UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

EXHIBITUS, LLC

and Case No. 4–CA–37328

NEW JERSEY REGIONAL COUNCIL OF
CARPENTERS, UNITED BROTHERHOOD
OF CARPENTERS AND JOINERS OF AMERICA

Noelle M. Reese, Esq., for the General Counsel.

Kurt Rotan, of Gloucester, New Jersey for the Charging Party.

Bill Holden, Exhibitus, LLC, 341 New Albany Road, Suite 1,
Gloucester, NJ 08030 (did not appear at trial).

DECISION

Statement of the Case

ROBERT A. GIANNASI, Administrative Law Judge. This case was tried in Philadelphia, Pennsylvania, on July 26, 2010. The charge was filed February 12, 2010[1] and the complaint was issued May 20. The complaint, as amended in a minor respect at the hearing, alleges that Respondent failed and refused to bargain in good faith with the Charging Party (hereinafter "the Union") in violation of Section 8(a)(5) and (1) of the Act. Respondent denies the material allegations in the complaint.[2]

Although Respondent's attorney filed an answer in this case on June 3, Respondent later proceeded without counsel. I held a pre-hearing telephone conference call, in which all parties, including Respondent's owner and CEO, Bill Holden, participated. Neither Holden nor any other agent of Respondent appeared at trial. Pursuant to Board law, I have decided this case after hearing the General Counsel's evidence.[3]

On the entire record, including the testimonial evidence and my observation of the demeanor of the witnesses, and after considering the brief filed by the General Counsel, I make the following[4]

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[1] All dates are from December 2009 to July 2010 unless otherwise indicated.

[2] The General Counsel's amendment at the hearing stated that Respondent ceased operations in December 2009, as asserted in Respondent's answer, rather than on or about January 8, 2010, as alleged in the complaint. The amendment is granted.

[3] See *Beta Steel Corp.*, 326 NLRB 1267, 1267 n.3 (1998); and *Bristol Manor Health Care Center*, 295 NLRB 1106, 1006 n.1 (1989).

[4] I hereby grant the General Counsel's unopposed motion to correct transcript. In addition,

Continued

Findings of Fact

I. Jurisdiction

Respondent, a New Jersey corporation, does custom millwork at its facility in Moorestown, New Jersey, where it sold and shipped goods valued in excess of $50,000 directly to points outside the State of New Jersey in the twelve month period ending January 8, 2010. Accordingly, I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I also find based on the testimony and evidence in this case, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

Without opposing evidence or testimony by the Respondent, the facts of this case are not in dispute. Moreover, the General Counsel's three witnesses testified credibly and corroborated one another.

A. The Facts

Respondent's employees are represented by the Union in an appropriate unit, as defined in the collective bargaining agreement of the parties and as set forth in the complaint. In 2000, Respondent's owner, Bill Holden first signed a collective bargaining agreement with the Union to cover its cabinet makers, painters, apprentices, and foremen. The current bargaining agreement came into effect on October 1, 2008 and is effective through September 30, 2011.[5] In December 2009, Respondent employed three employees – shop steward Bill Senatore, foreman Joe Senatore, and finisher Terrance Coyle – all three of whom were union members. All three employees came to be employed by Respondent through the Union hiring hall.[6]

On December 18 or 19, 2009, Holden called Union Representative Kurt Rotan, as required under the collective bargaining agreement, to inform him that he would be laying off his three employees – Coyle on December 21 and the Senatore brothers on December 24. Holden later sent Rotan a fax confirming this personnel action.[7] The employees believed that the layoff would be temporary and that they would return to work in January or February because Holden had previously laid off his workers and had always recalled them. Joe Senatore, an employee since 2000, testified that since late 2002 or early 2003 he had been laid off approximately twelve times for no more than six months at a time whenever there was not enough work.[8] Bill Senatore testified that since he began working for Respondent in 2005 he had been laid off five or six times for up to four months at a time due to lack of work.[9] At least two layoffs had occurred earlier in 2009 alone. When Holden informed them of the December layoff, Joe and Bill Senatore assumed that this layoff would be temporary as well.[10] Holden did not mention to Rotan or to Joe or Bill Senatore that he was considering or would be closing his business.[11]

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at page 4, line 12, the word "I" is substituted for the word "me."

[5] Tr. 10-11.

[6] GC Exh. 4; Tr. 16-17.

[7] GC Exh. 3.

[8] Tr. 23-24.

[9] Tr. 29-30.

[10] Tr. 25, 31.

[11] Tr. 12-13, 25, 31.

When the employees left the facility for the layoff, they left behind personally-owned tools, including hammers, screwdrivers, and handsaws, that they used for work.

On January 8, 2010, Holden called Joe Senatore and told him that he would be ceasing operations and that the employees should come in and pick up their tools. Joe Senatore then notified his brother Bill of the closing. On January 11, Bill Senatore called Union Representative Rotan to ask if he had heard about the closing. This was the first time that Rotan had heard that Respondent would be closing.[12] The same day Rotan called Holden, who confirmed that he was closing. Rotan testified that Holden said he was going to call Rotan to inform him but had gotten busy. Holden said that he had to close the business but was not filing for bankruptcy. Rotan reminded Holden that there was a collective bargaining agreement in place and that there were benefits left to be paid to the employees.[13] Rotan had no other contact with Holden about the closing. The employees did not receive any severance pay when Respondent closed,[14] although, at the end of January or beginning of February, they did receive contractual benefits that remained due under the collective bargaining agreement.[15]

Soon after hearing about the closing, Joe and Bill Senatore went to Respondent's facility to pick up their tools. Bill Senatore testified that the paint booth inside the shop was being torn down at the time. Toward the end of January, Rotan went by the Respondent's facility. He testified that no employees were there and that there was a handwritten sign on the door stating, "Please leave mail, it will be picked up." A few weeks later, Rotan went back to the facility and saw that all Exhibitus signs were removed.[16]

B. Discussion and Analysis

It is well established that an employer is obligated under Section 8(a)(5) and (1) of the Act to bargain in a meaningful manner and at a meaningful time over the effects on employees of a decision to close its operations. See *Woodland Clinic*, 331 NLRB 735, 738 (2000) and cases there cited. Thus, an employer violates its obligation to bargain in good faith about the effects of a decision to cease operations if it fails to notify the union of the decision in a timely manner. *Ibid.* Effects bargaining must occur sufficiently before implementation so that the union is not presented with a fait accompli. *Willamette Tug & Barge Co.*, 300 NLRB 282, 283 (1990). Notice to individual employees does not constitute notice to the bargaining agent. *Bridon Cordage, Inc.*, 329 NLRB 258, 259 (1999).

The Board has repeatedly held that a union's failure to request effects bargaining does not constitute a waiver of the right to bargain over effects if an employer fails to give timely notice to the union, presents a decision to the employees as a fait accompli, or otherwise indicates that requests for effects bargaining would be futile. *See Seaport Printing*, 351 NLRB 1269, 1270 (2007) (finding that respondent violated Section 8(a)(5) because any request for bargaining over effects would have been futile); and *Gannett Co.*, 333 NLRB 355, 359 (2001) (holding that a union did not waive its right to bargain over effects when presented with a fait accompli). An employer may justify untimely notice to a union in these circumstances only by proving the existence of unusual factors, such as a bona fide emergency. See *Gannett*, above, 333 NLRB at 359; and *Metropolitan Teletronics Corp.*, 279 NLRB 957, 959 (1986).

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[12] Tr. 16.
[13] Tr. 16.
[14] Tr. 16.
[15] Tr. 18-19.
[16] Tr. 19.

Respondent admitted in its answer that it ceased operations in December 2009. Holden did not begin to notify his employees until January 8, and did not notify the Union until January 11, when Rotan asked Holden about what he had heard from Bill Senatore. By informing the Union of the decision to close his business after he had actually ceased operations, Holden failed to give timely notice, thus presenting the Union with a fait accompli and precluding any meaningful effects bargaining. In these circumstances, the fact that the union did not specifically request bargaining over the effects of the decision does not constitute a waiver of bargaining rights. See, in addition to the cases cited above, *Melody San Bruno*, 325 NLRB 846, 848 (1998) ("On this record the Union was presented with a classic fait accompli and had no chance whatsoever to communicate a bargaining demand or engage in bargaining before the operations was closed. Having been unable to locate an agent of the Respondent, it was impossible for the Union to request or engage in effects bargaining."). See also *Stagg Zipper Corp.*, 222 NLRB 1249 (1976) (union entitled to notice for purposes of effects bargaining, even if employees were on layoff status when employer decided to close operations). Because Respondent presented no evidence at trial, it has demonstrated no extraordinary or emergency considerations that would justify the untimely notice to the Union. See *Gannett*, above, 333 NLRB at 359.

Conclusions of Law

1. By ceasing operations without giving the Union the opportunity to bargain over the effects of its decision to cease operations, Respondent failed and refused to bargain in good faith in violation of Section (8)(a)(5) and (1) of the Act.

2. The above violation is an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist from its unlawful conduct and take certain affirmative action designed to effectuate the policies of the Act.

The traditional Board remedy for refusal to bargain about the effects of a decision to cease operations is the one granted in *Transmarine Navigation Corp.*,170 NLRB 389 (1968). In that case, the Board recognized that "a bargaining order alone cannot serve as an adequate remedy for [this] unfair labor practice," and thus accompanied an order to bargain with a limited backpay requirement subject to certain conditions. A *Transmarine* remedy is appropriate for refusals to bargain over effects even when the union has not requested bargaining after being presented with a fait accompli, an untimely notice, or a situation in which a request would be futile. *See Seaport Printing*, above, 351 NLRB at 1271; *Gannett*, above, 333 NLRB at 359-360; and *Melody San Bruno*, above, 325 NLRB at 846. See also *Rochester Gas & Electric Corp*., 355 NLRB No. 86 (2010)

Accordingly, I recommend that, in order to effectuate the purposes of the Act, Respondent be ordered to bargain with the Union concerning the effects on the employees of closing its facility. Pursuant to *Transmarine* and its progeny, Respondent is also required to pay backpay to the terminated employees at the rate of their normal wages when they were last working from 5 days after the date of this Decision and Order until occurrence of the earliest of the following conditions: (1) The date Respondent bargains to agreement with the Union on the subjects pertaining to the effects of their December 2009 termination; (2) a bona fide impasse in bargaining; (3) the Union's failure to request bargaining within 5 days of the date of this Decision

and Order, or to commence negotiations within 5 days of Respondent's notice of its desire to bargain with the Union; (4) the Union's subsequent failure to bargain in good faith; but in no event shall the sum paid to any of those employees exceed the amount they would have earned as wages from the final day of Respondent's operations, to the time they secured equivalent employment elsewhere, or to the date on which Respondent 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 working for Respondent. Backpay shall be based on the earnings which the terminated employees would normally have received during the applicable period, less any 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).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[17]

ORDER

1. Cease and desist from

(a) Failing or refusing to bargain collectively and in good faith with the Regional Council of Carpenters of the United Brotherhood of Carpenters and Joiners of America concerning the effects resulting from the closure of its Moorestown, New Jersey facility in December 2009, on its employees in the following appropriate unit:

> All cabinet makers, painters, apprentices, lead men, and their foreman who are involved in the manufacturing and maintenance of a product line.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) On request, bargain in good faith with the Union concerning the effects on employees which it represents resulting from the closing of its Moorestown, New Jersey facility in December 2009.

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

(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 the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

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[17] 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.

(d) Within 14 days after service by the Region mail copies, at the Respondent's expense, of the attached notice marked "Appendix"[18]to the last known address of each employee employed in the unit represented by the Union as of or after December 2009; and similarly mail a copy of the notice to the Union at its business address. Copies of the notice, on forms provided by the Regional Director for Region 4, shall be mailed after being signed by the Respondent's authorized representative.

(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., September 3, 2010.

Robert A. Giannasi
Administrative Law Judge

[18] 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."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist 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 or refuse to bargain collectively and in good faith with the New Jersey Regional Council of Carpenters of the United Brotherhood of Carpenters and Joiners of America concerning the effects resulting from the closure of our Moorestown, New Jersey facility in December 2009, on our employees in the following appropriate unit:

All cabinet makers, painters, apprentices, lead men, and their foreman who are involved in the manufacturing and maintenance of a product line.

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the exercise of the rights guaranteed by Section 7 of the Act.

WE WILL, on request, bargain with the Union concerning the effects on our employees in the above unit resulting from the closing of our Moorestown, New Jersey facility.

WE WILL pay the unit employees their normal wages for the period set forth in the Decision and Order of the National Labor Relations Board, with interest.

EXHIBITUS, LLC
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

615 Chestnut Street, One Independence Mall, 7th Floor
Philadelphia, Pennsylvania 19106-4404
Hours: 8:30 a.m. to 5 p.m.
215-597-7601.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 215-597-7643.