on the circumstances of each case, by reference to provisions in the documents governing the funds at issue and, where there are no governing provisions, to evidence of any loss directly attributable to the unlawful withholding action, which might include the loss of return on investment of the portion of funds withheld, additional administrative costs, etc , but not collateral losses *Merryweather Optical Co* , 240 NLRB 1213 (1979)

[4] 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 "

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.

CHAIRMAN DOTSON, dissenting.

Contrary to my colleagues, and for the reasons fully set forth in my dissenting opinion in *Rapid Fur Dressing*, 278 NLRB 905 (1986), I would deny the General Counsel's Motion for Summary Judgment and dismiss the complaint in its entirety.

The Respondent has unilaterally ceased making contractually required payments to various benefit funds on behalf of its employees, and has also unilaterally failed to fully comply with its contract with the Union. As discussed fully in my dissenting opinion in *Rapid Fur*, a breach of contract is not necessarily an unfair labor practice; nor is the National Labor Relations Board a collection agency for parties hoping to recoup financial arrearages incurred by employers who have failed to comply with particular contractual terms. Rather, the Board should—indeed, it must—intervene only when, during the term of a contract, a party engages in conduct reflecting a substantial repudiation of its contractual and bargaining obligation. When, on the other hand, a party seeks to involve the Board in a dispute arising solely over contract compliance, the Board should not—indeed, it must not—become involved. My colleagues leave the details of the collection process "to the compliance stage" in fn. 3 of their opinion. They thus utilize Board resources of money and personnel to achieve a "remedy" where there is no proved violation. Worse yet, they open the door for a second appearance of this inconsequential matter before this Board. This Board, as my colleagues are aware, has a high backlog of undecided cases. Currently over 1200 cases are awaiting decision. This Board exists for the purpose of expounding the national labor policy in adjudicated cases which determine "the Board's reasonable interpretations and applications of the Act." *NLRB v. Action Automotive, Inc.*, 105 S.Ct. 984 (Feb. 19, 1985). So long as the Board continues to invite multiple appearances of matters which in no way involve the national labor policy, it will continue to waste its time and resources and delay consideration of those cases which make policy and expound law. There exist an infinitude of disputes which involve nonstatutory issues of concern only to particular parties. The charging party in such a case must be left to seek enforcement of the contract, and recoupment of any damages, through appropriate informal efforts, or through arbitral or judicial proceedings.

The instant case involves a matter which falls clearly within the latter category discussed above: a dispute arising solely over contract compliance, in which the Board should not become involved. In my view, the Respondent's conduct here constitutes nothing more than a contract violation, and the Charging Party's unfair labor practice charge constitutes nothing more than an attempt to have the Board enforce the contract and collect any delinquent benefit fund payments. For the reasons fully discussed in my dissenting opinion in *Rapid Fur*, I believe the Board errs in permitting itself to become enmeshed in such disputes. Accordingly, I would deny the General Counsel's Motion for Summary Judgment.

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 fail and refuse to bargain with the Union by refusing to remit contributions to the various benefit funds as required by the terms of our 1982–1985 collective-bargaining agreement with the Union.

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

WE WILL honor our 1982–1985 collective-bargaining agreement with the Union, including making contributions to the various benefit funds required by the terms of the 1982–1985 collective-bargaining agreement, and WE WILL make you whole for any expenses ensuing from our failure to make such contributions.

ADOLPH'S CONSTRUCTION CO., INC.