

Admiral Manufacturing & Sales, Inc. d/b/a Baird Manufacturing Company and International Brotherhood of Electrical Workers, Local 295, AFL-CIO. Case 26-CA-20155

November 22, 2002

DECISION AND ORDER

BY MEMBERS LIEBMAN, COWEN, AND BARTLETT

The General Counsel seeks summary judgment in this case because the Respondent has failed to file an answer to the consolidated complaint and compliance specification. Upon a charge filed by the International Brotherhood of Electrical Workers, Local 295, AFL-CIO, the Union, on March 16, 2001, as amended on October 3, 2001, the Regional Director issued a consolidated complaint and compliance specification on July 26, 2002, against Admiral Manufacturing & Sales, Inc. d/b/a Baird Manufacturing Company, the Respondent. The consolidated complaint and compliance specification alleges that the Respondent has violated Section 8(a)(1) and (5) of the Act. The Respondent failed to file an answer.¹

On January 9, 2002, the General Counsel filed a Motion for Summary Judgment with the Board. On January 11, 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. 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 consolidated complaint and compliance specification affirmatively note that unless an answer

¹ The charge was served on the Respondent at the address given on the charge, but the Regional Office was informed that the name of legal counsel and address for the Respondent were incorrect. Upon learning that the Respondent had filed for bankruptcy, the Region contacted its attorney in bankruptcy, James Surprise, who agreed to accept service of the original charge. A copy of the charge was sent to Surprise by regular mail on May 7, 2001. A copy of the Order consolidating complaint and compliance specification was sent to Surprise by certified mail on July 26, 2001. Thereafter, having obtained a forwarding address from the Bankruptcy clerk, the Region sent copies of the amended consolidated complaint and compliance specification by certified mail to the Respondent's corporate officer, James Baird. The certified receipt shows that James Baird signed for delivery on November 15, 2001.

was 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 facsimile letters dated October 25, 2001, and November 7, 2001, notified the Respondent's trustee in bankruptcy, Warren Dupwe, and its attorney in bankruptcy, James Surprise, respectively, that the time limits for filing an answer had expired and inquiring as to whether the Respondent intended to file an answer.² No response to these letters was received.

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 Arkansas corporation with an office and place of business in Clarendon, Arkansas, has been engaged in the manufacture of industrial metal racks. During the 12-month period ending December 1, 2000, the Respondent, in conducting its business operations, sold and shipped from its Clarendon, Arkansas facility goods valued in excess of \$50,000 directly to points located outside the State of Arkansas. 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 production and maintenance employees at the Employer's Clarendon, Arkansas plant, excluding all office clerical employees, guards, and supervisors as defined by the Act.

Since about January 5, 1967, the Union has been the designated exclusive collective-bargaining representative of the unit and since then has been recognized as the representative by the Respondent. This recognition has

² The Respondent is in Chapter 7 bankruptcy and has ceased operating. However, it is well established 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. Accord: *NLRB v. Continental Hagen*, 932 F.2d 828, 834-835 (9th Cir. 1991).

been embodied in successive collective-bargaining agreements, the most recent being effective from June 1, 2000, through May 31, 2003.

At all material times, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the unit described above.

On about December 1, 2000, the Respondent closed its business operations and terminated the employment of all bargaining unit employees.

Between October and November 2000, the Respondent failed to remit union dues collected pursuant to the terms of the collective-bargaining agreement.

As of December 1, 2000, the Respondent was delinquent in paying its employees vacation pay benefits accrued pursuant to the collective-bargaining agreement.

The subjects set forth above relate to wages, hours, and other terms and conditions of employment and are mandatory subjects for the purposes of collective bargaining. The Respondent engaged in the conduct 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 the effects of this conduct.

CONCLUSIONS OF LAW

1. By failing to notify the Union of its decision to close its Clarendon 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 failing, between October and November 2000, to remit to the Union the union dues collected pursuant to the terms of the collective-bargaining agreement, 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 to pay its employees the vacation pay benefits accrued pursuant to the collective-bargaining agreement as of December 1, 2000, 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 Clarendon 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 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 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, in light of the Respondent's Chapter 7 bankruptcy and cessation of operations, we shall simply award the unit employees the minimum 2 weeks of backpay required by *Transmarine*, in the amounts set forth in the consolidated complaint and compliance specification, as requested by the General Counsel.

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 Respondent bargains to agreement with the Union on those subjects pertaining to the effects of the closing of the Clarendon 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 days 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 em-

ployee 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 seeks only the minimum 2 weeks of backpay due the terminated unit employees under *Transmarine*.³ The consolidated complaint and compliance specification sets forth the number of employees in the bargaining unit, the average pay rate per hour for the unit employees, the amount due each employee based on 40 hours of work per week, and the total amount of backpay due to the unit employees. We shall grant the General Counsel's request and order the Respondent to pay each unit em-

³ Member Liebman observes that *Transmarine* was recently reaffirmed by the Board as long-standing precedent that has been approved by the courts. See *IHS at West Broward*, 338 NLRB 239 fn. 2 (2002) (rejecting the doubts expressed by Member Bartlett that the Board has the authority to impose the *Transmarine* remedy). Here, Member Bartlett argues in particular that the 2-week minimum backpay award—the only element of the *Transmarine* remedy granted—is improperly punitive, under the circumstances. Member Liebman disagrees.

There can be no doubt about the Board's authority. *Transmarine* itself clearly states that "in no event" shall employees be awarded less than 2 weeks of backpay. 170 NLRB at 390. Since the Board has the authority to issue a complete *Transmarine* backpay remedy, it necessarily has the authority to grant a more limited one. Further, in analogous circumstances, the Board has limited a respondent's backpay obligation under *Transmarine* to the 2-week minimum. See *St. Mary's Foundry Co.*, 303 NLRB 1032 fn. 3 (1991).

While Member Bartlett does not deny that the employees in this case suffered economic harm because of Respondent's violation of the Act, his position would deny them any meaningful remedy. That result is unacceptable. The award of backpay could arguably be called punitive, meanwhile, only if it served no compensatory purpose. But that is not the case. As the Board explained in *Transmarine*, the remedy crafted there was "designed both to make whole the employees for losses suffered as a result of the violation 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." 170 NLRB at 390 (emphasis added). That the circumstances may frustrate the Board's ability to recreate, "in some practicable manner," the situation that would have obtained had the Respondent engaged in effects bargaining when it was required to do, does not mean that employees suffered no losses. Indeed, the modest, minimum backpay award more likely than not *undercompensates* employees, who were deprived of the opportunity to negotiate compensation for, or mitigation of, the losses caused by the closure of the facility. The Respondent, moreover, presumably enjoyed some economic benefit attributable to its unlawful failure to bargain, assuming its decision not to bargain was economically rational. Finally, a Board remedy is not punitive simply because it places the burden of uncertainty on the wrongdoer. E.g., *Virginia Electric & Power Co. v. NLRB*, 319 U.S. 533, 544 (1943).

ployee the amount of backpay shown in the consolidated complaint and compliance specification, with interest as prescribed in *New Horizons for the Retarded*, supra.⁴

Further, in view of the fact that the Clarendon 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, between October and November 2000, to remit to the Union 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 the withheld dues to the Union as required by the agreement, and set forth in the consolidated complaint and compliance specification, with interest as prescribed in *New Horizons for the Retarded*, supra.⁵

Further, having found that the Respondent unlawfully failed to pay its employees the vacation pay benefits accrued pursuant to the agreement as of December 1, 2000, we shall order the Respondent to pay the employees the accrued vacation pay benefits. Appendix A to the consolidated complaint and compliance specification sets forth the amount due each employee for accrued vacation pay benefits. We shall order the Respondent to pay the unit employees the amounts shown opposite their respective names in Appendix A (attached hereto), with interest as prescribed in *New Horizons for the Retarded*, supra.⁶

ORDER

The National Labor Relations Board orders that the Respondent, Admiral Manufacturing & Sales, Inc. d/b/a Baird Manufacturing Company, Clarendon, Arkansas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing to give International Brotherhood of Electrical Workers, Local 295, AFL-CIO prior notice of its decision to close its Clarendon facility and an opportunity to bargain over the effects of that decision on the unit employees. The unit consists of the following employees:

All production and maintenance employees at the Employer's Clarendon, Arkansas plant, excluding all of-

⁴ The consolidated complaint and compliance specification states that for each unit employee, the total backpay for two 40-hour weeks is \$696, and that the amount of total backpay for the entire unit of 48 employees is \$33,408.

⁵ The consolidated complaint and compliance specification states that the total amount owed to the Union for unremitted union dues is \$84.

⁶ The consolidated complaint and compliance specification states that the total amount owed to unit employees for accrued vacation pay benefits is \$55,065.73.

fice clerical employees, guards, and supervisors as defined by the Act.

(b) Failing to remit to the Union the union dues collected between October and November 2000, pursuant to the terms of the collective-bargaining agreement.

(c) Failing to pay its employees the vacation pay benefits accrued pursuant to the collective-bargaining agreement as of December 1, 2000.

(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 Clarendon facility, and reduce to writing and sign any agreement reached as a result of such bargaining.

(b) Pay unit employees limited backpay for the period set forth in this Decision and Order, as specified below.

(c) Remit to the Union the union dues collected pursuant to the terms of the collective-bargaining agreement that the Respondent failed to remit between November and December 2000, as specified below.

(d) Pay unit employees the vacation pay benefits accrued pursuant to the collective-bargaining agreement as of December 1, 2000, as specified below.

(e) 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.

(f) 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, signed and dated copies of the attached notice marked "Appendix B"⁷ to the Union and to all current and former unit employees.

(g) 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.

⁷ 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."

IT IS FURTHER ORDERED that the Respondent, Admiral Manufacturing & Sales, Inc. d/b/a Baird Manufacturing Company, its officers, agents, successors, and assigns, shall make whole the Union and the unit employees by paying them the amounts set forth in the consolidated complaint and compliance specification, with interest as prescribed in *New Horizons for the Retarded*, supra, minus tax withholdings as required by Federal and State laws. In summary, the amounts owed by the Respondent are as follows:

TOTAL BACKPAY	\$33,408.00
TOTAL VACATION PAY BENEFITS	55,065.73
TOTAL UNION DUES	84.00
GRAND TOTAL	\$88,557.73

MEMBER BARTLETT, dissenting in part.

I concur in granting summary judgment for the unfair labor practice allegations of the complaint. I do not agree, however, with the majority's grant of a fixed two-week backpay remedy as part of a modified *Transmarine* remedy [*Transmarine Navigation Corp.*, 170 NLRB 389 (1968)]. For the reasons set forth in my concurring opinion in *IHS at West Broward*, 338 NLRB 239 (2002), I doubt that the Board's general use of a *Transmarine* remedy represents a permissible exercise of the Board's remedial authority under Section 10(a) of the Act. As applied in this case, the provision of a fixed 2-week backpay remedy is clearly punitive.

First, there is no attempt to justify this backpay remedy on the basis of financial losses actually suffered by employees as the result of the Respondent's unlawful failure to bargain about the effects of closing its facility. The remedial amount is entirely speculative. Second, the fixed backpay remedy provides no economic inducement whatsoever for the Respondent to bargain. It therefore fails to serve the primary purpose ascribed to the remedy in *Transmarine*. Even assuming, arguendo, that the Respondent, or its trustee in Chapter 7 bankruptcy proceedings, is in any position to bargain, its willingness to do so cannot reasonably be said to turn on the imposition of an independent and immutable backpay obligation. At least in the circumstances of a regular *Transmarine* remedy, the Respondent can toll the accrual of additional backpay liability by bargaining. (However, as I stated in my opinion in *HIS at West Broward*, the potential coercive effect of the backpay remedy on the Respondent during such bargaining raises other concerns.) Here, the Respondent cannot alter its backpay liability at all by choosing to bargain.

In sum, even though I recognize that the Board adheres to the use of a *Transmarine* remedy in other effects-bargaining situations, I find it inappropriate to do so

here. I would delete that remedy and the corresponding amount of backpay in the compliance specification from our Order.

APPENDIX A

ACCRUED VACATION PAY BENEFITS

Last Name	First Name	Vacation Pay
Alexander	Terry	\$ 297.60
Arnold	Patrica	931.20
Bracy	Jessie	319.60
Brown	Betty	623.20
Carr	Bobby	405.12
Chism	Joseph	976.80
Chism	Jacqueline	976.80
Ellis	Scott	2,095.20
Ester	Terry	344.00
Finney	Carolyn	1,597.51
Gutt	Folker	1,835.20
Hamilton	Nancy	618.40
Harlin	Carl	1,828.00
Henderson	Shirley	40.11
Holmes	Jeri	980.00
Horton	Karen	1412.02
Jackson	Lavern	1,256.80
Jackson	Timothy	958.80
Littlejohn	Cathy	159.39
Littlejohn	Curtis	994.80
Littlejohn	Chris	1,332.00
Littlejohn	Lena	927.60
Littlejohn	Phillip	1,541.29
Littlejohn	Terry	2,564.00
Littlejohn	Randy	1,793.60
Littlejohn	Tommy	634.40
Martin	Larry	798.94
Nelson	Debra	916.80
Nothern	Kenneth	1,844.80
Norwood	Margie	606.40
Norwood	Sadie	297.20
Owens	Betty	311.60
Parker	Lee H.	65.67
Phyllis	Miller	973.20
Samuels	Barbara	4,860.00
Senter	James	650.16
Smith	Claude	1,253.20
Smith	Gertrude	1,246.40
Smith	Jessie	1,825.60
Smith	Otis	1,512.00
Smith	Thelma	1,278.40
Suggett	Johnny	1,721.60
Sullins	Johnny	1,676.80
Summage	Irene	1,270.40
Thorton	Calvin	1,141.20

Turner	Joyce	1,440.00
Watson	Henry	1,246.40
Wiley	Lorene	685.52
Total Vacation Pay		\$ 55,065.73

APPENDIX B

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 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
 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 International Brotherhood of Electrical Workers, Local 295, AFL-CIO prior notice of a decision to close our facility and an opportunity to bargain over the effects of that decision on the employees in the following unit:

All production and maintenance employees at our Clarendon, Arkansas plant, excluding all office clerical employees, guards, and supervisors as defined by the Act.

WE WILL NOT fail to remit to the Union the union dues collected pursuant to the terms of the collective-bargaining agreement.

WE WILL NOT fail to pay our employees the vacation pay benefits accrued pursuant to the collective-bargaining agreement.

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 International Brotherhood of Electrical Workers, Local 295, AFL-CIO over the effects on unit employees of our decision to close the Clarendon facility, and reduce to writing and sign any agreement reached as a result of such bargaining.

WE WILL pay unit employees limited backpay in the amount set forth in this Decision and Order, with interest.

WE WILL remit to the Union the union dues collected pursuant to the terms of the collective-bargaining agreement that we failed to remit between November and December 2000, with interest.

WE WILL pay unit employees the vacation pay benefits accrued pursuant to the collective-bargaining agreement as of December 1, 2000, with interest.

ADMIRAL MANUFACTURING & SALES, INC.
D/B/A BAIRD MANUFACTURING COMPANY