Crystal Soda Water Company, Inc. *and* International Brotherhood of Teamsters, Local 229. Case 4–CA–38046

November 10, 2011

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS BECKER AND HAYES

The Acting General Counsel seeks a default judgment in this case on the ground that the Respondent has withdrawn its answer to the complaint. Upon a charge filed by International Brotherhood of Teamsters, Local 229, the Union, on March 31, 2011, the Acting General Counsel issued the complaint on June 27, 2011, against Crystal Soda Water Company, Inc., the Respondent, alleging that it has violated Section 8(a)(5) and (1) of the Act. The Respondent filed an answer to the complaint. However, by letter dated September 16, 2011, the Respondent withdrew its answer.

On September 20, 2011, the Acting General Counsel filed a Motion for Default Judgment with the Board. Thereafter, on September 21, 2011, 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

Section 102.20 of the Board's Rules and Regulations provides that the allegations in a 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 states that the answer must be received by the Regional Office on or before July 11, 2011. Although the Respondent filed an answer to the complaint on July 9, 2011, it subsequently withdrew its answer by letter dated September 16, 2011. The withdrawal of an answer has the same effect as a failure to file an answer, i.e., the allegations in the complaint must be considered to be true.[1] Accordingly, we grant the Acting General Counsel's Motion for Default Judgment.

On the entire record, the Board makes the following

[1] See *Maislin Transport*, 274 NLRB 529 (1985).

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a Pennsylvania corporation, has been engaged in the operation of a beverage bottling facility in Scranton, Pennsylvania. During the 12-month period preceding issuance of the complaint, the Respondent, in conducting its business operations described above, sold and shipped goods valued in excess of $50,000 directly to 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 LABOR PRACTICES

At all material times, Louis Kahonowitz held the position of the Respondent's President and has been a supervisor of the 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.

The following employees of the Respondent, the unit, constitute an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All of the Respondent's full-time drivers, mechanics, and production employees.

At all material times, the Union has been the designated exclusive collective-bargaining representative of the unit and the Union has been recognized as the representative by the Respondent. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which was effective by its terms from April 1, 2008 through March 31, 2011 (the 2008–2011 agreement).

At all material times, since at least April 1, 2008, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the unit.

Since the fall of 2010, a more precise date being unknown, during the effective dates of the 2008–2011 agreement, the Respondent ceased: (1) paying unit employees their accrued holiday and vacation pay as required by articles 5 and 6 of the agreement; (2) paying health insurance premiums as required by article 15 of the agreement; and (3) making pension contributions as required by the Pension Fund-Monthly Accounts provision of the agreement.

On about March 31, 2011, the Respondent ceased its operations at its Scranton facility.

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

and are mandatory subjects for the purpose of collective bargaining.

The Respondent ceased paying holiday pay, vacation pay, and health insurance premiums, and ceased making pension contributions, as described above, without the Union's consent and without having afforded the Union an opportunity to bargain with the Respondent with respect to this conduct.

The Respondent ceased operations at its facility, as described above, without adequate notice to the Union and without affording the Union an opportunity to bargain with the Respondent with respect to the effects of this conduct.

CONCLUSION OF LAW

By the acts and conduct described above, the Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees, and has thereby engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1). The Respondent's unfair labor practices affect commerce within the meaning of 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, to remedy the Respondent's unlawful failure and refusal to bargain with the Union about the effects of the Respondent's decision to cease operations at its Scranton, Pennsylvania facility, we shall order the Respondent to bargain with the Union, on request, about the effects of its decision. As a result of the Respondent's unlawful conduct, however, the unit employees have been denied an opportunity to bargain through their collective-bargaining representative at a time when the Respondent might still have been in need of their services and a measure of balanced bargaining power existed. Meaningful bargaining cannot be assured until some measure of economic strength is restored to the Union. A bargaining order alone, therefore, cannot serve as an adequate remedy for the unfair labor practices committed.

Accordingly, we deem it necessary, in order to ensure that meaningful bargaining occurs and to effectuate the policies of the Act, to accompany our bargaining order with a limited backpay requirement designed both to make whole the employees for losses suffered as a result of the violation and to recreate in some practicable manner a situation in which the parties' bargaining position is not entirely devoid of economic consequences for the Respondent. We shall do so by ordering the Respondent to pay backpay to the unit employees in a manner similar to that required in *Transmarine Navigation Corp*., 170 NLRB 389 (1968), as clarified by *Melody Toyota*, 325 NLRB 846 (1998).[2]

Thus, the Respondent shall pay its unit employees backpay at the rate of their normal wages when last in the Respondent's employ from 5 days after the date of this Decision and Order until occurrence of the earliest of the following conditions: (1) the date the Respondent bargains to agreement with the Union on those subjects pertaining to the effects of its decision to cease operations of its facility on the unit employees; (2) a bona fide impasse in bargaining; (3) the Union's failure to request bargaining within 5 business days after receipt of this Decision and Order, or to commence negotiations within 5 business days after receipt of the Respondent's notice of its desire to bargain with the Union; or (4) the Union's subsequent failure to bargain in good faith.

In no event shall the sum paid to these employees exceed the amount they would have earned as wages from the date on which the Respondent ceased operations of its Scranton, Pennsylvania facility to the time they secured equivalent employment elsewhere, or the date on which the Respondent shall have offered to bargain in good faith, whichever occurs sooner. However, in no event shall this sum be less than the employees would have earned for a 2-week period at the rate of their normal wages when last in the Respondent's employ.[3] Backpay shall be based on earnings which the unit employees would normally have received during the applicable period, less any net interim earnings, and shall be computed in accordance with *F.W. Woolworth Co*., 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), enf. denied on other grounds sub nom., *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011).

---

[2] See also *Live Oak Skilled Care & Manor*, 300 NLRB 1040 (1990). Neither the complaint nor the motion specifies the impact, if any, on the unit employees of the Respondent's decision to close. Thus, we do not know whether, or to what extent, the refusal to bargain about the effects of this decision had an impact on the unit employees. In these circumstances, we shall permit the Respondent to contest the appropriateness of a *Transmarine* backpay remedy at the compliance stage. See, e.g., *Buffalo Weaving & Belting*, 340 NLRB 684, 685 fn. 3 (2003); and *ACS Acquisition Corp.*, 339 NLRB 736, 737 fn. 2 (2003).

[3] In accordance with his dissenting view in *Kadouri International Foods*, 356 NLRB No. 148, slip op. at 1 fn. 1 (2011), Member Hayes would delete that portion of the remedy requiring that the minimum backpay due employees should not be less than 2 weeks' pay, without regard to actual losses incurred, and would limit the remedy only to those employees who were adversely affected by the Respondent's unlawful action.

Further, having found that the Respondent violated Section 8(a)(5) and (1) by ceasing to pay unit employees their accrued holiday and vacation pay as required by articles 5 and 6 of the 2008–2011 agreement, we shall order the Respondent to make the unit employees whole for any loss of earnings and other benefits attributable to its unlawful conduct. Backpay shall be computed in accordance with *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*, supra, and *Kentucky River Medical Center*, supra.

Also, having found that the Respondent has violated Section 8(a)(5) and (1) by ceasing to pay health insurance premiums as required by article 15 of the 2008–2011 agreement and ceasing to make pension contributions as required by the Pension Fund-Monthly Accounts provision of the 2008–2011 agreement, we shall order the Respondent to pay all delinquent health insurance premiums and make all such delinquent pension fund contributions that were not made since the fall of 2010, including any additional amounts due the fund on behalf of the unit employees, in accordance with *Merryweather Optical Co*., 240 NLRB 1213, 1216 fn. 7 (1979).[4]

We shall additionally order the Respondent to reimburse unit employees for any expenses ensuing from its failure to make the required health insurance premiums and pension fund contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection Service*, supra, with interest as prescribed in *New Horizons for the Retarded*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.[5]

Finally, in view of the fact that the Respondent has ceased operations at its Scranton, Pennsylvania facility, we shall order the Respondent to mail a copy of the attached notice to the Union and to the last known addresses of the unit employees who were employed by the Respondent since the fall of 2010, in order to inform them of the outcome of this proceeding.

ORDER

The National Labor Relations Board orders that the Respondent, Crystal Soda Water Company, Inc., Scranton, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain collectively and in good faith with International Brotherhood of Teamsters, Local 229, as the exclusive collective-bargaining representative of its unit employees over the effects of the Respondent's decision to cease operations at its Scranton, Pennsylvania facility. The bargaining unit is:

> All of the Respondent's full-time drivers, mechanics, and production employees.

(b) Ceasing to pay employees their accrued holiday and vacation pay as required by articles 5 and 6 of its 2008–2011 collective-bargaining agreement with the Union.

(c) Ceasing to pay health insurance premiums as required by article 15 of its 2008–2011 collective-bargaining agreement with the Union.

(d) Ceasing to make pension contributions on behalf of its employees as required by the Pension Fund-Monthly Accounts provision of its 2008–2011 collective-bargaining agreement with the Union.

(e) 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, bargain collectively and in good faith with the Union concerning the effects of the Respondent's decision to cease operations at its Scranton, Pennsylvania facility, and reduce to writing and sign any agreement reached as a result of such bargaining.

(b) Pay the unit employees their normal wages for the period set forth in the remedy section of this decision, with interest.

(c) Make whole the unit employees for any loss of earnings and other benefits resulting from the Respondent's failure to pay employees accrued holiday and vacation pay since the fall of 2010, with interest, as set forth in the remedy section of this decision.

---

[4] 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.

[5] In the complaint, the Acting General Counsel seeks an order requiring the Respondent to reimburse employees in amounts equal to the difference in taxes owed upon receipt of a lump-sum payment and taxes that would have been owed had there been no discrimination. Further, the Acting General Counsel requests that the Respondent be required to submit the appropriate documentation to the Social Security Administration so that, when backpay is paid, it will be allocated to the appropriate periods. He further seeks all other relief as may be just and proper to remedy the unfair labor practices alleged. Because the relief sought would involve a change in Board law, we believe that the appropriateness of this proposed remedy should be resolved after a full briefing by the affected parties, and there has been no such briefing in this case. Accordingly, we decline to order this relief at this time. See, e.g., *Ishikawa Gasket America, Inc.*, 337 NLRB 175, 176 (2001), enfd. 354 F.3d 534 (6th Cir. 2004), and cases cited therein.

(d) Make the contractually required health insurance premiums on behalf of the unit employees, with interest, that were not made since the fall of 2010, and make whole the unit employees for any expenses ensuing from the Respondent's failure to make the health insurance premiums, with interest, as set forth in the remedy section of this decision.

(e) Make all contractually required pension fund contributions that have not been made since the fall of 2010, including any additional amounts due the fund, and make whole the unit employees for any expenses ensuing from the Respondent's failure to make the contractually required pension fund contributions, with interest, as set forth in the remedy section of this decision.

(f) 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.

(g) Within 14 days after service by the Region, duplicate and mail, at its own expense and after being signed by the Respondent's authorized representative, copies of the attached notice marked "Appendix"[6] to the Union and to all unit employees who were employed by the Respondent since the fall of 2010.

(h) 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 the Respondent has taken to comply.

Dated, Washington, D.C. November 10, 2011

Mark Gaston Pearce, Chairman

Craig Becker, Member

Brian E. Hayes, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Mailed By Order of the National Labor Relations Board" shall read "Mailed Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX
NOTICE TO EMPLOYEES
MAILED 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 mail 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 bargain collectively and in good faith with International Brotherhood of Teamsters, Local 229, as the exclusive collective-bargaining representative of our unit employees over the effects of our decision to cease operations at our Scranton, Pennsylvania facility. The bargaining unit is:

All of our full-time drivers, mechanics, and production employees.

WE WILL NOT fail to pay employees their accrued holiday and vacation pay as required by articles 5 and 6 of our 2008–2011 collective-bargaining agreement with the Union.

WE WILL NOT fail to pay health insurance premiums as required by article 15 of our 2008–2011 collective-bargaining agreement with the Union.

WE WILL NOT fail to make pension contributions on behalf of our employees as required by the Pension Fund-Monthly Accounts provision of our 2008–2011 collective-bargaining agreement with the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, bargain collectively and in good faith with the Union concerning the effects of our decision to cease operations at our Scranton, Pennsylvania facility, and WE WILL reduce to writing and sign any agreement reached as a result of such bargaining.

WE WILL pay our unit employees their normal wages for the period set forth in the remedy section of the Board's decision, with interest.

WE WILL make whole our unit employees for any loss of earnings and other benefits resulting from our failure

to pay employees their accrued holiday and vacation pay since the fall of 2010, with interest.

WE WILL make the contractually required health insurance premiums on behalf of our unit employees, with interest, that were not made since the fall of 2010, and WE WILL make whole our unit employees for any expenses ensuing from our failure to make the health insurance premiums, with interest.

WE WILL make all contractually required pension fund contributions that have not been made since the fall of 2010, including any additional amounts due the fund, and WE WILL make whole our unit employees for any expenses ensuing from our failure to make the contractually required pension fund contributions, with interest.

CRYSTAL SODA WATER CO.