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Cattleman's Meat Company and Local 876, United Food and Commercial Workers International Union. Case 7-CA-50213

December 28, 2007

DECISION AND ORDER

BY MEMBERS SCHAUMBER, KIRSANOW, 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 reissued complaint and compliance specification. Upon a charge filed by the Union on March 15, 2007, the General Counsel issued the reissued complaint and compliance specification on July 23, 2007, against Cattleman's Meat Company, the Respondent, alleging that it had violated Section 8(a)(5) and (1) of the Act. The Respondent failed to file an answer.

On October 26, 2007, the General Counsel filed a Motion for Default Judgment with the Board. Thereafter, on October 31, 2007, 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. Similarly, Section 102.56 of the Board's Rules and Regulations provides that the allegations in a compliance specification will be taken as true if an answer is not filed within 21 days from service of the compliance specification. In addition, the reissued complaint and compliance specification affirmatively stated that unless an answer was received by August 13, 2007, the allegations in the reissued complaint and compliance specification could be found to be true. Further, the undisputed allegations in the General Counsel's motion disclose that the Region, by letter dated August 16, 2007, notified the Respondent that unless an answer was received by August 23, 2007, a motion for default judgment would be filed.¹

¹ The General Counsel issued the original complaint and notice of hearing on May 24, 2007. On June 5, 2007, the Region granted the Respondent's request for an extension of time in which to answer the complaint to June 21, 2007. On June 20, 2007, the Region granted a

On September 7, 2007, the Respondent's president, David Rothbart, called the Region indicating that settlement might be possible. In response, the Region issued an order postponing the trial. On October 4, 2007, after settlement appeared unlikely, the Region, by letter dated October 4, 2007, notified the Respondent that unless an answer was received by October 11, 2007, a motion for default judgment would be filed. Nevertheless, the Respondent failed to file an answer.²

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.³

On the entire record, the Board makes the following

further extension of time to July 16, 2007. The requests for extensions of time were filed by the Respondent's counsel, who indicated that the parties were discussing settlement. After the Respondent's counsel received the reissued complaint, he notified the Region that he was no longer representing the Respondent.

² All pleadings and correspondence to the Respondent were mailed by certified mail and regular mail to the Respondent's last known business address and to David Rothbart's current place of employment. The reissued complaint and compliance specification, which was mailed by certified mail to the Respondent's business address, was returned to the Regional Office stamped "refused." The copy mailed by certified mail to Rothbart's place of employment was also returned to the Regional Office stamped "unclaimed."

The Region's August 16, 2007 letter mailed by certified mail to the Respondent's business address was returned to the Regional Office stamped "Return to Sender, Vacant, Unable to Forward." The copy mailed by certified mail to Rothbart's place of employment, its "Return Receipt" card, and the copies sent by regular mail were not returned.

The order postponing trial sent by certified mail to Rothbart's place of employment was returned to the Regional Office stamped "Return to Sender, Unclaimed, Unable to Forward." The copy sent by regular mail to the Respondent's business address was returned to the Regional Office stamped "Return to Sender, Unclaimed, Unable to Forward."

The Region's October 4, 2007 letter mailed by regular mail to the Respondent's business address was returned to the Regional Office stamped "Return to Sender, Refused, Unable to Forward." The certified copies and their "Return Receipt" cards, and the copy sent by regular mail to Rothbart's place of employment were not returned to the Regional Office.

It is well settled that a respondent's failure or refusal to accept certified mail or to provide for appropriate service cannot serve to defeat the purposes of the Act. See, e.g., *I.C.E. Electric, Inc.*, 339 NLRB 247 fn. 2 (2003), and cases cited therein. In any event, the failure of the Postal Service to return documents sent by regular mail indicates actual receipt. *Id.*

³ The General Counsel's motion indicates that on March 19, 2007, the Respondent was placed into Chapter 7 involuntary bankruptcy by its creditors. 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.*, and cases cited therein; *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).

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a corporation with an office and place of business at 1825 Scott Street, Detroit, Michigan (the facility), has been engaged in the processing and wholesale sale and distribution of meat and meat products. During calendar year 2006, a representative period, the Respondent, in conducting its business operations described above, purchased and received at its facility goods and materials valued in excess of \$50,000 directly from points outside the State of Michigan.

We find that the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that Local 876, United Food and Commercial Workers International Union, 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, David Rothbart held the position of the Respondent's president, and has been a supervisor of the Respondent within the meaning of Section 2(11) of the Act and an agent of the Respondent within the meaning of Section 2(13) of the Act.

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

All employees employed by the Respondent at its facility at 1825 Scott Street, Detroit, Michigan, who are engaged in daytime clean-up, receiving, boning, breaking, cutting, grinding, sealing, wrapping, bagging or prefabricating of all meat products, whether such products are fresh, frozen or chilled, cooking and pickling, including those employees operating equipment used in wrapping or tenderizing of meat products and who perform their duties in all areas where such products are prepared; but excluding guards, supervisors, office employees, employees of independent contractors and sales and professional employees.

Since about 1999, the Union has been the designated exclusive collective-bargaining representative of the unit and has been recognized as such representative by the Respondent. This recognition has been set forth in successive collective-bargaining agreements, the most recent of which is effective from November 27, 2006 through November 22, 2010.

At all times since about 1999, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the unit.

About January 25, 2007, the Respondent permanently closed its facility and terminated the employment of its unit employees.

The Respondent engaged in this conduct 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 on the unit.

The subject set forth above relates to wages, hours, and other terms and conditions of employment of the unit and is a mandatory subject for the purpose of collective bargaining.

About March 5, 2007, the Union made a written request that the Respondent bargain collectively about the effects of the closing of its facility.

By the above conduct, the Respondent has failed and refused to bargain collectively about the effects of the closing of its facility.

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 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.

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 to bargain with the Union about the effects of its decision to permanently close its facility, we shall order the Respondent to bargain with the Union, on request, about the effects of that decision. As a result 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 bargaining order with a limited backpay requirement designed to make whole the unit 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 Respon-

dent to pay backpay to the terminated unit employees in a manner similar to that required in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968), as clarified by *Melody Toyota*, 325 NLRB 846 (1998).

Pursuant to *Transmarine*, the Respondent typically would be required to 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 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 closing 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 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.

Transmarine provides that the sum paid to these unit employees may not 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, *Transmarine* further provides that in no event shall this sum be less than the unit employees would have earned for a 2-week period at the rate of their normal wages when last in the Respondent's employ. Backpay is typically based on earnings which the unit employees would normally have received during the applicable period, less any net interim earnings, and is computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Here, in the circumstances of the Respondent's bankruptcy and cessation of operations, the General Counsel in the compliance specification seeks only the minimum 2 weeks of backpay due the terminated employees under *Transmarine*. Attachment A to the compliance specification sets forth the amount due each employee based on 40 hours of work per week. We shall grant the General Counsel's request and order the Respondent to pay those amounts to the discriminatees, plus interest accrued to the date of payment.

Further, in view of the fact that the Respondent's facility is 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 unit employees in order to inform them of the outcome of this proceeding.

ORDER

The National Labor Relations Board orders that the Respondent, Cattleman's Meat Company, Detroit, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain collectively and in good faith with Local 876, United Food and Commercial Workers International Union as the exclusive collective-bargaining representative of the employees in the unit about the effects of its decision to permanently close its Detroit, Michigan facility and terminate the employment of employees in the unit. The appropriate unit is:

All employees employed by the Respondent at its facility at 1825 Scott Street, Detroit, Michigan, who are engaged in daytime clean-up, receiving, boning, breaking, cutting, grinding, sealing, wrapping, bagging or prefabricating of all meat products, whether such products are fresh, frozen or chilled, cooking and pickling, including those employees operating equipment used in wrapping or tenderizing of meat products and who perform their duties in all areas where such products are prepared; but excluding guards, supervisors, office employees, employees of independent contractors and sales and professional employees.

(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 with the Union concerning the effects on the unit employees of the Respondent's decision to permanently close its Detroit, Michigan facility, and reduce to writing and sign any agreement reached as a result of such bargaining.

(b) Make whole the unit employees for losses suffered as a result of the Respondent's failure to bargain with the Union concerning the effects on the unit employees of its decision to permanently close its Detroit, Michigan facility, by paying them the backpay amounts following their names, plus interest accrued to the date of payment, as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), and minus tax withholdings required by Federal and State laws:

Abdulmalek, Ahmed	\$ 968
Allen, Robert E.	756
Alvarenga, Edgar	968
Alvarenga, Isaias	920
Beasley, Christopher	920
Beltram, William	704
Bernoudy, Rodney	956
Billings, Willie	920
Bojovic, Paska	892

Bruce, Isaiah	656
Buckner, Eddie L.	984
Carter, Christopher	676
Childress, John	932
Conrad, Jarvis E.	932
Cooper, Montoz	656
Divito, Antonio	932
Eller, Richard	948
Foster, Allan	948
Franklin, Robert	932
Freeman, Kenneth	920
Garcia, Lorenzo	976
Hazard, Westina	932
Hernandez, Jose	976
Hester, Henrietta	920
Hill, Willie	984
Jackson, Derrick R.	656
Jozwik, James	920
Lazzana, Hollis	968
Lucas, Robert	980
Matthew, Archie	920
Maynard, Shelly	932
McGee, George	892
Moore, Clyde	920
Murray, Myra Jean	1,096
Perez, Fausto	972
Peterson, Roscoe	1,016
Ramsey, Karin	928
Ringo, Richard	920
Ruffin, Marlon	948
Salamanca, Nubia	892
Spires, Audrey	932
Sykes, Anthony	956
Thornton, Anthony L.	912
Tolin, Steve	948
Travis, Charles	908
Tucker, Jason	948
Washington, Floyd	928
Watson, Billy	948
Welsh, Richard	948
Wilburn, Joe	920
Williams, Brenda	920
Williams, Jerome	952
Williams, Terrence	952
Williams, Troy	1,036
Crumbly, Darrel M.	892
Davis, Gregory	1,036
Henry, Ronald E.	920
Mathis, Damon R.	996
Williamson, Conard	1,312
TOTAL:	\$ 54,632

(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 elec-

tronic 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, duplicate and mail, at its own expense and after being signed by the Respondent's authorized representative, copies of the attached notice marked "Appendix"⁴ to the Union and to all unit employees employed by the Respondent on or after January 25, 2007.

(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. December 28, 2007

Peter C. Schaumber, Member

Peter N. Kirsanow, Member

Dennis P. Walsh, Member

(SEAL) 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 and refuse to bargain collectively and in good faith with Local 876, United Food and Commercial Workers International Union, as the exclusive collec-

⁴ If the Order is enforced by 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."

tive-bargaining representative of the employees in the unit about the effects of our decision to permanently close our Detroit, Michigan facility. The appropriate unit is:

All employees employed by us at our facility at 1825 Scott Street, Detroit, Michigan, who are engaged in daytime clean-up, receiving, boning, breaking, cutting, grinding, sealing, wrapping, bagging or prefabricating of all meat products, whether such products are fresh, frozen or chilled, cooking and pickling, including those employees operating equipment used in wrapping or tenderizing of meat products and who perform their duties in all areas where such products are prepared; but excluding guards, supervisors, office employees, employees of independent contractors and sales and professional 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, on request, bargain with the Union concerning the effects on the unit employees of our decision to permanently close our Detroit, Michigan facility, and reduce to writing and sign any agreement reached as a result of such bargaining.

WE WILL make whole the unit employees for losses suffered as a result of our failure to bargain with the Union concerning the effects on the unit employees of our decision to permanently close our Detroit, Michigan facility, with interest:

Abdulmalek, Ahmed	\$	968
Allen, Robert E.		756
Alvarenga, Edgar		968
Alvarenga, Isaias		920
Beasley, Christopher		920
Beltram, William		704.
Bernoudy, Rodney		956
Billings, Willie		920
Bojovic, Paska		892
Bruce, Isaiah		656
Buckner, Eddie L.		984
Carter, Christopher		676
Childress, John		932
Conrad, Jarvis E.		932

Cooper, Montoz	656
Divito, Antonio	932
Eller, Richard	948
Foster, Allan	948
Franklin, Robert	932
Freeman, Kenneth	920
Garcia, Lorenzo	976
Hazard, Westina	932
Hernandez, Jose	976
Hester, Henrietta	920
Hill, Willie	984
Jackson, Derrick R.	656
Jozwik, James	920
Lazzana, Hollis	968
Lucas, Robert	980
Matthew, Archie	920
Maynard, Shelly	932
McGee, George	892
Moore, Clyde	920
Murray, Myra Jean	1,096
Perez, Fausto	972
Peterson, Roscoe	1,016
Ramsey, Karin	928
Ringo, Richard	920
Ruffin, Marlon	948
Salamanca, Nubia	892
Spires, Audrey	932
Sykes, Anthony	956
Thornton, Anthony L.	912
Tolin, Steve	948
Travis, Charles	908
Tucker, Jason	948
Washington, Floyd	928
Watson, Billy	948
Welsh, Richard	948
Wilburn, Joe	920
Williams, Brenda	920
Williams, Jerome	952
Williams, Terrence	952
Williams, Troy	1,036
Crumbley, Darrel M.	892
Davis, Gregory	1,036
Henry, Ronald E.	920
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CATTLEMAN'S MEAT COMPANY