Brian David Sanderson d/b/a ABS Heating and Cooling *and* Local 7, Sheet Metal Workers International Association, AFL–CIO. Case 7–CA–50842

April 7, 2008

DECISION AND ORDER

BY CHAIRMAN SCHAUMBER AND MEMBER LIEBMAN

The General Counsel seeks a default judgment in this case on the ground that the Respondent has failed to file an answer to the complaint. Upon a charge filed by the Union on November 8, 2007, the General Counsel issued a complaint on December 27, 2007, against Brian David Sanderson d/b/a ABS Heating and Cooling, the Respondent, alleging that it has violated Section 8(a)(5) and (1) of the Act by failing and refusing to abide by its collective-bargaining agreement with the Union. The Respondent failed to file an answer.

On February 14, 2008, the General Counsel filed a Motion for Default Judgment with the Board. Thereafter, on February 19, 2008, 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 motion are therefore undisputed.

Ruling on Motion for Default Judgment[1]

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 complaint affirmatively stated that the answer must be received by the Regional Office on or before January 10, 2008, or a motion for default judgment may be filed. Further, the undisputed allegations in the General Counsel's motion disclose that the Region, by letter dated January 11, 2008, notified the Respondent that unless an answer was received by January 18, 2008, a motion for default judgment would be filed. On January 14 and 28, 2008, the Respondent requested and was granted extensions of time to file an answer; on January 30, 2008, the Regional Director issued an Order extending the time to file an answer to February 4, 2008. Despite these extensions, however, the Respondent failed to file an answer.

In the absence of good cause being shown for the failure to file a timely answer, we grant the General Counsel's motion for default judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a sole proprietorship, with its principal office and place of business in Linden, Michigan, has been engaged as a heating and cooling contractor in the construction industry doing commercial and residential installation, maintenance and repairs throughout the State of Michigan.

During calendar year 2006, a representative period, the Respondent, in conducting its business operations described above, purchased and received at its Linden, Michigan facility goods valued in excess of $50,000 from other enterprises located within the State of Michigan, each of which other enterprises had received these goods directly from points outside the State of Michigan.

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 Local 7, Sheet Metal Workers International Association, AFL–CIO, the Union, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

At all material times, Brian David Sanderson has held the position of the Respondent's owner and has been a supervisor of Respondent within the meaning of Section 2(11) of the Act, and an agent of the Respondent within the meaning of Section 2(13) of the Act.

At all material times, the Flint Area Association of Sheet Metal Contractors (the Association), has been an organization composed of various employers engaged in the construction industry, one purpose of which is to represent its employer-members in negotiations and administering collective-bargaining agreements with the Union.

At all material times, the Association and the Union have entered into successive collective-bargaining agreements, the most recent of which is effective from May 1, 2005 through April 30, 2008.

About June 23, 2006, the Respondent entered into a letter of assent which at all material times bound the Respondent to the terms and conditions of employment of the 2005–2008 collective-bargaining agreement.

The Respondent, an employer engaged in the building and construction industry, granted recognition to the Union as the exclusive collective-bargaining representative

[1] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Schaumber and Member Liebman constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

of the unit without regard to whether the majority status of the Union had ever been established under the provisions of Section 9(a) of the Act. Such recognition is embodied in the letter of assent.

The following employees of the Respondent, herein called the unit, constitute a unit appropriate for the purposes of collective bargaining with the meaning of Section 9(b) of the Act:

> All employees engaged in the fabrication, erection, installation, repairing, replacing and servicing of all residential heating and air conditioning systems and the architectural sheet metal work of such residences; and all employees engaged in the fabrication, erection, installation, repairing, replacing and servicing of all jobs consisting of 20 tons of light commercial work.

At all material times, since June 23, 2006, based on Section 8(f) of the Act, the Union has been the limited exclusive collective-bargaining representative of the unit.[2]

On or about May 30, 2007, the Union, by its agent Ralph Fick, requested that Respondent adhere to the 2005–2008 collective-bargaining agreement.

Since on or about May 30, 2007, the Respondent has refused to comply with the terms and conditions of the 2005–2008 collective-bargaining agreement.

The Respondent's actions constitute a repudiation of the 2005–2008 collective-bargaining agreement.[3]

CONCLUSION OF LAW

By refusing to adhere to the terms of the 2005–2008 collective-bargaining agreement, the Respondent has been failing and refusing to bargain collectively and in good faith 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.[4]

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 actions designed to effectuate the policies of the Act. Specifically, having found that the Respondent has violated Section 8(a)(5) and (1) by refusing to comply with the terms and conditions of the 2005–2008 collective-bargaining agreement, thereby repudiating the agreement, we shall order the Respondent to adhere to the collective-bargaining agreement with the Union. In addition, in order to remedy the repudiation of the agreement, we shall order the Respondent to (1) make the unit employees whole for the

[2] The complaint alleges that the Respondent is a construction industry employer and that it granted recognition to the Union without regard to whether the Union had established majority status. Accordingly, we find that the relationship was entered into pursuant to Sec. 8(f) of the Act and that the Union is therefore the limited 9(a) representative of the unit employees for the period covered by the contract. See, e.g., *A.S.B. Cloture, Ltd*., 313 NLRB 1012 (1994).

[3] The General Counsel requests, in the prayer for relief in the complaint, that the Respondent be ordered to 1) make the unit employees whole for the difference owed to them between the wage rates that should have been paid under the 2005–2008 collective-bargaining agreement and the wage rates actually paid, with interest compounded quarterly; 2) make all the payments to the various fringe benefit funds, including all liquidated damages; and 3) file the required monthly fringe benefit reports not yet filed with the fringe benefit funds. The General Counsel's request is granted, except as set forth in fns. 4 and 5, in order to remedy the Respondent's repudiation of the agreement.

[4] The prayer for relief in the complaint requests that the Respondent make all payments to the various fringe benefit funds but does not identify what those funds are. The General Counsel's motion, however, indicates that these fringe benefit funds are described in addendum III of the collective-bargaining agreement as follows: vacation/savings, miscellaneous and work assessment deductions which consist of dues and the youth-to-youth fund, health and welfare, pension, a second health plan entitled 401H, International Training Institute (ITI) which implements apprenticeship training programs, National Energy Management Institute (NEMI) which funds and creates apprenticeship programs, Sheet Metal Occupational Health Institute Trust (SMOIT) which funds and creates health and safety programs, and the Industry Fund which funds the contractor's organizations.

With respect to the "miscellaneous and work assessment deductions which consist of dues and the youth-to-youth fund" neither the complaint nor the motion describes the type of dues or what the "youth-to-youth fund" is. In addition, the Industry Fund appears to be an industry advancement fund. The Board has held that certain types of benefit funds are permissive subjects of bargaining for which no remedy would be warranted. See, e.g., *Finger Lakes Plumbing & Heating Co*., 254 NLRB 1399 (1981) (industry advancement fund). Because there is no indication here as to the nature of the "miscellaneous and work assessment deductions," and because the Industry Fund appears to be an industry advancement fund, we decline to find that the Respondent violated the Act by refusing to make these contributions. Accordingly, the General Counsel's request that the Respondent be ordered to make these payments is denied, and the matter is remanded to the Regional Director for further appropriate action. See *Nick & Bob Partners*, 340 NLRB 1196 fn. 2 (2003) (default judgment denied as to allegation that respondent failed to bargain over decision to close business); *St. Regis Hotel*, 339 NLRB 143, 144 fn. 3 (2003) (default judgment denied as to information request for "other matters important to the Union"); *Michigan Inn*, 340 NLRB 983, 989 (2003) (complaint not well pleaded if too vague to determine whether a violation occurred). Nothing 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. See, e.g., *Cray Construction Group LLC*, 341 NLRB 944 (2004).

Although Member Liebman agrees with former Member Walsh's dissenting opinion in *Cray Construction Group*, she acknowledges that, in contrast to the situation presented in *Cray Construction Group,* the complaint involved here does not allege that the funds at issue are mandatory subjects of bargaining.

difference owed to them between the wage rates that should have been paid under the 2005–2008 collective-bargaining agreement and the wage rates actually paid,[5] (2) make all the payments to the fringe benefit funds, including all liquidated damages as required by the collective-bargaining agreement and any additional amounts due the funds in accordance with *Merryweather Optical Co*., 240 NLRB 1213, 1216 fn. 7 (1979);[6] and 3) file the required monthly fringe benefit reports not yet filed with the fringe benefit funds.

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 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, Brian David Sanderson d/b/a ABS Heating and Cooling, Linden, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively and in good faith with Local 7, Sheet Metal Workers International Association, AFL–CIO, as the limited exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All employees engaged in the fabrication, erection, installation, repairing, replacing and servicing of all residential heating and air conditioning systems and the architectural sheet metal work of such residences; and all employees engaged in the fabrication, erection, installation, repairing, replacing and servicing of all jobs consisting of 20 tons of light commercial work.

(b) Failing to comply with the terms and conditions of the 2005–2008 collective-bargaining agreement between the Flint Area Association of Sheet Metal Contractors and the Union, thereby repudiating the agreement.

(c) 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) On request, recognize and bargain collectively and in good faith with the Union as the limited exclusive collective-bargaining representative of the unit employees.

(b) Comply with the terms and conditions of employment of the unit employees contained in the 2005–2008 collective-bargaining agreement between the Flint Area Association of Sheet Metal Contractors and the Union.

(c) Make whole the unit employees for the difference owed to them between the wage rates that should have been paid under the 2005–2008 collective-bargaining agreement and the wage rates actually paid, as set forth in the remedy section of this decision.

(d) Make all the contractually-required payments that have not been paid to the fringe benefit funds, as set forth in the remedy section of this decision and file the required monthly fringe benefit reports not yet filed with the fringe benefit funds.

(e) 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.

(f) Within 14 days after service by the Region, post at its facility in Linden, Michigan, copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 7, 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 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 du-

[5] In the complaint's prayer for relief, the General Counsel seeks "interest compounded quarterly" for any difference in wage rates owing to the unit employees. Having duly considered the matter, we are not prepared at this time to deviate from our current practice of assessing simple interest. See, e.g., *Rogers Corp*., 344 NLRB 504 (2005).

[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 to the various fringe benefit funds during the period of the delinquency, the Respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to any 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."

plicate 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 May 30, 2007.

(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.

Dated, Washington, D.C. April 7, 2008

Peter C. Schaumber, Chairman

Wilma B. Liebman, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

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 refuse to bargain collectively and in good faith with Local 7, Sheet Metal Workers International Association, AFL–CIO, as the limited exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All employees engaged in the fabrication, erection, installation, repairing, replacing and servicing of all residential heating and air conditioning systems and the architectural sheet metal work of such residences; and all employees engaged in the fabrication, erection, installation, repairing, replacing and servicing of all jobs consisting of 20 tons of light commercial work.

WE WILL NOT fail to comply with the terms and conditions of the 2005–2008 collective-bargaining agreement between the Flint Area Association of Sheet Metal Contractors and 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, on request, recognize and bargain collectively and in good faith with the Union as the limited exclusive collective-bargaining representative of the unit employees.

WE WILL comply with the terms and conditions of employment of the unit employees contained in the 2005–2008 collective-bargaining agreement.

WE WILL make whole the unit employees for the difference owed to them between the wage rates that should have been paid under the 2005–2008 collective-bargaining agreement and the wage rates actually paid, with interest.

WE WILL make all the contractually required payments that have not been paid to the fringe benefit funds, with interest, and WE WILL file the required monthly fringe benefit reports not yet filed with the fringe benefit funds.

BRIAN DAVID SANDERSON D/B/A ABS HEATING AND COOLING