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Nicholas Morrone and Robert M. Verbosky d/b/a Nick and Bob Partners d/b/a VMI Cabinets and Millwork, and/or VMI Cabinets and Millwork, Inc. and/or Nicholas Morrone, and/or Robert M. Verbosky, Alter Egos and Greater Pennsylvania Regional Council of Carpenters a/w United Brotherhood of Carpenters and Joiners of America. Case 6-CA-33210

November 28, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN
AND WALSH

The General Counsel seeks a default judgment in this case on the ground that the Respondent has failed to file an answer to the complaint. Based on a charge and an amended charge filed by Greater Pennsylvania Regional Council of Carpenters a/w United Brotherhood of Carpenters and Joiners of America, the Union, on January 30 and May 16, 2003, respectively, the General Counsel issued the complaint on May 30, 2003, against Nicholas Morrone and Robert M. Verbosky d/b/a Nick and Bob Partners d/b/a VMI Cabinets and Millwork (Respondent Partnership), and/or VMI Cabinets and Millwork, Inc. (Respondent Corporation), and/or Nicholas Morrone (Respondent Morrone), and/or Robert M. Verbosky (Respondent Verbosky), alter egos, collectively called the Respondent. The complaint alleges that the Respondent has violated Section 8(a)(1) and (5) of the Act. The Respondent failed to file an answer.

On July 21, 2003, the General Counsel filed a Motion for Default Judgment with the Board. On July 24, 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 stated that unless an answer was filed by June 13, 2003, all the allegations in the complaint would be considered admit-

ted. Further, the undisputed allegations in the General Counsel's motion disclose that the Region, by letter dated June 19, 2003, notified the Respondent that unless an answer was received "by the close of business on the third business day following receipt of this letter," a motion for default judgment would be filed.¹ Nevertheless, the Respondent did not file an answer to the complaint.

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, Respondent Partnership has been owned jointly by Nicholas Morrone and Robert M. Verbosky, partners, doing business as VMI Cabinets and Millwork.

At all material times, Respondent Partnership, with an office and place of business in Lemont Furnace, Pennsylvania, herein called Respondent Partnership's facility, has been engaged in the manufacture and installation of custom cabinets for commercial and residential customers.

At all material times, Respondent Corporation, with an office and place of business in Lemont Furnace, Pennsylvania, herein called Respondent Corporation's facility, has been engaged in the manufacture and installation of custom cabinets for commercial and residential customers.

At all material times, Respondent Partnership and Respondent Corporation have been affiliated business enterprises with common officers, ownership, directors, management and supervision; have formulated and administered a common labor policy; have shared common premises and facilities; have employed the same personnel and have held themselves out to the public as a single-integrated business enterprise and alter ego.

On or about June 28, 2002, Respondent Corporation was established by Respondent Partnership, Respondent Morrone, and Respondent Verbosky, as a subordinate instrument to and a disguised continuation of Respondent Partnership.

¹ The General Counsel's motion indicates that the Respondent has filed a petition for bankruptcy. 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. See, e.g., *Cardinal Services*, 295 NLRB 933 fn. 2 (1989), and cases cited there. 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; *NLRB v. 15th Avenue Iron Works, Inc.*, 964 F.2d 1336, 1337 (2d Cir. 1992). Accord: *Aherns Aircraft, Inc. v. NLRB*, 703 F.2d 23 (1st Cir. 1983).

Based on the operations described above, Respondent Partnership, Respondent Corporation, Respondent Morrone and Respondent Verbosky are, and have been at all material times, alter egos and a single employer within the meaning of the Act.

At all material times, Respondent Morrone and Respondent Verbosky have each disregarded the separate business form of Respondent Partnership and Respondent Corporation and personally conducted the business of each of the aforementioned entities.

By virtue of the activities and conduct described above, there is a unity of interest and ownership such that the separate personalities of Respondent Partnership, Respondent Corporation, Respondent Morrone, and Respondent Verbosky no longer exist and adherence to the fiction of separate business existence would sanction fraud or promote injustice.

Since on or about March 5, 2003, Robert H. Sloan has been duly designated by the U.S. Bankruptcy Court for the Western District of Pennsylvania as the trustee in the bankruptcy of Respondent Morrone, with full authority to continue Respondent's operations and to exercise all powers necessary to the administration of Respondent's business.

Since on or about March 5, 2003, Robert H. Sloan has been duly designated by the U.S. Bankruptcy Court for the Western District of Pennsylvania as the trustee in the bankruptcy of Respondent Verbosky, with full authority to continue Respondent's operations and to exercise all powers necessary to the administration of Respondent's business.

Since on or about March 7, 2003, Robert H. Sloan has been duly designated by the U.S. Bankruptcy Court for the Western District of Pennsylvania as the trustee in the bankruptcy of Respondent Partnership, with full authority to continue Respondent's operations and to exercise all powers necessary to the administration of Respondent's business.

During the 12-month period ending December 31, 2002, Respondent Partnership, in conducting its business operations described above, purchased and received at its Lemont Furnace, Pennsylvania facility goods valued in excess of \$50,000 directly from points located outside the Commonwealth of Pennsylvania.

During the 12-month period ending December 31, 2002, Respondent Corporation, in conducting its business operations described above, purchased and received at its Lemont Furnace, Pennsylvania facility goods valued in excess of \$50,000 directly from points located outside the Commonwealth of Pennsylvania.

We find that at all material times, the Respondent collectively has been 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

At all material times, the following individuals held the positions set forth opposite their 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:

Nicholas Morrone — CEO, Owner
Robert M. Verbosky — Manager, Owner

The Respondent, by Nicholas Morrone, interrogated employees concerning their union support and sympathies, as follows:

(a) In and about late November 2002, the exact dates being unknown to the General Counsel but known to the Respondent, in small group meetings, at the Respondent's Lemont Furnace, Pennsylvania facility, by asking employees whether they would honor a strike if the Union engaged in a strike.

(b) On or about December 16 and 17, 2002, in Morrone's office at the Respondent's Lemont Furnace, Pennsylvania facility, by asking employees "where they stood if he went against the Union."

(c) On or about December 18, 2002, at the Respondent's Lemont Furnace, Pennsylvania facility, in a large group meeting, by asking "where employees stood if he decided to go without the Union."

The following employees of the Respondent, herein called the Unit, 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 employed by Respondent Partnership at its Lemont Furnace, Pennsylvania facility; excluding all other employees, such as office clerical employees, guards, professional employees, and supervisors as defined in the Act.

Since about August 2001, and at all material times, the Union has been the designated exclusive collective-bargaining representative of the unit and since then the Union has been recognized as the representative by Respondent Partnership and by the Respondent. This recognition has been embodied in successive collective-bargaining agreements between Respondent Partnership and the Union, the most recent of which is effective from August 1, 2002, to August 31, 2004.

At all times since August 2001, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the unit.

On or about January 8, 2003, the Respondent made the decision to close its Lemont Furnace, Pennsylvania, facility.

On or about April 23, 2003, the Respondent ceased all operations.

The Respondent closed the Lemont Furnace facility and ceased all operations without prior notice to the Union and without affording the Union an opportunity to bargain with the Respondent with respect to the effects of the closure and cessation of business on unit employees.

On or about December 16, 2002, the Respondent temporarily laid off all of its employees, and on or about January 8, 2003, the Respondent converted the temporary layoff to a permanent layoff.

On or about January 8, 2003, the Respondent recalled certain of its employees to assist in the dismantling and transportation of the Respondent's equipment from its Lemont Furnace, Pennsylvania facility.

On or about February 28, 2003, the Respondent subcontracted all of the work formerly performed by bargaining unit employees to Jon-Christopher Interior Concepts, Inc., in an effort to operate as a disguised continuance of the Respondent, and on or about April 23, 2003, the subcontracting arrangement terminated.

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 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 its conduct or the effects of its conduct.

Since on or about August 1, 2002, the Respondent ceased making contractually-mandated pension fund and benefit fund contributions to the Carpenters Combined Funds, Inc. as required by articles 12 and 18 of the collective-bargaining agreement set forth above.

On or about January 8, 2003, the Respondent changed the wage rates and payment method and failed to pay those employees who assisted in the dismantling and transportation of the Respondent's equipment.

By failing to make contractually-mandated pension and benefit fund contributions; by laying off all of its employees; by recalling certain employees; by changing the wage rate and payment method of recalled employees and failing to pay them wages; and by subcontracting all of the work formerly performed by bargaining unit employees, the Respondent has failed to continue in effect all of the terms and conditions of the collective-bargaining agreement by failing to continue in effect the

terms and conditions set forth in articles 12 and 18, 6, 4, 5, and 28 of such agreement, respectively.

The Respondent engaged in the conduct described above without prior notice to the Union and without the Union's consent.²

CONCLUSIONS OF LAW

By interrogating employees concerning their union support and sympathies, the Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, in violation of Section 8(a)(1) of the Act.

By laying off unit employees and subcontracting all bargaining unit work, without prior notice to the Union, and without affording it an opportunity to bargain over the layoff and subcontracting and their effects as a direct result of its decisions to close the Lemont Furnace facility and cease all operations; by closing the Lemont Furnace facility and ceasing all operations without prior notice to the Union, and without affording it an opportunity to bargain over the effects of the closure and cessation of all operations on unit employees; and by failing to continue in effect the terms and conditions set forth in articles 12 and 18, 6, 4, 5, and 28 of the 2002–2004 collective-bargaining agreement, the Respondent has failed and refused to bargain collectively and in good faith with the exclusive collective-bargaining representative of the unit employees within the meaning of Section 8(d), in violation of Section 8(a)(5) and (1) of the Act.

The Respondent's unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Our dissenting colleague would deny the General Counsel's motion in its entirety because he finds that the allegations of the complaint are insufficient to establish that the layoff and subcontracting were effects of the Respondent's decision to cease operating; that the collective-bargaining agreement specifically proscribed the layoff and subcontracting; or that the Respondent's alleged breaches of the collective-bargaining agreement

² The complaint also alleges that the Respondent violated the Act by failing to bargain over its decisions to close the Lemont Furnace facility and to cease all operations. Although the complaint alleges that these decisions were mandatory subjects of bargaining, we find that the allegations of the complaint do not support a cause of action given the Supreme Court's decision in *First National Maintenance v. NLRB*, 452 U.S. 666 (1981). Accordingly, we shall deny the motion for default judgment with respect to these allegations and remand them for further appropriate action. Nothing herein will require a hearing if, in the event of the amendment to the complaint, the Respondent again fails to answer, thereby admitting evidence that would permit the Board to find the alleged violations. In such circumstances, the General Counsel may renew the motion for default judgment with respect to the amended complaint allegations.

were violative of Section 8(a)(5). Our colleague's position does not withstand scrutiny.

As set forth above, the complaint alleges that on or about January 8, 2003, the Respondent permanently laid off all of its employees (unit and nonunit) and closed its Lemont Furnace, Pennsylvania facility; on or about February 28, it subcontracted unit work; on or about March 5, it entered into bankruptcy; and on or about April 23, the subcontracting terminated and the Respondent ceased all operations. In our view, these facts clearly establish that the Respondent decided to go out of business entirely due to its financial condition, then contracted out a small portion of work that was already in the pipeline. Accordingly, we find that the Respondent's decisions to layoff unit employees and subcontract unit work resulted directly from, and hence were bargainable effects of, the closing.³

Concededly, as the dissent emphasizes, "the subcontracting and layoffs are separately alleged" in the complaint. However, even assuming, arguendo, that the layoff and subcontracting decisions were separate from, and independent of, the Respondent's decision to go out of business, this would not warrant denial of the General Counsel's motion. As set forth above, the complaint alleges that the layoff and subcontracting decisions were mandatory subjects of bargaining and that the Respondent violated Section 8(a)(5) and (1) by failing to bargain over the decisions or their effects. The Respondent has failed to file an answer to the complaint, and has thereby effectively admitted these allegations. See Section 102.20 of the Board's Rules and Regulations.

Given the Respondent's admission that it committed the unfair labor practices, the Board's sole responsibility is to determine whether the complaint allegations support a cause of action. In contrast to the complaint allegations relating to the closure of the facility and cessation of op-

erations, the layoff and subcontracting allegations amply support an unfair labor practice finding.

It is well settled, and our colleague does not dispute, that the layoff of unit employees and the subcontracting of bargaining unit work, without providing the representative of the unit notice and an opportunity to bargain, violates Section 8(a)(5) of the Act.⁴ While there may be facts that establish that such conduct is not unlawful, in the absence of an answer, there is no contention, and no basis in the pleadings to conclude, that such facts exist here. Therefore, even assuming that the Respondent's layoff and subcontracting decisions were independent of its cessation of operations, we nevertheless find it appropriate to grant the General Counsel's motion for default judgment with respect to these allegations.

As noted above, our colleague also contends that the complaint does not provide a sufficient basis for finding that the layoff and subcontracting were violative of the collective-bargaining agreement. Our colleague acknowledges that the complaint alleges that the layoff and subcontracting breached specific articles of the agreement. However, he argues that because we do not have the agreement before us, we cannot be sure. We respectfully disagree with our colleague's position. If the layoffs and subcontracting did not breach the collective-bargaining agreement, the Respondent could have filed an answer alleging as much. It failed to do so; therefore, it has effectively admitted these allegations.

Further, to the extent our colleague suggests that the Respondent's conduct constitutes a "mere breach of contract" and not an unfair labor practice, we reject that suggestion. As an initial matter, we find it significant that the Respondent itself does not contend that default judgment should be denied based on the "mere breach of contract" theory. Therefore, we need not address that issue.⁵

In any event, the dissent's position lacks merit. The layoff and subcontracting resulted in the elimination of the unit and led to the premature termination of the Respondent's bargaining relationship with the Union. Moreover, the layoff and subcontracting allegations cannot be viewed in isolation, but must be considered in the context of the complaint as a whole. See *Bristol Nursing Home*, 338 NLRB No. 86 fn. 5 (2002) (in determining whether complaint sufficiently alleges a violation, individual allegations should not be viewed in isolation, but

³ See *Lenz & Riecker*, 340 NLRB No. 21, slip op. at 3 (2003) (employer's decision to layoff unit employees and subcontract unit work that resulted directly from the employer's decision to close its business was a mandatory subject of bargaining as an effect of the closure decision, citing *Bridon Cordage, Inc.*, 329 NLRB 258, 259 (1999)).

The dissent errs in speculating that the subcontracting and layoff decisions were "part and parcel of the decision to go out of business." While the Respondent could have chosen to present such a possible defense, it has not done so. The dissent should not offer a defense for a respondent that has amply shown that it does not wish to be troubled raising its own. Indeed, in a similar default judgment case, our dissenting colleague recently joined us in finding unilateral subcontracting to be an "effect" of a plant closure without, sua sponte, arguing that the former decision was "part and parcel" of the latter. *Buffalo Weaving & Belting*, 340 NLRB No. 80, slip op. at 2 (2003). In *Buffalo Weaving*, as in this case, the complaint separately alleged that the Respondent unlawfully failed to bargain over the subcontracting, and it did not specifically allege that the subcontracting was an effect of the respondent's decision to close.

⁴ *Porta-King Building Systems v. NLRB*, 14 F.3d 1258 (8th Cir. 1994) (unilateral layoff of unit employees); *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964) (unilateral subcontracting of unit work).

⁵ See, e.g., *Avne Systems, Inc.*, 331 NLRB 1352, 1354 (2000) (Board Member's dissenting argument not made by excepting party itself is not procedurally before the Board).

should be construed in the context of the complaint as a whole). The complaint alleges, and the Respondent admits, that during the same time period, the Respondent breached the collective-bargaining agreement and violated the Act by, among other things, failing to make contractually required pension and benefit fund payments over a period of approximately 9 months and failing to pay contractual wages. Hence, the Respondent's conduct was not simply a failure to adhere to certain contractually-mandated terms and conditions of employment, but rather, a basic repudiation of the collective-bargaining relationship. See *Oak Cliff-Golman Baking Co.*, 207 NLRB 1063, 1064 (1973), enfd. mem. 505 F.2d 1302 (5th Cir. 1974), cert. denied 423 U.S. 826 (1975) (employer's midterm unilateral change in contractual wage rate was "not just mere breach of contract" but a "basic repudiation of the bargaining relationship"); *New Mexico Symphony Orchestra, Inc.*, 335 NLRB 896, 898 (2001) (rejecting claim that respondent's failure to make timely and full contractual wage payments was "a de minimis failure to abide by the contractually mandated terms and conditions of employment," that did not rise to the level of an 8(a)(5) violation). See also *E.R. Steubner, Inc.*, 313 NLRB 459 (1993) (subcontracting in breach of collective-bargaining agreement is an 8(a)(5) violation); *CBS Corporation*, 326 NLRB 861 (1998) (unilateral subcontracting in contravention of collective-bargaining agreement's zipper clause violates 8(a)(5)).

In sum, contrary to our colleague, we find that the undisputed complaint allegations are sufficient to establish that the Respondent violated Section 8(a)(1) by interrogating employees concerning their union support and sympathies, and violated Section 8(a)(5) and (1) by failing to provide the Union with notice and an opportunity to bargain over the effects of its decision to close its Lemont Furnace, Pennsylvania facility and cease operations, including the layoff of unit employees and subcontracting of unit work, and by failing to continue in effect the terms and conditions set forth in the collective-bargaining agreement. Accordingly, a partial default judgment based on the Respondent's failure to answer the complaint is warranted.

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 failure to bargain with the Union about the effects on unit employees of the closure of its Lemont Furnace facility and cessation of all operations, including the layoff of unit employees and subcontracting of unit work, we shall order the Respondent to bargain with the

Union, on request, about these subjects.⁶ Because of the Respondent's unlawful conduct, however, the laid off 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 employees for losses suffered 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 laid off employees in a manner similar to that required in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968),⁷ as clarified by *Melody Toyota*, 325 NLRB 846 (1998).

Thus, the Respondent shall pay its laid off 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 about the effects on unit employees of its decisions to close the Lemont Furnace facility and cease all operations, including the layoff of all employees and the subcontracting of unit work; (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 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.

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 all business

⁶ We are providing a *Transmarine* "effects" remedy for the Respondent's unlawful failure to bargain over the layoffs and the subcontracting of unit work, because the given facts indicate that they were the direct result of the Respondent's decisions to close its Lemont Furnace facility and cease operating. The layoffs and the subcontracting hence were bargainable effects of the closing. See *Bridon Cordage, Inc.*, 329 NLRB 258, 259 fn. 11 (1999). However, because we also find that the Respondent failed to continue in effect the terms and conditions of the collective-bargaining agreement by laying off unit employees and subcontracting unit work, we shall order the Respondent to make whole the laid off employees for any loss of earnings and other benefits from the date of the layoff to the date the Respondent ceased all business operations.

⁷ See also *Live Oak Skilled Care & Manor*, 300 NLRB 1040 (1990).

operations 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 laid off 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) since August 2002, by failing and refusing to continue in effect all the terms and conditions of the 2002–2004 collective-bargaining agreement by, inter alia, failing to pay pension fund and benefit fund contributions on behalf of the unit employees and failing to pay contractual wages and benefits to unit employees who assisted in the dismantling and transportation of the Respondent's equipment on or about January 8, 2003, we shall order the Respondent to make whole its unit employees for any loss of earnings and other benefits they have suffered as a result. In addition, we shall order the Respondent to make all contractually required pension and benefit fund contributions that have not been made since that date, including any additional amounts due the funds in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 6 (1979). The Respondent shall also reimburse unit employees for any expenses ensuing from its failure to make the required contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981).⁸ Payments to the unit employees shall be computed in accordance with *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.

Having found that the Respondent also failed to continue in effect the terms and conditions of the collective-bargaining agreement by laying off unit employees and subcontracting unit work, we shall order the Respondent to make whole the laid off employees for any loss of earnings and other benefits from the date of the layoff to the date the Respondent ceased all business operations. Backpay shall be computed in the manner prescribed in

⁸ To the extent that an employee has made personal contributions to a fund that are accepted by the fund in lieu of the employer's delinquent contributions during the period of the delinquency, the Respondent will reimburse the employee, but the amount of such delinquency will constitute a setoff to the amount that the Respondent otherwise owes the fund.

F. W. Woolworth Co., supra, with interest as prescribed in *New Horizons for the Retarded*, supra.

Because the Respondent ceased all operations after it laid off unit employees and subcontracted out unit work, we shall not order it to restore the status quo ante by re-establishing the subcontracted operations and offering unit employees reinstatement. To further effectuate the policies of the Act, however, in the event the Respondent resumes the same or similar business operations, we shall require the Respondent, within 14 days thereafter, to offer those unit employees who were laid off reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

Finally, in view of the fact that the Respondent's Lemont Furnace 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 its former employees who were employed by the Respondent since August 1, 2002, in order to inform them of the outcome of this proceeding.

ORDER

The National Labor Relations Board orders that the Respondent, Nicholas Morrone and Robert M. Verbosky d/b/a Nick and Bob Partners d/b/a VMI Cabinets and Millwork, and/or VMI Cabinets and Millwork, Inc. and/or Nicholas Morrone, an Individual, and/or Robert M. Verbosky, an Individual, Alter Egos, Lemont Furnace, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees concerning their union sympathies and support.

(b) Failing and refusing to honor articles 12 and 18, 6, 4, 5, and 28 of the 2002–2004 collective-bargaining agreement with Greater Pennsylvania Regional Council of Carpenters a/w United Brotherhood of Carpenters and Joiners of America by laying off unit employees and subcontracting all unit work, failing to make contractually-mandated pension fund and benefit fund contributions on behalf of the unit employees, and failing to apply the terms and conditions of the agreement, including wages and benefits, to unit employees who assisted in the dismantling and transportation of the Respondent's equipment on or about January 8, 2003. The appropriate unit is:

All production and maintenance employees employed by Respondent Partnership at its Lemont Furnace, Pennsylvania facility; excluding all other employees,

such as office clerical employees, guards, professional employees, and supervisors as defined in the Act.

(c) Laying off unit employees and subcontracting all bargaining unit work, without prior notice to the Union, and without affording it an opportunity to bargain over the layoff and subcontracting and their effects as a direct result of its decisions to close the Lemont Furnace facility and cease all operations.

(d) Closing the Lemont Furnace facility and ceasing all operations without prior notice to the Union, and without affording it an opportunity to bargain over the effects of its conduct on unit employees.

(e) 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) Honor and comply with articles 12 and 18, 6, 4, 5, and 28 of the 2002–2004 collective-bargaining agreement with the Union.

(b) Make whole the unit employees for any loss of wages and other benefits they may have suffered as a result of its failure to abide by the 2002-2004 collective-bargaining agreement, with interest, as set forth in the remedy section of this decision.

(c) Make all contractually required pension and benefit fund contributions on behalf of unit employees that have not been made since August 2002, and reimburse unit employees for any expenses ensuing from its failure to make the required payments, with interest, in the manner set forth in the remedy section of this decision.

(d) In the event the Respondent resumes the same or similar business operations, within 14 days thereafter, offer those unit employees who were laid off in or about December 16, 2002, reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(e) On request, bargain with the Union over the layoff of unit employees and subcontracting of all unit work, and their effects as a direct result of its decisions to close the Lemont Furnace facility and cease all operations, and reduce to writing and sign any agreement reached as a result of such bargaining.

(f) On request, bargain with the Union over the effects of the closure of the Lemont Furnace facility and cessation of operations on unit employees, and reduce to writing and sign any agreement reached as a result of such bargaining.

(g) Pay to the unit employees their normal wages for the period set forth in the remedy section of this decision.

(h) 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.

(i) 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"⁹ to the Union and to all unit employees employed at the Lemont Furnace facility on or after August 1, 2002.

(j) 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.

Dated, Washington, D.C. November 28, 2003

Wilma B. Liebman, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN BATTISTA, dissenting.

I would deny, in its entirety, the General Counsel's motion for default judgment.

The complaint alleges that the Respondent decided to close the facility.¹ The complaint further alleges that the Respondent violated Section 8(a)(5) "with respect to this conduct and the effects of this conduct."² My colleagues conclude that the complaint alleges insufficient facts to show that the closing itself was a mandatory subject. They therefore deny default judgment in this respect. I agree.³

The complaint also alleges that the Respondent's subcontracting and layoffs were unlawful under Section 8(a)(5). I believe that these decisions were part and par-

⁹ 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."

¹ See paragraphs 18(c).

² See paragraph 23.

³ See *infra* for a discussion of "effects."

cel of the decision to go out of business. Indeed, the layoffs occurred on January 8, the very same day on which the Respondent decided to go out of business. My colleagues concede that the decision to go out of business was not a mandatory subject. Accordingly, it would seem to follow that decisions that are part and parcel of the basic decision to go out of business are also non-mandatory subjects. At the very least, the complaint allegations raise sufficient concerns as to warrant the denial of a default judgment.

My colleagues contend that the layoff and subcontracting decisions were effects of the Respondent's decision to go out of business. If the complaint had so alleged, and if the complaint had further alleged a refusal to bargain about these effects, I would likely grant default judgment. However, the complaint alleges the subcontracting and layoffs as decisions, not as effects. Concededly, paragraph 23 of the complaint generally mentions "effects." However, the subcontracting and layoffs are separately alleged and thus it is unclear as to whether the "effects" mentioned in paragraph 23 are intended to refer to subcontracting and layoffs.

My colleagues rely on *Buffalo Weaving and Belting*, 340 NLRB No. 80 (2003). That case is inapposite. The relevant footnote in that case (fn. 2) focuses on why a limited *Transmarine* remedy is ordered rather than a fuller remedy. In explaining this matter, the Board noted that the subcontracting was a "bargainable effect of the closing." There is no basis for such a finding here.

Finally, the complaint alleges that the subcontracting and layoffs are violations of the contract. However, a mere breach of contract is not a violation of Section 8(a)(5).⁴ In the instant case, it is difficult to say whether the conduct was a contract breach, let alone a modification. The complaint alleges only that various numbered articles of the contract have been breached.⁵ However, since the contract is not before us, we do not even know what these articles say.

My colleagues say that the Respondent did not raise the aforementioned issues. Of course, in a "no answer" case, there is no contention at all from the respondent. However, it is nonetheless the Board's responsibility, in such cases, to examine the complaint and make an informed judgment as to whether the complaint will support a motion for default judgment. As discussed above, the complaint herein is not well pleaded. Accordingly, I would deny default judgment. Of course, the General Counsel is free to seek leave to amend the complaint to

make the allegations clearer and legally viable. In my view, that is the appropriate course to follow.

Dated, Washington, D.C. November 28, 2003

Robert J. Battista, Chairman

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 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 interrogate employees concerning their union sympathies and support.

WE WILL NOT fail to honor articles 12 and 18, 6, 4, 5, and 28 of our 2002–2004 collective-bargaining agreement with Greater Pennsylvania Regional Council of Carpenters a/w United Brotherhood of Carpenters and Joiners of America by laying off unit employees and subcontracting all unit work, failing to make contractually-mandated pension fund and benefit fund contributions on behalf of the unit employees, and failing to apply the terms and conditions of the agreement, including wages and benefits, to unit employees who assisted in the dismantling and transportation of our equipment on or about January 8, 2003. The appropriate unit is:

All production and maintenance employees employed by Respondent Partnership at its Lemont Furnace, Pennsylvania facility; excluding all other employees, such as office clerical employees, guards, professional employees and supervisors as defined in the Act.

WE WILL NOT layoff unit employees and subcontract all bargaining unit work, without prior notice to the Union, and without affording it an opportunity to bargain over the layoff and subcontracting and their effects as a direct result of our decisions to close the Lemont Furnace facility and cease all operations.

⁴ *NCR Corp.*, 271 NLRB 1212 (1984).

⁵ See paragraph 20.

WE WILL NOT close the Lemont Furnace facility and cease all operations without prior notice to the Union, and without affording it an opportunity to bargain over the effects of the closure and cessation of operations on 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 honor and comply with articles 12 and 18, 6, 4, 5, and 28 our 2002–2004 collective-bargaining agreement with Greater Pennsylvania Regional Council of Carpenters a/w United Brotherhood of Carpenters and Joiners of America.

WE WILL make whole unit employees for any loss of wages and other benefits they may have suffered as a result of our failure to abide by articles 12 and 18, 6, 4, 5, and 28 the 2002-2004 collective-bargaining, with interest.

WE WILL make all contractually required pension and benefit fund contributions that have not been made since August 2002, and reimburse unit employees for any expenses ensuing from our failure to make the required payments, with interest.

WE WILL, in the event we resume the same or similar business operations, within 14 days thereafter, offer the laid off unit employees reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL, on request, bargain with the Union over the layoff of unit employees and subcontracting of all bargaining unit work and their effects as a direct result of our decisions to close the Lemont Furnace facility and cease all operations, and reduce to writing and sign any agreement reached as a result of such bargaining.

WE WILL, on request, bargain with the Union over the effects of the closure of the Lemont Furnace facility and cessation of all operations on unit employees, and reduce to writing and sign any agreement reached as a result of such bargaining.

WE WILL pay the unit employees their normal wages when last in our employ from 5 days after the date of this decision until occurrence of the earliest of the following conditions: (1) we bargain to agreement with the Union about the effects on unit employees of our decisions to close the Lemont Furnace facility and cease all operations, including the layoff of all employees and the subcontracting of unit work; (2) 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 notice of our desire to bargain with the Union; or (4) the subsequent failure of the Union to bargain in good faith; but in no event shall the sum paid to any employee exceed the amount that he or she would have earned as wages from April 23, 2003, the date we ceased all business operations, to the time he or she secured equivalent employment elsewhere, or the date on which we 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 our employ, with interest.

NICHOLAS MORRONE AND ROBERT M. VERBOSKY D/B/A NICK AND BOB PARTNERS D/B/A VMI CABINETS AND MILLWORK, AND/OR VMI CABINETS AND MILLWORK, INC. AND/OR NICHOLAS MORRONE, AND/OR ROBERT M. VERBOSKY, ALTER EGOS