

**Air Convey Industries, Ltd and Sheet Metal Workers' International Association Local Union No 83 Case 3-CA-14289**

December 20, 1988

**DECISION AND ORDER**

**BY CHAIRMAN STEPHENS AND MEMBERS  
JOHANSEN AND HIGGINS**

On May 5, 1988, the General Counsel of the National Labor Relations Board issued a complaint and on June 10, 1988, an amended complaint, alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by failing to make certain fringe benefit fund payments required by the parties' unexpired collective bargaining agreement. The Respondent filed an answer admitting in part and denying in part the allegations in the complaint and submitting affirmative defenses.

On August 5, 1988, the General Counsel filed a Motion for Summary Judgment. The General Counsel further moved that the Board deem the allegations set forth in the complaint, as amended, be admitted to be true.<sup>1</sup> The General Counsel also moved to have the Respondent's affirmative defenses stricken. On August 8, 1988, 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 National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

**Ruling on Motion for Summary Judgment**

The General Counsel alleges that the Respondent has not made fringe benefit fund payments into "Local Funds" as described in the bargaining agreement since September 29, 1987, and that the Respondent also has not made such payments into "National Funds" as described in the contract since January 1, 1988. In its answer the Respondent admits its failure to comply with the above-mentioned provisions of the collective bargaining agreement, but denies the General Counsel's allegations that these are mandatory subjects of bargaining. The Respondent also raises three affirmative defenses: the cessation of business, the lack of funds, and the filing of all necessary reports. The

<sup>1</sup> The General Counsel's motion also clarified the amended complaint explaining that in par IX of the amended complaint in which it alleges that certain funds are mandatory subjects of bargaining that the complaint's reference to mandatory subjects should not be read to include COLA, Michael Constanzo Scholarship Fund or the Henry Jackson Diabetes Fund.

Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence. For the reasons set forth below, 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 New York corporation, engages in the business of a sheet metal contractor at its facility in Schenectady, New York, where it annually derives gross revenues in excess of \$50,000 and during the same period of time purchases and receives goods and materials valued in excess of \$50,000, which are shipped to its jobsites located within the State of New York directly from points located outside the State of New York. 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**

**A The Unit**

At all times material, the Union has been the exclusive representative of the employees in the following appropriate unit: "All journeymen, foremen, and apprentices."

Such recognition has been embodied in a series of collective-bargaining agreements, the most recent of which runs from July 1, 1986, to June 30, 1988. The Union continues to be the exclusive representative under Section 9(a) of the Act.

**B Refusal to Comply with the Terms of the Contract**

The complaint, as amended, alleges and the Respondent admits that the Respondent has failed since January 1, 1988, to make required contributions into the following "Local Funds": Local 83 Insurance Fund, Local 83 Journeyman & Apprentice Training Trust Fund, and Local Industry Fund, and that the Respondent has similarly failed since September 29, 1987, to make required contributions into the following "National Funds": National Industry Fund, National Training Fund, National Pension Fund, National Stabilization Agreement of Sheet Metal Industry, and Vacation Plan.

It is well established that Section 8(a)(5) and (1) of the Act prohibits an employer who is a party to an existing collective-bargaining agreement from

modifying the terms and conditions of employment established by that agreement without obtaining the consent of the union. Here, the Respondent has admitted that it unilaterally failed and refused to make the contractually required fringe benefit fund contributions. Accordingly, the Respondent has admitted all the facts material to a resolution of the unfair labor practice issues raised by the amended complaint. The Respondent's claim that it is financially unable to make the required payments, and its related claim that it has ceased operations 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 provisions of a collective bargaining agreement. See *General Split Corp*, 284 NLRB 418 (1987), *Raymond Prats Sheet Metal Co*, 285 NLRB 194 (1987). We also find without merit the Respondent's proffered affirmative defense that it has filed all necessary reports. Although the original unfair labor practice charge alleged that the Respondent had failed to file those reports, the complaint and the amended complaint do not. In any event, there is nothing in the record that would make the filing of such reports relevant to the Respondent's admitted failure to make the actual fringe benefit fund contributions.<sup>2</sup> Finally, we reject the Respondent's general claim that its failure to make all the fringe benefit fund contributions noted above was not unlawful because these funds are not mandatory subjects of bargaining. See, e.g., *Lo Pri Plumbing & Heating*, 283 NLRB 1076 (1987).<sup>3</sup> Accordingly, we find that the Respondent has violated Section 8(a)(5) and (1) by failing to make the contractually required payments to fringe benefit funds.<sup>4</sup>

#### CONCLUSIONS OF LAW

By ceasing to make fringe benefit trust fund contributions to the Local 83 Insurance Fund, Local 83 Journeyman and Apprentice Training Trust

<sup>2</sup> In view of our finding that the Respondent's proffered affirmative defenses are without merit, we shall deny the General Counsel's motion to strike these affirmative defenses.

<sup>3</sup> We find merit in that aspect of the Respondent's answer which denies that the national and local industry funds are mandatory subjects of bargaining. These funds as they are described in the parties' collective bargaining agreement are industry funds and are therefore not mandatory subjects of bargaining. See *Sheet Metal Workers Local 38 (Elmsford Sheet Metal Works)*, 231 NLRB 699 (1977). Accordingly, it is not an unfair labor practice to refuse to bargain over them. See *Finger Lakes Plumbing Co*, 254 NLRB 1399 (1981), *Raymond Prats Sheet Metal Co*, supra.

<sup>4</sup> Member Johansen agrees that the Respondent violated Sec. 8(a)(5) and (1) of the Act but notes his dissent in *Hiysota Fuel Co*, 280 NLRB 763 (1986), in which he stated that in certain circumstances he would not find that an employer's delinquency regarding its contractual obligations violated Sec. 8(a)(5) of the Act. Also, in Member Johansen's view, an employer must present evidence to establish that despite its delinquency it has not repudiated the obligation to avoid being found in violation of Sec. 8(a)(5). Here, Member Johansen finds that the Respondent failed to establish that it has not repudiated the obligation.

Fund, National Training Fund, National Pension Fund, National Stabilization Agreement of Sheet Metal Industry, and Vacation Plan, 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 violated Section 8(a)(5) and (1) of the Act, 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 transmit the required contributions to the Local 83 Insurance Fund, Local 83 Journeyman & Apprentice Training Trust Fund, National Training Fund, National Pension Fund, National Stabilization Agreement of Sheet Metal Industry, and Vacation Plan, with any interest or other sums applicable to the payments to be computed in accordance with the Board's decision in *Merryweather Optical Co*, 240 NLRB 1213 (1979). We shall also order the Respondent to make the unit employees whole for any losses they may have suffered as a result of its failure to make the contractually required fringe benefit contributions, *Kraft Plumbing*, 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), with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Further, as it appears that the Respondent may have discontinued its manufacturing operations, the Respondent, in addition to posting the notice to employees at its facility, will be required to mail to the Union and to the home address of each employee who was on, or has been on, the Respondent's payroll for any amount of time from September 29, 1987, until the date the notices are mailed, a signed and dated copy of the notice. This mailing is necessary to advise employees of the Respondent's unlawful conduct and its resulting obligations.

#### ORDER

The National Labor Relations Board orders that the Respondent, Air Convey Industries, Ltd., Schenectady, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Sheet Metal Workers' International Association Local Union No. 83, by failing to make contributions into contractually required fringe benefit trust funds.

(b) In any other 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) Pay all delinquent fringe benefit trust fund contributions and reimburse employees for any losses directly attributable to the withholding of such contributions under the parties' trust fund agreements 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, all records concerning the above mentioned contractual provisions and the funds they describe, and all other records necessary to analyze the amount of backpay due under the terms of this Order

(c) Post at its facility in Schenectady, New York, copies of the attached notice marked "Appendix"<sup>5</sup> Copies of the notice, on forms provided by the Regional Director for Region 3, 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) Mail a duly signed copy of the attached notice marked "Appendix" to the Union for post

<sup>5</sup> 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"

ing, if willing, and to the home address of each employee who was on or has been on the Respondent's payroll from September 29, 1987, until the date the notices are mailed

(e) 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 Sheet Metal Workers' International Association Local Union No 83 by failing to make the contractually required fringe benefit trust fund contributions

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 transmit to the various funds those contributions that we have unlawfully withheld pursuant to the collective bargaining agreement between ourselves and the Union

WE WILL make whole our employees in the unit for any losses directly attributable to our withholding of the contributions, with interest The appropriate unit is

All journeymen, foremen, and apprentices

AIR CONVEY INDUSTRIES, LTD