Smith Industrial Maintenance Corporation d/b/a Quanta a*nd* International Union, United Automobile, Aerospace And Agricultural Implement Workers of America (UAW), AFL–CIO, and its Local 174. Case 7–CA–52097

January 29, 2010

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

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 May 15, 2009, the General Counsel issued the complaint on July 31, 2009, against Smith Industrial Maintenance Corporation d/b/a Quanta, the Respondent, alleging that it has violated Section 8(a)(3) and (5) of the Act. The Respondent failed to file an answer.

On September 16, 2009, the General Counsel filed a Motion for Default Judgment with the Board. Thereafter, on September 17, 2009, 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 unless an answer was received by August 14, 2009, the Board may find, pursuant to a motion for default judgment, that the allegations in the complaint are true. Further, the undisputed allegations in the General Counsel's motion disclose that the Region, by letter dated August 17, 2009, notified the Respondent that unless an answer was received by August 24, 2009, a motion for default judgment would be filed.[2]

In the absence of good cause being shown for the failure to file an answer or a response to the Notice to Show Cause, we deem the allegations in the complaint to be admitted as true. We grant the General Counsel's Motion for Default Judgment in part, and deny it in part.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a corporation with an office and place of business in Taylor, Michigan, has been engaged in the business of cleaning, selling, and repairing intermediate bulk containers and chemical totes.

During the 12-month period preceding the issuance of the complaint, a representative period, the Respondent, in conducting its business operations described above, provided services valued in excess of $50,000 to enterprises located outside the State of Michigan, and derived gross revenues in excess of $1 million.

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 International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL–CIO (the International Union) and its Local 174 (Local 174), collectively the Union, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The following employees (the unit) 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, shipping inspection employees, and truck drivers employed by

[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 Liebman and Member Schaumber 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. See *Teamsters Local 523 v. NLRB*, ___F.3d ___, 2009 WL 4912300 (10th Cir. Dec. 22, 2009); *Narricot Industries, L.P. v. NLRB*, 587 F.3d 654 (4th Cir. 2009); *Snell Island SNF LLC v. NLRB*, 568 F.3d 410 (2d Cir. 2009), petition for cert. filed 78 U.S.L.W. 3130 (U.S. Sept. 11, 2009) (No. 09-328); *New Process Steel v. NLRB*, 564 F.3d 840 (7th Cir. 2009), cert. granted ___S.Ct.___, 2009 WL 1468482 (U.S. Nov. 2, 2009); *Northeastern Land Services v. NLRB*, 560 F.3d 36 (1st Cir. 2009), petition for cert. filed 78 U.S.L.W. 3098 (U.S. Aug. 18, 2009)(No. 09-213). But see *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009), petition for cert. filed 78 U.S.L.W. 3185 (U.S. Sept. 29, 2009) (No. 09-377).

[2] The General Counsel's motion for default judgment indicates that both the complaint and the August 17, 2009 reminder letter were sent to the Respondent by certified mail, return receipt requested. Although no return receipt was received for the complaint, the Region received a return receipt for the August 17, 2009 letter, showing that it was delivered to the Respondent. Further, on August 24, 2009, the Regional Director received a letter by facsimile transmission from the Respondent requesting an unspecified extension of time to file an answer to the complaint, and the Region granted an extension of time by Order dated September 2, 2009. However, no answer was filed.

the Respondent, but excluding office clerical employees, and guards and supervisors as defined in the Act.

Since at least May 1, 2004, and at all material times, the International Union has been the designated exclusive collective-bargaining representative of the unit, and has been so recognized by the Respondent. This recognition is embodied in successive collective-bargaining agreements, the most recent of which was effective May 1, 2006, to April 30, 2009, and extended on April 23, 2009, for an additional 1-year term through April 30, 2010 (the current contract).

At all material times since at least May 1, 2004, based on Section 9(a) of the Act, the International Union has been the exclusive collective-bargaining representative of the unit.

At all material times until about February 2009, the International Union designated Local 174 as its servicing representative of the unit.

Since about February 2009, the International Union has functioned as servicing representative of the unit.

At all material times, the following individuals held the positions set forth opposite their names and have been supervisors of the Respondent within the meaning of Section 2(11) of the Act, and its agents within the meaning of Section 2(13) of the Act:

Bruce Smith	Owner and President
Brian Smith	Operations Manager
Randy Eick	Account Manager

1. Since about late 2007, the Respondent has failed to make Independent Retirement Account (IRA) contributions for eligible unit employees, as required by article XIII of the current contract.

2. Since about August 1, 2008, the Respondent has intermittently failed to compensate the unit at all for work they performed, as required by article XII, section 1, and by Exhibit A, of the current contract.

3. Since about October 31, 2008, the Respondent has failed to provide health insurance for the unit, as required by article XII, section 2, of the current contract.

4. Since about November 18, 2008, the Respondent has failed to deduct and remit union dues from those unit employees who authorized the deductions, as required by article II, sections 2 and 3, of the current contract.

5. The subjects described in paragraphs 1 through 4 relate to wages, hours, and other terms and conditions of employment of the unit, and are mandatory subjects for the purposes of collective bargaining.

6. The Respondent engaged in the conduct described in paragraphs 1 through 4 without the consent of the Union, and in violation of Section 8(d) of the Act.[3]

7. About May 7, 2009, the Respondent, by its agent Bruce Smith, refused to accept a contractual grievance filed by the Union on behalf of unit employee William Kachigian, or to bargain with the Union about the grievance.

8. About May 11, 2009, by its agent Randy Eick, and about May 13, 2009, by its agent Bruce Smith, the Respondent bypassed the Union and dealt directly with the unit regarding the subject matter of the rejected grievance described in paragraph 7 and the terms of unit employee William Kachigian's reinstatement.

CONCLUSION OF LAW

By the 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, within the meaning of Section 8(d) of the Act, in violation of Section 8(a)(5) and (1) of the Act, and has thereby engaged in unfair labor practices affecting 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, having found that the Respondent has violated Section 8(a)(5) and (1) by violating the provisions of its current contract with the Union by failing to (1) make IRA contributions; (2) compensate unit employees for work they performed; (3) provide health insurance; (4) deduct and remit union dues pursuant to valid dues-checkoff authorizations; and (5) accept and bargain with the Union about a contractual grievance filed on behalf of a unit employee, we shall

[3] In the absence of a majority to grant the General Counsel's Motion for Default Judgment as to the allegations that the Respondent (1) unlawfully caused the terminations of its employees William Blunk, William Kachigian, James Powers, Kenneth Robinson, Welton Seawright, and John Blunk, and (2) repudiated its contract with the Union, we deny the motion as to these allegations without prejudice.

In Chairman Liebman's view, the complaint—while it could be clearer—adequately pleads the constructive discharge of the named employees under existing law. See, e.g., *RCR Sportswear, Inc.*, 312 NLRB 513, 513-514 (1993), enfd. 37 F.3d 1488 (3d Cir. 1994); *Control Services*, 303 NLRB 481, 485 (1991), enfd. 975 F.2d 1551 (3d Cir. 1992). The Board has "found constructive discharges in the absence of express total repudiation of the employees' bargaining representative," where employers have failed to honor provisions of a collective-bargaining agreement and so required employees to work under unlawfully-imposed conditions. *Lively Electric, Inc.*, 316 NLRB 471, 472 (1995).

order the Respondent to honor the terms and conditions of its current contract with the Union, and any further automatic renewal or extension of it, until a new agreement or good-faith impasse in negotiations is reached. In addition, in order to remedy the violations of the agreement, we shall order the Respondent to make whole the unit employees for any loss of earnings and other benefits they may have suffered as a result of the Respondent's failure to compensate unit employees for work they performed. 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).[4] In addition, we shall order the Respondent to restore the employees' health insurance coverage and to make all contractually-required IRA contributions that have not been made since late 2007, including any additional amounts due the funds in accordance with *Merryweather Optical Co*., 240 NLRB 1213, 1216 fn. 7 (1979).[5] Further, the Respondent shall be required to reimburse unit employees for any expenses ensuing from its failure to make the required IRA and health insurance contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891, 891 fn. 2 (1980), enfd. mem. 661 F. 2d 940 (9th Cir. 1981).[6]

In addition, we shall order the Respondent to deduct and remit union dues pursuant to valid dues-checkoff authorizations that have not been deducted since November 18, 2008, with interest as prescribed in *New Horizons for the Retarde*d, supra.

Further, we shall order the Respondent to cease and desist from bypassing the Union and dealing directly with unit employees regarding the subject matter of rejected grievances and the terms of reinstatement of unit employees, and we shall affirmatively order the Respondent to accept and bargain with the Union about the contractual grievance filed on behalf of unit employee William Kachigian.

[4] In the complaint, the General Counsel seeks interest computed on a compounded quarterly basis for any backpay or other monetary awards. 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., *Glen Rock Ham*, 352 NLRB 516, 516 fn. 1 (2008), citing *Rogers Corp.*, 344 NLRB 504 (2005).

[5] 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 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 funds.

[6] The General Counsel's request regarding IRA contributions due prior to April 30, 2009, can be addressed at the compliance stage of this proceeding.

ORDER

The National Labor Relations Board orders that the Respondent, Smith Industrial Maintenance Corporation d/b/a Quanta, Taylor, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Violating the provisions of its current contract with International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL–CIO (the International Union) and its Local 174 (Local 174), collectively the Union, by failing to (1) make IRA contributions; (2) compensate unit employees for work they performed; (3) provide health insurance; (4) deduct and remit union dues pursuant to valid dues-checkoff authorizations; and (5) accept and bargain with the Union about contractual grievances filed on behalf of unit employees. The appropriate unit is:

> All production and maintenance employees, shipping inspection employees and truck drivers employed by the Respondent, but excluding office clerical employees, and guards and supervisors as defined in the Act.

(b) Bypassing the Union and dealing directly with unit employees regarding the subject matter of rejected grievances and the terms of reinstatement of unit employees.

(c) Refusing to accept and bargain with the Union about the contractual grievance filed on behalf of unit employee William Kachigian.

(d) 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 and conditions of its current contract with the Union, and any further automatic renewal or extension of it, until a new agreement or good-faith impasse in negotiations is reached, and make whole the unit employees for any loss of earnings and other benefits they may have suffered as a result of the Respondent's violation of the provisions of the agreement relating to payment for work performed by unit employees, with interest, in the manner set forth in the remedy section of this decision.

(b) Make all IRA contributions that have not been made since late 2007, and reimburse unit employees for any expenses ensuing from its failure to make the required IRA contributions, with interest, in the manner set forth in the remedy section of this decision.

(c) Restore health insurance coverage for the unit employees and reimburse unit employees for any expenses ensuing from its failure to make the required payments,

with interest, in the manner set forth in the remedy section of this decision.

(d) Deduct and remit union dues pursuant to valid dues-checkoff authorizations that have not been deducted since November 18, 2008, with interest, in the manner set forth in the remedy section of this decision.

(e) Accept and bargain with the Union about the contractual grievance filed on behalf of unit employee William Kachigian.

(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, post at its facility in Taylor, 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 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 December 2007.

(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 that the Respondent has taken to comply.

[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."

Dated, Washington, D.C. January 29, 2010

Wilma B. Liebman, Chairman

Peter C. Schaumber, 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 violate the provisions of our current contract with International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL–CIO (the International Union) and its Local 174 (Local 174), collectively the Union, by failing to (1) make IRA contributions; (2) compensate unit employees for work they performed; (3) provide health insurance; (4) deduct and remit union dues pursuant to valid dues-checkoff authorizations; and (5) accept and bargain with the Union about contractual grievances filed on behalf of unit employees.

WE WILL NOT bypass the Union and deal directly with unit employees regarding the subject matter of rejected grievances and the terms of reinstatement of unit employees.

WE WILL NOT refuse to accept and bargain with the Union about the contractual grievance filed on behalf of unit employee William Kachigian.

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 and conditions of our current contract with the Union, and any further automatic re-

newal or extension of it, until a new agreement or good-faith impasse in negotiations is reached, and WE WILL make whole the unit employees for any loss of earnings and other benefits they may have suffered as a result of our violation of the provisions of the agreement relating to IRA contributions, work performed by unit employees, health insurance, and the contractual grievance filed by the Union, with interest.

WE WILL make all IRA contributions that have not been made since late 2007, and WE WILL reimburse unit employees for any expenses ensuing from our failure to make the required IRA contributions, with interest.

WE WILL restore health insurance coverage for the unit employees and reimburse unit employees for any expenses ensuing from our failure to make the required payments, with interest.

WE WILL accept and bargain with the Union about the contractual grievance filed on behalf of unit employee William Kachigian.

WE WILL deduct and remit union dues pursuant to valid dues-checkoff authorizations that have not been deducted since November 18, 2008, with interest.

SMITH INDUSTRIAL MAINTENANCE CORPORATION D/B/A QUANTA