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Commercial Coatings and International Brotherhood of Painters and Allied Workers of the United States and Canada, Local 768, AFL-CIO. Cases 9-CA-32732 and 9-CA-32772

August 17, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING
AND TRUESDALE

Upon a charge and amended charge filed by the Union in Case 9-CA-32732 on March 17 and April 19, 1995, and a charge and an amended charge filed by the Union on March 28 and April 19, 1995, in Case 9-CA-32772, the General Counsel of the National Labor Relations Board issued a consolidated complaint (complaint) on April 26, 1995, against Commercial Coatings, the Respondent, alleging that it has violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act. Although properly served copies of the charges and complaint, the Respondent failed to file an answer.

On July 14, 1995, the General Counsel filed a Motion for Summary Judgment with the Board. On July 19, 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 June 29, 1995, notified the Respondent that unless an answer were received by July 6, 1995, a Motion for Summary Judgment would be filed.

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

At all material times, the Respondent has been jointly owned by Ray Cannon and Brenda Cannon, partners, doing business as Commercial Coating, and has maintained an office and place of business in Georgetown, Kentucky, where it has been engaged as a painting contractor in the building and construction industry. During the calendar year ending December 31, 1994, the Respondent, in conducting its business operations, provided services valued in excess of \$50,000 for Toyota Motor Manufacturing, U.S.A., Inc., an enterprise within the Commonwealth of Kentucky which is directly engaged in interstate commerce. 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

About November 13, 1995, Respondent laid off its employee Raymond Logue because he assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities.

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 working in the Kentucky counties of Fayette, Franklin, Woodford, Clark, Madison, Bath, Wolfe, Powell, Jessamine, Scott, Bourbon, Nicholas, Jackson, Menifee, Montgomery, Robertson, Estill, Garrard, Harrison, Breathitt, Lee, Mercer, Owsley and Boyle, but excluding all office clerical employees and all guards and supervisors as defined in the Act.

About August 18, 1993, the Respondent entered into a collective-bargaining agreement with the Union covering the employees in the unit effective for the period August 18, 1993, to August 31, 1994, thereby recognizing the Union as the exclusive collective-bargaining representative of the unit. About September 1995, the Respondent entered into a successor collective-bargaining agreement with the Union covering the employees in the unit effective for the period September 1, 1994, to August 31, 1995, thereby recognizing the Union as the exclusive collective-bargaining representative of the unit. The Respondent, an employer in the construction industry, granted recognition to the Union as the exclusive collective-bargaining representative of the unit without regard to whether the majority status of the Union had ever been established under Section 9(a) of the Act. For these time periods, based on Section 9(a) of the Act, the Union has been the limited

exclusive collective-bargaining representative of the Unit.

The Respondent failed to continue in effect all the terms and conditions of the agreements described above by:

- (1) Since about June 1994, failing to make contributions into the health and welfare plan provided for in the agreements;
- (2) Since about August 1994, failing to remit to the Union administrative dues checkoffs;
- (3) Since about October 1994, failing to make contributions to the appropriate pension fund; and
- (4) Since about November 13, 1994, by laying off Union Steward Raymond Logue, thereby failing to adhere to a contractual provision providing that the appointed union steward shall remain on the job as long as there is work available.

The Respondent engaged in this conduct without the Union's consent, notwithstanding that these terms and conditions of employment are mandatory subjects for the purpose of collective bargaining.

CONCLUSIONS OF LAW

By failing to continue in effect all the terms and conditions of the agreements, the Respondent has been failing and refusing to bargain collectively with the limited exclusive collective-bargaining representative of its employees within the meaning of Section 8(d) of the Act, and has 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. By laying off Raymond Logue the Respondent has also been discriminating in regard to the hire or tenure or terms or conditions of employment of its employees, thereby discouraging membership in a labor organization, and has thereby engaged in unfair labor practices within the meaning of Section 8(a)(3) 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. Specifically, having found that the Respondent has violated Section 8(a)(5), (3), and (1) by laying off Raymond Logue, we shall order the Respondent to offer the discriminatee immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and to make him whole for any loss of earnings and other benefits suffered as a result of the unlawful layoff. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with in-

terest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Respondent shall also be required to expunge from its files any and all references to the unlawful layoff, and to notify the discriminatee in writing that this has been done.

Furthermore, having found that the Respondent violated Section 8(a)(5) and (1) by failing, since about August 1994, to remit to the Union dues that were deducted from the pay of unit employees pursuant to valid dues-checkoff authorizations, we shall order the Respondent to remit such withheld dues to the Union as required by the agreement, with interest as prescribed in *New Horizons for the Retarded*, supra.

In addition, having found that the Respondent has violated Section 8(a)(5) and (1) by failing to make contractually required contributions to the health and welfare plan since about June 1994, and the appropriate pension fund since about October 1994, we shall order the Respondent 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). In addition, the Respondent shall reimburse unit employees for any expenses ensuing from its 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*, supra.¹

ORDER

The National Labor Relations Board orders that the Respondent, Commercial Coatings, Georgetown, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Laying off its employees because they assist the International Brotherhood of Painters and Allied Workers of the United States and Canada, Local 768, AFL-CIO or engage in concerted activities, or to discourage employees from engaging in these activities.

(b) Failing to continue in effect all the terms and conditions of the collective-bargaining agreements with the Union covering the employees in the unit effective for the periods August 18, 1993, to August 31, 1994, and September 1, 1994, to August 31, 1995, by failing to make contributions into the health and welfare plan provided for in the agreements; failing to remit to the Union administrative dues checkoffs; failing to make

¹To the extent that an employee has made personal contributions to a fund that are accepted by the fund in lieu of the Respondent's delinquent contributions during the period of the delinquency, the Respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the Respondent otherwise owes the fund.

contributions to the appropriate pension fund; or failing to adhere to a contractual provision providing that the appointed union steward shall remain on the job as long as there is work available. The unit includes the following employees:

All employees working in the Kentucky counties of Fayette, Franklin, Woodford, Clark, Madison, Bath, Wolfe, Powell, Jessamine, Scott, Bourbon, Nicholas, Jackson, Menifee, Montgomery, Robertson, Estill, Garrard, Harrison, Breathitt, Lee, Mercer, Owsley and Boyle, but excluding all office clerical employees and all guards and supervisors as defined in the Act.

(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) Offer Raymond Logue immediate and full reinstatement to his former job, or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole, with interest, for any loss of earnings or other benefits suffered as a result of his unlawful layoff, in the manner set forth in the remedy section of this decision.

(b) Expunge from its files any and all references to Logue's unlawful layoff and notify him in writing that this has been done.

(c) Remit to the Union dues that were deducted from the pay of unit employees pursuant to valid dues-checkoff authorizations since about August 1994, as required by the agreement, with interest, in the manner set forth in the remedy section of this decision.

(d) Make all delinquent contributions to the health and welfare plan since about June 1994, and to the appropriate pension fund since about October 1994, and reimburse the unit employees, with interest, for any expenses ensuing from its failure to make the required contributions, as 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, time-cards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Post at its facility in Georgetown, Kentucky, copies of the attached notice marked "Appendix."² Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Re-

² 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."

spondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced or covered by any other material.

(g) 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. August 17, 1995

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William B. Gould IV,	Chairman
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Margaret A. Browning,	Member
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John C. Truesdale,	Member

(SEAL) 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 lay off our employees because they assist the International Brotherhood of Painters and Allied Workers of the United States and Canada, Local 768, AFL-CIO or engage in concerted activities, or to discourage employees from engaging in these activities.

WE WILL NOT fail to continue in effect all the terms and conditions of the collective-bargaining agreements with the Union covering the employees in the unit effective for the periods August 18, 1993, to August 31, 1994, and September 1, 1994, to August 31, 1995, by failing to make contributions into the health and welfare plan provided for in the agreements; failing to remit to the Union administrative dues checkoffs; failing to make contributions to the appropriate pension fund; or failing to adhere to a contractual provision providing that the appointed union steward shall remain on the job as long as there is work available. The unit includes the following employees:

All employees working in the Kentucky counties of Fayette, Franklin, Woodford, Clark, Madison, Bath, Wolfe, Powell, Jessamine, Scott, Bourbon,

Nicholas, Jackson, Menifee, Montgomery, Robertson, Estill, Garrard, Harrison, Breathitt, Lee, Mercer, Owsley and Boyle, but excluding all office clerical employees and all guards 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 offer Raymond Logue immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole, with interest, for any loss of earnings and other benefits suffered as a result of his unlawful layoff.

WE WILL expunge from our files any and all references to Logue's unlawful discharge and notify him in writing that this has been done.

WE WILL remit to the Union dues that were deducted from the pay of unit employees pursuant to valid dues-checkoff authorizations since about August 1994, as required by the agreement, with interest.

WE WILL make all delinquent contributions to the health and welfare plan since about June 1994, and to the appropriate pension fund since about October 1994, and reimburse the unit employees, with interest, for any expenses ensuing from our failure to make the required contributions.

COMMERCIAL COATINGS