

NOTICE: This opinion is subject to formal revision before publication in the Board volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Eclair, Inc. and Local 3, Bakery, Confectionery and Tobacco Workers International Union of America, AFL-CIO

Eclair, Inc., and its Successor New York Eclair, Inc., and its Successor Eclair Bakery Cafe, Inc. and Local 3, Bakery, Confectionery and Tobacco Workers International Union of America, AFL-CIO. Cases 2-CA-27137 and 2-CA-27486

June 13, 1995

DECISION AND ORDER

BY MEMBERS BROWNING, COHEN, AND
TRUESDALE

Upon charges filed by the Union on January 25 and May 25, 1994, in Cases 2-CA-27317 and 2-CA-27486, respectively, the General Counsel of the National Labor Relations Board issued an order consolidating cases, consolidated complaint and notice of hearing on July 29, 1994, and an order amending consolidated complaint on March 24, 1995, against Eclair, Inc. (Eclair) and its successor New York Eclair, Inc. (New York) and its successor Eclair Bakery Cafe, Inc. (Bakery), the Respondents, alleging that they have violated Section 8(a)(1) and (5) of the National Labor Relations Act. Although properly served copies of the charges, consolidated complaint, and order amending consolidated complaint, Respondents Eclair and New York failed to file an answer.¹

On May 8, 1995, the General Counsel filed a Motion for Partial Summary Judgment² with the Board.³ On May 11, 1995, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. None of the Respondents filed a 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

Sections 102.20 and 102.21 of the Board's Rules and Regulations provide that the allegations in the complaint shall be deemed admitted if an answer is not

¹ Bakery has filed an answer, and the General Counsel does not move for summary judgment against Bakery.

² Although styled a *Motion for Partial Summary Judgment*, the motion seeks summary judgment with regard to all allegations in the consolidated complaint with respect to Respondents Eclair and New York.

³ On May 30, 1995, the General Counsel filed a clarification of Motion for Partial Summary Judgment.

filed within 14 days from service of the complaint, unless good cause is shown. In addition, the consolidated complaint and the order amending consolidated complaint affirmatively note that unless an answer is filed within 14 days of service, all the allegations in the consolidated complaint or order amending consolidated complaint will be considered admitted. Further, the undisputed allegations in the Motion for Partial Summary Judgment disclose that the Region, by letters dated September 19, 1994, October 6, 1994, and April 12, 1995, notified Respondents Eclair and New York that no answer had been received and that unless an answer were received, a Motion for Summary Judgment would be filed. Nevertheless, Respondents Eclair and New York failed to file an answer.⁴

In the absence of good cause being shown for the failure by either Respondent Eclair or Respondent New York to file a timely answer to either the consolidated complaint or the order amending consolidated complaint, we grant the General Counsel's Motion for Partial Summary Judgment with respect to Respondent Eclair and Respondent New York.

On the entire record, the Board makes the following

Findings of Fact

I. JURISDICTION

Respondent Eclair, a domestic corporation with an office and place of business located at 141 West 72nd Street, New York, New York, had been engaged in the retail and nonretail sale of baked goods. Annually, in the course and conduct of its business operations, Respondent Eclair derived gross revenues in excess of \$500,000 and purchased and received at its facility goods and products valued in excess of \$5000 directly from suppliers located outside the State of New York. Based on a projection of its operations since about August 15, 1993, at which time Respondent New York commenced operations, in the course and conduct of its business operations Respondent New York also would have derived gross revenues in excess of \$500,000 and would have purchased and received at its facility goods and products valued in excess of \$5000 directly from suppliers located outside the State of New York. We find that Respondents Eclair and New York are employers 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.

⁴ In response to the Region's first letter, Respondent Eclair, by letter dated September 28, 1994, stated that it was attempting to obtain payment of the amount owed to the funds and that it did not expect to contest the allegations in the consolidated complaint. In agreement with the General Counsel, however, we find that Respondent Eclair's letter does not purport to constitute an answer, fails to address the allegations of the consolidated complaint with specificity, and appears to admit that it has failed to remit payments to the funds.

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I. JURISDICTION

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⁴In response to the Region's first letter, Respondent Eclair, by letter dated September 28, 1994, stated that it was attempting to obtain payment of the amount owed to the funds and that it did not expect to contest the allegations in the consolidated complaint. In agreement with the General Counsel, however, we find that Respondent Eclair's letter does not purport to constitute an answer, fails to address the allegations of the consolidated complaint with specificity, and appears to admit that it has failed to remit payments to the funds.

II. ALLEGED UNFAIR LABOR PRACTICES

The following employees of Respondent Eclair and Respondent New York constitute units appropriate for the purposes of collective-bargaining within the meaning of Section 9(b) of the Act:

Unit 1: All production employees of Eclair, Inc. and New York Eclair, Inc. as listed in schedule A of the collective-bargaining agreement, excluding guards, professional employees and supervisors as defined in the Act.

Unit 2: All office employees of Eclair, Inc. and New York Eclair, Inc. as set forth in the collective-bargaining agreement, excluding guards, professional employees and supervisors as defined in the Act.

At all material times the Union has been the designated exclusive collective-bargaining representative of the units and has been recognized as such representative by the Respondents. Such recognition has been embodied in successive collective-bargaining agreements, one of which was effective by its terms for the period February 1, 1990, to January 31, 1993. At all material times the Union by virtue of Section 9(a) of the Act has been, and is, the exclusive representative of the units for the purposes of collective bargaining with respect to rates of pay, wages, hours, and other terms and conditions of employment.

Articles XV pension and welfare and schedule D of the collective-bargaining agreement between Respondent Eclair and the Union, states, inter alia, that Respondent Eclair is obliged to make monthly contributions to the Bakery and Confectionery Workers International Union of America, Local 3, Welfare Fund and International Pension Fund on behalf of its employees employed in unit 1 and contributions to the Bakery and Confectionery Workers International Union Pension Fund on behalf of all employees employed in unit 2.

From about July 10, 1993, and continuing to August 15, 1993, Respondent Eclair has failed and refused to make the required contributions to the funds as provided in the contractual clauses described above on behalf of all Respondent Eclair's employees in the units. About the middle of August 1993, Respondent Eclair reaffirmed its obligation to make past due contributions to the funds.

About August 15, 1993, Respondent New York purchased the business of Respondent Eclair and continued to operate that business in substantially unchanged form, and continued to employ a majority of the employees in the units previously employed by Respondent Eclair. About the same day, Respondent New York recognized the Union as the exclusive collective-bargaining representative of the units and reaffirmed its obligation to make contributions to the funds.

From about August 15, 1993, and continuing through December 15, 1993, Respondent New York has failed and refused to make the required contributions to the funds as provided in the contractual clauses described above on behalf of all Respondent New York's employees in the units. These contributions relate to the wages, hours, and other terms and conditions of employment of the units and are a mandatory subject for the purposes of collective-bargaining.

Respondent Eclair and Respondent New York engaged in the acts and conduct described above without prior notice to the Union and without having bargained to a good-faith impasse with the Union concerning the payments to the funds as provided in the applicable collective-bargaining agreement.

CONCLUSIONS OF LAW

By the acts and conduct described above, Respondent Eclair and Respondent New York have been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees and have thereby 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 Respondents have engaged in certain unfair labor practices, we shall order them to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that Respondent Eclair has violated Section 8(a)(5) and (1) by failing, from about July 10 to August 15, 1993, to make contractually required contributions to the Bakery and Confectionery Workers International Union of America, Local 3, Welfare Fund and International Pension Fund for employees in unit 1 and to the Bakery and Confectionery Workers International Union Pension Fund for employees in unit 2, we shall order Respondent Eclair to make whole its unit employees by making all such delinquent contributions, including any additional amounts due the funds in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).

Furthermore, having found that Respondent New York has violated Section 8(a)(5) and (1) by failing, from about August 15 to December 15, 1993, to make contractually required contributions to the same funds on behalf of the employees in the units, we shall order Respondent New York to make whole its unit employees by making all such delinquent contributions, including any additional amounts due the funds in accordance with *Merryweather Optical Co.*, supra.

Finally, we shall order both Respondents to make whole the unit employees for any expenses ensuing

from their failure to make the required contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enf. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enf. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).⁵

ORDER

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

1. Cease and desist from

(a) Failing to make contractually required contributions to the Bakery and Confectionery Workers International Union of America, Local 3, Welfare Fund and International Pension Fund for employees in unit 1 and to the Bakery and Confectionery Workers International Union Pension Fund for employees in unit 2. The following employees are included in the units:

Unit 1: All production employees of Eclair, Inc. and New York Eclair, Inc. as listed in schedule A of the collective-bargaining agreement, excluding guards, professional employees and supervisors as defined in the Act.

Unit 2: All office employees of Eclair, Inc. and New York Eclair, Inc. as set forth in the collective-bargaining agreement, excluding guards, professional employees and supervisors as defined in the Act.

(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) Make all contractually required contributions to the Bakery and Confectionery Workers International Union of America, Local 3, Welfare and International Pension Fund for employees in unit 1 and to the Bakery and Confectionery Workers International Union Pension Fund for employees in unit 2 that have not been made for the period from about July 10 to August 15, 1993, and make whole its unit employees for any expenses ensuing from the failure to make such contributions, as set forth in the remedy section of this decision.

(b) 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 records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Mail signed and dated copies of the attached notice marked "Appendix A"⁶ to all unit employees employed by Respondent Eclair at their facility in New York, New York, at the time they ceased operations, to the employees' last known address. Copies of the notice, on forms provided by Regional Director for Region 2, after being signed by Respondent's authorized representative, shall be mailed by Respondent Eclair, Inc. immediately upon receipt.

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

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

1. Cease and desist from

(a) Failing to make contractually required contributions to the Bakery and Confectionery Workers International Union of America, Local 3, Welfare Fund and International Pension Fund for employees in unit 1 and to the Bakery and Confectionery Workers International Union Pension Fund for employees in unit 2. The following employees are included in the units:

Unit 1: All production employees of Eclair, Inc. and New York Eclair, Inc. as listed in schedule A of the collective-bargaining agreement, excluding guards, professional employees and supervisors as defined in the Act.

Unit 2: All office employees of Eclair, Inc. and New York Eclair, Inc. as set forth in the collective-bargaining agreement, excluding guards, professional employees and supervisors as defined in the Act.

(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) Make all contractually required contributions to the Bakery and Confectionery Workers International Union of America, Local 3, Welfare Fund and International Pension Fund for employees in unit 1 and to the Bakery and Confectionery Workers International Union Pension Fund for employees in unit 2 that have not been made for the period from about August 15 to December 15, 1993, and make whole its unit employees for any expenses ensuing from the failure to make

⁵To the extent that an employee has made personal contributions to a fund that are accepted by the fund in lieu of an employer's delinquent contributions during the period of the delinquency, the respective Respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the respective Respondent otherwise owes the fund.

⁶If 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."

such contributions, as set forth in the remedy section of this decision.

(b) 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 records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Mail signed and dated copies of the attached notice marked "Appendix B"⁷ to all unit employees employed by Respondent New York Eclair, Inc. at their facility in New York, New York, at the time they ceased operations, to the employees' last known address. Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by Respondent's authorized representative, shall be mailed by Respondent New York Eclair, Inc. immediately upon receipt.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent New York Eclair, Inc. has taken to comply.

Dated, Washington, D.C. June 13, 1995

Margaret A. Browning, Member

Charles I. Cohen, Member

John C. Truesdale, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX A

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 fail to make contractually required contributions to the Bakery and Confectionery Workers International Union of America, Local 3, Welfare Fund or International Pension Fund for employees in unit 1 and to the Bakery and Confectionery Workers International Union Pension Fund for employees in unit 2. The following employees are included in the units:

⁷If 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."

Unit 1: All production employees of Eclair, Inc. and New York Eclair, Inc. as listed in schedule A of the collective-bargaining agreement, excluding guards, professional employees and supervisors as defined in the act.

Unit 2: All office employees of Eclair, Inc. and New York Eclair, Inc. as set forth in the collective-bargaining agreement, excluding guards, professional employees and supervisors as defined in the act.

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 all contractually required contributions to the Bakery and Confectionery Workers International Union of America, Local 3, Welfare Fund and International Pension Fund for employees in unit 1 and to the Bakery and Confectionery Workers International Union Pension Fund for employees in unit 2 that have not been made for the period from about July 10 to August 15, 1993, and make whole our unit employees for any expenses ensuing from the failure to make such contributions, as set forth in a decision of the National Labor Relations Board.

ECLAIR, INC.

APPENDIX B

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 fail to make contractually required contributions to the Bakery and Confectionery Workers International Union of America, Local 3, Welfare Fund or International Pension Fund for employees in unit 1 and to the Bakery and Confectionery Workers International Union Pension Fund for employees in unit 2. The following employees are included in the units:

Unit 1: All production employees of Eclair, Inc. and New York Eclair, Inc. as listed in schedule A of the collective-bargaining agreement, excluding guards, professional employees and supervisors as defined in the Act.

Unit 2: All office employees of Eclair, Inc. and New York Eclair, Inc. as set forth in the collective-bargaining agreement, excluding guards, professional employees and supervisors as defined in the Act.

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 all contractually required contributions to the Bakery and Confectionery Workers International Union of America, Local 3, Welfare Fund and International Pension Fund for employees in unit 1 and to the Bakery and Confectionery Workers International

Union Pension Fund for employees in unit 2 that have not been made for the period from about August 15 to December 15, 1993, and make whole our unit employees for any expenses ensuing from the failure to make such contributions, as set forth in a decision of the National Labor Relations Board.

NEW YORK ECLAIR, INC.