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Buffalo Color Corporation, Debtor In Possession and United Steelworkers, USW, AFL-CIO, District 4 and its Local 3609 and Christopher Reed, U.S. Trustee, Trustee in Bankruptcy (Party in Interest). Case 3-CA-25483

March 31, 2006

DECISION AND ORDER

BY MEMBERS LIEBMAN, SCHAUMBER, AND KIRSANOW

The General Counsel seeks a default judgment in this case on the ground that the Respondent has failed to file an answer to the complaint. Upon a charge and an amended charge filed by the Union on July 14 and September 22, 2005, respectively, the Acting General Counsel issued the complaint on October 31, 2005, against Buffalo Color Corporation, the Respondent, alleging that it has violated Section 8(a)(1) and (5) of the Act. The Respondent failed to file an answer.

On December 13, 2005, the Acting General Counsel filed a Motion for Default Judgment with the Board. Thereafter, on December 19, 2005, 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 did not file a 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 stated that unless an answer was filed by November 14, 2005, all the allegations in the complaint could be considered admitted and so found by the Board pursuant to a motion for default judgment. Further, the undisputed allegations in the Motion for Default Judgment disclose that the Region, by letter dated November 22, 2005, advised the Respondent that unless an answer was filed by November 29, 2005, a motion for default judgment would be filed.¹

¹ The complaint was sent to the Respondent at the address designated by the Respondent with the New York Department of State for service of process by the Secretary of State. This address is the same as

In the absence of good cause being shown for the failure to file an answer, we grant the General Counsel's Motion for Default Judgment.²

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a corporation with an office and place of business in Buffalo, New York, has been engaged in the manufacture of indigo dye.

During the 12-month period preceding the issuance of the complaint, the Respondent, in conducting its business operations described above, received funds in excess of \$50,000 from the government of the United States.

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 United Steelworkers, USW, AFL-CIO, District 4 and its Local 3609 (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, Lawrence Kaminski has held the position of chief operating officer, 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.

At all material times, Armen Dekmejian has held the position of restructuring officer, and has been an agent of the Respondent within the meaning of Section 2(13) of the Act.

that listed in the December 2004 Verizon Buffalo telephone directory as the Respondent's business address. On November 22, 2005, the complaint was returned to the Regional Office marked by the Postal Service as "unclaimed" or "refused." 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 there. In any event, the Region's November 22, 2005 "last chance" letter was not returned to the Regional Office by the Postal Service.

² The captions of the complaint and the General Counsel's motion both denote the Respondent as a "Debtor in Possession" and include Christopher Reed, Trustee in Bankruptcy, as a party in interest. It is well established, however, 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 *Cardinal Services*, 295 NLRB 933 fn. 2 (1989), and cases cited therein. Board proceedings fall within the exception to the automatic stay provisions of the Bankruptcy Code 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).

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

All production and maintenance employees employed at 100 Lee Street, Buffalo, New York, including operators "A," and mechanics, but excluding executives, office employees, clerks, chemists and their assistants who are not hourly paid, salaried employees, supervisors and managers, technical engineers, uniformed policemen, watchmen, first aid employees, instrument mechanics and their apprentices; said unit also to include all hourly paid laboratory employees at said plant, excluding all salaried employees and all supervisory employees with authority to hire, promote, discharge, discipline or otherwise effect changes in status of employees, or effectively recommend such action.

At all material times, the Union has been the designated exclusive collective-bargaining representative of the unit, and 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 was effective from June 13, 2002, to June 13, 2005.

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

On or about June 10, 2005, the Respondent laid off employees in the unit. Since that date, the Respondent has failed and refused to bargain with the Union with respect to the effects of these layoffs.

On or about March 23, 2005, the Union, by letter, requested that the Respondent meet with the Union for the purpose of negotiating a new or modified collective-bargaining agreement.

Since on or about June 13, 2005, the Respondent has failed and refused to bargain collectively with the Union concerning a new or modified collective-bargaining agreement.

The June 10, 2005 layoff of unit employees and the negotiations for a new contract relate to the wages, hours, and other terms and conditions of employment of the unit and are mandatory subjects for the purposes of collective bargaining.

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 within the meaning of Section 8(d) of the Act, 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 violated Section 8(a)(1) and (5) of the Act by failing to meet and bargain with the Union for the purpose of negotiating a new or modified collective-bargaining agreement with the Union, we shall order the Respondent, on request, to meet and bargain in good faith with the Union and, if an understanding is reached, to embody that understanding in a signed agreement.

Further, having found that the Respondent unlawfully failed and refused to bargain with the Union about the effects of the Respondent's decision to lay off its unit employees, we shall order the Respondent to bargain with the Union, on request, about the effects of that decision. Because of the Respondent's unlawful conduct, however, the laid-off 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 employees for losses suffered as a result of the violations and to re-create in some practicable manner a situation in which the parties' bargaining positions are not entirely devoid of economic consequences for the Respondent. We shall do so by ordering the Respondent to pay backpay to the laid-off employees in a manner similar to that required in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968),³ as clarified by *Melody Toyota*, 325 NLRB 846 (1998).

Thus, the Respondent shall pay its laid-off 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 or until occurrence of the earliest of the following conditions: (1) the date the Respondent bargains to agreement with the Union on those subjects

³ See also *Live Oak Skilled Care & Manor*, 300 NLRB 1040 (1990).

pertaining to the effects of the layoffs; (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 they were laid off 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 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 laid-off 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).

ORDER

The National Labor Relations Board orders that the Respondent, Buffalo Color Corporation, Buffalo, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to meet and bargain collectively and in good faith with the United Steelworkers, USW, AFL-CIO, District 4 and its Local 3609, as the collective-bargaining representative of the employees in the following unit:

All production and maintenance employees employed at 100 Lee Street, Buffalo, New York, including operators "A," and mechanics, but excluding executives, office employees, clerks, chemists and their assistants who are not hourly paid, salaried employees, supervisors and managers, technical engineers, uniformed policemen, watchmen, first aid employees, instrument mechanics and their apprentices; said unit also to include all hourly paid laboratory employees at said plant, excluding all salaried employees and all supervisory employees with authority to hire, promote, discharge, discipline or otherwise effect changes in status of employees, or effectively recommend such action.

(b) Failing and refusing to bargain collectively and in good faith with the Union about the effects of the Respondent's layoff of unit employees.

(c) 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, meet and bargain with the Union as the exclusive collective-bargaining representative of the employees in the unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(b) On request, bargain with the Union concerning the effects on the unit employees of the Respondent's decision to lay off unit employees on June 10, 2005, and reduce to writing and sign any agreement reached as a result of such bargaining.

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

(d) 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.

(e) Within 14 days after service by the Region, post at its facility in Buffalo, New York, copies of the attached notice marked "Appendix."⁴ 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 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. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 10, 2005.

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."

(f) 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. March 31, 2006

Wilma B. Liebman, Member

Peter C. Schaumber, Member

Peter N. Kirsanow, 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 meet and bargain collectively and in good faith with the United Steelworkers, USW, AFL-CIO, District 4 and its Local 3609, as the collective-bargaining representative of the employees in the following unit:

All production and maintenance employees employed at 100 Lee Street, Buffalo, New York, including operators "A," and mechanics, but excluding executives, office employees, clerks, chemists and their assistants who are not hourly paid, salaried employees, supervisors and managers, technical engineers, uniformed policemen, watchmen, first aid employees, instrument mechanics and their apprentices; said unit also to include all hourly paid laboratory employees at said

plant, excluding all salaried employees and all supervisory employees with authority to hire, promote, discharge, discipline or otherwise effect changes in status of employees, or effectively recommend such action.

WE WILL NOT fail and refuse to bargain collectively and in good faith with the Union about the effects of our layoff of unit 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, meet and bargain with the Union as the exclusive collective-bargaining representative of the employees in the unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

WE WILL, on request, bargain with the Union concerning the effects on unit employees of our decision to lay off unit employees on June 10, 2005, and reduce to writing and sign any agreement reached as a result of such bargaining.

WE WILL pay the unit employees who were laid off limited backpay in connection with our failure to bargain over the effects of our decision to lay off unit employees on June 10, 2005, as required by the Decision and Order of the National Labor Relations Board.

BUFFALO COLOR CORPORATION