

Z&Z Distributing Company/and its alter ego or successor employer, Nature Beverage Co. and Aluminum, Brick and Glass Workers International Union, AFL-CIO, CLC, Local 87.
Case 8-CA-27805

March 26, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING
AND FOX

Upon a charge filed by the Union on November 1, 1995, the General Counsel of the National Labor Relations Board issued a complaint on December 7, 1995,¹ against Z&Z Distributing Company and its alter ego or successor employer, Nature Beverage Co., the Respondents, alleging that they have violated Section 8(a)(1) and (5) of the National Labor Relations Act. Although properly served copies of the charge and complaint, the Respondents failed to file an answer.

On February 20, 1996, the General Counsel filed a Motion for Summary Judgment with the Board. On February 21, 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 Respondents 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 letters dated December 13, 1995, and January 9, 1996, notified the Respondents that unless an answer were received by December 21, 1995, and January 16, 1996, respectively, a Motion for Summary Judgment would be filed.

In the absence of good cause being shown for the failure to file a timely answer, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

¹ As amended January 24, 1996. The amendment merely corrected the Charging Party Union's name.

FINDINGS OF FACT

I. JURISDICTION

Sometime between July 1 and September 29, 1995, Respondent Nature Beverage Co. (Nature) purchased the business of Z&Z Distributing Co. (Z&Z) and since then has continued to operate the business of Z&Z in basically unchanged form, and has employed as a majority of its employees, individuals who were previously employees of Respondent Z&Z. Based on these operations, Respondent Nature has continued the employing entity and is a successor to Respondent Z&Z.

Sometime before July 1995, Respondent Nature was established by Respondent Z&Z as a disguised continuation of Respondent Z&Z. Based on this conduct, Respondent Nature and Respondent Z&Z are, and have been at all material times, alter egos and a single employer within the meaning of the Act.

At all material times, Respondent Z&Z, an Ohio corporation with an office and place of business in Toledo, Ohio, has been engaged in business as a wholesale beverage distributor. During the 12-month period ending November 1, 1995, Respondent Z&Z, in conducting its business operations, purchased and received at its Toledo, Ohio facility goods valued in excess of \$50,000 directly from points outside the State of Ohio.

At all material times, Respondent Nature, an Ohio corporation with an office and place of business in Toledo, Ohio, has also been engaged in business as a wholesale beverage distributor. Based on its operations since about September 29, 1995, at which time Respondent Nature commenced its operations, Respondent Nature, in conducting its business operations, will annually purchase and receive at its Toledo, Ohio facility goods valued in excess of \$50,000 directly from points outside the State of Ohio.

We find that Respondent Z&Z and Respondent Nature are employers 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 Respondents constitute a unit appropriate for the purposes of collective bargaining within the meaning of the Act:

All driver/salesmen, combination route drivers, and warehousemen, employed by the Respondents at their Toledo, Ohio facility, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

Since about September 21, 1992, and at all material times, the Union has been the designated exclusive

collective-bargaining representative of the unit and has been recognized as the representative by Respondent Z&Z. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which is effective from September 21, 1992, to September 20, 1995.

Since about October 2, 1995, based on the facts set forth above, the Union has also been the designated exclusive collective-bargaining representative of the unit employees employed by Respondent Nature.

Since at least September 21, 1992, until September 29, 1995, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the unit employees employed by Respondent Z&Z. At all times since about September 29, 1995, based on Section 9(a) of the Act, the Union has also been the exclusive collective-bargaining representative of Respondent Nature's employees.

About July 20, 1995, the Union requested that Respondent Z&Z bargain collectively with the Union as the exclusive collective-bargaining representative of the unit with respect to the effects of Respondent Z&Z's decision to cease operations, and since that date, Respondent Z&Z has failed and refused to do so.

About August 4, 1995, the Union also requested that Respondent Z&Z meet and bargain for a new collective-bargaining agreement, and, since that date, Respondent Z&Z has failed and refused to do so.

About September 29, 1995, Respondent Z&Z withdrew its recognition of the Union as the exclusive collective-bargaining representative of the unit. About that same date, Respondent Nature unilaterally implemented a new wage and benefit package. These subjects relate to wages, hours, and other terms and conditions of employment of the unit and are mandatory subjects for the purposes of collective bargaining. Respondent Nature engaged in this conduct without prior notice to the Union and without affording it an opportunity to bargain with Respondent Nature with respect to this conduct.

CONCLUSION OF LAW

By the acts and conduct described above, the Respondents have been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of their employees, and have 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 Respondents have 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 Respondents have violated

8(a)(5) by failing to meet and bargain with the Union with respect to the effects on the unit employees of Z&Z's decision to cease operations and for a new collective-bargaining agreement, and by withdrawing recognition from the Union as the exclusive collective-bargaining representative of the unit, we shall order the Respondents to recognize and bargain with the Union over the effects of Respondent Z&Z's decision to cease operations and for a new collective-bargaining agreement and, if an understanding is reached, to embody such understanding in a signed agreement.

As a result of Respondent Z&Z's unlawful failure to bargain in good faith with the Union about the effects of its decision to close its facility, Respondent Z&Z's 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.²

Accordingly, we deem it necessary, in order to effectuate the purposes of the Act, to require the Respondents to bargain with the Union concerning the effects of closing Respondent Z&Z's facility on the unit employees, and shall accompany our order with a limited backpay requirement designed both 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 position is not entirely devoid of economic consequences for the Respondents. We shall do so by ordering the Respondents pay backpay to Respondent Z&Z's unit employees in a manner similar to that required in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968).

Thus, the Respondents shall pay these employees backpay at the rate of their normal wages when last in Respondent Z&Z'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 Respondents bargain to agreement with the Union on those subjects pertaining to the effects of the closing of Respondent Z&Z's facility on its employees; (2) a bona fide impasse in bargaining; (3) the Union's failure to request bargaining within 5 days of the date of this Decision and Order, or to commence negotiations within 5 days of the Respondents' notice of its desire to bargain with the Union; (4) the Union's subsequent failure to bargain in good faith; but in no event shall the sum paid to these employees exceed the amount

² As the complaint and motion are less than clear, however, as to the actual impact, if any, of the closure of Respondent Z&Z's facility on the employees, we shall permit the Respondents to contest the appropriateness of such a *Transmarine* backpay remedy at the compliance stage. See *United Exposition Service Co.*, 313 NLRB 1007 (1994), and *Creative Woodworking*, 313 NLRB 1241, 1242 (1994).

they would have earned as wages from the date on which Respondent Z&Z terminated its operations, to the time they secured equivalent employment elsewhere, or the date on which the Respondents shall have offered to bargain in good faith, whichever occurs sooner; provided, however, that in no event shall this sum be less than Respondent Z&Z's unit employees would have earned for a 2-week period at the rate of their normal wages when last in Respondent Z&Z's employ. Backpay shall be based on earnings which Respondent Z&Z's 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).

Furthermore, having found that Respondent Nature unilaterally implemented a new wage and benefit package about September 29, 1995, we shall order the Respondents, on request, to rescind the changes in wages and benefits of the unit employees, and to make them whole, with interest, for any losses attributable to these unlawful changes since that date. Backpay shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enf. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, supra.

Finally, in view of the fact that Respondent Z&Z's facility is currently closed, we shall order the Respondents to mail a copy of the attached notice to the Union and to the last known addresses of Respondent Z&Z's former employees in order to inform them of the outcome of this proceeding. We shall also order that notices be posted at Respondent Nature's facilities.

ORDER

The National Labor Relations Board orders that the Respondents, Z&Z Distributing Company and its successor, alter ego, and single employer, Nature Beverage Co., Toledo, Ohio, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with Aluminum, Brick and Glass Workers International Union, AFL-CIO, CLC, Local 87 as the exclusive collective-bargaining representative of the following unit with respect to the effects of Respondent Z&Z's decision to cease operations or for a new collective-bargaining agreement:

All driver/salesmen, combination route drivers, and warehousemen, employed by Z&Z Distributing Company or Nature Beverage Co. at their Toledo, Ohio facility, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

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

(c) Unilaterally implementing new wages or benefit packages.

(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) Recognize and, on request, bargain with the Union as the exclusive representative of the unit with respect to the effects on the unit employees of Z&Z Distributing Company's decision to cease operations and for a new collective-bargaining agreement and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Pay limited backpay to the unit employees of Respondent Z&Z in the manner set forth in the remedy section of this decision.

(c) Rescind, on request, the September 29, 1995 changes in wages and benefits of the unit employees and make them whole, with interest, for any losses attributable to these unlawful changes since that date, in the manner set forth in the remedy section of this decision.

(d) 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.

(e) Post at their facility in Toledo, Ohio, copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondents' authorized representative, shall be posted by the Respondents 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 Respondents to ensure that the notices are not altered, defaced, or covered by any other material. The Respondents shall also mail an exact copy of the signed notice to the Union, Aluminum, Brick and Glass Workers International Union, AFL-CIO, CLC, Local 87, and to the unit employees of Z&Z Distributing Company at their last known address.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondents have taken to comply.

³If 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 refuse to bargain collectively with Aluminum, Brick and Glass Workers International Union, AFL-CIO, CLC, Local 87 as the exclusive collective-bargaining representative of the following unit with respect to the effects of Z&Z Distributing Company's decision to cease operations or for a new collective-bargaining agreement:

All driver/salesmen, combination route drivers, and warehousemen, employed by us at our Toledo, Ohio facility, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

WE WILL NOT withdraw recognition of the Union as the exclusive collective-bargaining representative of the unit.

WE WILL NOT unilaterally implement new wages or benefit packages.

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 recognize and, on request, bargain with the Union as the exclusive representative of the unit with respect to the effects on the unit employees of our decision to cease operations and for a new collective-bargaining agreement and, if an understanding is reached, embody such understanding in a signed agreement.

WE WILL pay limited backpay to the unit employees of Z&Z Distributing Company, plus interest, as required by the Board's Order.

WE WILL, on request, rescind the September 29, 1995 changes in wages and benefits of the unit employees and WE WILL make them whole, with interest, for any losses attributable to these unlawful changes since that date.

Z&Z DISTRIBUTING COMPANY AND ITS
SUCCESSOR, ALTER EGO, AND SINGLE
EMPLOYER, NATURE BEVERAGE CO.