

**Center State Beef and Veal Co., Inc. and Teamsters Local 317, affiliated with the International Brotherhood of Teamsters.** Cases 3–CA–21521, 3–CA–21582, 3–CA–21636, and 3–CA–21702

November 18, 1999

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS HURTGEN AND BRAME

On March 31, 1999, the National Labor Relations Board issued a Decision and Order in this proceeding, which granted the General Counsel's Motion for Summary Judgment in part, and denied the motion in part.<sup>1</sup> Specifically, based on the withdrawal of the Respondent's answer to the consolidated complaint, and in the absence of good cause being shown for the Respondent's failure to file a timely answer to the amended consolidated complaint and the second amended consolidated complaint (complaint), the Board granted the General Counsel's Motion for Summary Judgment insofar as the complaint alleged that the Respondent had violated Section 8(a)(1) and (3) of the Act, including by discharging or permanently laying off four employees because of their union and other protected concerted activities.

The Board, however, denied the General Counsel's Motion for Summary Judgment insofar as it alleged that a bargaining order was warranted under *NLRB v. Gissel Packing Co.*,<sup>2</sup> and that the Respondent therefore violated Section 8(a)(5) and (1) of the Act by failing to recognize and bargain with the Union over the effects on employees of its decision to close its facility in Cortland, New York. In denying the General Counsel's request for a bargaining order, the Board concluded that the complaint did not allege sufficient facts to enable the Board to evaluate the pervasiveness of the 8(a)(1) and (3) violations, and therefore the possibility of erasing their effects by the use of traditional remedies. Accordingly, the Board remanded the case for a hearing before an administrative law judge on the issue of whether a bargaining order is an appropriate remedy under the circumstances of this case. The Board, however, stated that a hearing was not required:

[i]f, in the event of an amendment to the complaint, the Respondent fails to answer thereby admitting evidence that would permit the Board to resolve the bargaining order issue. In such circumstances, the General Counsel may renew the Motion for Summary Judgment with respect to the 8(a)(5) allegations and remedies.

Subsequently, on April 28, 1999, the General Counsel issued an amendment to second amended consolidated complaint and compliance specification and notice of

hearing. The amendment to second amended consolidated complaint sets forth additional factual allegations specifically relating to the bargaining order sought by the General Counsel. The compliance specification sets forth amounts owed to the four discriminatees pursuant to the Board's March 31, 1999 Decision and Order. Although properly served a copy of the amendment to second amended consolidated complaint and compliance specification, the Respondent failed to file an answer.

Thereafter, on June 23, 1999, the General Counsel filed a Motion for Summary Judgment with the Board. On June 25, 1999, 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

I. AMENDMENT TO SECOND AMENDED CONSOLIDATED COMPLAINT

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 amendment to second amended consolidated complaint (amendment to complaint) affirmatively notes that unless an answer is filed within 14 days of service, all the allegations in the amendment to complaint will be considered admitted. Further, the undisputed allegations in the Motion for Summary Judgment disclose that the Region, by certified letters<sup>3</sup> dated May 21, 1999, notified the Respondent that unless answers to the amendment to second amended consolidated complaint and to the compliance specification were received by June 1, 1999, a Motion for Summary Judgment would be filed. These letters were returned to the Regional Office with the designation "moved, left no address."<sup>4</sup>

The General Counsel's June 23, 1999 motion renews her prior motion's request for findings of 8(a)(5) violations and a *Gissel* bargaining order based on the Respondent's failure to answer the allegations set forth in the April 28, 1999 amendment to complaint. For the reasons set forth below, we conclude that, in view of the amendment to second amended consolidated complaint, there are no material facts bearing on the appropriateness of a

<sup>3</sup> The letters were sent to the Respondent's addresses in Cortland, Utica, and Frankfort, New York.

<sup>4</sup> We find service sufficient in these circumstances. It is well established that the failure to provide for receiving appropriate service cannot serve to defeat the purposes of the Act. See *Summit Mechanical Contractors*, 316 NLRB 699 fn. 2 (1995); *National Automatic Sprinklers*, 307 NLRB 481 fn. 1 (1992); and *Michigan Expediting Service*, 282 NLRB 210 fn. 6 (1986).

<sup>1</sup> 327 NLRB 1246.

<sup>2</sup> 395 U.S. 575 (1969).

bargaining order that are absent from the complaint. Accordingly, we find that the General Counsel has demonstrated that a bargaining order is necessary to remedy the Respondent's unlawful conduct.

In our previous decision, we found that the Respondent had committed numerous 8(a)(1) violations, which we again will list in this decision because they are germane to determining whether a bargaining order is warranted. Further, as mentioned above, we found that the Respondent violated Section 8(a)(3) and (1) by discharging or permanently laying off four employees because they engaged in union or other concerted activities.

Although we found in our earlier decision that these 8(a)(1) and (3) violations are serious in nature, we declined to give a bargaining order because we found that the complaint allegations at that time were inadequate to support such an order. For example, we noted that the complaint did not allege the size of the unit or the extent of dissemination, if any, of the violations among the employees not directly affected by them. Accordingly, we concluded that a remand for a hearing on the 8(a)(5) allegations was necessary.

The subsequent April 1999 amendment to complaint, however, does set forth sufficient facts that enable us to assess the propriety of a *Gissel* bargaining order without the need for a hearing. Thus, the amendment to complaint alleges, and we find to be admitted as true in the absence of an answer by the Respondent, the facts set forth below.<sup>5</sup>

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 full-time and regular part-time butchers, laborers, loaders, plant clericals and working foremen employed by the Respondent at its East River Crossings Road, Cortland, New York facility, excluding all office clerical employees, professional employees, sales employees, guards and supervisors as defined in the Act.

The unit was comprised of 22 employees. The Union's first organizational meeting with unit employees occurred on September 10, 1998,<sup>6</sup> and the Respondent learned about the Union's meeting on that same day. On about September 14, the Union filed a representation petition regarding the unit, and on that same date, the Union, by letter, requested that the Respondent recognize it as the exclusive collective-bargaining representative of the unit. By about September 17, a majority of the unit employees had signed authorization cards that designated and selected the Union as their representative for the purposes of collective bargaining with the Respondent.

<sup>5</sup> In our prior decision, we found that the Respondent is an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Sec. 2(5) of the Act.

<sup>6</sup> All subsequent dates are in 1998, unless stated otherwise.

At all times since September 17, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the unit. Since on about September 17, the Respondent has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit. As a result of the Respondent's pervasive and severe unfair labor practices, which were widely disseminated among the unit employees, the Union's support was seriously eroded, and it lost the representation election held on October 9, by a margin of 16 votes against the Union and 1 vote for.

In our prior decision, we found that the Respondent violated Section 8(a)(1) when its vice president and agent, Victor Broccoli, at the Respondent's facility between September 14 and October 5: (1) informed employees that if they selected the Union as their collective-bargaining representative, all employees would be paid the same; (2) told employees that if they selected the Union as their collective-bargaining representative, current employees would make the same wages as new employees, and urged employees to vote against the Union to prevent that occurrence; (3) threatened employees that the Respondent's facility would close if employees selected the Union as their collective-bargaining representative; and (4) promised employees a job and a raise at a different facility if they voted against the Union.

We now find, based on the allegations in the April 1999 amendment to complaint, which the Respondent has admitted, that these unlawful statements were made by Broccoli during meetings with employees at which all 22 unit employees were present and, thus, these coercive statements affected every unit employee.

We also previously found that the Respondent, through Broccoli, additionally violated Section 8(a)(1) between September 14 and October 5, by offering an employee a wage raise if the employee voted against the Union and by threatening to have an employee arrested if he came on the Respondent's premises to vote in the representation election. The amendment to complaint alleges, and we find, that information about these two statements was disseminated to a majority of the unit employees.

Further, in our earlier decision we found that on about September 11, the Respondent unlawfully discharged employees Gerald Cobb Jr. and Rodney Clark, and permanently laid off employee Jon Horner, and that on about October 5, the Respondent unlawfully discharged employee Kenny Grewe. We now find that these terminations were carried out by Broccoli or Plant Foreman Frank Lussier, and that these four discriminatees were leading organizers for the Union and/or employees who openly supported the Union. The discharges of Cobb Jr., and Clark, and the permanent layoff of Horner occurred on the day after the Union's first organizational meeting held on September 10, about which the Respondent had acquired knowledge on that same day. Information

about these terminations was widely disseminated to all unit employees, and was discussed with employees at a meeting held by Broccoli. Grewe's discharge—which was disseminated to other employees in the unit—directly followed his open assertion to Broccoli, both individually and at an employee meeting, that he intended to vote for the Union in the election.

In addition, on about December 18, the Respondent closed its Cortland facility and terminated the employment of all unit employees. The Respondent closed this facility without any prior notice to the Union and without affording the Union an opportunity to bargain with the Respondent with respect to the effects of the closing.

The complaint alleges that the Respondent's violations of Section 8(a)(1) and (3) are "so serious and substantial in character that the possibility of erasing the effects of these unfair labor practices and of conducting a fair rerun election by the use of traditional remedies is slight, and the employees' sentiments regarding representation, having been expressed through authorization cards, would, on balance, be protected better by issuance of a bargaining order than by traditional remedies alone." In light of the additional facts pled in the amendment to complaint, we agree that a bargaining order is warranted in this case under the principles explicated in *Gissel*.

Under *Gissel*, the Board will issue a bargaining order, absent an election, in two categories of cases. The first category involves "exceptional cases" marked by unfair labor practices so "outrageous" and "pervasive" that traditional remedies cannot erase their coercive effects, thus rendering a fair election impossible. The second category involves "less extraordinary cases marked by less pervasive practices which nonetheless have a tendency to undermine majority strength and impede the election processes." In this second category of cases, the "possibility of erasing the effects of past practices and of ensuring a fair election . . . by the use of traditional remedies, although present, is slight and . . . employee sentiments once expressed [by authorization] cards would, on balance, be better protected by a bargaining order." *Id.* at 613–615.

We find that the complaint, as supplemented by the April 1999 amendment, sets out sufficient grounds for the issuance of a bargaining order remedy under the second category of the *Gissel* standards, and that those grounds are uncontested and must be accepted as fact as a result of the Respondent's failure to answer the General Counsel's allegations.<sup>7</sup> The General Counsel has pled only the *Gissel* category II standards in his complaint, and the Respondent has admitted, by not answering the

complaint, only the category II justification for a bargaining order.<sup>8</sup>

In concluding that a bargaining order is necessary to remedy the Respondent's unfair labor practices we rely on the following. First, we have found that the Union attained majority status in the unit on September 17, 1998, and that it has been the unit employees' collective-bargaining representative since that date. We have also found that on September 11, just 1 day after the Respondent learned of the Union's September 10 meeting with employees, the Respondent discharged or permanently laid off three employees because they were leading organizers for the Union. And, about 3 weeks later—just 4 days before the election—the Respondent discharged union supporter Grewe, directly following his informing Vice President Broccoli that he would vote for the Union.

Further, on learning of the employees' organizational activities, Broccoli embarked on a series of threats and promises that delivered the unmistakable message to all unit employees that the plant would close and they would lose their jobs if they selected the Union, but that they would reap benefits if they rejected union representation.

The Respondent's unlawful conduct, carried out primarily by the Respondent's vice president, either affected or was disseminated to all unit employees. Thus, contemporaneous with the discharges or permanent layoffs of four leading union activists and/or open supporters of the Union, the Respondent made it crystal clear to the remaining employees that their continued employment depended on their rejection of the Union. The Respondent's reaction to its employees' organizational activities was swift and severe. The effectiveness of the Respondent's unlawful conduct is shown by the dramatic and rapid loss of employee support for the Union in the 3 weeks between September 17, when a majority of the unit signed authorization cards for the Union, and October 9, when only one employee voted for the Union in the representation election. There is a strong likelihood that the Respondent's unfair labor practices will have a pervasive and lasting deleterious effect on the Respondent's employees' exercise of their Section 7 rights. Consequently, we find that the Respondent's conduct warrants a bargaining order under category II of the *Gissel* standards, as the Respondent's unfair labor practices certainly qualify as "less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes," *Gissel Packing*, *supra* at 614. The discharge of union adherents has long been considered by the Board and the courts to be a "hallmark" violation of the Act because of its lasting effect on election conditions.

<sup>7</sup> Member Brame joins this reasoning and further notes specifically that he finds this case of no precedential value, however, given its posture as a no-answer summary judgment proceeding. Member Brame simply finds that the sum of the General Counsel's uncontested allegations, which must be accepted as fact in the face of a failure to answer them, warrants the imposition of a bargaining order.

<sup>8</sup> In view of the pleadings, we find it unnecessary to pass on whether a bargaining order is warranted under category I of the *Gissel* standards.

In view of our conclusion that the Respondent had a bargaining obligation since September 17, we find that the Respondent violated Section 8(a)(5) and (1) of the Act by closing its Cortland facility and terminating the employment of all unit employees on about December 18 without prior notice to the Union, and without giving the Union an opportunity to bargain concerning the effects of this closing on unit employees. Accordingly, we shall order the Respondent, on request, to bargain with the Union regarding the effects of the decision to close its Cortland facility. In addition, we shall accompany our bargaining order with a limited backpay requirement related to the closing designed both to make whole the employees for losses they may have suffered as a result of the failure to bargain about such effects 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 to pay backpay to employees in a manner similar to that required in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968).<sup>9</sup> Backpay 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).

## II. THE COMPLIANCE SPECIFICATION

As mentioned above, our prior decision found that the Respondent discharged or permanently laid off employees Cobb, Clark, Grewe, and Horner in violation of Section 8(a)(3) and (1) of the Act. We ordered the Respondent to make these discriminatees whole for any loss of earnings and other benefits suffered as a result of the discrimination against them by paying them backpay from the time of their discharges and/or layoff until the date the Cortland facility closed. Pursuant to that backpay remedy, the General Counsel issued the instant compliance specification.

Section 102.56(a) of the Board's Rules and Regulations provides that the Respondent shall file an answer within 21 days from service of a compliance specification. Section 102.56(c) of the Board's Rules and Regulations states:

If the respondent fails to file any answer to the specification within the time prescribed by this section, the Board may, either with or without taking evidence in support of the allegations of the specification and with-

out further notice to the respondent, find the specification to be true and enter such order as may be appropriate.

According to the uncontroverted allegations of the Motion for Summary Judgment, the Respondent, despite having been advised of the filing requirements, has failed to file an answer to the compliance specification. In the absence of good cause for the Respondent's failure to file an answer, we deem the allegations in the compliance specification to be admitted as true, and grant the General Counsel's Motion for Summary Judgment as to the specification. Accordingly, we conclude that the net backpay due the discriminatees is as stated in the compliance specification and we will order payment by the Respondent of those amounts to the discriminatees, plus interest accrued on the amounts to the date of payment.

## ORDER

The National Labor Relations Board orders that the Respondent, Center State Beef and Veal Co., Inc., Cortland, New York, its officers, agents, successors, and assigns, shall

### 1. Cease and desist from

(a) Refusing and failing to recognize and bargain in good faith with Teamsters Local 317, affiliated with the International Brotherhood of Teamsters, as the exclusive collective-bargaining representative of the employees in the appropriate unit set forth below by refusing to bargain with the Union concerning the effects on the unit employees of the Respondent's closing of its facility in Cortland, New York on December 18, 1998, and the termination of the unit employees.

All full-time and regular part-time butchers, laborers, loaders, plant clericals and working foremen employed by the Respondent at its East River Crossings Road, Cortland, New York facility, excluding all office clerical employees, professional employees, sales employees, guards 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) On request, bargain with the Union concerning the effects on the unit employees of the closing of the Respondent's facility in Cortland, New York, and the termination of the unit employees.

(b) Pay the employees in the unit described above their normal wages when 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 those subjects pertaining to the effects of the closing of its facility in Cortland, New York, and its termination of

<sup>9</sup> See also *Live Oak Skilled Care & Manor*, 300 NLRB 1040 (1990). In *Transmarine*, the Board ordered an employer that had unlawfully refused to bargain over the effects of its plant closure decision to, inter alia, pay unit employees at their normal rate of pay beginning 5 days after the Board's decision until the first of four events: (1) an effects bargaining agreement was reached; (2) a bona fide bargaining impasse was reached; (3) the union failed to timely request or commence bargaining; or (4) the union failed to bargain in good faith. *Id.* The Board further specified that "in no event shall this sum be less than these employees would have earned for a 2-week period at the rate of their normal wages when last in the Respondent's employ." *Id.*

the unit employees; (2) the date a bona fide impasse in bargaining occurs; (3) the failure of the Union to request bargaining within 5 business days after receipt of this decision, or to commence negotiations within 5 business days after receipt of the Respondent's notice of its desire to bargain with the Union;<sup>10</sup> or (4) the subsequent failure of the Union to bargain in good faith; but in no event shall the sum paid to any of the employees exceed the amount he or she would have earned as wages from about December 18, 1998, when the Respondent closed its Cortland, New York facility, to the time he or she 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 these employees would have earned for a 2-week period at the rate of their normal wages when last in the Respondent's employment, with interest, as set forth above.

(c) Make whole Gerald Cobb Jr., Rodney Clark, Kenny Grewe, and Jon Horner by paying them the amounts following their names below, plus interest accrued to the date of payment, minus tax withholding required by Federal and state laws. Interest shall be computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Gerald Cobb Jr.	\$ 5,396
Rodney Clark	5,396
Kenny Grewe	3,080
Jon Horner	4,544
TOTAL:	18,416

(d) Preserve and, within 14 days of a 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, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.<sup>11</sup>

<sup>10</sup> *Melody Toyota*, 325 NLRB 846 (1998).

<sup>11</sup> In the complaint, the General Counsel seeks an order requiring the Respondent to preserve and, on request, provide at the office designated by the Board or its agents, copies of specified records necessary to analyze the amount of backpay due under the terms of the Board's Order, including electronic copies, if such records are stored in electronic form.

We find that electronic copies of the relevant records, where such already exist, are encompassed within the Board's traditional remedial language. See generally Fed.R.Civ.P. 34 (definition of "document" includes data compilations). See also *Bills v. Kennecott Corp.*, 108 F.R.D. 459 (D.Utah 1985) (requesting party need not accept only data that exists in traditional forms, but may discover the same information when stored in electronic form in a computer); *National Union Electric Corp. v. Matsushita Electric Industrial Co.*, 494 F.Supp. 1257 (E.D.Pa. 1980) (same). Moreover, the Respondent has not established that it would be prejudiced in any way by a requirement that it produce electronic copies of these documents. Accordingly, and to clarify any ambiguity with respect to this matter, we have provided in the Order for

(e) Within 14 days after service by the Region, duplicate and mail, at its own expense and after being signed by the Respondent's authorized representative, copies of the attached notice marked "Appendix"<sup>12</sup> to all current employees and former employees employed by the Respondent at any time since September 11, 1998.

(f) Within 21 days after service by the Region, file with the Regional Director for Region 3 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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 and fail to recognize and bargain in good faith with Teamsters Local 317, affiliated with the International Brotherhood of Teamsters as the exclusive collective-bargaining representative of the employees in the appropriate unit set forth below by refusing to bargain with the Union concerning the effects on the unit employees of our closing of our facility in Cortland, New York on December 18, 1998, and the termination of the unit employees.

All full-time and regular part-time butchers, laborers, loaders, plant clericals and working foremen employed by us at our East River Crossings Road, Cortland, New York facility, excluding all office clerical employees, professional employees, sales employees, 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, on request, bargain with the Union concerning the effects on the unit employees of the closing of our facility in Cortland, New York and the termination of the unit employees.

the production of electronic copies of the specified backpay records if they are stored in electronic form.

With respect to the General Counsel's proposed requirement that the Respondent submit copies of the necessary backpay records at the office designated by the Board or its agents, however, we find that this proceeding does not satisfactorily present the question of whether a respondent should be ordered to provide copies of its records in this manner. We accordingly decline to order the Respondent to do so in connection with this case.

<sup>12</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."

WE WILL pay limited backpay to the unit employees in connection with our failure to bargain with the Union concerning the effects of the closing of our Cortland, New York facility.

CENTER STATE BEEF AND VEAL CO., INC.