

Frosted Foods, Inc. and Teamsters Local Union No. 633 of New Hampshire, a/w International Brotherhood of Teamsters, AFL-CIO.¹ Cases 1-CA-26183, 1-CA-26270, and 1-CA-26353

August 14, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
OVIATT AND RAUDABAUGH

Upon charges filed by the Union on March 6, March 30, and May 5 (amended June 5), 1989, the General Counsel of the National Labor Relations Board issued a second consolidated complaint on June 14, 1989, against Frosted Foods, Inc., the Respondent, alleging that it has violated Section 8(a)(5) and (1) of the National Labor Relations Act. Although properly served copies of the charge and complaint, the Respondent has failed to file an answer.

On July 20, 1992, the General Counsel filed a Motion for Summary Judgment. On July 22, 1992, 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.

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 second consolidated complaint states that unless an answer is filed within 14 days of service, "all of the allegations in the second consolidated complaint shall be deemed to be admitted to be true and shall be so found by the Board." Further, the undisputed allegations in the Motion for Summary Judgment disclose that by letter dated April 28, 1992, counsel for the General Counsel notified the Respondent that unless an answer was received by the close of business May 8, 1992, a Motion for Summary Judgment would be filed.² To date, no answer has been filed by the Respondent.

¹ The name of the Respondent has been changed to reflect the new official name of the International Union.

² A similar letter was forwarded to the Respondent on July 6, 1989, advising it that a Motion for Summary Judgment would be filed if an answer was not received by the close of business July 12, 1989.

In the absence of good cause being shown for the failure to file a timely answer, we grant the General Counsel's Motion for Summary Judgment. On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation with an office and place of business in Hooksett, New Hampshire, has been engaged in the wholesale sale and distribution of grocery items. The Respondent, in the course and conduct of its business operations, annually sells and ships from its Hooksett facility products, goods, and materials valued in excess of \$50,000 directly to points outside the State of New Hampshire, and annually purchases and receives at the facility products, goods, and materials valued in excess of \$50,000 directly from points outside the State of New Hampshire. 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

Since in or about 1968, the Union has been the designated exclusive collective-bargaining representative of the Respondent's employees in an appropriate unit and has been recognized as such by the Respondent in successive collective-bargaining agreements, the most recent of which was effective by its terms for the period October 1, 1986, through September 30, 1989. At all times since 1968, the Union, by virtue of Section 9(a) of the Act, has been, and still remains, the exclusive bargaining representative of the Respondent's unit employees for purposes of collective bargaining regarding rates of pay, wages, hours of employment, and other terms and conditions of employment. The appropriate bargaining unit consists of:

All truck drivers, truck driver helpers, warehousemen and freezermen employed by Respondent at its Hooksett, New Hampshire facility, but excluding executives, office and clerical personnel, supervisors as defined in the Act and any other individuals as are excluded by the provisions of the Labor-Management Relations Act of 1947 or any acts in amendment or replacement thereof.

Since on or about November 1988, the Respondent ceased making payments to the Northern New England Benefit Trust for medical and life insurance for unit employees, as required by article 9 of

the parties' 1986-1989 agreement, thereby causing the insurance coverage to terminate and/or lapse. The Respondent's discontinuance of such payments, which is a mandatory subject of bargaining, was done without notifying the Union or affording it an opportunity to bargain, and violated Section 8(a)(5) and (1) of the Act, as alleged.

Further, since on or about February 15, 1989, and on various dates thereafter, the Union filed grievances pursuant to the agreement and, since on or about February 24, 1989, and continuing thereafter, the Respondent has failed and refused to select an arbitrator to hear the grievances as required by article 7 of the agreement. We find that by engaging in such conduct, the Respondent has repudiated the grievance procedure set forth in the 1986-1989 agreement, and has violated Section 8(a)(5) and (1) of the Act, as alleged.

On or about March 31, 1989, the Respondent closed its Hooksett facility and, on or about the same date, the Union requested that the Respondent negotiate concerning the effects of the closing of the Hooksett facility on unit employees. Since on or about March 31, 1989, the Respondent has failed and refused, and continues to refuse, to bargain with the Union over the effects of the closing on unit employees. By refusing to bargain with the Union over the effects of the closing of the Hooksett facility on unit employees, which is a mandatory subject of bargaining, the Respondent has violated Section 8(a)(5) and (1) of the Act, as alleged.

CONCLUSION OF LAW

By ceasing to make payments to the Northern New England Benefit Trust for medical and life insurance for unit employees as required by the 1986-1989 contract with the Union, failing and refusing to select an arbitrator to hear grievances as required by that agreement, and failing and refusing to bargain with the Union over the effects of the closing of its Hooksett facility on unit employees, the Respondent has 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.

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 necessary to effectuate the policies of the Act.

To remedy the Respondent's unlawful failure and refusal to bargain with the Union regarding the effects of the closing of its Hooksett, New Hampshire facility on unit employees, we shall order the

Respondent to bargain with the Union, on request, concerning the effects of that decision. To ensure that meaningful bargaining occurs and to effectuate the policies of the Act, the Respondent shall be ordered to pay its employees backpay at the rate of normal wages when last in the Respondent's employ from 5 days after the date of this decision until the occurrence of the earliest of the following conditions: (1) the date the Respondent bargains to agreement with the Union on the effects on unit employees of the closing of its Hooksett facility; (2) a bona fide impasse in bargaining; (3) the failure of the Union to request bargaining within 5 days of the Respondent's notice of its desire to bargain in good faith; (4) the subsequent failure of the Union to bargain in good faith; but in no event shall the sum paid to any of these employees exceed the amount the employees would have earned as wages from the date on which the Respondent closed its Hooksett facility to the time the employee secured equivalent employment elsewhere, or the date on which the Respondent shall have offered to bargain, whichever occurs sooner; provided, however, that in no event shall this sum be less than these employees would have earned for a 2-week period at a rate of their normal wages when last in the Respondent's employ. See *Transmarine Corp.*, 170 NLRB 389 (1968). Interest on all sums shall be paid in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The Respondent shall also be ordered to make the payments to the Northern New England Benefit Trust that were required under article 9 of the parties' 1986-1989 collective-bargaining agreement for medical and life insurance for unit employees but which the Respondent failed to make since in or about November 1988.³ The Respondent will be required to make whole unit employees for any expenses they may have incurred as a result of the Respondent's refusal to make such payments, 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 prescribed in *New Horizons for the Retarded*, supra. The Respondent shall further be required to select an arbitrator to hear grievances that were filed by the Union since on or about February 15, 1989, and on various dates thereafter, as required by article 7 of its 1986-1989 agreement with the Union.

Finally, in view of the closing of the Hooksett facility, the Respondent shall be required to mail copies of the Board's notice to all unit employees.

³ Any additional amounts applicable to these payments shall be computed in the manner prescribed in *Merryweather Optical Co.*, 240 NLRB 1213 (1979).

ORDER

The National Labor Relations Board orders that the Respondent, Frosted Foods, Inc., Hooksett, New Hampshire, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Teamsters Local Union No. 633 of New Hampshire, a/w International Brotherhood of Teamsters, AFL-CIO, which is the designated exclusive collective-bargaining representative of the Respondent's employees in an appropriate unit, over the effects of its decision to close its Hooksett, New Hampshire facility. The appropriate unit consists of:

All truck drivers, truck driver helpers, warehousemen and freezermen employed by Respondent at its Hooksett, New Hampshire facility, but excluding executives, office and clerical personnel, supervisors as defined in the Act and any other individuals as are excluded by the provisions of the Labor-Management Relations Act of 1947 or any acts in amendment or replacement thereof.

(b) Refusing to make payments for medical and insurance benefits for unit employees to the Northern New England Benefit Trust and refusing to select an arbitrator to hear grievances filed by the Union when required by the terms of a collective-bargaining 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, bargain with the Union over the effects on unit employees of the closing of the Respondent's Hooksett, New Hampshire facility, reduce to writing any agreement reached as a result of such bargaining, and pay limited backpay, with interest, in the manner set forth in the remedy section of this decision.

(b) Make the payments to the Northern New England Benefit Trust for medical and insurance benefits for unit employees that were required under the parties' 1986-1989 collective-bargaining agreement but which the Respondent ceased to make beginning in or about November 1988, and make whole unit employees for any expenses they may have incurred as a result of the Respondent's failure and refusal to make such payments, with interest as set forth in the remedy section of this decision.

(c) Select an arbitrator to hear the grievances that were filed by the Union on or about February

15, 1989, and on various dates thereafter, as required by article 7 of the parties' 1986-1989 collective-bargaining agreement.

(d) 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.

(e) Mail signed and dated copies of the attached notice marked "Appendix"⁴ to the Union and to all unit employees employed as of the date the Respondent closed its Hooksett, New Hampshire facility. Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be mailed immediately upon receipt by the Respondent to the last known address of each employee.

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

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."

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

WE WILL NOT refuse to bargain with Teamsters Local Union No. 633 of New Hampshire, a/w International Brotherhood of Teamsters, AFL-CIO, which is the exclusive designated collective-bargaining representative of our employees in an appropriate unit, over the effects of our decision to close our Hooksett, New Hampshire facility on the unit employees. The appropriate unit consists of:

All truck drivers, truck driver helpers, warehousemen and freezermen employed by Respondent at its Hooksett, New Hampshire facility, but excluding executives, office and clerical personnel, supervisors as defined in the Act and any other individuals as are excluded by the provisions of the Labor-Management Relations Act of 1947 or any acts in amendment or replacement thereof.

WE WILL NOT refuse to make payments for medical and insurance benefits for unit employees to the Northern New England Benefit Trust or refuse to select an arbitrator to hear grievances filed by the Union when required by the terms of a collective-bargaining agreement.

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, bargain in good faith with the Union over the effects on unit employees of our decision to close the Hooksett, New Hampshire facility, and will put in writing any agreement reached as a result of such bargaining, and WE WILL pay unit employees limited backpay as re-

quired by the National Labor Relations Board, with interest.

WE WILL make payments to the Northern New England Benefit Trust for medical and life insurance for unit employees that were required under our 1986-1989 collective-bargaining agreement with the Union but which we ceased to make beginning in or about November 1988, and WE WILL make whole unit employees for any expenses they may have incurred as a result of our failure to make such payments, with interest.

WE WILL select an arbitrator to hear grievances that were filed by the Union on or about February 15, 1989, and on various dates thereafter, as required by article 7 of the 1986-1989 agreement.

FROSTED FOODS, INC.