Kohler & Sons, Inc. *and* Local 6-505M, Graphic Communications Conference of the International Brotherhood of Teamsters. Case 14–CA–29932

May 24, 2010

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS SCHAUMBER AND BECKER

The General Counsel seeks a default judgment in this case on the ground that the Respondent has withdrawn its answer to the complaint. Upon a charge and an amended charge filed by the Union on October 23 and December 22, 2009, respectively, the General Counsel issued the complaint on December 31, 2009, against Kohler & Sons, Inc., the Respondent, alleging that it has violated Section 8(a)(5) and (1) of the Act. The Respondent filed an answer to the complaint. However, by letter dated February 18, 2010, the Respondent withdrew its answer.

On March 11, 2010, the General Counsel filed a Motion for Default Judgment with the Board. Thereafter, on March 12, 2010, 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 a 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 states that the answer must be received by the Regional Office on or before January 14, 2010. Although the Respondent filed an answer to the complaint on January 14, 2010, it subsequently withdrew its answer by letter dated February 18, 2010. The withdrawal of an answer has the same effect as a failure to file an answer, i.e., the allegations in the complaint must be considered to be true.[1] Accordingly, we grant the General Counsel's Motion for Default Judgment.

On the entire record, the Board makes the following

[1] See *Maislin Transport*, 274 NLRB 529 (1985).

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a Missouri corporation, with an office and place of business in St. Louis, Missouri, has been engaged in the commercial printing business. During the 12-month period ending November 30, 2009, the Respondent, in conducting its business operations described above, purchased and received at its St. Louis, Missouri facility goods valued in excess of $50,000 directly from points outside the State of Missouri.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that Local 6-505M, Graphic Communications Conference of the International Brotherhood of Teamsters, 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 respective names and have been supervisors of the Respondent within the meaning of Section 2(11) of the Act and agents of the Respondent within the meaning of Section 2(13) of the Act:

Kevin C. Kohler	—	President
Kent J. Kohler	—	Vice President and Secretary
Keith G. Kohler	—	Member, Board of Directors

The employees of the Respondent in the unit covered by the collective-bargaining agreement described below (the unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.[2]

Since about 1970, 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 the Respondent. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which is effective from July 1, 2007, through June 30, 2011.

At all material times since about 1970, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the unit.

Since about October 9, 2009, the Respondent has failed to continue in effect all the terms and conditions of

[2] There is no specific unit description set forth in the complaint. However, in light of the Respondent's withdrawal of its answer, there is no dispute that the unit described in the parties' collective-bargaining agreements is appropriate.

the 2007–2011 agreement, by failing and refusing to pay unit employees accrued vacation pay, and failing to make pension fund and retirement fund contributions on behalf of the unit employees for September and October 2009.

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 purpose of collective bargaining. The Respondent engaged in the conduct described above without the Union's consent and without affording the Union an opportunity to bargain with the Respondent with respect to this conduct.

About October 9, 2009, the Respondent ceased operations and laid off all the employees in the unit. 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 on the unit of its decision to cease operations and the resulting layoffs.[3]

CONCLUSION OF LAW

By the acts and conduct described above, the Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees, and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.[4]

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, to remedy the Respondent's unlawful failure and refusal to bargain with the Union about the effects of the Respondent's decision to cease operations at its St. Louis, Missouri facility and lay off all the employees in the unit, we shall order the Respondent to bargain with the Union, on request, about the effects of its 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 at a time when the Respondent might still have been in need of their services and a measure of balanced bargaining power existed. 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 both to make whole the employees for losses suffered as a result of the violation 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 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).[5]

Thus, the Respondent shall pay its unit employees backpay at the rate of their normal wages when last in the Respondent's employ from 5 days after the date of this Decision and Order until occurrence of the earliest of the following conditions: (1) the date the Respondent bargains to agreement with the Union on those subjects pertaining to the effects of its decision to cease operations of its facility on the unit 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.

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 operations of its St. Louis, Missouri facility to the time they secured equivalent employment elsewhere, or the date on which the Respondent shall have offered to bargain in good faith, whichever occurs sooner. However, in no event shall this sum be less than the employees would have

[3] Although the complaint alleges that the Respondent's cessation of operations and laying off of all unit employees are mandatory subjects of bargaining, we need not address those allegations because there is no allegation that the failure to bargain about the *decision* to close violates the Act. Instead, the complaint specifically alleges only that the Respondent violated the Act by failing to give notice and afford the Union an opportunity to bargain about the *effects* of that conduct. The Board has repeatedly found that the *effect* of such decisions on unit employees is a mandatory bargaining subject. See *Shasta Regional Medical Center, LLC*., 354 NLRB No. 65, slip op. at 2 fn. 2 (2009); *Nick & Bob Partners*, 340 NLRB 1196, 1198 (2003). Accordingly, we find that the complaint supports a cause of action as to the failure to bargain over the effects of the Respondent's decision to cease its operations and to lay off its unit employees.

[4] In its letter to the Region withdrawing its answer, the Respondent stated that because it is "out of business with virtually no remaining assets, no office, no staff and depleted records, . . . it is simply not prudent . . . to proceed further in this matter given those economic circumstances." It is well settled that an employer's adverse business circumstances do not constitute an adequate defense to the complaint allegations here. See, e.g., *Coal Rush Mining, Inc.,* 341 NLRB 32, 33 fn. 2 (2004), and *Nick Robilotto, Inc.,* 292 NLRB 1279 (1989).

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

earned for a 2-week period at the rate of their normal wages when last in the Respondent's employ. Backpay shall be based on earnings which the unit employees would normally have received during the applicable period, less any net interim earnings, and shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[6]

Further, having found that the Respondent violated Section 8(a)(5) and (1) by failing and refusing to continue in effect all of the terms and conditions of the 2007–2011 collective-bargaining agreement since October 9, 2009, by failing to pay unit employees accrued vacation pay, we shall order the Respondent to make the unit employees whole for any loss of earnings and other benefits attributable to its unlawful conduct. Backpay 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.

Also, having found that the Respondent has violated Section 8(a)(5) and (1) by failing to continue in effect all of the terms and conditions of the 2007–2011 collective-bargaining agreement since October 9, 2009, by failing to make pension fund and retirement fund contributions on behalf of the unit employees for September and October 2009, we shall order the Respondent to make all such delinquent pension and retirement fund contributions that were not made for September and October 2009, including any additional amounts due the funds in accordance with *Merryweather Optical Co*., 240 NLRB 1213, 1216 fn. 7 (1979).[7] We shall also order the Respondent to 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), such amounts to be computed in the manner set forth in *Ogle Protection Service*, supra, with interest as prescribed in *New Horizons for the Retarded*, supra.

Finally, in view of the fact that the Respondent has ceased operations at its St. Louis, Missouri facility, we shall order the Respondent to mail a copy of the attached notice to the Union and to the last known addresses of the unit employees who were employed by the Respondent on October 9, 2009, in order to inform them of the outcome of this proceeding.

ORDER

The National Labor Relations Board orders that the Respondent, Kohler & Sons, Inc., St. Louis, Missouri, 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 6-505M, Graphic Communications Conference of the International Brotherhood of Teamsters, as the exclusive collective-bargaining representative of its unit employees over the effects of the Respondent's decision to cease operations at its St. Louis, Missouri facility and to lay off all of the unit employees. The unit is comprised of those employees covered by the 2007–2011 collective-bargaining agreement between the Respondent and the Union.

(b) Failing to continue in effect all the terms and conditions of its 2007–2011 collective-bargaining agreement with the Union by failing to pay employees accrued vacation pay.

(c) Failing to continue in effect all the terms and conditions of its 2007–2011 collective-bargaining agreement with the Union by failing to make pension fund and retirement fund contributions on behalf of the employees.

(d) 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 collectively and in good faith with the Union concerning the effects of the Respondent's decision to cease operations at its St. Louis, Missouri facility and to lay off all of the unit employees, and reduce to writing and sign any agreement reached as a result of such bargaining.

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

(c) Make whole the unit employees for any loss of earnings and other benefits resulting from the Respondent's failure to pay employees accrued vacation pay since October 9, 2009, with interest, as set forth in the remedy section of this decision.

(d) Make the delinquent pension fund and retirement fund contributions on behalf of employees, with interest, that were not made for September and October 2009, in the manner set forth in the remedy section of this decision.

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[6] In the complaint, the General Counsel seeks compound interest computed on a quarterly basis for any backpay or other monetary awards. Having duly considered the matter, we are not prepared at this time to deviate from our current practice of assessing simple interest. See, e.g., *Glen Rock Ham,* 352 NLRB 516, 516 fn. 1 (2008), citing *Rogers Corp.*, 344 NLRB 504 (2005).

[7] To the extent that an employee has made personal contributions to a benefit or other fund that have been accepted by the fund in lieu of the Respondent's delinquent contributions during the period of the delinquency, the Respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the Respondent otherwise owes the fund.

(e) Make whole the unit employees for any expenses ensuing from the Respondent's failure to make the contractually-required pension fund and retirement fund contributions, with interest, as set forth in the remedy section of this decision.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, duplicate and mail, at its own expense and after being signed by the Respondent's authorized representative, copies of the attached notice marked "Appendix"[8] to the Union and to all unit employees who were employed by the Respondent on October 9, 2009.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

Dated, Washington, D.C. May 24, 2010

Wilma B. Liebman, Chairman

Peter C. Schaumber, Member

Craig Becker, Member

(SEAL) 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 fail and refuse to bargain collectively and in good faith with Local 6-505M, Graphic Communications Conference of the International Brotherhood of Teamsters, as the exclusive collective-bargaining representative of the employees in the unit over the effects of our decision to cease operations at our St. Louis, Missouri facility and to lay off all of the unit employees.

WE WILL NOT fail to continue in effect all the terms and conditions of our 2007–2011 collective-bargaining agreement with the Union by failing to pay employees accrued vacation pay.

WE WILL NOT fail to continue in effect all the terms and conditions of our 2007–2011 collective-bargaining agreement with the Union by failing to make pension fund and retirement fund contributions on behalf of the 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 collectively and in good faith with the Union concerning the effects of our decision to cease operations at our St. Louis, Missouri facility and to lay off all of the unit employees, and WE WILL reduce to writing and sign any agreement reached as a result of such bargaining.

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.

WE WILL make whole the unit employees for any loss of earnings and other benefits resulting from our failure to pay employees accrued vacation pay since October 9, 2009, with interest.

WE WILL make the delinquent pension fund and retirement fund contributions on behalf of employees, with interest, that were not made for September and October 2009.

WE WILL make whole the unit employees for any expenses ensuing from our failure to make the contractually-required pension fund and retirement fund contributions, with interest.

KOHLER & SONS, INC.

[8] 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."