

**Eric, Inc. d/b/a Hastings Industries and District Lodge No. 7, International Association of Machinists & Aerospace Workers, AFL–CIO.**  
Case 17–CA–21260

March 24, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN  
AND WALSH

The General Counsel seeks summary judgment in this case on the ground that the Respondent has failed to file an answer to the complaint and the compliance specification. Upon a charge filed by District Lodge No. 7, International Association of Machinists & Aerospace Workers, AFL–CIO, the Union, on June 29, 2001, as amended on July 11 and August 21, 2001, the Acting Regional Director issued the complaint on August 28, 2001, against Eric, Inc. d/b/a Hastings Industries, the Respondent. The complaint alleges that the Respondent has violated Section 8(a)(1) and (5) of the Act. On November 13, 2001, the Regional Director issued a compliance specification against the Respondent and, on November 20, 2001, issued an order consolidating the compliance specification with the complaint. The Respondent failed to file an answer to either pleading.

On January 15, 2002, the General Counsel filed with the Board a Motion for Summary Judgment on all allegations of the complaint and the compliance specification. On January 16, 2002, 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 a 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 August 28, 2001 complaint affirmatively states that, unless an answer is filed within 14 days of service, all the allegations in the complaint will be considered admitted.

Similarly, Section 102.56 of the Board’s Rules provides that the allegations in a compliance specification will be taken as true if an answer is not filed within 21 days from service of the compliance specification. In addition, the November 13, 2001 compliance specification expressly advised the Respondent of Section 102.56

and the consequences of failing to answer the specification.

Further, the undisputed allegations in the Motion for Summary Judgment disclose that the Region, by letter dated November 13, 2001, notified John A. Wolf, the Respondent’s trustee in bankruptcy, of the 21-day period for filing an answer to the compliance specification. In the same letter, the Region also advised that, while the time limit for filing an answer to the complaint had expired, the Region would accept such an answer if it were filed within the same 21-day period allotted to answer the compliance specification. Finally, the Region advised that, unless timely answers were filed, a Motion for Summary Judgment likely would be filed.<sup>1</sup>

In the absence of good cause being shown for the Respondent’s failure to file a timely answer to the complaint or the compliance specification, 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, a corporation, with an office and place of business in Hastings, Nebraska, was engaged in the manufacture of commercial air handling equipment. During the 12-month period ending June 30, 2001, the Respondent, in conducting its business operations, sold and shipped from its Hastings, Nebraska facility goods valued in excess of \$50,000 directly to points outside the State of Nebraska. 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, the unit, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All employees in the classifications I, IAA, IA, II, III, IV, V and VI, employed by Respondent at its Hastings, Nebraska facility, but EXCLUDING all office and

<sup>1</sup> The Respondent is in Chapter 7 bankruptcy and has ceased operating. The bankruptcy proceeding, however, does not deprive the Board of jurisdiction or authority to process an unfair labor practice case to its final disposition. See *Phoenix Co.*, 274 NLRB 995 (1985). Board proceedings, moreover, fall within the exception to the automatic stay provision for proceedings by a governmental unit to enforce its police or regulatory powers. See *id.* Accord: *NLRB v. Continental Hagen*, 932 F.2d 828, 834–835 (9th Cir. 1991).

clerical employees and supervisors as defined in the Act.

At all material times, the Union has been the designated exclusive collective-bargaining representative of the unit, and has been recognized as the representative by the Respondent. This recognition has been embodied in successive collective-bargaining agreements between the Union and the Respondent, the most recent of which is effective from May 1, 1999, until April 30, 2002. At all material times, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the unit.

Since about June 1, 2001, the Respondent has failed and refused to notify the Union of its decision to close its Hastings facility. Since about June 22, 2001, the Union has requested that the Respondent bargain collectively about the effects of that decision and since that date the Respondent has failed and refused to do so. The effects of the Respondent's decision to close its facility relate to wages, hours, and other terms and conditions of employment of the unit employees, and are mandatory subjects for the purposes of collective bargaining.

On about June 12, 2001, the Respondent changed its policy pertaining to the continuation of employees' insurance coverage after layoff or termination, by discontinuing its practice of continuing employees' insurance coverage through the end of the month in which layoff or termination occurred. The Respondent engaged in this conduct without prior notice to the Union and without affording the Union an opportunity to bargain with the Respondent over this change. This change affected terms and conditions of employment that are mandatory subjects for the purposes of collective bargaining. On about June 22, 2001, the Union, by letter, requested that the Respondent provide it with the following information:

How many employees have been laid off in the months of April, May and June and upon final closure. How many management personnel were laid-off on the same dates and upon final closure. Are there any management or employee personnel or people working on behalf of [Respondent] that will be able to answer questions from the employees.

This information is relevant and necessary to the Union's performance of its duties as the exclusive collective-bargaining representative of the unit. Since about June 22, 2001, the Respondent has failed and refused to furnish the Union with the information.<sup>2</sup>

<sup>2</sup> The information here includes nonunit information. Such information is not presumptively relevant. In *Capital City Fire Protection*, 332 NLRB No. 129 (2000) (not reported in Board volumes), a "no answer"

#### CONCLUSIONS OF LAW

1. By failing to notify the Union of its decision to close its Hastings facility, and by failing to give the Union an opportunity to bargain over the effects of that decision, 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.

2. By unilaterally discontinuing its practice of maintaining employees' insurance coverage through the end of the month in which layoff or termination occurred, 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.

3. By failing and refusing to provide the Union with requested information that is relevant and necessary to the Union's performance of its duties as the exclusive collective-bargaining representative of the unit, 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 designed to effectuate the policies of the Act.

To remedy the Respondent's unlawful failure and refusal to notify and bargain with the Union about the effects of the Respondent's decision to close its Hastings facility, we shall order the Respondent to bargain with the Union, on request, about the effects of that decision. Because of the Respondent's unlawful conduct, however, the terminated unit employees have been denied an opportunity to bargain through their collective-bargaining representative at a time when the Respondent might still have been in need of their services and a measure of balanced bargaining power existed. Meaningful bargaining cannot be assured until some measure of bargaining power is restored to the Union. A bargaining order alone, therefore, is not an adequate remedy for the unfair labor practices committed.

Accordingly, we deem it necessary, in order to ensure that meaningful bargaining occurs and to effectuate the policies of the Act, to accompany our Order with a limited backpay requirement designed both to offset some of the losses suffered by the employees as a result of the violations and to recreate in some practicable manner a

case, the Board denied summary judgment as to an allegation concerning information that was not presumptively relevant. See fn. 2. However, the information there (social security information) implicated the privacy concerns of nonparties to the litigation. That problem is not present in the instant case.

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 the terminated unit employees in a manner similar to that required in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968), as clarified in *Melody Toyota*, 325 NLRB 846 (1998). In applying *Transmarine* in this instance, though, we shall grant the General Counsel's request that, in light of the Respondent's Chapter 7 bankruptcy and cessation of operations, we simply award the unit employees the minimum 2 weeks of backpay required by *Transmarine*, in the amounts set forth in the compliance specification.

Pursuant to *Transmarine*, the Respondent normally would be required to pay its terminated unit 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 the Hastings facility on unit employees; (2) a bona fide impasse in bargaining; (3) the failure of the Union to request bargaining within 5 business days after receipt of this Decision and Order, or to commence negotiations within 5 business days after receipt of the Respondent's notice of its desire to bargain with the Union; or (4) the Union's subsequent failure to bargain in good faith.

*Transmarine* provides that the sum paid to any employee may not exceed the amount the employee would have earned as wages from the date on which the Respondent terminated its operations, to the time the employee secured equivalent employment elsewhere, or the date on which the Respondent shall have offered to bargain in good faith, whichever occurs sooner. But, *Transmarine* further provides that the sum paid to any employee shall not be less than the employee would have earned for a 2-week period at the rate of his normal wages when last in the Respondent's employ. Backpay for these purposes is typically based on earnings which the terminated unit employees would normally have received during the applicable period, less any interim earnings, and is 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).

As stated, in view of the Respondent's bankruptcy and its cessation of operations, the General Counsel in the compliance specification seeks only the minimum 2 weeks of backpay due the terminated unit employees under *Transmarine*. Exhibit 1 to the compliance specification sets forth the amount due each employee based on

40 hours of work per week. We shall grant the General Counsel's request and order the Respondent to pay the employees the amounts shown in Exhibit 1, with interest as prescribed in *New Horizons for the Retarded*, supra.<sup>3</sup>

Further, in view of the fact that the Hastings 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 the unit employees in order to inform them of the outcome of this proceeding.

Having also found that the Respondent unlawfully failed to continue the unit employees' insurance coverage through the end of the month in which layoff or termination occurred, we shall order the Respondent to reimburse the unit employees for any expenses ensuing from the Respondent's failure to continue such coverage. The compliance specification, in exhibit 2, sets forth the names of 21 unit employees who incurred such expenses and the amount due each employee. The Respondent shall be ordered to pay those employees the amounts set forth in exhibit 2, with interest as prescribed in *New Horizons for the Retarded*, supra.

Finally, we shall order the Respondent to provide the Union with the information it requested on about June 22, 2001.

#### ORDER

The National Labor Relations Board orders that the Respondent, Eric, Inc. d/b/a Hastings Industries, Hastings, Nebraska, its officers, agents, successors, and assigns, shall

##### 1. Cease and desist from

(a) Failing to give the Union notice of its decision to close the Hastings facility and an opportunity to bargain over the effects of that decision on the unit employees. The bargaining unit consists of:

All employees in the classifications I, IAA, IA, II, III, IV, V and VI, employed by Respondent at its Hastings, Nebraska facility, but EXCLUDING all office and clerical employees and supervisors as defined in the Act.

<sup>3</sup> In the complaint, the General Counsel seeks an order requiring the Respondent to reimburse any unit employee entitled to a monetary award in this case for any extra federal and/or state income taxes that would or may result from the lump sum payment of the award. We decline to order this relief at this time. Such remedial relief sought by the General Counsel would involve a change in Board law. See, e.g., *Hendrickson Bros.*, 272 NLRB 438, 440 (1985), enf. 762 F.2d 990 (2d Cir. 1985). We do not think it is appropriate, at this time, to consider such a change in Board law in the absence of a full briefing by the parties. See *Kloepfers Floor Covering, Inc.*, 330 NLRB 811 fn. 1 (2000); *Ishikawa Gasket America, Inc.*, 337 NLRB 175, 176 (2001), *Cannon Valley Woodwork*, 333 NLRB No. 97 fn. 3 (2001) (not reported in Board volumes).

(b) Unilaterally discontinuing its practice of maintaining employees' insurance coverage through the end of the month in which layoff or termination occurred.

(c) Failing and refusing to provide the Union with information that is relevant and necessary to the performance of its duties as the exclusive representative of the unit.

(d) 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 its decision to close the Hastings facility, and reduce to writing and sign any agreement reached as a result of such bargaining.

(b) Make whole the individuals named in the compliance specification by paying them the amounts specified therein, with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), minus tax withholdings on the backpay due the employees required by Federal and State laws. The total amount set forth in the specification is: \$89,099.15.

(c) Provide the Union with the information it requested on about June 22, 2001.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, 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.

(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>4</sup> to the Union and to all unit employees employed at the Hastings facility on or after June 1, 2001.

(f) Within 21 days after service by the Region, file with the Regional Director 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.

<sup>4</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Mailed by Order of the National Labor Relations Board" shall read "Mailed Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

## APPENDIX

### NOTICE TO EMPLOYEES

#### MAILED 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 Federal labor law and has ordered us to mail and obey this notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail to give District Lodge No. 7, International Association of Machinists & Aerospace Workers, AFL-CIO prior notice of a decision to close our facility and an opportunity to bargain about the effects of that decision on employees in the following unit:

All employees in the classifications I, IAA, IA, II, III, IV, V and VI, employed by us at our Hastings, Nebraska facility, but EXCLUDING all office and clerical employees and supervisors as defined in the Act.

WE WILL NOT unilaterally discontinue our practice of continuing employees' insurance coverage through the end of the month in which layoff or termination occurred.

WE WILL NOT fail to provide the Union with information that is relevant and necessary to the performance of its duties as the exclusive representative of the unit employees.

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 over the effects of the closure of our facility on the unit employees, and put in writing and sign any agreement reached as a result of such bargaining.

WE WILL pay unit employees limited backpay in the amounts set forth next to their names in exhibit 1 to the compliance specification, with interest.

WE WILL make unit employees whole for our failure to continue their insurance coverage through the end of the month in which their layoff or termination occurred by reimbursing them the amounts set forth next to their

names in exhibit 2 to the compliance specification, with interest.

WE WILL provide the Union with the information it requested on about June 22, 2001.

ERIC, INC. D/B/A HASTINGS INDUSTRIES