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Freedman Die Cutters, Inc. and Local 107, Paper, Allied-Industrial, Chemical and Energy Workers International Union, AFL-CIO. Case 29-CA-25110

September 30, 2003

DECISION AND ORDER

BY MEMBERS LIEBMAN, SCHAUMBER, AND WALSH

On February 14, 2003, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The Respondent filed exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and has decided to affirm the judge's rulings,¹ findings, and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Freedman Die Cutters, Inc., Long Island City, New York, its officers, agents, successors, and assigns shall take the action set forth in the Order.

Dated, Washington, D.C. September 30, 2003

Wilma B. Liebman, Member

Peter C. Schaumber, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

¹ No exceptions were filed to the judge's grant of the General Counsel's motion for partial default judgment regarding paras. 3, 6, 7, and 8 of the complaint. We adopt the judge's grant of default judgment with respect to complaint paras. 4 and 5.

With respect to complaint par. 5, which alleges the Union's labor organization status within the meaning of Sec. 2(5) of the Act, Member Schaumber finds the Respondent's answer sufficient to raise an issue for hearing. However, he finds that the General Counsel met the burden of proof on this issue by other undisputed factual allegations of the complaint and by evidence adduced at the hearing.

Jonathon Chait, Esq., Counsel for the General Counsel.
Jeffrey Russ, Esq., Counsel for the Respondent.
George Kirschenbaum, Esq., (*Vladeck, Waldman, Elias & Engelhard*), Counsel for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard by me on January 29, 2003, in Brooklyn, New York. The Complaint, which issued on November 7, 2002,¹ and was based on an unfair labor practice charge that was filed on August 19 by Local 107, Paper, Allied-Industrial, Chemical and Energy Workers International Union, AFL-CIO (the Union), alleges that Freedman Die Cutters, Inc. (Respondent), ceased operations at its facility and laid off all of its unit employees without prior notice to the Union, and without affording the Union an opportunity to bargain with the Respondent regarding the effects of the plant closing on the unit employees, in violation of Section 8(a)(1)(5) of the Act.

FINDINGS OF FACT

I. BACKGROUND

Counsel for the Respondent, in his answer dated December 16, 2002, stated, inter alia: "Neither admits nor denies the conclusory allegations set forth in paragraphs 3, 4, 5, 6, 7, 8, 12, and 13 of the Complaint and submits that General Counsel has the burden of proving, by appropriate factual evidence, such conclusory allegations."² After receiving Respondent's answer, counsel for the General Counsel, by fax dated December 18, forwarded to counsel for the Respondent a copy of Sec. 102.20 of the Board's Rules and Regulations. By further fax to counsel for the Respondent dated December 24 counsel for the General Counsel stated:

This confirms our telephone conversation of December 20, 2002, in which I explained to you the deficiencies in your answer to the complaint in the referenced case.

I have discussed the matter with David Pollack, Regional, Attorney for Region 29. To summarize the Region's position, your answer is insufficient because, under Section 102.20 of the NLRB Rules, you must "specifically admit, deny or explain each of the facts alleged in the complaint." By neither admitting nor denying the allegations in paragraphs 3, 4, 5, 6, 7, 8, 12 and 13, you have failed to answer these allegations of the complaint. If you fail to amend your answer in advance of the trial, we will move for summary judgment with respect to these allegations.

Another copy of Section 102.20 of the NLRB Rules is enclosed for your convenience.

The Respondent did not amend its answer and at the commencement of the hearing counsel for the General Counsel

¹ Unless indicated otherwise, all dates referred to relate to the year 2002.

² In addition, Respondent's answer contains no response to paras. 1, 2, and 9 of the Complaint.

moved for partial summary judgment as to paragraphs 3, 4, 5, 6, 7, 8, 12, and 13 of the Complaint because Respondent's answer did not comply with Section 102.20 of the Board's Rules and Regulations. That section provides: "The respondent shall specifically admit, deny or explain each of the facts alleged in the complaint, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial." In defense of his answer, counsel for the Respondent defended that the Board's Rules do not really require an admission or a denial to conclusory allegations. I pointed out to him that not all of the complaint allegations involved therein were conclusory allegations and, regardless, the Board's Rules and Regulations clearly state that respondents must specifically admit or deny each allegation of the Complaint. As the Respondent neither admitted nor denied paragraphs 3, 4, 5, 6, 7, 8, 12, and 13, even after counsel for the General Counsel notified him that his answer to these allegations was insufficient, the allegations contained therein that follow, shall be deemed to be admitted:

1. The charge in this proceeding was filed by the Union on August 19, 2002, and served by regular mail on Respondent on August 20, 2002.

2. At all material times, Respondent, a domestic corporation, with its principal place of business located at 30-02 48th Avenue, Long Island City, New York, herein called the Long Island City facility, has been engaged in the business of embossing and die cutting.

3. During the past 12 month period, which period is representative of its annual operations in general, Respondent, in the course and conduct of its business operations described above in paragraph 2, purchased and received at its Long Island City facility goods, supplies and materials valued in excess of \$50,000 directly from points located outside the State of New York.

4. At all material times, Respondent has been an employer within the meaning of Section 2(2), (6) and (7) of the Act.

5. At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

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

All manufacturing employees, excluding executives, salesmen, office employees, construction employees, and sample department employees, guards and supervisors as defined in the Act.

7. At all material times, the Union has been the designated collective-bargaining representative of the Unit, and has been recognized as such representative by Respondent. Such recognition has been embodied in successive collective bargaining agreements between the Union and Respondent, the most recent of which is effective, by its terms, for the period February 1, 2000 through January 31, 2003.

8. At all material times, the Union, by virtue of Section 9(a) of the Act, has been the exclusive collective-bargaining representative of the employees in the Unit.

9. On or about August 13, 2002, Respondent ceased operations at its Long Island City facility, and laid off all the employees in the Unit.

Although the Respondent's "Neither admits nor denies. . ." response also applies to paragraphs 12 and 13, the conclusory paragraphs alleging that by the acts described in paragraphs 9 through 11, the Respondent has violated Section 8(a)(1)(5) of the Act and that these unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act, it would be unfair to the Respondent to assume that by its answer it meant for these paragraphs to be admitted.

II. THE FACTS AND ANALYSIS

The Union has been the collective-bargaining representative of the unit employees at the Long Island City facility since, at least, 1990. Marian Rice is the president of the Union; Michael Fisher, an international representative for the International, services the Respondent for the Union. David Halpern is the Respondent's president.

Fisher testified that in May or June he received a call from "Danny," the Union's shop steward at the facility, saying that he heard rumors that the facility was going to close. On about the following day, Fisher went to the facility and he and Danny spoke to Halpern. He asked Halpern if there was any truth to the rumor that the facility would be moving and Halpern answered "no." Fisher then said that if there was any intention to move, Halpern should notify the Union and Halpern said that he would.

The next time this issue arose was on August 13 when Fisher received a message saying that when the Respondent's employees arrived at the Long Island City facility that day, they found the doors at the facility were locked and signs said that the facility was closed. Fisher drove to the facility with Rice and when they arrived they saw the signs on the door saying that it was closed. He and Rice went inside and Fisher saw movers removing the machinery from the facility. He asked Halpern, "What's going on?" Halpern said that he had to close because he owed money to the Internal Revenue Service, and that he was selling his equipment. Fisher asked Halpern why he didn't first notify the Union and Halpern said, "I had to do it this way." When Fisher asked him how long he knew that he was going to close, Halpern said that he knew for 2 or 3 weeks. The Respondent had not previously notified the Union that it was going to close, nor did it offer the Union an opportunity to bargain about the closing or its effects on the unit employees. Rice, likewise, testified that she wasn't aware that the facility being was closed until the telephone call and her visit to the facility with Fisher on August 13. Prior to the date, the Respondent had not informed her of the fact that it was going to close, nor did it offer to negotiate about the effects of the closing on its unit employees.

Halpern testified that the Respondent owes Internal Revenue Service \$1.6 million and received in evidence was a Notice of Federal Tax Lien Filing to the Respondent, dated November 15, stating that the Respondent owed about \$1.6 million. In addi-

tion, he testified: "I received notice in the mail, certified letter, that the landlord was going to seize and padlock our premises." He did not testify as to when he received this letter or whether there were earlier letters or notifications from the landlord as well.

The sole allegation is that the Respondent violated Section 8(a)(1)(5) of the Act because it terminated operations on August 13 without affording the Union an opportunity to bargain with the Respondent regarding the effects of the plant closing. The Board and the Courts have long held that a union must be given an opportunity to bargain about the effects of a termination, or a partial termination of an employer's operation, that affects its members. *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981). This means that an employer must give the union representing its employees, timely notice of a planned closure or termination. *Daniel I. Burk Enterprises*, 313 NLRB 1263, 1268, stated:

Compliance with the preimplementation notice requirement has been excused only in the cases of emergency, such as the sudden refusal of the employer's bank to continue extending credit; the unanticipated denial of an employer's loan request; a bankruptcy trustee's closure of a business and termination of employees on learning serious mismanagement . . . existed."

(Citations omitted.)

The violation is quite clear. When the employees reported to work on August 13 they were notified that the business was closed and that they were terminated. When the employees reported this to the Union that was the first that the Union learned of the termination. The Respondent defends that it had to close because it owed Internal Revenue Service \$1.6 million and that its landlord took its machinery for nonpayment of rent. However, the Respondent's situation does not bring it within any of the exceptions referred to in *Daniel I. Burk*, supra. Although Halpern testified that he owed money to Internal Revenue and his landlord, he did not testify as to when he was notified by his landlord that he was taking his machinery and closing him down for nonpayment of rent. It is reasonable to assume that Halpern received notice of nonpayment of rent prior to August 13, probably a few months earlier, which would have given him plenty of time to notify the Union and offer to bargain about the effects of the upcoming closing. At a minimum, Halpern could have notified the Union 2 to 3 weeks before the closing when, according to what he told Fisher, he was first aware of the situation. I therefore find that the Respondent has failed to give the Union notice of its closing, and failed to give the Union an opportunity to bargain about the effects of the closing on the unit employees, in violation of Section 8(a)(1)(5) of the Act.

CONCLUSIONS OF LAW

1. Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union has been a labor organization within the meaning of Section 2(5) of the Act.
3. By terminating the operation at its Long Island City facility, without prior notice to the Union, and without giving the Union an opportunity to bargain about the effects of the closing

on the unit employees represented by the Union, the Respondent violated Section 8(a)(1)(5) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices in violation of Section 8(a)(1)(5) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the purposes of the Act. As a result of the Respondent's unlawful failure to provide the Union with notice of its cessation of operations and termination of its union-represented employees at a time when the Union would have had an adequate opportunity to bargain effectively over the effects thereof on the employees it represented, I recommend the Respondent be ordered to comply with the remedies set forth in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968). I therefore recommend Respondent be ordered to pay to each of the employees on its active payroll on August 13, 2002, backpay at the rate of their normal wages on that date from 5 days after the date the Board issues its Order in this case until the occurrence of the earliest of the following conditions: (1) the date Respondent bargains to agreement with the Union concerning the effects of the cessation of operations on its union represented employees; (2) a bona fide impasse in bargaining; (3) the failure of the Union to request bargaining within 5 days of the issuance of the Board's Order, or to commence negotiations within 5 days of Respondent's notice of 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 the employees exceed the amount he or she would have earned as wages from August 13, 2002, the date Respondent ceased operations to the time he or she secured equivalent employment elsewhere, or the date on which Respondent should have offered to bargain, 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 normal rate of their normal wages when last in Respondent's employ. Interest on all such sums shall be paid in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact, conclusions of law and on the entire record, I issue the following recommended³

ORDER

The Respondent, Freedman Die Cutters, Inc., Long Island City, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing to timely notify and bargain with the Union as the exclusive collective-bargaining representative of its employees in the appropriate unit set out below with respect to the effects on those employees of its decision to cease operations and terminate their employment:

³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

All manufacturing employees, excluding executives, salesmen, office employees, construction employees, and sample department employees, guards and supervisors 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) Pay the terminated employees their normal wages for the period set forth in the remedy section of this decision.

(b) On request, bargain in good faith with the Union concerning the effects on the unit employees of its decision to cease operations and terminate its union represented employees.

(c) 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.

(d) Within 14 days after service by the Region, post at its facility in Long Island City, New York, copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt 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. As the Respondent has terminated its business and closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the

⁴ 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."

notice to all current employees and former employees employed by the Respondent at any time since August 13, 2002.

(e) 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. February 14, 2003

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.

WE WILL NOT fail and refuse to give timely notice to, and to bargain with, Local 107, Paper, Allied-Industrial, Chemical and Energy Workers International Union, AFL-CIO, your exclusive collective-bargaining representative, in the unit set forth below, with respect to the effects that our decision to cease operations and terminate your employment had on you. The unit is:

All manufacturing employees, excluding executives, salesmen, office employees, construction employees, and sample department employees, guards and supervisors 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 with the Union with regard to the effects our decision to cease operations and terminate your employment had on you.

WE WILL pay to all of our unit employees who were terminated on August 13, 2002, when we ceased operations and terminated our employees, their normal wages for a period specified by the National Labor Relations Board, with interest on the sums due.

FREEDMAN DIE CUTTERS, INC.