

Astro Color Laboratories, Inc. and Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL-CIO. Case 13-CA-39518

November 20, 2002

DECISION AND ORDER

BY MEMBERS LIEBMAN, COWEN, AND BARTLETT

The General Counsel seeks summary judgment in this case on the ground that the Respondent has failed to file an answer to the complaint. Upon charges and amended charges filed by the Union on July 25, August 16 and 21, 2001, respectively, the Regional Director issued the complaint on December 4, 2001, against Astro Color Laboratories, Inc., the Respondent, alleging that it has violated Section 8(a)(1) and (5) of the Act. The Respondent failed to file an answer.

On March 19, 2002, the General Counsel filed a Motion for Summary Judgment with the Board. On March 22, 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.

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 December 27, 2001, notified the Respondent that unless an answer was received by January 3, 2002, 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, an Illinois corporation, with an office and place of business in Chicago, Illinois, has been engaged in the business of commercial film developing. From approximately June 14, 2000 to June 2001, a representative period, the Respondent, in conducting its operations described above, derived gross revenues in excess of \$500,000 and provided services

valued in excess of \$500,000 directly to customers located outside the State of Illinois. 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 Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

At all material times, Jan Cooper, vice president in charge of operations, has been a supervisor of the Respondent within the meaning of Section 2(11) of the Act and an agent of the Respondent within the meaning of Section 2(13) of the Act.

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 engaged in the development, printing, cutting, inspection, storing, shipping, maintenance of laboratory equipment and care of all motion picture film, including television film, regardless of size, including but not limited to 8 mm, 16 mm, 35 mm, and 70 mm where motion, slide and television pictures are made; excluding all non-working supervisors, office clerical employees, professional employees and guards as defined in the Act.

At all material times, the Union has been the designated exclusive collective-bargaining representative of the unit and the Union has been recognized as the representative by the Respondent. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which was effective from April 1, 1999, to March 31, 2002.

At all material times, based on Section 9(a) of the Act, the Union has been, and continues to be, the exclusive bargaining representative of the unit.

Since about April 2, 2001, the Respondent, by Jan Cooper, changed the working conditions of employees Don Bartomiccia and John Tibbets by reducing their work hours and subsequently laying them off.

The subjects set forth above relate to wages, hours and other terms and conditions of employment of the unit, and are mandatory subjects for the purpose of collective bargaining.

The Respondent engaged in the conduct described above without prior notice to the Union and without affording the Union an opportunity to bargain with the Respondent with respect to this conduct and its effects.

CONCLUSION OF LAW

By the acts and conduct described above, the Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees, 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.¹

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)(1) and (5) by changing the working conditions of employees Don Bartomiccia and John Tibbets by reducing their work hours and subsequently laying them off, we shall order the Respondent to offer Don Bartomiccia and John Tibbets full reinstatement to their former positions with their former work schedules or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed. We also shall order the Respondent to make Bartomiccia and Tibbets whole for any loss of earnings and other benefits suffered as a result of the Respondent's unlawful conduct. 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).²

¹ In Member Cowen's view, although the General Counsel's complaint allegation that the Respondent violated Sec. 8(a)(5) and (1) of the Act could have been more artfully pled, it does allege the minimum required, namely that the Respondent's reduction in work hours and layoff constituted changes in working conditions over which the Respondent failed to bargain. See Member Cowen's dissent in *Falcon Wheel Division L.L.C.*, 338 NLRB 576 (2002) (complaint that merely alleges that employer laid off employees without bargaining with the union fails to allege a violation of Sec. 8(a)(5) because it fails to assert that layoff varied from employer's past practice).

² In the complaint, the General Counsel seeks an order requiring the Respondent to award to Bartomiccia and Tibbets "any extra federal and/or state income taxes that would or may result from the lump sum payment of the [backpay] award." This aspect of the General Counsel's requested remedy would involve a change in Board law. See, e.g., *Hendrickson Bros.*, 272 NLRB 438, 440 (1985), *aff'd*, 762 F.2d 990 (2d Cir. 1985). In light of this, we believe that the appropriateness of this proposed remedy should be resolved after a full briefing by affected parties. See *Kloepfers Floor Covering, Inc.*, 330 NLRB 811 fn. 1 (2000). Because there has been no such briefing in this no-answer case, we decline to include this additional relief in the Order here.

ORDER

The National Labor Relations Board orders that the Respondent, Astro Color Laboratories, Inc., Chicago, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain in good faith with Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL-CIO as the exclusive collective-bargaining representative of the employees in the following unit by unilaterally changing the working conditions of employees by reducing their work hours and subsequently laying them off without prior notice to the Union and without affording the Union an opportunity to bargain with the Respondent with respect to this conduct and its effects:

All employees engaged in the development, printing, cutting, inspection, storing, shipping, maintenance of laboratory equipment and care of all motion picture film, including television film, regardless of size, including but not limited to 8 mm, 16 mm, 35 mm, and 70 mm where motion, slide and television pictures are made; excluding all non-working supervisors, office clerical employees, professional employees and guards 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 in good faith with the Union over the decision to reduce the working hours of Don Bartomiccia and John Tibbets, the subsequent decision to lay them off, and the effects of these decisions.

(b) Within 14 days from the date of this Order, offer Don Bartomiccia and John Tibbets full reinstatement to their former jobs with their former work schedules or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed.

(c) Make whole Don Bartomiccia and John Tibbets for any loss of earnings and other benefits suffered as a result of the unlawful reduction in their hours and the unlawful layoffs, with interest, in the manner set forth in the remedy section of this decision.

(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, post at its facility in Chicago, Illinois, copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent 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. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 2, 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.

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 Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Chose representatives to bargain with us on your behalf

³ 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."

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to bargain in good faith with Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL-CIO as the exclusive collective-bargaining representative of the employees in following unit by unilaterally changing the working conditions of employees by reducing their work hours and subsequently laying them off without prior notice to the Union and without affording the Union an opportunity to bargain with the Respondent with respect to this conduct and its effects:

All employees engaged in the development, printing, cutting, inspection, storing, shipping, maintenance of laboratory equipment and care of all motion picture film, including television film, regardless of size, including but not limited to 8 mm, 16 mm, 35 mm, and 70 mm where motion, slide and television pictures are made; excluding all non-working supervisors, office clerical employees, professional employees and guards 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 in good faith with the Union over the decision to reduce the working hours of Don Bartomiccia and John Tibbets, the subsequent decision to lay them off, and the effects of these decisions.

WE WILL, within 14 days from the date of the Board's Order, offer Don Bartomiccia and John Tibbets full reinstatement to their former jobs with their former work schedules or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed.

WE WILL make whole Don Bartomiccia and John Tibbets for any loss of earnings and other benefits suffered as a result of the unlawful reduction in their hours and the unlawful layoffs, with interest.

ASTRO COLOR LABORATORIES, INC.