

**Crest Litho, Inc. and Graphic Communications  
International Union, Local 259-M, AFL-CIO.**  
Cases 3-CA-16376 and 3-CA-16528

July 31, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS  
DEVANEY AND RAUDABAUGH

The question presented in this case is whether Crest Litho, Inc., the Respondent, violated Section 8(a)(5) and (1) of the Act by failing to abide by several provisions of its current collective-bargaining agreement with Graphic Communications International Union, Local 259-M, AFL-CIO, the Union.<sup>1</sup> For the reasons set forth below, we find that the Respondent unlawfully failed to comply with contractual provisions regarding vacation, dues checkoff, and fringe benefit contributions. We further find that the Respondent unlawfully failed to comply with contractual requirements when laying off some unit employees, but that it lawfully laid off other employees in reliance on a reasonable good-faith interpretation of those requirements.

On the entire record in this case, the Board makes the following findings.

I. JURISDICTION

The Respondent is a New York State corporation with its principal office and place of business at 2550 Ninth Avenue, Watervliet, New York, where it has been engaged as a commercial printer providing lithography, offset, photoengraving, and related services. During the 12 months preceding the parties' execution of the stipulation of facts, the Respondent, in the course and conduct of operations at the Watervliet facility, derived gross revenues in excess of \$50,000 from services provided to other employers directly engaged in interstate commerce. The parties have stipulated, and we find, that the Respondent is an employer

<sup>1</sup>Charging Party Graphic Communications International Union, Local 259-M, AFL-CIO filed unfair labor practice charges on June 11 and August 13, 1991. On August 30, 1991, the Regional Director for Region 3, acting on behalf of the General Counsel, issued an amended consolidated complaint alleging that Respondent Crest Litho, Inc. has violated Sec. 8(a)(5) and (1) of the National Labor Relations Act. On September 23, 1991, the Regional Director issued an order dismissing certain allegations of the amended consolidated complaint.

On October 7, 1991, the General Counsel, the Respondent, and the Charging Party filed with the Board a stipulation of facts, with attachments, and moved to transfer this proceeding directly to the Board for findings of fact, conclusions of law, and a Decision and Order. On December 2, 1991, the Board issued an order granting the motion to transfer and approving the stipulation of facts. Thereafter, the General Counsel filed a memorandum brief in support of the amended complaint allegations.

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

engaged in commerce within the meaning of Section 2(6) and (7) of the Act. We also find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE UNFAIR LABOR PRACTICES

A. *Facts*

At all times material, the Union has been the exclusive representative of a bargaining unit of certain of the Respondent's employees at the Watervliet facility. The parties have had a series of collective-bargaining agreements, the most recent of which is effective by its terms from January 3, 1991, until January 3, 1993. The current contract contains provisions for, inter alia, dues checkoff (art. 6), vacation pay (art. 14), payment of wages and interlocal pension deduction (article 31), and payments to employee benefit funds for educational training and retraining (art. 15), retirement (art. 49), and supplemental retirement and disability (art. 30).

Article 11 of the contract governs unit employee layoffs. In relevant part, that article provides:

*Section 1.* An employee may be laid off in the normal course of the operation of the business; employees may be discharged for just cause. When layoffs or discharges are to be made, the Company agrees to notify the Union in advance to give the Union representatives an opportunity to discuss the matter with the Company representatives.

*Section 2.* The Company shall give regular employees one week's notice or pay in lieu thereof in the event of a permanent layoff. An employee must have completed one month of continuous service to be eligible.

On May 24, 1991,<sup>2</sup> the Respondent filed a petition under Chapter 11 of the Bankruptcy Code in United States Bankruptcy Court for the Northern District of New York. On this date, the Respondent had little or no cash on hand after paying operating expenses. Its only source of income since the filing of the bankruptcy petition has been proceeds from accounts receivable. As of June 6, the Respondent had no cash or bank deposits.

Manufacturer's Hanover Trust Company (MHTC) had a first security interest in all the Respondent's accounts receivable. CIT Group/Equipment Financing, Inc. (CIT) had a second security interest in these assets. In order to meet payroll and other operating expenses, the Respondent had to obtain orders from the bankruptcy court with consents by the U.S. Trustee, counsel for the creditors' committee, and the attorney for MHTC and CIT. The first such order was dated

<sup>2</sup>Subsequent dates are in 1991, unless otherwise stated.

June 1. There has been a series of orders since that date.<sup>3</sup> In each case, the Respondent's requests were reduced. Nothing was allowed for the May 1 payments to the supplemental retirement and disability fund and the educational training and retraining fund. After July 1, nothing was allowed for dues checkoff, pension deduction, and retirement fund payments.

Other than paying basic wages to unit employees who continued to work, the Respondent ceased making required contractual payments: on May 1, for the supplemental retirement and disability fund and the educational training and retraining fund; on May 24, for vacations; and on July 1, for dues checkoff, pension deduction, and the retirement fund. In late September, the Respondent was in the process of permanent liquidation.

On or about May 24 and 28, the Employer informed employees at work and the Union that a bankruptcy petition had been filed and that employees would be terminated as in-house work was completed. The Respondent permanently laid off unit employees on various dates from May 24 to August 2.<sup>4</sup> Other than the May 24 and 28 announcements, the Respondent did not give the Union any advance notice of individual layoff actions pursuant to article 11, section 1 of the parties' collective-bargaining agreement. The Respondent also did not otherwise give specific 1 week's notice or pay-in-lieu to permanently laid-off employees pursuant to article 11, section 2.

#### B. Contentions of the parties

The General Counsel contends that the Respondent has violated Section 8(a)(5) by failing to make contractually required payments and by failing to comply with contractual provisions governing permanent layoffs of unit employees. The General Counsel argues that economic inability to pay does not excuse the statutory obligation to comply with the obligations of a collective-bargaining agreement. Furthermore, the pendency of bankruptcy proceedings does not stay the Board's

jurisdiction to hear and resolve unfair labor practice issues.

The Respondent contends<sup>5</sup> that the restrictions imposed by the Bankruptcy Code, the bankruptcy court, and its creditors precluded compliance with the monetary provisions of the collective-bargaining agreement. With respect to the layoffs, the Respondent contends that its May 24 and 28 notices to employees and the Union satisfied its contractual obligations, except as to two employees laid off on May 24 (Brian Bradt and Helen Myosin).

#### C. Discussion and Conclusions

1. Each of the contractual provisions at issue in this case relates to a mandatory subject of bargaining. A unilateral modification or repudiation of such provisions during a contract term is a violation of Section 8(a)(5). See *Rapid Fur Dressing*, 278 NLRB 905 (1986). In this case, the parties have stipulated that the Respondent failed to comply with contractual requirements for vacation, benefit fund, and dues-checkoff payments. (As discussed below in sec. C,2, the issue of whether Respondent complied with contractual layoff provisions is a disputed matter.) We need to consider only whether the Respondent has presented any meritorious affirmative defense to its otherwise unlawful conduct.

The Respondent's dire economic circumstances are clear from the stipulated record. It is well established, however, that economic inability to pay does not constitute an adequate defense to an allegation that an employer has violated Section 8(a)(5) by failing to abide by provisions of a collective-bargaining agreement. E.g., *Zimmerman Painting & Decorating*, 302 NLRB 856 (1991).

There remains the question whether the bankruptcy proceeding presents a defense for the Respondent's noncompliance with contractual payment obligations. In this regard, the stipulation of facts shows that the Respondent ceased making payments into funds for supplemental retirement and disability and for educational training and retraining on May 1, prior to the May 24 filing of a bankruptcy petition. Accordingly, the bankruptcy proceeding cannot be a defense to the Respondent's unlawful failure to make timely prepetition payments.<sup>6</sup>

<sup>5</sup>The Respondent did not file a statement of position with the Board. Its position was set forth in two letters submitted to the Board's Regional Office during the investigation of the unfair labor practice charges filed in this case. The stipulation of facts includes these letters.

<sup>6</sup>It is well established that the Board's jurisdiction and authority to hear and determine an unfair labor practice case to its final disposition are exempted from the automatic stay provisions of the Bankruptcy Act under the exception of 11 U.S.C. § 362(b)(4) and (5). See *Katco, Inc.*, 295 NLRB No. 92, slip op. at 2 (June 30, 1989)

*Continued*

<sup>3</sup>The orders themselves are not part of the record in this case.

<sup>4</sup>The dates of layoff and affected employees were:

*May 24:* Keith Pepicelli, Brian Bradt, Helen Myosin; *May 28:* Timothy Davis, Charles Quick, Michael Quick, Frank Degennaro; *May 31:* Monica Halfacre; *June 3:* Lucille A. Akins, Mitt Selke; *June 5:* Michael Schrell; *June 6:* James Bollacker; *June 7:* William Seredensky; *June 19:* William Mitchell, Carl Rivenburg; *June 26:* Barry Burns, Richard Cozzy; *June 27:* Annette Chakrumaninan, Eric Price, Theodore Hahn, John Sokol, Bob McNamee, Gerald Bernard, James Ballocker, Ronald Singley, Quinton Jones, Phillip Jackson, Richard Butler, Tom Gorham; *June 28:* Pete Dominici, Eric Ortiz, Bobby Ballocker, David Fleming; *June 29:* Harry Vanderhule; *July 8:* Robert Doterer; *July 12:* John Harper, Carol E. Olsen; *July 26:* Patrick Sullivan, William Wakely, Charles Bollacker, William J. Peper; *August 2:* Eugene A. Kromey, Joseph Belleville, Kenneth A. McDonald, Edward Sokol.

With respect to postpetition conduct, Section 1113 of the Bankruptcy Code describes the “sole method” for the termination or modification of the terms of a collective-bargaining agreement by a party in bankruptcy.<sup>7</sup> Congress enacted this legislation in response to, and as a reversal of, the Supreme Court’s holding in *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984), that a debtor in bankruptcy did not commit an unfair labor practice by unilaterally terminating or modifying a collective-bargaining agreement prior to seeking bankruptcy court approval. Specifically, Section 1113(f) states:

No provision of [the Bankruptcy Code] shall be construed to permit a trustee to unilaterally terminate or alter any provisions of a collective bargaining agreement prior to compliance with the provisions of this section.

Although the full text of Section 1113 is relatively lengthy, the Sixth Circuit has succinctly summarized the requirements for contract termination or modification as follow:

*Subsection 1113(b) requires* the trustee or debtor-in-possession to make a proposal to the union providing for employee benefit modifications that are necessary to permit the reorganization of the debtor and to assure that all creditors, the debtor, and all other affected parties are treated fairly. The debtor must also provide the union with all information necessary to effectively evaluate the proposal. *Subsection 1113(b) further requires* meetings between the debtor-in-possession and the union.

*Subsection 1113(c) provides* that the court shall approve an application for rejection of the collective bargaining agreement only if it finds that the debtor-in-possession has made a proposal that fulfills the requirements of subsection (b); that the union has refused to accept the proposal without good cause; and that the balance of the equities favors rejection of the contract.

*Subsection 1113(d) contains a timetable* during which the bankruptcy court must rule on the petition. *Subsection 1113(e) contains a provision allowing emergency relief* as necessary to prevent irreparable damage to the debtor’s business.<sup>8</sup>

The Respondent bears the burden of proving that its repudiation of the terms of its contract with the Union was in accordance with the specific requirements of

Section 1113.<sup>9</sup> Clearly, such proof must include a bankruptcy court order issued (1) in accordance with the terms of Section 1113(c) or (e), (2) prior to any change in the terms of the contract, and (3) expressly authorizing the specific change subsequently undertaken.

The stipulated record makes reference only to a series of orders issued by the bankruptcy court on and after June 1, 1991. These orders present no defense to the Respondent’s antecedent unilateral cessation of contract benefits, including not only the prepetition conduct previously discussed but also the cessation of vacation payments on and after May 24. Appropriate proof of bankruptcy court orders could justify the Respondent’s subsequent cessation of contract payments. The orders themselves are not part of the record, however, and there is insufficient evidence of their content or of the procedures leading to their issuance for us to find that the Respondent has acted in compliance with Section 1113. Consequently, the Respondent has failed to prove that bankruptcy proceedings justified any of its admitted failures to comply with the terms of its existing collective-bargaining agreement with the Union. This conduct therefore violated Section 8(a)(5) and (1) of the Act.

2. The Respondent’s defense of its layoff action differs from its defense of other conduct at issue here. In this regard, the Respondent argues that its oral notice to employees and the Union on May 24 and 28, 1991, satisfied its contractual obligations, except for two employees who were laid off on May 24. On the other hand, the General Counsel and the Union apparently believe that article 11 of the parties’ collective-bargaining agreement requires separate advance notices for each employee’s layoff, or at least for each day’s layoff action, from May 24 through August 2.

This dispute between the parties about layoffs is essentially a contractual one. In *Atwood & Morrill Co.*, 289 NLRB 794, 795 (1988), the Board held: “. . . the dispute is solely one of contract interpretation, and there is no evidence of animus, bad faith, or an intent to undermine the Union, we will not seek to determine which of two equally plausible contract interpretations is correct.” In such cases, the Board will not find an 8(a)(5) unilateral change if the record shows that “an employer has a sound arguable basis for ascribing a particular meaning to his contract and his action is in accordance with the terms of the contract as he construes it.” *Vickers, Inc.*, 153 NLRB 561, 570 (1965).<sup>10</sup>

Article 11 of the parties’ agreement permits the Respondent to lay off employees, subject to certain con-

(not reported in Board volumes); *American Fleet Maintenance Co.*, 289 NLRB 764 (1988).

<sup>7</sup> See *In re Ionosphere Clubs*, 922 F.2d 984 (2d Cir. 1990).

<sup>8</sup> *In re Unimet Corp.*, 842 F.2d 879, 882 (1988).

<sup>9</sup> The Respondent does not contend that different requirements should apply because it is now in the process of permanent liquidation, rather than reorganization.

<sup>10</sup> Also see *NCR Corp.*, 271 NLRB 1212, 1213 (1984).

ditions. Pursuant to section 1, the Respondent must notify the Union in advance to give it an opportunity to discuss the layoff action. Pursuant to section 2, the Respondent must give employees 1 week's notice of a permanent layoff. The Respondent did not give any laid-off employee pay in lieu. Consequently, its claim of compliance with article 11 rests entirely on the adequacy of its May 24 and 28 notices to the Union and to employees that all employees would be permanently laid off as work was completed.

The Respondent admits that its May 24 and 28 notices were untimely as to the two employees laid off on May 24. We further find that there is no plausible basis for finding that these notices were timely with respect to any employee permanently laid off less than 1 week after the notices. The Respondent therefore violated Section 8(a)(5) by failing to adhere to the lay-off provisions of its collective-bargaining agreement with the Union when it laid off Keith Pepicelli, Brian Bradt, Helen Myosin, Timothy Davis, Charles Quick, Michael Quick, Frank Degennaro, and Monica Halfacre.

On the other hand, we find that the Respondent has a sound arguable basis for contending that its permanent layoff of unit employees on and after June 3, more than a week after the May 24 notice, comported with contractual requirements. The terms of article 11, section 2 do not clearly require separate notices of related serial layoffs, as opposed to the notice given here by the Respondent to the Union and to all employees. Furthermore, article 11, section 1 does not state a specific time for advance notice to the Union so as to assure the opportunity to discuss the matter of layoffs. It is reasonable to conclude that a week's advance notice was at least sufficient time for the Union to request discussions. There is no evidence that it did so. There also is no evidence that the Respondent's actions involved animus, bad faith, or an attempt to undermine the Union's representative status. Accordingly, we find that the Respondent's layoff of unit employees on and after June 3 did not violate Section 8(a)(5).<sup>11</sup>

#### CONCLUSION OF LAW

By failing to adhere to provisions of the January 3, 1991, to January 3, 1993 collective-bargaining agreement with the Union for vacations, dues checkoff, supplemental retirement and disability, payment of wages and interlocal pension deduction, retirement, educational training and retraining, and layoffs, the Respondent has engaged in unfair labor practices affect-

<sup>11</sup> Apart from the contractual issue, the amended complaint alleged that the Respondent failed to bargain with the Union about the layoffs and their effects. The Respondent's answer denied this allegation, and the General Counsel has not addressed it in his memorandum brief to the Board. Assuming that the allegation has not effectively been withdrawn, we shall dismiss it as unproven, for the stipulation contains insufficient evidence to establish the violation.

ing 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. In view of the permanent layoffs and the Respondent's liquidation, we shall order that the Respondent mail notices to the last known address of all unit employees who were employed by the Respondent in the 2-month period preceding May 24, 1991.

We shall order the Respondent to reinstate and adhere to the terms and conditions of its current collective-bargaining agreement with the Union. We shall also order the Respondent to make whole unit employees, in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), for any loss of wages and benefits suffered as the result of its unlawful repudiation of contract provisions. The Respondent shall also reimburse its unit employees for any expenses ensuing from the Respondent's unlawful failure to make contractually required payments to benefit funds. *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981). Interest on amounts owing to unit employees shall be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

We shall also order the Respondent to remit to the Union the contractually required payments for dues deductions which the Respondent unlawfully failed to make, with interest as provided in *New Horizons*, supra. Finally, we shall order the Respondent to make the contractually required benefit fund payments which it has unlawfully failed to make.<sup>12</sup>

#### ORDER

The National Labor Relations Board orders that that Respondent, Crest Litho, Inc., Watervliet, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain in good faith with Graphic Communications International Union, Local 259-M, AFL-CIO as the exclusive bargaining representative of an appropriate bargaining unit of the Respondent's employees, by failing to adhere to provisions of the January 3, 1991, to January 3, 1993 collective-bargaining agreement with the Union for vacations, dues checkoff, supplemental retirement and disability, payment of wages and interlocal pension deduction, retirement, educational training and retraining, and layoffs.

<sup>12</sup> We leave to the compliance stage the question whether the Respondent must pay any additional amounts into the benefit funds in order to satisfy our "make-whole" remedy. *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).

(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) Reinstate and adhere to the terms and conditions of employment of its collective-bargaining agreement with the Union.

(b) Make whole, in the manner set forth in the remedy section of this decision, unit employees, the Union, and the contractual benefit funds for any losses resulting from the Respondent's failure to comply with provisions in the 1991-1993 collective-bargaining agreement with the Union.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, time-cards, personnel records and reports, and all other record necessary to analyze the amounts due under the terms of this Order.

(d) Mail a copy of the attached notice marked "Appendix"<sup>13</sup> to all bargaining unit employees who were employed by the Respondent at any time in the 2-month period preceding May 24, 1991. Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be mailed immediately upon receipt.

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

<sup>13</sup> 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."

## 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 mail and abide by this notice.

WE WILL NOT refuse to bargain in good faith with Graphic Communications International Union, Local 259-M, AFL-CIO as the exclusive bargaining representative of an appropriate bargaining unit of our employees, by failing to adhere to provisions of the January 3, 1991, to January 3, 1993 collective-bargaining agreement with the Union for vacations, dues checkoff, supplemental retirement and disability, payment of wages and interlocal pension deduction, retirement, educational training and retraining, and layoffs.

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 reinstate and adhere to the terms and conditions of employment of our collective-bargaining agreement with the Union.

WE WILL make whole unit employees, the Union, and the contractual benefit funds for any losses resulting from our failure to comply with provisions in the 1991-1993 collective-bargaining agreement with the Union.

CREST LITHO, INC.