

Aquaculture Products, Inc. and International Union of Operating Engineers, Local Union No. 624, AFL-CIO. Case 26-CA-14188

April 18, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
CRACRAFT AND RAUDABAUGH

Upon a charge and an amended charge filed by the Union November 28 and December 20, 1990, respectively, the General Counsel of the National Labor Relations Board issued a complaint against Aquaculture Products, Inc., the Respondent, alleging that it has violated Section 8(a)(5) and (1) and Section 8(d) of the National Labor Relations Act. Although properly served copies of the charges and complaint, and the amended complaint described below, the Respondent has failed to file an answer.

On January 28, 1991,¹ counsel for the General Counsel filed a Motion for Summary Judgment. Subsequent to issuing an amended complaint on January 30, which changed the date alleged for the Respondent's cessation of operations from May 28 to November 14, 1990, counsel for the General Counsel filed an Amended Motion for Summary Judgment on February 13. On February 14, 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 a response to the Notice to Show Cause and counsel for the General Counsel filed an opposition to the Respondent's response and a supplement in support of the Amended Motion for Summary Judgment.

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

Ruling on Motion for Summary 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. The complaint states that unless an answer is filed within 14 days of service, "all of the allegations in the complaint shall be deemed to be admitted to be true and shall be so found by the Board." Further, the undisputed allegations in the Amended Motion for Summary Judgment disclose that counsel for the General Counsel, by letter dated January 15, informed the Respondent of its failure to file an answer and extended the deadline for filing an answer until January 22. By telephone on January 16, the Respondent's attorney informed counsel for the General Coun-

sel that the Respondent did not intend to file an answer and expected counsel for the General Counsel to file a Motion for Summary Judgment. By letter dated January 23, the Respondent's attorney informed the Region that the Respondent had filed a voluntary Chapter 11 bankruptcy petition on January 22. On January 29, counsel for the General Counsel informed the Respondent's attorney by telephone of the Region's anticipated issuance of the amended complaint. At that time, the Respondent's attorney told counsel for the General Counsel that the Respondent considered the Board's proceedings to be stayed by the automatic stay provisions of the Bankruptcy Code and thus there would be no basis for answering the amended complaint. Counsel for the General Counsel confirmed the substance of the January 29 conversation in a letter to the Respondent's attorney on January 30. On February 4, in a letter to counsel for the General Counsel, the Respondent's attorney acknowledged receipt of the January 30 letter and asserted that "[n]ot only will . . . [the Respondent] not file an answer to the Amended Complaint and Amended Motion for Summary Judgment because of the stay, but . . . [it] will also consider the filing of the Amended Complaint and Amended Motion for Summary Judgment to be a violation of the automatic stay provisions."

On February 13, counsel for the General Counsel wrote the Respondent's attorney in part to advise him that unfair labor practice proceedings under the National Labor Relations Act are exempt from the automatic stay provisions of the Bankruptcy Code. That letter reiterated the citation of *NLRB v. Evans Plumbing Co.*, 639 F.2d 291 (5th Cir. 1981), with which the Respondent's attorney had been provided in a February 1 telephone conversation with the assistant to the Regional Director, and advised the Respondent's attorney of additional cases supporting the exemption of the Board's unfair labor practice proceedings from the automatic stay provisions of the Bankruptcy Code under the exceptions of 11 U.S.C. § 362(b)(4).

In its response to the Notice to Show Cause, the Respondent does not deny commission of any of the unfair labor practices alleged in the amended complaint, but asserts procedural defenses. Specifically, the Respondent argues that service of the original charge and complaint was insufficient and that the Respondent has not waived proper or adequate service of process. The Respondent further contends that all legal proceedings against it are automatically stayed due to the filing of its bankruptcy petition. In the alternative, the Respondent's response requests that the Board grant it an extension of time to answer the amended complaint.

The Respondent's contentions lack merit. With respect to service of the original charge and complaint, the Respondent claims that at the time when the General Counsel alleges that proper service on James

¹ All dates are 1991 unless otherwise specified.

Kahle or Ronnie Hamilton occurred, the Respondent had no officers or directors and neither Kahle nor Hamilton was an employee. We note, however, that Kahle signed the receipt for service of the original charge on November 30, 1990, and was sent copies of the complaint and amended complaint on December 20, 1990, and January 30, respectively. Kahle also signed the Respondent's bankruptcy petition on January 22, declaring in regard to the latter that he was the Respondent's managing agent. The Respondent may not deny Kahle's agency status to contest the Board's actions while at the same time holding him out as its agent in its bankruptcy proceeding. In addition, the Respondent did not answer the complaint and amended complaint that alleged that Kahle was both a supervisor and an agent of the Respondent. Consequently the allegations of Kahle's agency and supervisory status must be deemed to be admitted as true. In any event, the Respondent's counsel was informed of the issuance of the complaint and the amended complaint, and specifically has indicated to the General Counsel that the Respondent did not intend to file an answer to either document.

With respect to the Respondent's contention that its bankruptcy petition automatically stays all legal proceedings against it, it is well settled that the institution of bankruptcy proceedings does not deprive the Board of jurisdiction or authority to entertain and process an unfair labor practice case to its final disposition. Board proceedings fall within 11 U.S.C. § 362(b)(4) and (5), the exception to the automatic stay provisions for proceedings by a governmental unit to exercise its police or regulatory powers. *Katco, Inc.*, 295 NLRB No. 92 (June 30, 1989), citing *Phoenix Co.*, 274 NLRB 995 (1985). Finally, we find that the Respondent's request that it be allowed additional time to answer the amended complaint is also lacking in merit. It neither adequately explains the Respondent's failure to file a proper and timely answer to the amended complaint nor provides a cogent reason for extending the answer period. *Daywork Fire Protection*, 299 NLRB 328 (1990). In the absence of good cause being shown for the failure to file an answer, the allegations in the amended complaint are deemed to be admitted to be true and we grant the General Counsel's Amended Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a Mississippi corporation, has been engaged in the operation of catfish processing plants at its facilities in Schlater and Greenwood, Mississippi, where in the past 12 months, in the course and conduct of its business operations, it sold and shipped from its facilities products, goods, and materials valued in ex-

cess of \$50,000 directly to points outside the State of Mississippi. We find that the Respondent is an employer engaged in commerce within the meaning of Section 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

A. *The Unit and the Union's Representative Status*

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

All production and maintenance employees at Respondent's Greenwood, Mississippi and Schlater, Mississippi facilities, excluding truck drivers, quality control, sales, office, and clerical employees, guards and watchmen and supervisors within the meaning of the Act.

At all material times the Union has been the designated and recognized exclusive collective-bargaining representative of the above unit under Section 9(a) of the Act. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which is effective from March 30, 1990, to March 30, 1993.

B. *The Violations*

The current collective-bargaining agreement provides that the Respondent deduct union dues, initiation fees, and other authorized deductions from the pay of employees who have authorized the Respondent to make those deductions and to remit the deductions to the Union by the 25th day of the month for which the deductions are made. The collective-bargaining agreement also requires that the Respondent maintain hospitalization coverage for employees in the unit for the term of that agreement.

Since on or about July 1, 1990, the Respondent has ceased to remit union dues that it withheld from the pay of employees in the unit. Since on or about May 28, 1990, the Respondent has discontinued hospitalization coverage for employees in the unit. On or about November 14, 1990, the Respondent ceased operations at its Greenwood and Schlater, Mississippi facilities.

The Respondent's remission of dues deducted from employees' wages, its provision of hospitalization coverage, and the effects of its cessation of operations² are terms and conditions of employment of unit employees and are mandatory subjects of bargaining. The Respondent took these actions affecting unit employees'

²In light of the amended complaint's remedial request that the Respondent only be required to bargain about the effects of its cessation of operations at Greenwood and Schlater, we construe the complaint as alleging only an effects bargaining violation—consistent with the allegations in the underlying charge.

terms and conditions of employment without giving prior notice to the Union and without affording the Union an opportunity to negotiate and bargain about these acts and their effects. Consequently, the Respondent has violated Section 8(a)(5) and (1), as explained in Section 8(d), of the Act.

CONCLUSION OF LAW

By unilaterally failing to maintain contractually required hospitalization coverage for its unit employees, by failing to remit union dues withheld from employees' pay, and by refusing to bargain with the Union about the effects of its decision to close its Greenwood and Schlater facilities, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1), as explained in Section 8(d) of the Act, 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. In the event the collective-bargaining agreement requires the Respondent to make payments to a union fund for the provision of hospitalization coverage for employees in the unit, we shall order the Respondent to make such contractually required payments retroactively from May 28, 1990, to the date the Respondent closed, with any additional amounts owing as provided in *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).³ The Respondent shall also make the employees whole by reimbursing them for any losses or expenses they incurred because of the Respondent's unlawful failure to provide hospitalization coverage since May 28, 1990, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), with interest as provided in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). We shall also order the Respondent to remit to the Union dues deducted from employees' wages, with interest as provided in *New Horizons*, supra.

To remedy the Respondent's unlawful refusal to bargain about the effects of its decision to cease operations, we shall order it to bargain with the Union, on request, concerning the effects of its decision. We shall accompany the bargaining order with a limited backpay requirement designed to make whole the employ-

ees for losses sustained as a result of the violation, and to recreate in some practicable manner a situation in which the parties' bargaining positions are not entirely devoid of economic consequences for the Respondent. Therefore, we shall require the Respondent to pay backpay to its employees in a manner similar to that required in *Transmarine Corp.*, 170 NLRB 389 (1968). We shall order the Respondent to pay 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 the occurrence of the earliest of the following conditions: (1) the date the Respondent bargains to agreement with the Union concerning the effects on unit employees of its decision to cease operations; (2) a bona fide impasse in bargaining; (3) the failure of the Union to request bargaining within 5 days of this Decision and Order, or to commence negotiations within 5 days of the Respondent's notice of its desire to bargain with the Union; or (4) the subsequent failure of the Union to bargain in good faith. In no event shall the sum paid to any of these employees exceed the amount each would have earned as wages from the time the Respondent ceased operations to the time each secured equivalent employment elsewhere, or the date on which the Respondent shall have offered to bargain, whichever occurs first; provided, however, that in no event shall this sum be less than such employees would have earned for a 2-week period at the rate of their normal wages when last in the Respondent's employ. Interest on backpay shall be paid in the manner prescribed in *New Horizons*, supra.

ORDER

The National Labor Relations Board orders that the Respondent, Aquaculture Products, Inc., Schlater and Greenwood, Mississippi, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with International Union of Operating Engineers, Local Union No. 624, AFL-CIO about the effects on unit employees of its decision to cease operations at its Schlater and Greenwood, Mississippi facilities. The unit is:

All production and maintenance employees at Respondent's Greenwood, Mississippi and Schlater, Mississippi facilities, excluding truck drivers, quality control, sales, office, and clerical employees, guards and watchmen and supervisors within the meaning of the Act.

(b) Failing and refusing to continue in full force and effect all the terms of its collective-bargaining agreement with International Union of Operating Engineers, Local Union No. 624, AFL-CIO by unilaterally failing to maintain contractually required hospitalization coverage for unit employees and by failing to remit to the Union dues deducted from unit employees' wages.

³The record does not indicate whether hospitalization coverage was provided through a union fringe benefit fund. Assuming that such a fund was involved, the employees retain an interest in the overall financial stability of this fund; thus, requiring the Respondent to make payments into the fund is appropriate as part of the make-whole remedy for the employees. However, no such contributions into the hospitalization plan will be required if the hospitalization coverage was provided by a private insurance carrier. See *Excelsior Pet Products*, 276 NLRB 759, 763 (1985).

(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 by the Union, bargain with the Union as the exclusive representative of its employees in the above-described unit about the effects of its decision to cease operations, and pay limited backpay to the unit employees in the manner set forth in the remedy section of this decision.

(b) Make contractually required payments for hospitalization coverage of unit employees in the manner set forth in the remedy section of this decision, unless such coverage is provided other than through a union fund in which event no such payments shall be required.

(c) Remit to the Union dues deducted from employees' wages in the manner set forth in the remedy section of this decision.

(d) Make the unit employees whole for any losses or expenses they incurred because of the Respondent's unilateral failure to maintain contractually required hospitalization coverage for them in the manner set forth in the remedy section of this decision.

(e) 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 amounts due under the terms of this Order.

(f) Mail an exact copy of the attached notice marked "Appendix"⁴ to the Union and to all unit employees represented by the Union and employed by the Respondent between May 1 and November 14, 1990, inclusive, in the above described appropriate unit at its Schlater and Greenwood, Mississippi facilities. Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by the Respondent's authorized representative, shall be mailed by the Respondent immediately upon receipt.

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

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 the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with the Union about the effects on unit employees of our decision to cease operations. The unit is:

All production and maintenance employees at our Greenwood, Mississippi and Schlater, Mississippi facilities, excluding truck drivers, quality control, sales, office, and clerical employees, guards and watchmen and supervisors within the meaning of the Act.

WE WILL NOT fail or refuse to continue in full force and effect all the terms of our collective-bargaining agreement with International Union of Operating Engineers, Local Union No. 624, AFL-CIO by unilaterally failing to maintain contractually required hospitalization coverage for unit employees and by failing to remit to the Union dues deducted from your wages.

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 make contractually required payments for provision of your hospitalization coverage, unless such coverage is provided other than through a union fund in which event no such payments shall be required.

WE WILL remit to the Union dues deducted from your wages, with interest.

WE WILL make whole unit employees for any losses or expenses they incurred because of our unilateral failure to maintain contractually required hospitalization coverage for them.

WE WILL, on request by the Union, bargain with it as the exclusive representative of unit employees about the effects of our decision to cease operations and WE WILL pay the unit employees limited backpay, plus interest, as required by the National Labor Relations Board.

AQUACULTURE PRODUCTS, INC.

⁴If 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."