Charles Koffler, Lair Koffler, Steve Ferriea, Wilbert Boepple, Ben Gantt and Frank Wong, a Partnership, d/b/a Benkiser Electric *and* International Brotherhood of Electrical Workers, Local 595. Case 32–CA–8302

28 April 1987

DECISION AND ORDER

BY MEMBERS JOHANSEN, BABSON, AND STEPHENS

Upon a charge filed by the Union 22 August 1986, the General Counsel of the National Labor Relations Board issued a complaint 29 October 1986 against the Company, the Respondent, alleging that it has violated Section 8(a)(1) and (5) of the National Labor Relations Act.

Although the Respondent was properly served copies of the charge and complaint, it has failed to file a proper answer. Subsequent to the issuance of the complaint and pursuant to the Respondent's request, the Regional Attorney for Region 32 extended the date for submission of an answer to the complaint to the close of business on 24 November 1986. On 25 November 1986 the Regional Office received from the Respondent a one-paragraph "mailgram" that had been sent the previous day at 6:03 p.m. and which purported to deny "all charges set forth in the above-referenced case." The document failed to specifically admit, deny, or explain each of the facts alleged in the complaint, and there was no indication that copies of the document had been served on the other parties to the proceeding. On 31 December 1986 the Regional Office sent the Respondent a certified letter advising that its answer was procedurally defective since it did not meet the specificity and service requirements of Sections 102.20 and 102.21 of the Board's Rules and Regulations. The letter further stated that unless an answer in compliance with the Rules was received by 9 January 1987, the Regional Office would file a Motion for Summary Judgment with the Board. Additionally it is undisputed that the Regional Office, inter alia, advised the Respondent by telephone that its mailgram answer was procedurally defective and that summary judgment would be sought unless a satisfactory answer was received by the end of the week. Notwithstanding such notification, the Respondent has failed to submit a timely and proper answer to the complaint.

On 28 January 1987 the General Counsel filed a Motion for Summary Judgment, with exhibits attached. On 30 January 1987 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 a response to the Notice to Show Cause. Thereafter the General Counsel filed both a response to the Respondent's response to the Notice to Show Cause and a motion to accept the General Counsel's response.

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 of the allegations in the Complaint shall be deemed to be admitted to be true and may be so found by the Board." Further, the allegations in the Motion for Summary Judgment disclose that the Regional Office, by letter dated 31 December 1986, and by telephone conversation on 6 January 1987, notified the Respondent's counsel that the mailgram did not comply with the Board's Rules and that unless an answer which conformed to the Rules was forthcoming, a Motion for Summary Judgment would be filed. No such answer has been filed.

In its response to the Notice to Show Cause, the Respondent contends that from 27 October until 24 November 1986 its principal owner Charles Koffler was not present in the State and was therefore unavailable to meet with counsel to prepare an answer to the complaint. The Respondent maintains, however, that during this time its counsel M. Franklin Nichols III had several discussions with the Regional Office regarding his intent generally and specifically to deny each allegation of the complaint on behalf of his client. The Respondent also contends that after its 24 November request for additional time to file an answer was denied by the Regional Attorney, Nichols prepared the mailgram based on facts obtained from representatives of the Respondent, including some of the named parties. Finally, the Respondent contends that under all these circumstances the mailgram answer constitutes sufficient compliance with the Board's Rules and Regulations.

The Respondent also submitted the declarations of Koffler and Nichols in response to the Notice to Show Cause. Koffler stated that from 15 October through 30 November 1986 he was outside the State of California and unable to meet with his attorney and that, to the best of his knowledge, none of the other named Respondents or principals of the Company had knowledge of any matters men-

tioned in the complaint. Nichols essentially reiterated the contentions made in the Respondent's response and further stated that, except for the complaint, no notices or documents sent by the Board by certified mail regarding this case had been received by his office. In this regard, Nichols' declaration requested that the General Counsel produce "any such alleged registered notices."[1]

The Respondent's mailgram answer does not meet the specificity and service requirements of Sections 102.20 and 102.21 of the Board's Rules. Moreover, the Respondent's assertion that it sufficiently complied with the Board's Rules in view of the fact that its principal owner was not available in November 1986 fails to explain why the Respondent failed to file an adequate answer by 9 January 1987 and therefore does not constitute good cause within the meaning of Section 102.20 of the Board's Rules. See *Electro-Mechanical Industries*, 261 NLRB 467, 468 (1982).

Accordingly, in view of the Respondent's failure to file an answer that comports with the Board's Rules, and in the absence of good cause being shown for the failure to file a timely and proper 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 California partnership with an office and place of business in San Leandro, California, has been engaged in the sale and repair of electrical motors and pumps. During the year preceding the issuance of the complaint, a representative period, the Respondent, in the course and conduct of its business operations, purchased and received goods or services valued in excess of $50,000 directly from suppliers located outside the State of California. 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:

> All Working Foremen, Shop Journeymen "AA," Trouble Shooters, Shop Journeymen "A," Shop Journeymen "B," Tool Storeroom Keeper, Shop Coil Winder and Fractional Horsepower Motor Repairmen, Shop Laborers, Shop Helpers, Apprentices, M & F Journeymen "A," M & F Journeymen "B," M & F Journeymen "C," M & F Coil Winder "A," M & F Coil Winder "B," M & F Coil Winder "C," M & F Laborers "A," M & F Laborers "B," and M & F Laborers "C" employed by Respondent at its San Leandro, California facility; excluding all other employees, including clerical employees, supervisors, and guards, as defined in the Act.

Since at least 1978 and at all times material herein the Union has been the designated exclusive collective-bargaining representative of the Respondent's employees in the unit described above, and the Union has been recognized as such representative by the Respondent. Such recognition has been embodied in successive collective-bargaining agreements, the most recent of which was effective for the period 1 May 1984 to 30 April 1986.

Since at least 22 February 1986 and continuing to date the Respondent has failed and refused to make monthly contributions to various trust funds on behalf of unit employees, as required by the collective-bargaining agreement. The Respondent has engaged in such conduct during the term of the agreement and without prior notice to the Union, without having afforded the Union an opportunity to bargain as the exclusive representative of unit employees with respect to the conduct and its effects, and without the consent of the Union. Additionally, about 28 February 1986 the Respondent withdrew recognition from the Union as the collective-bargaining representative of the unit employees.

Based on the above, we find that the Respondent has, since 22 February 1986, refused to bargain collectively and in good faith with the Union as the exclusive representative of the unit employees in violation of Section 8(a)(5) and (1) of the Act.

[1] In the General Counsel's response to the Respondent's response to the Notice to Show Cause, the General Counsel submitted a photocopy of an envelope sent by certified mail from the Regional Office to the Respondent's counsel Nichols on 31 December 1986. The envelope indicates that on at least two occasions—2 and 7 January 1987—the Postal Service notified Nichols that a certified letter had been sent to him, and that the letter was subsequently returned to the Regional Office as unclaimed. In light of the Respondent's request for production of the Board documents sent by certified mail, we grant the General Counsel's unopposed motion to accept the response to the Respondent's response only to the extent of this submission. In any event, we note that the Respondent in its response to the Notice to Show Cause does not dispute the occurrence or substance of the 6 January 1987 telephone conversation with the Regional Office.

CONCLUSIONS OF LAW

1. By unilaterally failing and refusing to make monthly contributions to various trust funds, as required by the collective-bargaining agreement, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

2. By withdrawing recognition from the Union as the collective-bargaining representative of employees in the unit, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

3. By the aforesaid conduct, the Respondent has interfered with, restrained, and coerced the unit employees in the exercise of the rights guaranteed them by Section 7 of the Act and has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(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 paying contributions to the trust funds, as provided in the collective-bargaining agreement, which have not been paid,[2] and by reimbursing unit employees for any expenses ensuing from the Respondent's failure to make such required payments as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981). All payments to employees shall be made with interest as prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977). We also shall order the Respondent to bargain on request with the Union as the exclusive representative of the unit employees on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.[3]

ORDER

The National Labor Relations Board orders that the Respondent, Charles Koffler, Lari Koffler, Steve Ferriea, Wilbert Boepple, Ben Gantt and Frank Wong, A Partnership, d/b/a Benkiser Electric, San Leandro, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally failing and refusing to make monthly contributions to various trust funds on behalf of unit employees as required by the collective-bargaining agreement.

(b) Withdrawing recognition from International Brotherhood of Electrical Workers, Local 595 as the collective-bargaining representative of employees in the unit.

(c) 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 its employees whole by paying all trust fund contributions, as provided in the collective-bargaining agreement, which have not been paid, and by reimbursing unit employees for any expenses ensuing from the Respondent's unlawful failure to make such payments, in the manner set forth in the remedy section of this decision.

(b) On request, recognize and bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All Working Foremen, Shop Journeymen "AA," Trouble Shooters, Shop Journeymen "A," Shop Journeymen "B," Tool Storeroom Keeper, Shop Coil Winder and Fractional Horsepower Motor Repairmen, Shop Laborers, Shop Helpers, Apprentices, M & F Journeymen "A," M & F Journeymen "B," M & F Journeymen "C," M & F Coil Winder "A," M & F Coil Winder "B," M & F Coil Winder "C," M & F Laborers "A," M & F Laborers "B," and M & F Laborers "C" employed by Respondent at its San Leandro, California facility; excluding all other employees, including clerical employees, supervisors, and guards, as defined in the Act.

[2] Because the provisions of employee benefit fund agreements are variable and complex, the Board does not provide for interest at a fixed rate on fund payments due as part of a "make-whole" remedy. We therefore leave to further proceedings the question of any additional amount the Respondent must pay into the benefit fund in order to satisfy our "make-whole" remedy. These additional amounts may be determined, depending upon the circumstances of each case, by reference to provisions in the documents governing the fund at issue and, where there are no governing provisions, to evidence of any loss directly attributable to the unlawful action, which might include the loss of return on investment of the portion of funds withheld, additional administrative costs, etc., but not collateral losses. See *Merryweather Optical Co*, 240 NLRB 1213, 1216 fn. 7 (1979).

[3] The General Counsel has requested the inclusion of a visitatorial clause in the Order. A visitatorial clause authorizes the Board, for compliance purposes, to obtain discovery from the Respondent under the Federal Rules of Civil Procedure under the supervision of the United States court of appeals enforcing the Board's Order. Under the circumstances of this case, we find it unnecessary to include such a clause. Accordingly, we deny the General Counsel's request.

(c) Post at its facility in San Leandro, California, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 32, 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.

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

[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."

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 unilaterally fail and refuse to make monthly contributions to various trust funds on behalf of unit employees as required by our collective-bargaining agreement.

WE WILL NOT withdraw recognition from International Brotherhood of Electrical Workers, Local 595 as the collective-bargaining representative of employees in the unit.

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 our employees whole by paying all trust fund contributions, as provided in the collective-bargaining agreement effective 1 May 1984 through 30 April 1986, which have not been paid, and by reimbursing our unit employees, plus interest, for any expenses ensuing from our unlawful failure to make such required payments.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> All Working Foremen, Shop Journeymen "AA," Trouble Shooters, Shop Journeymen "A," Shop Journeymen "B," Tool Storeroom Keeper, Shop Coil Winder and Fractional Horsepower Motor Repairmen, Shop Laborers, Shop Helpers, Apprentices, M & F Journeymen "A," M & F Journeymen "B," M & F Journeymen "C," M & F Coil Winder "A," M & F Coil Winder "B," M & F Coil Winder "C," M & F Laborers "A," M & F Laborers "B," and M & F Laborers "C" employed by us at our San Leandro, California facility; excluding all other employees, including clerical employees, supervisors, and guards, as defined in the Act.

CHARLES KOFFLER, LARI KOFFLER, STEVE FERRIEA, WILBERT BOEPPLE, BEN GANTT AND FRANK WONG, A PARTNERSHIP, D/B/A BENKISER ELECTRIC