Vygen Corporation *and* EM-CO Committee. Case 8–CA–26536

May 16, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS AND TRUESDALE

Upon a charge, first amended charge, and second amended charge filed by EM-CO Committee (the Union) on July 13, August 29, and September 27, 1994, respectively, the General Counsel of the National Labor Relations Board issued a complaint on September 30, 1994, against Vygen Corporation, 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, first amended charge, second amended charge, and complaint, the Respondent failed to file an answer.

On April 17, 1995, the General Counsel filed a Motion for Summary Judgment with the Board. On April 20, 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. 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

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 filed within 14 days from service of the complaint, unless good cause is shown. In addition, the complaint affirmatively notes that unless an answer is filed within 14 days of service, all the allegations in the complaint will be considered admitted. Further, the undisputed allegations in the Motion for Summary Judgment disclose that the Region, by letter dated January 17, 1995, notified the Respondent and its trustee in bankruptcy that unless an answer was received, a Motion for Summary Judgment would be filed.

The Respondent's bankruptcy trustee maintained in a January 18, 1995 letter that by invoking the automatic stay provisions of 11 U.S.C. § 362(a) the Board is precluded from pursuing this matter. It is well established, however, 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. *Phoenix Co.*, 274 NLRB 995 (1985). Board proceedings fall within the exception to the automatic stay provisions for proceedings by a governmental unit to enforce its police or regulatory powers. See id., and cases cited therein.

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, an Ohio corporation with an office and place of business in Ashtabula, Ohio, has been engaged in the manufacture of PVC resins. Annually, the Respondent sold and shipped from its Ashtabula facility goods valued in excess of $50,000 directly to points outside the State of Ohio. 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 the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

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

> All employees, including all technicians, foremen, department managers, engineers, and office clerical employees, employed at the Employer's Ashtabula, Ohio facility, but excluding the Vice-President of Finance and the Vice-President of Operations.

Since sometime in 1987, and at all material times, the Union has been the exclusive collective-bargaining representative of the unit and since that time has been recognized as the representative by the Respondent. At all times since 1987, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the unit.

Since about May 19, 1994, the Union requested that the Respondent bargain collectively about the effects of its decision to close its facility, including, but not limited to, the Respondent's failure to make certain wage payments to certain foremen, engineers, department managers, and office clerical employees. These subjects relate to wages, hours, and other terms and conditions of the unit and are mandatory subjects for the purpose of collective bargaining. Since May 19, 1994, the Respondent has failed and refused to bargain collectively about these subjects.

CONCLUSION OF LAW

By the acts and conduct described above, the Respondent has been failing and refusing to bargain col-

lectively and in good faith with the exclusive collective-bargaining representative of its employees within the meaning of the Act, and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) 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. As a result of the Respondent's unlawful failure to bargain in good faith with the Union about the effects of its decision to close its facility, the terminated employees have been denied an opportunity to bargain through their collective-bargaining representative. Meaningful bargaining cannot be assured until some measure of economic strength is restored to the Union. A bargaining order alone, therefore, cannot serve as an adequate remedy for the unfair labor practices committed.

Accordingly, we deem it necessary, in order to effectuate the purposes of the Act, to require the Respondent to bargain with the Union concerning the effects of closing its facility on its employees, including, but not limited to, the Respondent's failure to make certain wage payments to certain foremen, engineers, department managers, and office clerical employees, and shall accompany our Order with a limited backpay requirement designed both to make whole the employees for losses suffered as a result of the violations and to recreate in some practicable manner a situation in which the parties' bargaining position is not entirely devoid of economic consequences for the Respondent. We shall do so by ordering the Respondent pay backpay to the terminated employees in a manner similar to that required in *Transmarine Corp.*, 170 NLRB 389 (1968).

Thus, the Respondent shall pay its terminated 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 occurrence of the earliest of the following conditions: (1) the date the Respondent bargains to agreement with the Union on those subjects pertaining to the effects of the closing of its facility on its employees; (2) a bona fide impasse in bargaining; (3) the Union's failure to request bargaining within 5 days of the date 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; (4) the Union's subsequent failure to bargain in good faith; but in no event shall the sum paid to these employees exceed the amount they would have earned as wages from the date on which the Respondent terminated its operations, to the time they secured equivalent employment elsewhere, or the date on which the Respondent shall have offered to bargain in good faith, whichever occurs sooner; provided, however, that in no event shall this sum be less than the employees would earned for a 2-week period at the rate of their normal wages when last in the Respondent's employ. Backpay shall be based on earnings which the terminated employees would normally have received during the applicable period, less any net interim earnings, and shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

In view of the fact that the Respondent's facility is currently closed, we shall order the Respondent to mail a copy of the attached notice to the Union and to the last known addresses of its former employees in order to inform them of the outcome of this proceeding.

ORDER

The National Labor Relations Board orders that the Respondent, Vygen Corporation, Ashtabula, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain collectively about the effects of its decision to close its facility, including, but not limited to, its failure to make certain wage payments to certain foremen, engineers, department managers, and office clerical employees. The unit includes the following employees:

> All employees, including all technicians, foremen, department managers, engineers, and office clerical employees, employed at the Employer's Ashtabula, Ohio facility, but excluding the Vice-President of Finance and the Vice-President of Operations.

(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) Pay the unit employees their normal wages for the period set forth in the remedy section of this decision

(b) On request, bargain collectively with EM-CO Committee, with respect to the effects of its decision to close its facility, including, but not limited to, its failure to make certain wage payments to certain foremen, engineers, department managers, and office clerical employees, and reduce to writing any agreement reached as a result of such bargaining.

(c) 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 amount of backpay due under the terms of this Order.

(d) Mail an exact copy of the attached notice marked "Appendix."[1] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be mailed immediately upon receipt thereof, as directed in the remedy section of this decision.

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

Dated, Washington, D.C. May 16, 1995

William B. Gould IV,	Chairman
James M. Stephens,	Member
John C. Truesdale,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[1] 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
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 or refuse to bargain collectively about the effects of our decision to close our facility, including, but not limited to, our failure to make certain wage payments to certain foremen, engineers, department managers, and office clerical employees. The unit includes the following employees:

> All employees, including all technicians, foremen, department managers, engineers, and office clerical employees, employed at our Ashtabula, Ohio facility, but excluding the Vice-President of Finance and the Vice-President of Operations.

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 pay the unit employees their normal wages for the period set forth, with interest.

WE WILL, on request, bargain collectively with EMCO Committee, with respect to the effects of our decision to close our facility, including, but not limited to, our failure to make certain wage payments to certain foremen, engineers, department managers, and office clerical employees, and reduce to writing any agreement reached as a result of such bargaining.

VYGEN CORPORATION