Active Metal Manufacturing, Inc. *and* Teamsters Local Union 837 a/w International Brotherhood of Teamsters, AFL–CIO. Case 4–CA–21317

March 30, 1995

DECISION AND ORDER

BY MEMBERS STEPHENS, BROWNING, AND TRUESDALE

Upon a charge and an amended charge filed by Teamsters Local Union 837 a/w International Brotherhood of Teamsters, AFL–CIO (the Charging Party) on December 24, 1992, and January 19, 1993,[1] respectively, the Regional Director for Region 4 of the National Labor Relations Board issued a complaint on February 18, against Active Metal Manufacturing, Inc. (the Respondent) alleging that it has violated Section 8(a)(5) and (1) of the National Labor Relations Act. The complaint alleges that the Respondent failed to comply with its obligations under the parties' collective-bargaining agreement by discontinuing unit employees' health and welfare payments and by failing to remit union dues deducted from unit employees' wages. Copies of the charges and complaint were properly served on the Respondent. Although the Respondent filed a timely answer on March 19, it failed to sign its answer, state its address, or serve copies on the Union or its counsel.[2]

On December 13, the General Counsel filed a Motion for Summary Judgment, with exhibits attached. On December 17, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause by January 3, 1994, why the motion should not be granted. The Respondent did not file a response to the Notice to Show Cause to explain its failure to serve its answer in accordance with the Board's Rules and Regulations. The allegations in the motion are therefore undisputed.

The Board has delegated its authority in this proceeding to a three-member panel.

Ruling on the Motion for Summary Judgment

Section 102.21 of the Board's Rules states, ''Immediately upon the filing of his answer, respondent shall serve a copy thereof on the other parties. . . . A party who is not represented by an attorney shall sign his answer and state his address.''

Under the Rules, the Respondent's time for filing an answer to the complaint in this case expired on March 4. On March 10, the Regional Office extended the time to March 19. On March 19, the Respondent, who was not represented by counsel and was proceeding pro se, timely filed an answer to the complaint. The Respondent did not sign its answer, state its address, or serve a copy on the Union or its counsel. However, the Respondent attached to its answer a signed covering letter that stated its address.

By letter dated March 19, the Regional Office informed the Respondent that its answer must be signed and served on the other parties by March 31. The Respondent provided no evidence that it had done so.

On May 10, the Regional Office again advised the Respondent that its answer must be signed and served on the other parties by May 18, and that if the Respondent failed to do so, a motion to strike the answer or a Motion for Summary Judgment would be filed. The Respondent again failed to furnish evidence of service of its answer on the other party to this proceeding.

The General Counsel's Motion for Summary Judgment states that the Respondent's March 19 cover letter submitted with its answer arguably met the requirement that a party's answer be signed and that it state the party's address. The General Counsel, however, alleges that the Respondent did not comply with the requirement that a copy of its answer be served on the other parties because it did not serve its answer on the Charging Party or its counsel, even though it was reminded to do so twice, in writing, by the Regional Office.

The General Counsel contends that the Respondent has failed to comply with Section 102.21 of the Board's Rules concerning the service of an answer on the parties. Accordingly, the General Counsel moves that the allegations of the complaint be deemed to be admitted as true.

Having duly considered the matter, we find that summary judgment is warranted here. There has been no showing that the Respondent's answer was served on the Charging Party or its counsel, as required by Section 102.21 of the Board's Rules. The Respondent failed to serve its answer even though the Regional Office reminded it to do so twice, in writing, by letters dated March 19 and May 10. In addition, the Respondent failed to file a response to the Notice to Show Cause.

While it is true that the Respondent was not represented by counsel and was proceeding pro se, in the circumstances of this case, we find its conduct in failing to comply with the service requirement is not excusable. The Respondent had four opportunities over an extended period of time, from March 4, 1993, to January 3, 1994, to comply with the service requirement or explain its failure to do so: before the March 4 due date; after the Regional Office's March 19 and May 10 letters; or after the issuance of the Notice to Show Cause.

[1] All dates hereinafter are in 1993, unless specified otherwise.

[2] The Respondent's answer ''admitted & denied,'' without further explanation, the substantive allegations of the complaint.

The Notice to Show Cause fully informed the Respondent that in the absence of a response thereto, the General Counsel's motion could be granted, the allegations of the complaint could be admitted to be true, and that the Board could so find and order an appropriate remedy. The Respondent still failed to file a response or any explanation for its failure to serve the Charging Party.

In these circumstances, we find no basis for excusing the Respondent's failure to comply with the service requirement of the Board's Rules. In fact, to do so would reward the Respondent for doing nothing to comply with the Board's Rules.[3]

The dissent notes that the Board has applied different, more lenient standards for pro se respondents. Our decision here is an endorsement of, rather than a departure from, that policy approach. The Board's recognition of more lenient standards for pro se parties is effectuated by the Region's treatment of the Respondent here. However, we believe that leniency ought not to be limitless. Here, despite repeated efforts by the Region to apprise the Respondent of its obligations under our Rules, the Respondent made no effort to comply or ask for further assistance. In such circumstances, we will not further excuse the Respondent's conduct.

The cases cited by our dissenting colleague are distinguishable. In those cases, the respondents made a good-faith effort to comply with the Board's Rules. In none of those cases is there any indication that the respondent was reminded repeatedly, in writing, that their answers must be served on the other parties to the proceedings. In the circumstances of this case, the Respondent's noncompliance with the Board's Rule is so blatant that we find the Respondent is not entitled to a hearing on the merits of the complaint.

Accordingly, in view of the Respondent's failure to serve its answer on the Charging Party or its counsel and in the absence of good cause being shown for the failure to do so, the General Counsel's Motion for Summary Judgment is granted and the allegations of the complaint shall be deemed to be true.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a Pennsylvania corporation, with an office and a place of business in Philadelphia, Pennsylvania, has been engaged in the manufacture of metal products. During the year preceeding issuance of the complaint, in conducting its business operations, the Respondent has purchased and received at its facility goods valued in excess of $50,000 directly from points outside the Commonwealth of Pennsylvania. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(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 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 production and maintenance employees and truck drivers, excluding guards and supervisors as defined in the Act.

Since at least 1982, and at all material times, the Union has been the designated exclusive collective-bargaining representative of the unit employees. Since on about February 1, 1992, the Respondent has been bound by the current collective-bargaining agreement in effect through July 4, 1993. Since at least 1982, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the unit.

Since about June 24, 1992, the Respondent has failed to continue in effect all terms and conditions of the agreement by failing to make health and welfare contributions to ''Keystone HMO'' and to provide Keystone HMO coverage to the unit as required by article XXIII of the parties' agreement. Since about November 1, 1992, the Respondent has failed to continue in effect all the terms of the parties' agreement by failing to remit to the Union dues and fees deducted from the wages of the unit employees as required by article IV of the parties' agreement. These contributions, dues, and fees relate to wages, hours, and other terms and conditions of employment of the unit and are mandatory subjects of bargaining for the purposes of collective bargaining. The Respondent engaged in this conduct unilaterally, without prior notice to the Union and without giving the Union an opportunity to bargain concerning this conduct.

CONCLUSIONS OF LAW

By failing to make health and welfare contributions required by its collective-bargaining agreement with the Union, and by failing to remit to the Union dues and fees deducted from the wages of unit employees as required by the parties' agreement, the Respondent has 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.

[3] See *Jay-Lor Drains & Piping Maintenance*, 300 NLRB 464 (1990); *Richardson Security Co.*, 297 NLRB 738 (1990); *Travelodge San Francisco Civic Center*, 242 NLRB 287, 288 (1979).

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. Specifically, having found that the Respondent has violated Section 8(a)(5) and (1) by failing since June 24, 1992, to make contractually required health and welfare payments, and by failing since November 1, 1992, to remit to the Union dues and fees deducted from the wages of its unit employees as required by the collective-bargaining agreement currently in effect, we shall order the Respondent to honor the terms of the agreement and to make whole its unit employees by making all such delinquent payments, including any additional amounts due the funds in accordance with *Merryweather Optical Co*., 240 NLRB 1213, 1216 fn. 7 (1979). In addition, the Respondent shall reimburse unit employees for any expenses resulting from its failure to make the required contributions, as set forth in *Kraft Plumbing & Heating*, 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*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[4] We also shall order the Respondent to remit to the Union all dues and fees withheld from bargaining unit employees' pay, plus interest as set forth in *New Horizons for the Retarded*, supra.

ORDER

The National Labor Relations Board orders that the Respondent, Active Metal Manufacturing, Inc., Philadelphia, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain collectively with Teamsters Local Union 837 a/w International Brotherhood of Teamsters, AFL–CIO as the exclusive collective-bargaining representative of its employees in the unit described below, by failing to make the contractually required health and welfare payments and by failing to remit to the Union dues and fees deducted from the wages of the unit employees as required by the agreement.

> All production and maintenance employees and truck drivers, excluding guards and supervisors as defined in the Act.

(b) 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) Honor the terms of the current collective-bargaining agreement with the Union by making all the contractually required health and welfare payments the Respondent failed to make and by remitting to the Union dues and fees deducted from employees' wages, in the manner set forth in the remedy section of this decision.

(b) Make whole the unit employees by reimbursing them for their expenses ensuing from its failure to make the required payments, with interest, as set forth in the remedy section of this decision.

(c) 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, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility in Philadelphia, Pennsylvania, copies of the attached notice marked ''Appendix.''[5] Copies of the notice, on forms provided by the Regional Director for Region 4, 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.

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

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[4] To the extent that an employee has made personal contributions to a fund that are accepted by the fund in lieu of the Respondent's delinquent contributions during the period of the delinquency, the Respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the Respondent otherwise owes the fund.

[5] 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.''

MEMBER BROWNING, dissenting.

Five times over the past 3 years, the Board has considered whether to accept an answer to a complaint that had not been served on the charging party, as required by Section 102.21 of the Board's Rules and Regulations. In each of the five cases, the answer was filed without benefit of counsel. And in each case, the Board denied the General Counsel's Motion for Summary Judgment.

In April 1992, 2 years before I became a Member of this Agency, the Board denied the General Counsel's Motion for Summary Judgment in *Acme Bldg. Maintenance*, 307 NLRB 358, stating, inter alia, ''Although the Respondent's letters were not served on the Charging Party, we note that they were filed pro se.'' Id. at 359 fn. 6.

In April 1993, the Board denied the General Counsel's Motion for Summary Judgment in *Tri-Way Security*, 310 NLRB 1222, stating, inter alia, ''The Respondent also apparently failed to serve its letter on the Charging Parties, but we again note the pro se basis on which the Respondent was then proceeding.'' Id. at 1223 fn. 5.

In September 1993, the Board denied the General Counsel's Motion for Summary Judgment in *Dismantlement Consultants*, 312 NLRB 650, stating, inter alia, ''Although it does not appear that the Respondent's letter was served on the Charging Party as required by Sec. 102.21, we note the pro se basis on which the Respondent was proceeding.'' Id. at 651 fn. 6.

When I became a Member of this Board in March 1994, I accepted this precedent and applied it in two cases in which I participated during 1994.

In August 1994, the Board denied the General Counsel's Motion for Summary Judgment in *Carpentry Contractors*, 314 NLRB 824, stating, inter alia, ''[A]lthough it does not appear that the Respondent's letters were served on the Charging Party as required by Sec. 102.21 of the Board's Rules and Regulations, we again note the pro se basis on which the Respondent was proceeding.'' Id. at 825 fn. 10.

On October 17, 1994, the Board denied the General Counsel's Motion for Summary Judgment in *Harborview Electric Construction Co.*, 315 NLRB 301, stating, inter alia, ''Although, as noted above, it does not appear that the Respondent's letter answer was served on the Charging Party, we again note the pro se basis on which the Respondent was proceeding.'' Id. at fn. 7.

As recently as January of this year, the Board summarized this line of case law as showing ''leniency . . . to pro se respondents.'' *American Gem Sprinkler Co.*, 316 NLRB 102 (1995).

Today, however, when presented with the sixth case in which a pro se Respondent has not served its answer on the Charging Party, a panel majority decides not to extend ''leniency'' and instead grants the General Counsel's Motion for Summary Judgment. The majority reasons that prior respondents made a ''good-faith effort to comply with the Board's Rules,'' while this Respondent's noncompliance was ''blatant'' because it was ''reminded repeatedly'' of the service requirement.

I am not persuaded that a principled basis exists for distinguishing this case from its five predecessors. Although it is certainly true that the Respondent received two ''reminder letters'' from the General Counsel before he moved for summary judgment, a close reading of *Tri-Way Security*, supra, shows that that respondent received one such reminder letter and yet the Board still denied the General Counsel's motion. The difference between one reminder letter and two reminder letters is, in my view, far too slim a reed on which to support the opposite outcomes in the two cases. This is particularly so in light of the language of the Motions for Summary Judgment which in each case effectively ''reminded'' the Respondent of the service requirement.

More importantly, the underlying rationale of the five leniency cases would appear to be that although the complaint notified each respondent that it ''shall serve a copy of its answer on each of the other parties,'' respondents proceeding without benefit of counsel are unlikely to be familiar with such legal terms as ''service.'' If that is true, then the fact that the Respondent here received further communications from the Regional Office advising that ''proof of service'' was lacking and reiterating that the answer must be ''served on the other parties'' should be accorded no weight whatsoever in deciding whether its pro se answer should be accepted.

''[T]he Board is [not] forever bound by prior precedent, but . . . when it departs from controlling precedent, it must present a reasoned explanation for the departure.'' *Stardyne, Inc. v. NLRB*, 41 F.3d 141 (3d Cir. 1994). In addition to this legal obligation, the Board, as a practical matter, should provide clear guidance to Agency personnel in the 34 Regional Offices as to how they should proceed once they receive a pro se respondent's answer that has not been served on the charging party. Believing as I do that today's decision fails to discharge both responsibilities, I respectfully dissent.

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 fail and refuse to bargain collectively with Teamsters Local 837 a/w the International Brotherhood of Teamsters, AFL–CIO as the exclusive collective-bargaining representative the employees in the following unit by failing to make the contractually required health and welfare payments and by failing to remit to the Union dues and fees deducted from unit employees' wages pursuant to the current collective-bargaining agreement:

All production and maintenance employees and truck drivers, excluding guards and supervisors as defined in the Act.

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 honor the terms of the current collective-bargaining agreement with Local 837 by making all the contractually required health and welfare payments we failed to make and by remitting to the Union the dues and fees deducted from employees' wages.

WE WILL make whole unit employees by reimbursing them for any expenses they incurred because of our failure to abide by the terms of the collective-bargaining agreement by making the required payments, plus interest.

ACTIVE METAL MANUFACTURING, INC.