

Cindy and Harold F Fitzgerald d/b/a A 1 Wholesale Seamless Guttering and Local 36, Sheet Metal Workers International Association, AFL-CIO Case 14-CA-19008

October 14 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
JOHANSEN AND CRACRAFT

Upon a charge filed by the Union on June 19 1987 and an amended charge filed on July 27 1987 the General Counsel of the National Labor Relations Board issued a complaint on July 28 1987 against Cindy and Harold F Fitzgerald d/b/a A 1 Wholesale Seamless Guttering the Respondent alleging that it has violated Section 8(a)(1) and (5) of the National Labor Relations Act. Although properly served copies of the charge and complaint the Respondent has failed to answer.

On September 22 1987 the General Counsel filed a Motion for Default Summary Judgment. On September 28 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 no response. On August 25 1988 the Board issued a Supplemental Notice to Show Cause why the motion should not be granted. The Respondent again 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 Default 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 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 General Counsel by letters dated August 12 and 18 1987 notified the Respondent that unless an answer was received immediately 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 Default Summary Judgment.

On the entire record the Board makes the following

FINDINGS OF FACT

I JURISDICTION

The Respondent a Missouri partnership is engaged in the nonretail distribution and installation of seamless guttering at its facility in Pevely Missouri. In the course of its operations the Respondent annually performs services valued in excess of \$50 000 in States other than the State of Missouri. During the 12 month period ending June 30 1987 the Respondent purchased and received at its Pevely Missouri facility products goods and materials valued in excess of \$50 000 from other enterprises located within the State of Missouri each of which other enterprises had received the products goods and materials directly from points outside the State of Missouri. 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

Since about March 18 1987 a majority of the Respondent's employees in the unit designated the Union as their collective bargaining representative. Since about March 27 1987 the Respondent has recognized the Union as the employees representative. Recognition has been embodied in a letter of agreement binding the Respondent to a collective bargaining agreement effective until April 30 1989.

The unit of employees set forth in the collective bargaining agreement between the Respondent and the Union is a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.¹

At all times since March 18 1987 and at all material times since the Respondent signed the letter of agreement the Union by virtue of Section 9(a) of the Act has been and is the exclusive representative of the unit for the purposes of collective bargaining with respect to rates of pay wages hours of employment and other terms and conditions of employment.

Since about April 30 1987 and continuing to date the Respondent has been and is failing and refusing to comply with the terms and provisions of the current collective bargaining agreement by the following acts and conduct: (1) failing and refusing to pay to its employees in the unit the wage

¹ The unit description is set out in the agreement but was not included in the pleadings.

rates and overtime pay set forth in the agreement (2) failing and refusing to make fringe benefit contributions to the appropriate fringe benefit funds on behalf of the employees in the unit² and (3) failing and refusing to file periodic fringe benefit reports with the Union. By these acts the Respondent has repudiated the collective bargaining agreement.

On June 22, 1987, the Union by its attorney requested the Respondent to furnish it with certain information. The requested information consisted of written reports listing the Respondent's sheet metal employees and the amount of money that the Respondent owed to the trust funds. Since June 22, 1987, the Respondent has failed and refused and continues to fail and refuse to furnish the Union with the requested information. The information is necessary for and relevant to the Union's performance of its function as the exclusive collective bargaining representative.

Based on the above, we find that the Respondent since April 30, 1987, has failed to comply with the terms and provisions of the collective bargaining agreement, has failed to furnish the Union with information necessary and relevant to the Union's role as collective bargaining agent, and has thereby violated Section 8(a)(5) and (1) of the Act.³

CONCLUSIONS OF LAW

1. By failing and refusing to comply with the terms and provisions of the collective bargaining agreement, the Respondent has refused to bargain collectively with the Union and thereby 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 to supply the Union with necessary and relevant information, 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.⁴

We shall order the Respondent to file periodic fringe benefit reports with the Union. We shall also order the Respondent to provide the Union on request with information necessary for collective bargaining.

Having found that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to give full force and effect to the wages and overtime provisions of the collective bargaining agreement, the Respondent will be ordered to make all bargaining unit employees adversely affected by these actions whole for losses incurred by virtue of these actions⁵ in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), with interest on any amount due paid in the manner prescribed in *New Horizons for the Retarded*.⁶

Having further found that the Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to make fringe benefit contributions to the appropriate fringe benefit funds, we shall order the Respondent to make whole its unit employees by making all contributions that have not been paid and that would have been paid but for the Respondent's unlawful discontinuance of the payments.⁷ In addition, the Respondent shall reimburse unit employees for any expenses ensuing from the Respondent's failure to make such required payments⁸ as set forth in *Kraft Plumbing*, 252 NLRB 891 fn 2 (1980) enfd 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection Service* supra with interest as prescribed in *New Horizons for the Retarded* supra and to post an appropriate notice.

ORDER

The National Labor Relations Board orders that the Respondent Cindy and Harold F. Fitzgerald d/b/a A 1 Wholesale Seamless Guttering, Pevely, Missouri, its partners, officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Refusing to bargain with Local 36 Sheet Metal Workers International Association AFL-CIO by failing to abide by the terms and provisions of the collective bargaining agreement by failing and refusing to pay to its unit employees the wage rates and overtime pay set forth in the agreement by failing and refusing to make fringe benefit con-

² These terms and conditions are mandatory subjects of bargaining.

³ In light of our conclusion that the Respondent violated Sec. 8(a)(5) and (1), we find it unnecessary to pass on the General Counsel's motion concerning the independent 8(a)(1) allegation in the complaint. This allegation is redundant, being grounded on the identical facts that support the 8(a)(5) and (1) violations.

⁴ The General Counsel requested a visitatorial provision subject to the supervision of the United States court of appeals enforcing this Order. Under the circumstances of this case, we find it unnecessary. See *Cherokee Marine Terminal*, 287 NLRB 1080 (1988).

⁵ See *Neosho Paper Products*, 286 NLRB No. 64 (Sept. 30, 1987) (not reported in Board Volumes).

⁶ 283 NLRB 1173 (1987). Interest will be computed at the short-term Federal rate for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

⁷ Any interest applicable to such delinquent payments shall be paid in accordance with the criteria set forth in *Merryweather Optical Co.*, 240 NLRB 1213 (1979).

⁸ See *Adirondack Foundries*, 286 NLRB 263 (1987).

tributions to the appropriate fringe benefit funds on behalf of the unit employees and by failing and refusing to file periodic fringe benefit reports with the Union

(b) Refusing to provide the Union with information necessary for collective bargaining

(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) Give full force and effect to the wage and overtime provisions and the provisions for filing fringe benefit contributions and reports of the current collective bargaining agreement

(b) Make any bargaining unit employee adversely affected by the actions found unlawful in the decision whole for any loss suffered as a result of such actions in the manner set forth in the remedy section of this decision

(c) Make whole the unit employees by abiding by the collective bargaining agreement and by making delinquent fringe benefit contributions to the appropriate fringe benefit funds on behalf of the unit employees and by reimbursing them 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

(d) On request provide the Union with information necessary for collective bargaining that was requested on June 22 1987

(e) Preserve and on request make available to agents of the National Labor Relations Board for examination and copying all records that are needed to analyze and determine the amounts of money due under the terms of the Board's Order

(f) Post at its facility in Pevely Missouri copies of the attached notice marked Appendix ⁹ Copies of the notice on forms provided by the Regional Director for Region 14 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

⁹ 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"

(g) 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 with Local 36 Sheet Metal Workers International Association AFL-CIO as the exclusive representative of the employees in the bargaining unit by ceasing to abide by the collective bargaining agreement by failing and refusing to pay our unit employees the wage rates and overtime pay set forth in the agreement by failing and refusing to make fringe benefit contributions to the appropriate fringe benefit funds on behalf of our employees in the unit and by failing and refusing to file periodic fringe benefit reports with the Union

WE WILL NOT fail to provide the Union with information necessary for collective bargaining

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 give full force and effect to the wage and overtime provisions of the current collective bargaining agreement

WE WILL make any bargaining unit employees adversely affected by our violations of the Act whole for any loss of earnings

WE WILL make whole our unit employees by paying all delinquent fringe benefit contributions required by our collective bargaining agreement with the Union and by reimbursing our unit employees for any expenses ensuing from the failure to make such payments

WE WILL file with the Union the fringe benefit reports

WE WILL on request furnish the above Union with the information it requested on June 22 1987 the information being relevant and necessary to its role as the exclusive bargaining representative of the employees in the bargaining unit

CINDY AND HAROLD F FITZGERALD
D/B/A A 1 WHOLESALE SEAMLESS
GUTTERING