

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

STANTON MECHANICAL, INC.

and

Case 20-CA-71846

SHEET METAL WORKERS INTERNATIONAL
ASSOCIATION LOCAL 162, AFL-CIO

Sarah McBride, Esq. of San Francisco, California
for the Acting General Counsel.

Nilesh Choudhary, Esq. of Sacramento, California
for the Respondent.

Dennis R. Canevari, Esq. of Sacramento, California
for the Union.

DECISION

Statement of the Case

Jay R. Pollack, Administrative Law Judge. I heard this case in trial at Sacramento, California, on April 24, 2012. On January 4, 2012, Sheet Metal Workers International Association Local 162, AFL-CIO, (the Union) filed the charge alleging that Stanton Mechanical, Inc., (Respondent) committed certain violations of Section 8(a)(5) and (1) of the National Labor Relations Act (the Act). On February 29, 2012, the Acting Regional Director for Region 20 of the National Labor Relations Board (the Board) issued a consolidated complaint and notice of hearing against Respondent, alleging that Respondent violated Section 8(a)(5) and (1) of the Act. Respondent filed a timely answer to the complaint, denying all wrongdoing.

The parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. Upon the entire record, from my observation of the demeanor of the witnesses¹, and having considered the post-hearing briefs of the parties, I make the following.

¹The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Manufacturing Company*, 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction to the findings herein, their testimony has been discredited, either as having been in conflict with credited documentary or testimonial evidence or because it was in and of itself incredible and unworthy of belief.

Findings of Fact

I. Jurisdiction

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The Respondent is a California corporation, with an office and principal place of business in Rancho Cordova, California, where it has been engaged in the business of installing and servicing commercial air conditioning systems. Respondent, in conducting its business operations, annually sells and performs services to customers in California, who themselves meet the Board's direct standards for asserting jurisdiction. Accordingly, Respondent admits and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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Respondent admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

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Respondent is engaged in the construction industry installing and servicing commercial air conditioning systems. The Union has been party to a series of multi-employer collective-bargaining agreements with the Sacramento Chapter of the Sheet Metal and Air Conditioning Contractors' National Association (SMACNA). In June 2004, Respondent signed the July 2003 to June 2008 collective-bargaining agreement between SMACNA and the Union. Although Respondent did not agree to join SMACNA, it did agree to be bound by the terms and conditions of the multi-employer contract and such future agreements unless timely notice was given.

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In November 2007 SMACNA and the Union reached agreement on a collective-bargaining agreement covering the Unit, effective July 1 2008 to June 30, 2013.

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In September 2008 Respondent ceased operating Stanton Mechanical. Its owner Thomas Stanton formed a partnership to form Advanced Logic Corporation to specialize in HVAC commercial controls. While Advanced Logic did not sign a Union contract, it made payments to the Union trust funds. Respondent made no payments to the trust funds from September 2008 to February 2010.

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On January 18, 2010, Respondent's president, Thomas Stanton, signed a Union-SMACNA collective-bargaining agreement with the Union. The July 1, 2008 to June 30, 2013 Union-SMACNA agreement had been finalized but had not yet been printed. Stanton was informed by Armando Guerrero, Union representative, that a new agreement had been reached but not yet printed and distributed. Stanton signed a signature page for the 2003-2008 agreement. Guerrero gave Stanton a page showing the new wage rates and trust fund contributions. Respondent paid the wages and trust fund contributions required by the agreement.

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In February and March of 2011 Respondent missed its trust fund contributions. Respondent continued to make payments to the trust funds in April 2011 and established a payment plan with the Board of trustees to make up the missed payments.

In April 2011, Guerrero met with Stanton to discuss the missed payments to the trust funds. Stanton assured Guerrero that future payments would be forthcoming. During this conversation, Guerrero told Stanton that the 2008-2013 agreement was available for distribution. The Union mailed Respondent two copies of the agreement shortly after this meeting.

On August 29, 2011, Respondent sent a letter to the Union repudiating the collective-bargaining agreement. Since August 29, 2011, Respondent has failed to abide by the labor agreement and has failed to recognize the Union as the collective-bargaining representative.

Respondent contends that it has gone through a number of business changes which has affected its ability to meet the financial obligations of the bargaining agreement.

III. Analysis and Conclusions

Section 8(f) of the Act reads as follows:

It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained or assisted by any action defined in section *(a) of this Act as an unfair labor practice) because 910 the majority status of such labor organization has not been established under the provisions of Section 9 of the Act prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer in the industry or the particular geographic area. *Provided*, That nothing in this subsection shall set aside the final to Section 8(a)(3) of the Act. *Provided further*, that any agreement which would be invalid but for clause (1) of this subsection , shall not be a bar to a petition filed pursuant to section 9(c) or 9(e).

In *John Deklewa & Sons*, 282 NLRB 1375, 1377-1378 (1987), enfd. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3rd Cir. 1988), cert denied, 488 U.S. 889 (1988), The Board announced the following principles in Section 8(f) cases: (1) a collective-bargaining agreement permitted by Section 8(f) shall be enforceable through the mechanisms of Section 8(a)(5) and Section 8(b)(3); (2) such agreements will not bar the processing of valid petitions filed pursuant to Section 9(c) and 9(e); (3) in processing such petitions, the appropriate unit normally will be the single employer's employees covered by the agreement; and (4) upon expiration of such agreements, the signatory union will enjoy no presumption of majority status, and either party may repudiate the 8(f) bargaining relationship.

In the instant case all parties agree that this was a Section 8(f) relationship. Here, Respondent voluntarily signed onto the Section 8(f) agreement on January 18, 2010. Stanton

knew that a new agreement had been reached but not yet printed. Respondent thereafter complied with the agreement until repudiation in August 2011.

Respondent argues that due to economic circumstances it can no longer afford the obligations under the Union contract. However, “the Board has consistently held that financial hardship is no justification for repudiation or modification of a collective-bargaining agreement or any of its terms. *Arco Electric Co.*, 237 NLRB 708, 709 (1978) enfd. 618 F.2d 698 (10th Cir. 1980). See also *Oak Cliff-Goldman Baking Company*, 207 NLRB 1063, 1064 (1973).

Accordingly, I find that by repudiating the Section 8(f) agreement prior to its expiration, Respondent violated Section 8(a)(5) of the Act.

Conclusions of Law

1. Respondent is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has violated Section 8(a)(1) and (5) of the Act by repudiating its collective-bargaining agreement and withdrawing recognition from the Union.

4. Respondent’s conduct in paragraph 3 above are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

Having found Respondent engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and take certain affirmative action to effectuate the purposes and policies of the Act. Respondent shall make whole, as prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), any employees for losses suffered as a result of the Respondent’s failure to adhere to the contract since August 2011, with interest as computed in *Florida Steel Corp.*, 231 NLRB 655 (1977).

The Respondent shall also be required to make contributions to the Trust Funds from the date Respondent stopped making payments to the Funds, with interest as provided by the collective-bargaining agreement.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended.²

² If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Area Stanton Mechanical, Inc., its officers, agents, successors, and assigns shall

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1. Cease and desist from

(a) Withdrawing recognition during the term of a collective bargaining agreement from Sheet Metal Workers International Association Local 162 as the exclusive collective bargaining representative of the Respondent's employees covered by the agreement,

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(b) Withdrawing recognition from the Union as the exclusive collective-bargaining representative of Respondent's employees in the unit described.

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(c) Refusing to adhere to its 2008 to 2013 collective-bargaining agreement with the Union.

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(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

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(a) Make whole the bargaining unit employees in the manner set forth in the remedy, for any losses they may have suffered as a result of Respondent's failure to adhere to collective-bargaining agreement.

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(b) Make whole the Trust Funds in the manner set forth in the remedy.

(c) On request by the Union, rescind any unilateral changes it has implemented in its employees' terms and conditions of employment.

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(d) Preserve and, upon 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 back pay due under the terms of the Order.

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(e) Within 14 days after service by the Region, post at its facility in Rancho Cordova, California copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent 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

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³ 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."

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altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 2004.

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(f) Within 21 days after service by the Region, file with the Regional Director for Region 20, a sworn certification of a responsible official on a form provided by Region 20 attesting to the steps the Respondent has taken to comply herewith.

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Dated, Washington, D.C. July 5, 2012

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Jay R. Pollack
Administrative Law Judge

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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 Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT withdraw recognition from the Sheet Metal Workers International Association Local 162, AFL-CIO as the exclusive collective-bargaining representative of our employees in the appropriate unit.

WE WILL NOT refuse to meet and bargain with the Union as the exclusive collective-bargaining representative of our employees in the appropriate bargaining unit with respect to rates of pay, hours of employment, and other terms and conditions of employment including contributions to health insurance, union security, and wages.

WE WILL NOT refuse to bargain collectively by refusing to adhere to, the 2008 to 2013 collective-bargaining agreement with the Union.

WE WILL NOT In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL upon request, meet and bargain with the Union as the exclusive collective-bargaining representative of its employees in the appropriate bargaining unit with respect to rates of pay, hours of employment, and other terms and conditions, and if an understanding is reached, embody such understanding in a signed agreement.

WE WILL on request by the Union, rescind any unilateral changes we have implemented in our employees' terms and conditions of employment.

WE WILL make whole the bargaining unit employees for any losses they may have suffered as a result of our failure to adhere to the collective-bargaining agreement.

WE WILL make whole the Trust Funds for our failure to make payments required by the collective-bargaining agreement.

WE WILL honor the 2008 to 2013 collective-bargaining agreement with the Union until its expiration date.

STANTON MECHANICAL, INC.

(Employer)

Dated _____

By _____

(Representative)

(Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

901 Market Street, Suite 400, San Francisco, CA 94103-1735
(415) 356-5130, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (415) 356-5139.