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Capital Bakery, Inc. *and* Local 3, Bakery, Confectionery & Tobacco Workers International Union of America. Case 3–CA–17723

April 25, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS COHEN AND FOX

Upon a charge, amended charge, and second amended charge filed by the Union on March 22, April 2, and May 25, 1993, the General Counsel of the National Labor Relations Board issued a complaint on May 28, 1993, against Capital Bakery, Inc., the Respondent, alleging that it has violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act. On June 17, 1993, the Respondent filed an answer to the May 25, 1993 complaint.

Thereafter, on December 9, 1993, the Acting Regional Director for Region 3 approved an informal settlement agreement that provided, inter alia:

> Approval of the Agreement by the Regional Director shall constitute withdrawal of any Complaint(s) and Notice of Hearing heretofore issued in this case, as well as any answer(s) filed in response.

On December 14, 1995, however, the Acting Regional Director issued an order revoking informal settlement agreement, complaint and notice of hearing that revoked the informal settlement and realleged the 8(a)(1) and (5) allegations of the prior complaint, on the ground that the Respondent had failed to comply with the settlement.

Although properly served copies of the charge, amended charge, second amended charge, and the reissued December 14, 1995 complaint, the Respondent failed to file an answer to that complaint. Accordingly, on March 27, 1996, the General Counsel filed a Motion for Summary Judgment with the Board. On March 29, 1996, 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 Summary Judgment

Sections 102.20 and 102.21 of the Board's Rules and Regulations provide 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 notes that unless an answer is filed within 14 days of service, all the allegations in the complaint will be considered admitted. Further, the undisputed allegations in the Motion for Summary Judgment disclose that the Region, by letter dated January 11, 1996, notified the Respondent that unless an answer were received by January 29, 1996, a Motion for Summary Judgment would be filed. Nevertheless, as indicated above, the Respondent failed to file an answer to the December 14, 1995 complaint.

Although the Respondent did file an answer to the original May 28, 1993 complaint, that answer was withdrawn by the explicit terms of the settlement agreement, and was not thereafter revived by the Acting Regional Director's order revoking informal settlement agreement. Thus, as the Respondent's answer to the original May 28, 1993 complaint does not remain extant, it does not preclude summary judgment.[1]

Accordingly, in the absence of good cause being shown for the failure to file a timely answer to the December 14, 1995 complaint, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a New York corporation with a principal office and place of business at 411 East Oakley Street, Poughkeepsie, New York, has been engaged in the baking and wholesale sale and distribution of baked goods. Annually the Respondent derives gross revenues in excess of $50,000, and purchases and receives goods valued in excess of $50,000 that are shipped to the Poughkeepsie facility directly from points located outside the State of New York. 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 the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

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 in the wage classifications listed in Schedule A of the collective-bargaining agreement, effective February 1, 1990, to January 31, 1993.

[1] See *Signage Systems, Inc.*, 312 NLRB 1115 (1993); *Orange Data, Inc.*, 274 NLRB 1018 (1985); and *Ofalco Properties*, 281 NLRB 84 (1986).

At all material times, based on Section 9(a) of the Act, the Union has been the designated exclusive collective-bargaining representative of the unit and has been recognized as the representative by the Respondent. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which was effective for the period February 1, 1990, to January 31, 1993 (1990–1993 agreement).

About February 19, and March 5, 1993, the Respondent impliedly and explicitly informed its employees that it would not engage in good-faith bargaining with the Union and would not execute a successor collective-bargaining agreement with the Union.

About March 5, 13, and 18, 1993, the Respondent informed its employees that it would no longer recognize the Union and threatened to discharge employees unless they agreed to specified terms and conditions of employment and abandoned the Union.

In the first week of February and on March 2, 1993, the Respondent informed its employees that it would no longer recognize the Union as the exclusive collective-bargaining representative of the unit.

Since about September 22, 1992, and continuing thereafter, the Respondent has failed to continue in full force and effect all the terms and conditions of the 1990–1993 collective-bargaining agreement by failing to abide by schedule D (pension and welfare). Since about March 3, 1993, and continuing thereafter, the Respondent has also failed to continue in full force and effect all the terms and conditions of the 1990–1993 collective-bargaining agreement by failing to abide by article XII (paid birthday). These terms and conditions of employment are mandatory subjects for the purposes of collective bargaining. The Respondent engaged in this conduct without the Union's consent, without prior notice to the Union and without bargaining with the Union.

About March 16, 1993, the Respondent informed the Union it would not sign a contract with the Union and that it had engaged in direct dealing with employees in the unit concerning terms and conditions of employment. Thereafter, about March 19, through March 30, 1993, the Respondent withdrew its recognition of the Union as the exclusive collective-bargaining representative of the unit.

Conclusion of Law

By the acts and conduct described above, the Respondent has been interfering with, restraining, or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act. By unilaterally and without the consent of the Union failing to abide by schedule D (pension and welfare) and article XII (paid birthday) of the 1990–1993 collective-bargaining agreement, by informing the Union that it would not sign a contract with the Union and that it had engaged in direct dealing with the unit employees, and by withdrawing recognition from the Union, the Respondent has been failing and refusing to bargain collectively 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)(1) and (5) and 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, having found that the Respondent has violated Section 8(a)(5) and (1) by failing to abide by schedule D (pension and welfare) since September 22, 1992, we shall order the Respondent to make whole its unit employees by making all such delinquent contributions, including any additional amounts due the funds in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979). In addition, the Respondent shall 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*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[2] Furthermore, having found that the Respondent violated Section 8(a)(5) and (1) by unilaterally failing to comply with article XII (paid birthday) of the 1990–1993 agreement since March 3, 1993, we shall order the Respondent to honor the terms of the collective-bargaining agreement and make the unit employees whole for any loss of earnings attributable to its unlawful conduct. Backpay shall be computed in accordance with *Ogle Protection Service*, supra, with interest as prescribed in *New Horizons for the Retarded*, supra. Finally, having found that the Respondent violated Section 8(a)(5) and (1) by withdrawing recognition from the Union about March 19 through March 30, 1993, we shall order the Respondent to recognize and, on request, bargain with the Union as the exclusive collective-bargaining representative of the unit employees and put in writing and sign

[2] 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 reimbursement will constitute a setoff to the amount that the respondent otherwise owes the fund.

any agreement reached on terms and conditions of employment.

ORDER

The National Labor Relations Board orders that the Respondent, Capital Bakery, Inc., Poughkeepsie, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Impliedly or explicitly informing its employees that it will not engage in good-faith bargaining with Local 3, Bakery, Confectionery & Tobacco Workers International Union of America or will not execute a successor collective-bargaining agreement with the Union.

(b) Informing its employees that it would no longer recognize the Union.

(c) Threatening to discharge employees unless they agree to specified terms and conditions of employment or abandon the Union.

(d) Unilaterally or without the consent of the Union failing to continue in full force and effect all the terms and conditions of the 1990–1993 collective-bargaining agreement by failing to abide by schedule D (pension and welfare) or article XII (paid birthday).

(e) Informing the Union it would not sign a contract with the Union or that it had engaged in direct dealing with unit employees.

(f) Withdrawing recognition from the Union as the exclusive collective-bargaining representative of the unit.

(g) 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 the terms of the collective-bargaining agreement, including schedule D (pension and welfare) and article XII (paid birthday) and make the unit employees whole for any loss of earnings, benefits or expenses attributable to its unlawful conduct, in the manner set forth in the remedy section of this decision.

(b) Recognize and, on request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following unit and put in writing and sign any agreement reached on terms and conditions of employment:

> All employees employed in the wage classifications listed in Schedule A of the collective-bargaining agreement, effective February 1, 1990, to January 31, 1993.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility in Poughkeepsie, New York, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon 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.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C. April 25, 1996

William B. Gould IV,	Chairman
Charles I. Cohen,	Member
Sarah M. Fox,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[3] 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 the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT impliedly or explicitly inform our employees that we will not engage in good-faith bargaining with Local 3, Bakery, Confectionery & Tobacco Workers International Union of America or that we will not execute a successor collective-bargaining agreement with the Union.

WE WILL NOT inform our employees that we will no longer recognize the Union.

WE WILL NOT threaten to discharge employees unless they agree to specified terms and conditions of employment or abandon the Union.

WE WILL NOT unilaterally or without the consent of the Union fail to continue in full force and effect all the terms and conditions of the 1990–1993 collective-

bargaining agreement with the Union by failing to abide by schedule D (pension and welfare) or article XII (paid birthday).

WE WILL NOT inform the Union we would not sign a contract with the Union or that we had engaged in direct dealing with unit employees concerning terms and conditions of employment.

WE WILL NOT withdraw recognition from the Union.

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 the terms of the 1990–1993 collective-bargaining agreement with the Union, including schedule D (pension and welfare) and article XII (paid birthday) and WE WILL make our unit employees whole for any loss of earnings, benefits, or expenses resulting from our unlawful failure to do so.

WE WILL recognize and, on request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following unit and put in writing and sign any agreement reached on terms and conditions of employment:

> All employees employed in the wage classifications listed in Schedule A of the collective-bargaining agreement, effective February 1, 1990, to January 31, 1993.

CAPITAL BAKERY, INC.