ACS Acquisition Corp. ***and*** **Local 348, IUE–CWA, AFL–CIO, CLC.** Case 3–CA–23882

July 15, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

The General Counsel seeks a default judgment[1] 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 October 18 and 31, November 18, and December 17, 2002, the General Counsel issued the complaint on December 24, 2002, against ACS Acquisition Corp. (the Respondent), alleging that it has violated Section 8(a)(1) and (5) of the Act. The Respondent failed to file an answer.

On January 27, 2003, the General Counsel filed a Motion for Summary Judgment with the Board. On January 29, 2003, 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 Default Judgment

Section 102.20 of the Board's Rules and Regulations provides 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 noted that unless an answer was filed by January 7, 2003, all the allegations in the complaint would be considered admitted. Further, the undisputed allegations in the General Counsel's motion disclose that the Region, by letter dated January 10, 2003, notified the Respondent that unless an answer was received by January 17, 2003, a motion for default 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 default 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 Angola, New York (the Respondent's facility), has been engaged in the manufacturing of water filtration products.

During the 12-month period ending December 18, 2002, the Respondent, in conducting its business operations described above, sold and shipped from its Angola, New York facility goods valued in excess of $50,000 directly to points outside the State of New York.

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 Local 348, IUE–CWA, AFL–CIO, CLC, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of the Respondent within the meaning of Section 2(11) of the Act and agents of the Respondent within the meaning of Section 2(13) of the Act:

Ron Spier	President
Harry Rector	Chief Financial Officer

The following employees of the Respondent (the unit), constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> All production and maintenance employees of the Company's Filtration and Separation Dynamics Division operations located at 9542 Hardpan Road, Angola, New York, excluding all office and factory clerical employees, guards, professional/technical and all supervisory employees with authority to hire, promote, discharge employees as defined in the Labor Management Relations Act, as amended.

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 a collective-bargaining agreement, which is effective from July 22, 2000, to July 22, 2005.

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

On or about October 15, 2002, the Respondent unilaterally ceased doing business at its facility located at 9542 Hardpan Road, Angola, New York, without prior notice to the Union and without affording the Union an opportunity to bargain with the Respondent with respect to the effects of this conduct.

The subject set forth above relates to the wages, hours, and other terms and conditions of employment of the unit

[1] The General Counsel's motion requests summary judgment on the ground that the Respondent has failed to file an answer to the complaint. Accordingly, we construe the General Counsel's motion as a motion for default judgment.

and is a mandatory subject for the purposes of collective bargaining.

Since on or about September 21, 2002, and continuously thereafter, the Respondent has unilaterally failed to remit the contractually required payments to the employees' 401(k) plan.

Since on or about October 5, 2002, and continuously thereafter, the Respondent has unilaterally failed to pay employees their wages.

Since in or about October 2002, a more precise date being presently unknown to the General Counsel, but within the knowledge of the Respondent, and continuously thereafter, the Respondent has unilaterally failed to make contractually required health insurance payments.

The subjects set forth above relate to the wages, hours, and other terms and conditions of employment of the unit and are mandatory subjects for the purposes 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 the conduct and the effects of the conduct.

CONCLUSION OF LAW

By the acts and conduct described above, the Respondent has failed and refused to bargain collectively and in good faith with the 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.

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, to remedy the Respondent's unlawful failure and refusal to bargain with the Union about the effects of the Respondent's decision to cease doing business at its 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 unit employees have been denied an opportunity to bargain through their collective-bargaining representative. Meaningful bargaining cannot be assured until some measure of economic strength is restored to the Union. A bargaining order alone, therefore, cannot serve as 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 to make whole the unit employees for losses suffered as a result of the violations and to re-create 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 unit employees in a manner similar to that required in *Transmarine Navigation Corp*., 170 NLRB 389 (1968), as clarified by *Melody Toyota*, 325 NLRB 846 (1998).[2]

Thus, the Respondent shall pay its 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 its facility on its employees; (2) a bona fide impasse in bargaining; (3) the Union's failure to request bargaining within 5 business days after receipt of this Decision and Order, or to commence negotiations within 5 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.

In no event shall the sum paid to these employees exceed the amount they would have earned as wages from the date on which the Respondent ceased doing business at the facility to the time they secured equivalent employment elsewhere, or the date on which the Respondent shall have offered to bargain in good faith, whichever occurs sooner. However, in no event shall this sum be less than the employees would have earned for a 2-week period at the rate of their normal wages when last in the Respondent's employ. Backpay shall be based on earnings which the unit employees would normally have received during the applicable period, less any net interim earnings, and 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).

In addition, having found that the Respondent violated Section 8(a)(5) and (1) by unilaterally failing to remit contractually required payments to the unit employees' 401(k) plan since September 21, 2002, we shall order the Respondent to remit all contractually required payments

[2] See also *Live Oak Skilled Care & Manor*, 300 NLRB 1040 (1990). As the complaint and motion are less than clear, however, as to the actual impact on the unit employees, if any, of the Respondent's decision to cease doing business at its Angola, New York facility, we shall permit the Respondent to contest the appropriateness of such a *Transmarine* backpay remedy at the compliance stage. See *Z&Z Distributing Co*., 320 NLRB 1031, 1032 fn. 2 (1996), and cases cited there.

to the 401(k) plan that have not been remitted since that date, including any additional amounts due the plan in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 6 (1979), and to make whole the unit employees for any loss of interest they may have suffered as a result of the failure to remit such payments.

Further, having found that the Respondent also violated Section 8(a)(5) and (1) by unilaterally failing to pay unit employees their wages since October 5, 2002, we shall order the Respondent to make the employees whole for any loss of earnings suffered as a result of the Respondent's unlawful conduct. Backpay shall be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, supra.

Finally, having found that the Respondent also violated Section 8(a)(5) and (1) by unilaterally failing to make contractually required health insurance payments since about October 2002, we shall order the Respondent to restore the unit employees' health insurance coverage and reimburse the employees for any expenses ensuing from the Respondent's failure to make required payments, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in accordance with *Ogle Protection Service*, supra, with interest as prescribed in *New Horizons for the Retarded*, supra.

In view of the fact that the Respondent is no longer doing business at the facility, we shall order the Respondent to mail a copy of the attached notice to the Union and to the last known addresses of all unit employees employed by the Respondent at any time since September 21, 2002, in order to inform them of the outcome of this proceeding.

ORDER

The National Labor Relations Board orders that the Respondent, ACS Acquisition Corp., Angola, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain with Local 348, IUE–CWA, AFL–CIO, CLC as the designated exclusive bargaining representative of the Respondent's employees in the following appropriate unit, concerning the effects on the unit employees of its decision to cease doing business at its Angola, New York facility:

> All production and maintenance employees of the Company's Filtration and Separation Dynamics Division operations located at 9542 Hardpan Road, Angola, New York, excluding all office and factory clerical employees, guards, professional/technical and all supervisory employees with authority to hire, promote, discharge employees as defined in the Labor Management Relations Act, as amended.

(b) Unilaterally failing to remit contractually required payments to the unit employees' 401(k) plan, to pay employees their wages, and to make contractually required health insurance payments.

(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) On request, bargain with the Union concerning the effects on the unit employees of Respondent's decision to cease doing business at its Angola, New York facility, and reduce to writing and sign any agreement reached as a result of such bargaining.

(b) Pay the unit employees their normal wages when last in the Respondent's employ from 5 days after the date of this Decision and Order 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 its decision to cease doing business at its Angola, New York facility on its employees; (2) a bona fide impasse in bargaining; (3) the Union's failure to request bargaining within 5 business days after receipt of this Decision and Order, or to commence negotiations within 5 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; but in no event shall the sum paid to any of the employees exceed the amount they would have earned as wages from the date Respondent ceased doing business at the facility to the time they 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 the employees would have earned for a 2-week period at the rate of their normal wages when last in the Respondent's employ, with interest, as set forth in the remedy section of this decision.

(c) Remit all contractually required payments to the unit employees' 401(k) plan that have not been remitted since September 21, 2002, and make the unit employees whole for any loss of interest they may have suffered as a result of the unilateral failure to remit such payments, in the manner set forth in the remedy section of this decision.

(d) Make the unit employees whole for any loss of earnings suffered as a result of the Respondent's unilateral failure to pay them their wages since October 5, 2002, with interest, as forth in the remedy section of this decision.

(e) Restore the unit employees' health insurance coverage and reimburse the employees for any expenses ensuing from the Respondent's unilateral failure to make contractually required health insurance payments since about October 2002, with interest, as set forth in the remedy section of this decision.

(f) 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.

(g) 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"[3] to the Union and all unit employees employed by the Respondent at any time since September 21, 2002.

(h) 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
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 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 and refuse to bargain with Local 348, IUE–CWA, AFL–CIO, CLC as the designated exclusive bargaining representative of our employees in the following appropriate unit, concerning the effects on the unit employees of our decision to close our Angola, New York facility:

> All production and maintenance employees of our Filtration and Separation Dynamics Division operations located at 9542 Hardpan Road, Angola, New York, excluding all office and factory clerical employees, guards, professional/technical and all supervisory employees with authority to hire, promote, discharge employees as defined in the Labor Management Relations Act, as amended.

WE WILL NOT unilaterally fail to remit contractually required payments to the unit employees' 401(k) plan, to pay employees their wages, and to make contractually required health insurance payments.

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 our decision to cease doing business at the Angola, New York facility, and reduce to writing and sign any agreement reached as a result of such bargaining.

WE WILL pay the unit employees limited backpay in connection with our failure to bargain over the effects of our decision to cease doing business at the Angola, New York facility, as required by the Decision and Order of the National Labor Relations Board.

WE WILL remit all contractually required payments to the unit employees' 401(k) plan that have not been remitted since September 21, 2002, and make the unit employees whole for any loss of interest they may have suffered as a result of our unilateral failure to remit such payments.

WE WILL make the unit employees whole for any loss of earnings suffered as result of our unilateral failure to pay them their wages since October 5, 2002, with interest.

WE WILL restore the unit employees' health insurance coverage and reimburse the employees for any expenses ensuing from our unilateral failure to make contractually required health insurance payments since about October 2002, with interest.

ACS ACQUISITION CORP.

[3] 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."