

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION SIX

PITTSBURGH ATHLETIC ASSOCIATION

and

Case 6-CA-067464

UNITE HERE LOCAL 57

MOTION FOR SUMMARY JUDGMENT

Counsel for the Acting General Counsel, pursuant to Sections 102.24, 102.26 and 102.50 of the Board's Rules and Regulations, Series 8, as amended, makes this motion to transfer this case to the Board and to grant summary judgment against Respondent based on the pleadings and related documents which accompany this Motion. In support of this Motion, Counsel for the Acting General Counsel submits that the pleadings raise no material issues of either fact or law, and states the following:

1. On April 27, 2012, a Complaint and Notice of Hearing, a copy of which is attached hereto as Exhibit A, issued in the above-entitled matter alleging that Respondent had engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act by unilaterally ceasing to remit to the Union contractually required pension contributions to the Hotel Employees Restaurant Employees International Union Pension Fund, hereinafter Pension Fund, on behalf of bargaining unit employees.

2. On May 10, 2012, Respondent filed its Answer to the aforesaid Complaint, a copy of which is attached hereto as Exhibit B, admitting:¹ (a) the filing and service of the charge, amended charge and second amended charge in this matter; (b) the underlying factual

¹ The Answer admits paragraphs 1 through 11 of the Complaint. Respondent denies paragraphs 12 through 14.

allegations and the conclusion that Respondent is engaged in interstate commerce; (c) the labor organization status of Unite HERE Local 57, hereinafter referred to as Local 57; (d) the supervisory and agency status of Joseph Dengler, David Bruce, Robert Dauer, John Freyvogel, James Sheehan² and Mike McSorely; (e) that Respondent has recognized Local 57 as the exclusive collective-bargaining representative of the unit as evidenced by successive collective-bargaining agreements, the most recent of which is effective by its terms from March 1, 2012 to February 28, 2015; (f) the appropriateness of the existing bargaining unit; (g) the Section 9(a) status of Local 57; (h) that since on or about May 1, 2011 Respondent has failed to remit to the Union contractually required pension contributions to the Pension Fund on behalf of Unit employees; and (i) that the remittance of contractually required pension contributions is a mandatory subject for the purposes of collective bargaining.

3. In its Answer, Respondent has denied the factual averments in paragraph 12 and the legal conclusions alleged in paragraphs 13 and 14 of the Complaint.

4. Further, in its Answer, Respondent has raised a financial inability to pay as the reason why it stopped remitting pension contributions to the Pension Fund on behalf of Unit employees. It is well-settled that a Respondent is obligated to refrain from making unilateral changes in unit employees' terms and conditions of employment unless the parties have reached agreement or overall impasse. *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991) *enfd.* 15 F.3d 1087 (9th Cir. 1994). Inasmuch as Respondent was obligated under the terms of its collective-bargaining agreement with Local 57 to make monetary contributions to the Pension Fund on behalf of its employees in the unit, its failure to do so is a violation of Section 8(a)(1) and (5) of the Act. Respondent's Answer admits that contributions to the Pension Fund are a mandatory subject of bargaining. Respondent's failure to make such contributions negatively

² Respondent notes that the correct spelling of the name of the Secretary, Board of Directors, is James Sheehan, but does not otherwise deny any allegation of paragraph 6.

impacts the Union's statutory right to represent the employees in the bargaining unit. *Flatbush Manor Care Center*, 315 NLRB 15 (1994).

The Board has recognized two levels of economic exigency in this context. In the most severe circumstance, "extraordinary events which are an unforeseen occurrence, having a major economic effect [requiring] the company to take immediate action," such immediate action may serve to entirely excuse an employer's obligation to bargain. *RBE Electronics of S.D. Inc.*, 320 NLRB 80, 81 (1995) quoting *Hankins Lumber Co.*, 316 NLRB 837, 838 (1995). In such a case, the employer has the heavy burden of demonstrating the existence of circumstances which required implementation at the time the action was taken, or an economic business emergency that required prompt action. "Absent a dire financial emergency, the Board has held that economic events such as loss of significant accounts or contracts, operation at a competitive disadvantage, or supply shortages do not justify unilateral actions." *RBE Electronics*, supra at 81. There are, however, other economic exigencies, although not sufficiently compelling to excuse bargaining altogether, that may constitute exigent circumstances. In this second situation, an employer satisfies its obligation to bargain by providing the union with adequate notice and an opportunity to bargain. In that event, the employer can act unilaterally if either the union waives its right to bargain or the parties reach impasse on the matter proposed for change. The second exception is limited only to those exigencies in which time is of the essence and which demand prompt action. The employer must additionally demonstrate that the exigency was caused by external events, was beyond the employer's control, or was not reasonably foreseeable. In such time-sensitive circumstances, bargaining need not be protracted. *RBE Electronics*, supra at 81; *Bottom Line Enterprises*, supra.

Respondent's Answer indicates that it had a financial inability to pay the required pension contributions and stopped making those required contributions to the Pension Fund. Respondent's Answer further indicates that it subsequently met with Local 57 to discuss the

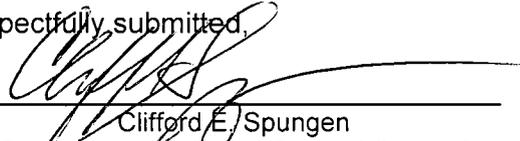
financial condition of Respondent. That fact leads to the inescapable conclusion that it was not some unforeseen emergency, which led to Respondent's decision not to pay the required contributions. In addition to the usual payment obligations imposed by any collective-bargaining agreement, the Act requires an employer to pay those obligations even when the employer is unable to do so. See *Oak Cliff-Golman Baking Co.*, 207 NLRB 1063 (1974). A failure to do so is deemed an unlawful unilateral change under Section 8(a)(5). *Northeast Truck Center*, 296 NLRB 753 (1989). Therefore, in making the argument that its failure to make the required contributions was unavoidable, Respondent is relying on its own failure, not only to pay under its contractual obligation, but also to abide by the law requiring it to pay. There is no circumstance where a defaulting employer can take advantage of its own failure to pay to excuse its unilateral discontinuation of its pension contributions.

WHEREFORE, Counsel for the Acting General Counsel respectfully moves:

- (1) That the Board grant this Motion for Summary Judgment;
- (2) That all material allegations in the Complaint, which Respondent has admitted or should be deemed to have admitted in its Answer, or which is supported by the Exhibits attached hereto, be deemed admitted to be true.
- (3) That Respondent be further found to have violated Sections 8(a)(1) and (5) of the Act in the manner alleged in the instant Complaint, and that the Board issue an appropriate remedial Order.

Dated at Pittsburgh, Pennsylvania, this 28th day of June 2012.

Respectfully submitted,



 Clifford E. Spungen
 Counsel for the Acting General Counsel

NATIONAL LABOR RELATIONS BOARD
 Region 6
 William S. Moorhead Federal Building
 1000 Liberty Avenue, Room 904
 Pittsburgh, Pennsylvania 15222

Attachments

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION SIX

PITTSBURGH ATHLETIC ASSOCIATION

and

Case 06-CA-067464

UNITE HERE LOCAL 57

COMPLAINT AND NOTICE OF HEARING

UNITE HERE LOCAL 57, herein called "the Union," has charged that Pittsburgh Athletic Association, herein called Respondent, has been engaging in unfair labor practices as set forth in the National Labor Relations Act, 29 U.S.C. Section 151 et seq., herein called the Act. Based thereon the Acting General Counsel, by the undersigned, pursuant to Section 10(b) of the Act and Section 102.15 of the Rules and Regulations of the National Labor Relations Board, herein called the Board, issues this Complaint and Notice of Hearing and alleges as follows:

1. (a) The charge in this proceeding was filed by the Union on October 25, 2011, and a copy was served by mail on Respondent on October 25, 2011.

(b) The first amended charge in this proceeding was filed by the Union on January 27, 2012, and a copy was served by mail on Respondent February 1, 2012.

(c) The second amended charge in this proceeding was filed by the Union on April 18, 2012, and a copy was served by mail on Respondent on April 20, 2012.

2. At all material times, Respondent, a non-profit Pennsylvania corporation, with an office and place of business in Pittsburgh, Pennsylvania, herein called Respondent's facility, has been engaged in the operation of a private club which supplies food and beverage services, athletic services and related services to members and their guests.

3. (a) During the 12-month period ending September 30, 2011, Respondent, in conducting its business operations described above in paragraph 2, derived gross revenues in excess of \$500,000.

(b) During the 12-month period ending September 30, 2011, Respondent, in conducting its business operations described above in paragraph 2, purchased and received at its Pittsburgh, Pennsylvania, facility goods valued in excess of \$50,000 from other enterprises, including Sysco Food Service, located within the Commonwealth of Pennsylvania, which other enterprise had received these goods directly from points outside the Commonwealth of Pennsylvania.

4. At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

5. At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

6. At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act:

Joseph Dengler	-	General Manager
David Bruce	-	Controller
Robert Dauer	-	President, Board of Directors
John Freyvogel	-	Vice-President, Board of Directors
James Sheechan	-	Secretary, Board of Directors
Mike McSorely	-	Treasurer, Board of Directors

7. For many years, and at all material times, the Union has been the designated exclusive collective-bargaining representative of all food and beverage and housekeeping employees of Respondent, herein called the Unit, and since then, has been recognized as such representative by Respondent. Such recognition has been embodied in successive collective-

bargaining agreements, the most recent of which is effective by its terms from March 1, 2012 to February 28, 2015.

8. The Unit, as set forth in the collective-bargaining agreement described above in paragraph 7, constitutes a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

9. At all material times, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the Unit.

10. Since on or about May 1, 2011, Respondent has failed to remit to the Union contractually required pension contributions to the Hotel Employees Restaurant Employees International Union Pension Fund on behalf of Unit employees.

11. The subject set forth above in paragraph 10 relates to wages, hours, and other terms and conditions of employment of the Unit and are mandatory subjects for the purposes of collective bargaining.

12. Respondent engaged in the conduct described above in paragraph 10 without prior notice to the Union and/or without affording the Union an opportunity to bargain with Respondent with respect to this conduct and/or the effects of this conduct.

13. By the conduct described above in paragraphs 10 and 12, Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees in violation of Section 8(a)(1) and (5) of the Act.

14. The unfair labor practices of Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

ANSWER REQUIREMENT

Respondent is notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, it must file an answer to the complaint. The answer must be **received by this office on or before May 11, 2012, or postmarked on or before May 10, 2012.**

Unless filed electronically in a pdf format, Respondent should file an original and four copies of the answer with this office.

An answer may also be filed electronically by using the E-Filing system on the Agency's website. To file electronically, go to <http://www.nlr.gov>, click on **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt and usability of the answer rests exclusively upon the sender.

Unless notification on the Agency's website informs users that the Agency's E-Filing system is officially determined to be in technical failure because it is unable to receive documents for a continuous period of more than 2 hours after 12:00 noon (Eastern Time) on the due date for filing, a failure to timely file the answer will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off-line or unavailable for some other reason. The Board's Rules and Regulations require that an answer be signed by counsel or non-attorney representative for represented parties or by the party if not represented. See Section 102.21. If the answer being filed electronically is a pdf document containing the required signature, no paper copies of the document need to be transmitted to the Regional Office. However, if the electronic version of an answer to a complaint is not a pdf file containing the required signature, then the E-filing rules require that such answer containing the required signature be submitted to the Regional Office by traditional means within three (3) business days after the date of electronic filing.

Service of the answer on each of the other parties must still be accomplished in conformance with the Requirements of Section 102.114 of the Board's Rules and Regulations. The answer may not be filed by facsimile transmission. If no answer is filed or if an answer is filed untimely, the Board may find, pursuant to a Motion for Default Judgment, that the allegations in the complaint are true.

NOTICE OF HEARING

PLEASE TAKE NOTICE that on July 10, 2012, at 10:00 a.m., at the William S. Moorhead Federal Building, 1000 Liberty Avenue, Pittsburgh, Pennsylvania, and on consecutive days thereafter until concluded, a hearing will be conducted before an Administrative Law Judge of the National Labor Relations Board. At the hearing, Respondent and any other party to this proceeding have the right to appear and present testimony regarding the allegations in this complaint. The procedures to be followed at the hearing are described in the attached Form NLRB-4668. The procedure to request a postponement of the hearing is described in the attached Form NLRB-4338.

Dated at Pittsburgh, Pennsylvania, this 27th day of April 2012.



Mark E. Wirick
Acting Regional Director, Region Six

NATIONAL LABOR RELATIONS BOARD
William S. Moorhead Federal Building
1000 Liberty Avenue, Room 904
Pittsburgh, Pennsylvania 15222

Attachments

UNITED STATES OF AMERICA
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PITTSBURGH ATHLETIC ASSOCIATION

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UNITE HERE LOCAL 57

ANSWER TO COMPLAINT AND NOTICE OF HEARING

NOW COMES Respondent, Pittsburgh Athletic Association, by and through its counsel, Litchfield Cavo LLP and Trisha A. Gill, Esquire, and files the within Answer to Complaint and Notice of Hearing and states as follows:

1. (a) Admitted.
(b) Admitted.
(c) Admitted.
2. Admitted.
3. (a) Admitted.
(b) Admitted.
4. Admitted.
5. Admitted.
6. Admitted with the caveat that James Sheehan is the Secretary, Board of Directors.
7. Admitted.
8. Admitted.
9. Admitted.

10. Admitted.

11. Admitted.

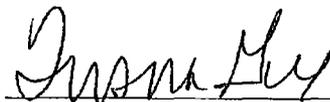
12. Denied. It is specifically denied that the Respondent failed to give notice to the Union regarding its financial inability to pay the required pension contributions to the pension fund and strict proof thereof is demanded. The Respondent and the Union have continuously met and discussed the financial condition of the Respondent. The Union representatives were fully aware of the dire financial condition and have been aware of shortages in the payments to the fund. The Union has had every opportunity to bargain with the Respondent regarding the contributions required for the pension fund.

13. Denied. It is specifically denied that the Respondent has failed and refused to bargain collectively and in good faith with the Union. To the contrary, the Respondent has repeatedly met with and bargained with the Union regarding wages, hours, terms and conditions of employment and specifically regarding the pension contributions to be made to the fund.

14. Denied. It is denied that the Respondent is engaging in any unfair labor practices.

Respectfully submitted,

LITCHFIELD CAVO LLP



Trisha A. Gill, Esquire

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