

Bildisco and Bildisco, Debtor in Possession and Local 408, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 22-CA-10061

April 23, 1981

DECISION AND ORDER

Upon a charge and amended charges filed on June 3, July 16, and August 28, 1980, respectively, by Local 408, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union, and duly served on Bildisco and Bildisco, Debtor in Possession, herein collectively called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 22, issued a complaint and notice of hearing on July 31, 1980, and a first amended complaint and notice of hearing on October 8, 1980, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charges and complaints and notices of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that the Union is the exclusive representative of certain of the Respondent's employees in a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act,¹ and that since on or about January 3, 1980, and at all times thereafter, Respondent has refused and is now refusing to bargain collectively with the Union by unilaterally changing existing terms and conditions of employment of its employees in the appropriate unit, as contained in its collective-bargaining agreement with the Union, regarding remittance of union dues, payment of pension, health, and welfare contributions, and payment of vacation benefits and wage increases. Respondent failed to file a timely answer to the complaint.

On February 2, 1981, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment based upon Respondent's failure to file an answer as required by Sections 102.20 and 102.21 of the Board's Rules and Regulations, Series 8, as amended. In a response to the General Counsel's motion, Respondent requested a 60-day

¹ All warehousemen, drivers and mechanics including straight truck drivers, outside field servicemen, order pickers, helpers, working foremen, employed at Respondent's Avenel place of business, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

stay of these proceedings to allow it to apply to the United States Bankruptcy Court for authorization to retain special counsel to represent it in these proceedings. Counsel for the General Counsel opposed Respondent's request. Subsequently, on February 9, 1981, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Thereafter, Respondent filed a response to the Notice To Show Cause, including affirmative defenses, and counsel for the General Counsel filed a response to Respondent's response.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

Section 102.20 of the Board's Rules and Regulations, Series 8, as amended, provides as follows:

The respondent shall, within 10 days from the service of the complaint, file an answer thereto. The respondent shall specifically admit, deny, or explain each of the facts alleged in the complaint, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. All allegations in the complaint, if no answer is filed, or any allegation in the complaint not specifically denied or explained in an answer filed, unless the respondent shall state in the answer that he is without knowledge, shall be deemed to be admitted to be true and shall be so found by the Board, unless good cause to the contrary is shown.

The complaints and notices of hearing served on Respondent herein specifically state that unless an answer to the complaint is filed within 10 days of service thereof "all of the allegations contained in the Complaint shall be deemed to be admitted to be true and may be so found by the Board." Further, according to the uncontroverted allegations of the Motion for Summary Judgment, a Board agent met with Sal Valente, a general partner of Respondent, on September 24, 1980, and informed him of his obligation to file an answer, which was already past due, to the complaint issued on July 31. By letter dated October 27, 1980, a Board agent, confirming a telephone conversation of that date, advised Valente that no answer had been received to the first amended complaint and that summary judgment would be sought if no answer was received by October 31, 1980.

In its response to the Notice To Show Cause, Respondent states that its failure to file an answer was due to the disruption in its operations caused

by its reorganization proceedings in the United States Bankruptcy Court. Respondent further states that it is currently attempting to obtain court approval to retain special labor counsel but has not to date received the requisite order from that court. In his response, counsel for the General Counsel states, as he did in his response to Respondent's letter of January 29, 1981, that Respondent had more than 6 months to file an answer or seek an extension of time to file an answer in order to obtain court authorization to employ labor counsel, and failed to do so.

As indicated above, Respondent was served with the complaint and first amended complaint on July 31 and October 8, 1980, respectively, at which times it was engaged in proceedings before the bankruptcy court. It was notified several times of its obligation to file an answer or to request an extension of time to do so, but failed to do either. The response to the Notice To Show Cause does not explain why Respondent failed to contact the Regional Office concerning an answer or an extension of time to file an answer. Accordingly, we find that Respondent's response does not constitute good cause under our rules for its failure to file a timely answer.² Therefore, in accordance with the rule set forth above, the allegations of the first amended complaint are deemed to be admitted to be true and are so found by the Board, and the General Counsel's Motion for Summary Judgment is granted.

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Bildisco, a partnership duly organized under, and existing by virtue of, the laws of the State of New Jersey, with its principal office and place of business in Avenel, New Jersey, is and has been at all times material herein continuously engaged in the retail and wholesale sale and distribution of building supply products. During the 12-month period ending June 3, 1980, Bildisco caused to be purchased, transferred, and delivered to the Avenel place of business building supplies and other materials valued in excess of \$50,000, of which goods and materials valued in excess of \$50,000 were transported to the Avenel place of business directly from points outside the State of New Jersey. Since on or about April 17, 1980, Bildisco has been duly designated as Debtor-in-Possession for Bildisco

pursuant to a voluntary arrangement proceeding in the United States Bankruptcy Court of the District of New Jersey, and as such has full authority to continue the operation of and exercise all powers necessary to the administration of the business of Bildisco.

We find, on the basis of the foregoing, that Bildisco, Debtor-in-Possession, is, and has been at all times material herein since April 17, 1980, an *alter ego* in bankruptcy to Bildisco and that Bildisco and Bildisco, Debtor-in-Possession, collectively called Respondent, is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

Local 408, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

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

All warehousemen, drivers and mechanics including straight truck drivers, outside field service men, order pickers, helpers, working foremen, employed at Respondent's Avenel place of business, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

On or before May 1, 1979, a majority of the employees of Respondent in the unit described above designated and selected the Union as their representative for the purpose of collective bargaining, and since on or before May 1, 1979, the Union has been and is now, pursuant to Section 9(a) of the Act, the exclusive representative of the employees in the unit described above for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment. As a result of the representative status of the Union, Respondent and the Union have entered into successive collective-bargaining agreements, the most recent of which is effective from May 1, 1979, through April 30, 1982.

Since on or about January 3, 1980, Respondent has unilaterally changed existing terms and conditions of employment of its employees in the unit described above by failing and refusing to: make required pension, health, and welfare contributions;

² See *World Services Corporation and/or Peggs Coal Company; and World Services Corporation, Debtor In Possession*, 247 NLRB 1430 (1980); *Evans Express Company, Inc. and Intercontinental Systems, Inc.*, 232 NLRB 655 (1977).

remit to the Union the dues withheld from the pay of employees; and pay vacation benefits, all as required by the collective-bargaining agreement described above. Since on or about May 1, 1980, Respondent has unilaterally changed existing terms and conditions of employment of its employees in the unit described above by failing and refusing to pay wage increases as required by the collective-bargaining agreement.

Accordingly, we find that by the aforesaid conduct Respondent has failed and refused, and is now failing and refusing, to bargain collectively with the Union as the exclusive representative of its employees in the appropriate unit. By such conduct, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Such affirmative action shall include that Respondent recognize and deal with the Union as the exclusive bargaining representative of its employees in the appropriate unit by honoring the collective-bargaining agreement executed by it on May 1, 1979, in all its terms.

Additionally, we have found that Respondent has made unilateral changes in certain terms and conditions of employment in violation of Section 8(a)(5) and (1) of the Act. In order to dissipate the effect of these unfair labor practices, we shall order Respondent to make whole its employees by making the required pension, health, and welfare contributions that it has failed to pay since January 3, 1980,³ remitting to the Union the dues it has

³ Because the provisions of employee benefit fund agreements are variable and complex, the Board does not provide at the adjudicatory stage of a proceeding for the addition of interest at a fixed rate on unlawfully withheld fund payments. We leave to the compliance stage the question of whether Respondent must pay any additional amounts into the benefit funds in order to satisfy our "make-whole" remedy. These additional

withheld from its employees' paychecks since January 3, 1980, paying the vacation benefits it has failed to pay since January 3, 1980, and paying the wage increases it has failed to pay since May 1, 1980, plus interest on the dues, vacation benefits, and wage increases as prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).⁴

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. Bildisco and Bildisco, Debtor-in-Possession, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local 408, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. All warehousemen, drivers and mechanics including straight truck drivers, outside field service men, order pickers, helpers, working foremen, employed at Respondent's Avenel place of business, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times material herein, the above-named labor organization has been and now is the exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By unilaterally failing and refusing, since on or about January 3, 1980, and at all times thereafter, to make required pension, health, and welfare contributions, to remit to the Union the dues withheld from its employees' pay, and to pay vacation benefits, and by unilaterally failing and refusing since on or about May 1, 1980, and at all times thereafter, to pay wage increases to its employees, all as required by its collective-bargaining agreement with the Union, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

amounts may be determined, depending upon the circumstances of each case, by reference to provisions in the documents governing the funds at issue and, where there are no governing provisions, to evidence of any loss directly attributable to the unlawful withholding action, which might include the loss of return on investment of the portion of funds withheld, additional administrative costs, etc., but not collateral losses. See *Merryweather Optical Company*, 240 NLRB 1213, 1216, fn. 7 (1979).

⁴ See *Ogle Protection Service, Inc. and James L. Ogle*, 183 NLRB 682, 683 (1970); and see, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). In accordance with his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Bildisco and Bildisco, Debtor-in-Possession, Avenel, New Jersey, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with the Union as the exclusive bargaining representative of its employees in the following appropriate unit:

All warehousemen, drivers and mechanics including straight truck drivers, outside field service men, order pickers, helpers, working foremen, employed at Respondent's Avenel place of business, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

(b) Failing and refusing to make pension, health, and welfare contributions, to remit to the Union dues withheld from its employees' pay, to pay vacation benefits, and to pay wage increases, all as required by its collective-bargaining agreement with the Union.

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

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

(a) Recognize and bargain with the Union as the exclusive representative of its employees in the aforesaid appropriate unit by honoring the collective-bargaining agreement executed by it on May 1, 1979, in all its terms.

(b) Make whole its employees, in the manner set forth in the section of this Decision entitled "The Remedy," by making the required pension and health and welfare contributions it has failed to pay since January 3, 1980, by remitting to the Union the dues it has withheld from its employees' pay since January 3, 1980, plus interest, by paying the vacation benefits it has failed to pay since January 3, 1980, plus interest, and by paying to employees any wage increases it has failed to pay since May 1, 1980, plus interest, all as required by its collective-bargaining agreement with the Union.

(c) Preserve and, upon 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 money due under the terms of this Order.

(d) Post at its Avenel, New Jersey, place of business copies of the attached notice marked "Appendix."⁵ Copies of said notice, on forms provided by the Regional Director for Region 22, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 22, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

⁵ In the event that 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**

WE WILL NOT refuse to bargain collectively with Local 408, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive representative of all warehousemen, drivers, and mechanics including straight truck drivers, outside field service men, order pickers, helpers, working foremen, employed at our Avenel place of business, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

WE WILL NOT unilaterally change existing terms and conditions of employment of our employees in the above-described unit by failing and refusing to make pension, health, and welfare contributions, to remit to the Union the dues withheld from our employees' pay, to pay vacation benefits, and to grant wage increases, all as required by our collective-bargaining agreement with the Union.

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

WE WILL recognize and bargain with the Union as the exclusive representative of our employees in the above-described unit by honoring the collective-bargaining agreement executed by us on May 1, 1979, in all its terms.

WE WILL make whole our employees by making the pension and health and welfare contributions we have failed to pay since January 3, 1980, by remitting to the Union the dues we have withheld from our employees' pay

since January 3, 1980, plus interest, by paying the vacation benefits we have failed to pay since January 3, 1980, plus interest, and by paying our employees any wage increases we have failed to pay since May 1, 1980, plus interest, all as required by our collective-bargaining agreement with the Union.

BILDISCO AND BILDISCO, DEBTOR-IN-
POSSESSION