Cray Construction Group LLC *and* Laborers International Union of North America, Local 130, AFL–CIO. Case 4–CA–32367

May 13, 2004

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS WALSH AND MEISBURG

On March 5, 2004, the National Labor Relations Board issued a Decision and Order[1] granting the General Counsel's Motion for Default Judgment and finding, inter alia, that the Respondent had violated Section 8(a)(5) and (1) of the Act by failing and refusing to abide by its collective-bargaining agreement with the Union by refusing to remit dues moneys to the Union and failing to make wage payments to unit employees.

However, the Board denied the motion with respect to the allegation that the Respondent had violated Section 8(a)(5) by failing to make contributions to "certain funds" as required by the contract.[2] The Board stated that certain types of funds are permissive subjects of bargaining for which no remedy would be warranted, and that there was no indication as to the nature of the funds involved in this case. The Board further stated that "[n]othing herein will require a hearing if, in the event of an appropriate amendment to the complaint, the Respondent again fails to answer, thereby admitting evidence that would permit the Board to find the alleged violation. In such circumstances, the General Counsel may renew the motion for default judgment with respect to the amended complaint allegations."[3]

Subsequently, on March 15, 2004, the General Counsel issued amendments to the complaint and notice of hearing, alleging that since on or about April 15, 2003, the Respondent has ceased abiding by its collective-bargaining agreement with the Union by, inter alia, failing and refusing to make contributions to the "appropriate Health and Welfare, Pension, Annuity, and Training Fund" referred to in article X of the agreement. The Respondent again failed to file an answer.

Accordingly, on April 6, 2004, the General Counsel filed a Renewed Motion for Default Judgment with the Board. On April 8, 2004, 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 allegations in the renewed motion are therefore undisputed.

[1] 341 NLRB No. 50.

[2] Id., slip op. at 2, fn. 1.

[3] Id. Member Walsh dissented, stating that he would grant default judgment on this issue and leave to compliance the issue of whether any of the funds were permissive subjects of bargaining.

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

Ruling on Renewed Motion for Default 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. In addition, the amendments to the complaint affirmatively stated that unless an answer was filed on or before March 29, 2004,[4] all the allegations in the amendments to the complaint may be found to be true, pursuant to a motion for default judgment or pursuant to the Board's earlier Decision and Order in this case. Further, the undisputed allegation in the General Counsel's motion disclose that the Region, by letter dated March 24, 2004, notified the Respondent that unless an answer was received by April 2, 2004, a motion for default judgment would be filed.

In the absence of good cause being shown for the failure to file a timely answer,[5] we grant the General Counsel's Renewed Motion for Default Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

Consistent with the allegations in the amendments to the complaint, which have effectively been admitted by the Respondent's failure to file an answer, we find that since on or about April 15, 2003, the Respondent has ceased abiding by its collective-bargaining agreement while performing work within the geographic jurisdiction of the Union by, inter alia, failing and refusing to make contributions to the appropriate health and welfare, pension, annuity, and training funds referred to in article X of the agreement.

The subjects set forth above relate to wages, hours and other terms and conditions of employment of the unit and are mandatory subjects of bargaining.

The Respondent engaged in the conduct described above without prior notice to the Union and without hav-

[4] The amendments to the complaint inadvertently stated this date as March 29, 2003.

[5] The amendments to the complaint were served upon the Respondent by certified mail on March 15, 2004, but were returned with the United States Postal Service designation "Not Deliverable as Addressed Unable to Forward." On March 24, 2004, the amendments to the complaint were re-served on the Respondent by certified mail and by regular first class mail at the address now listed for the Respondent by the Pennsylvania Corporations Department, and at a further address where documents had been served on the Respondent by the Charging Party. It is well settled that a respondent's failure or refusal to claim certified mail or to provide for receiving appropriate service cannot serve to defeat the purposes of the Act. See *I.C.E. Electric, Inc*., 339 NLRB 247 fn. 2 (2003). Further, the failure of the Postal Service to return documents sent by regular mail indicates actual receipt. Id.

ing afforded the Union an opportunity to bargain with the Respondent concerning this conduct.

The Respondent engaged in the conduct described above without the Union's consent.

CONCLUSION OF LAW

By the conduct described above, the Respondent has been failing and refusing to bargain collectively with the limited exclusive collective-bargaining representative of its employees, and has thereby 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. Specifically, having found that the Respondent has violated Section 8(a)(5) and (1) by, inter alia, failing and refusing since April 15, 2003, to make contributions to the appropriate health and welfare, pension, annuity, and training funds as required by the parties' collective-bargaining agreement, we shall order the Respondent to make all contractually required contributions that have not been made since that date, including any additional amounts due the funds in accordance with *Merryweather Optical Co*., 240 NLRB 1213, 1216 fn. 6 (1979).[6] The Respondent shall also reimburse unit employees for any expenses ensuing 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 are 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).

ORDER

The National Labor Relations Board orders that the Respondent, Cray Construction Group LLC, Gap, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to abide by its collective-bargaining agreement by, inter alia, failing and refusing to remit dues moneys to Laborers' International Union of North America, Local 130, AFL–CIO, failing and refusing to make wage payments to unit employees, and failing and refusing to make contributions to the appropriate health and welfare, pension, annuity, and training funds referred to in article X of the agreement. The appropriate unit includes journeymen laborers, construction specialists, mason and plaster tenders, skid-steering loader and forklift laborers, masonry crane laborers, and foremen performing work within the geographic jurisdiction of the Union.

(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) Remit to the Union dues that were deducted from unit employees' pay pursuant to valid dues-checkoff authorizations, and that were not remitted since about April 15, 2003, as required by the collective-bargaining agreement, with interest, in the manner set forth in the remedy section of this decision.

(b) Make whole unit employees for any loss of earnings and other benefits ensuing from its failure to abide by the collective-bargaining agreement since April 15, 2003, including its failure to make the contractually-required wage payments to employees, with interest, as set forth in the remedy section of this decision.

(c) Make all contractually-required contributions to the appropriate health and welfare, pension, annuity, and training funds referred to in article X of the agreement that have not been made since about April 15, 2003, and reimburse unit employees for any expenses ensuing from its failure to make the required contributions, with interest, as set forth in the remedy section of this decision.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this order.

(e) Within 14 days after service by the Region, post at its facility in Gap, Pennsylvania, copies of the attached notice marked "Appendix."[7] 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 and main-

[6] To the extent that an employee has made personal contributions to a benefit or other fund that have been 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.

[7] "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."

tained 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. 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 April 15, 2003.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that 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 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 fail and refuse to abide by our collective-bargaining agreement by, among other things, failing and refusing to remit dues moneys to Laborers' International Union of North America, Local 130, AFL–CIO, failing and refusing to make wage payments to our unit employees, and failing and refusing to make contributions to the appropriate health and welfare, pension, annuity, and training funds referred to in article X of the agreement. The appropriate unit includes journeymen laborers, construction specialists, mason and plaster tenders, skid-steering loader and forklift laborers, masonry crane laborers, and foremen performing work within the geographic jurisdiction of the Union.

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 remit to the Union dues that were deducted from unit employees' pay pursuant to valid dues-checkoff authorizations, and that were not remitted since about April 15, 2003, as required by the collective-bargaining agreement, with interest.

WE WILL make whole our unit employees for any loss of earnings and other benefits ensuing from our failure to abide by the collective-bargaining agreement since April 15, 2003, including our failure to make the contractually-required wage payments to employees, with interest.

WE WILL make all contractually-required contributions to the appropriate health and welfare, pension, annuity, and training funds referred to in article X of the agreement that have not been made since about April 15, 2003, and reimburse unit employees for any expenses ensuing from our failure to make the required contributions, with interest.

CRAY CONSTRUCTION GROUP LLC