

Weatherly Frozen Food Group, Inc. d/b/a Vroman Foods and Toledo Frigid Lines, Inc. and Local No. 20, International Brotherhood of Teamsters, AFL-CIO.¹ Case 8-CA-23552

October 9, 1992

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND
RAUDABAUGH

Upon a charge filed on April 22, 1991, and an amended charge filed on July 15, 1991, by Local No. 20, International Brotherhood of Teamsters, AFL-CIO (the Union), the General Counsel of the National Labor Relations Board issued a complaint on July 17, 1991, alleging that the Respondents violated Section 8(a)(5) and (1) of the National Labor Relations Act. The complaint alleges that the Respondents violated the Act by failing to make contributions to a defined benefit pension plan for unit employees, failing to provide for vacation benefits for unit employees, and failing to bargain collectively with the Union over the effects of the closure of the Toledo Frigid Lines facility.

On April 20, 27, and 29, 1992, the parties jointly moved the Board to transfer the proceeding to the Board, without benefit of a hearing before an administrative law judge, and submitted a proposed record consisting of the formal papers and the parties' stipulation of facts with attached exhibits. On July 15, 1992, the Deputy Executive Secretary, by direction of the Board, issued an order approving the stipulation, granting the motion, and transferring the proceeding to the Board. The General Counsel and the Charging Party have filed briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

On the entire record in the case, the Board makes the following findings.

I. JURISDICTION

Respondent Weatherly Frozen Food Group, Inc. d/b/a Vroman Foods (Respondent Weatherly) is a Delaware corporation with an office and place of business in Toledo, Ohio, where it is engaged in the manufacture and nonretail sale of frozen foods. Annually, Respondent Weatherly, in the course and conduct of its business operations purchases and receives at its Toledo, Ohio facility products, goods, and materials valued in excess of \$50,000 directly from points outside the State of Ohio. Respondent Toledo Frigid Lines, Inc. (Respondent Toledo) is an Ohio corporation with an office and place of business in Toledo, Ohio, where it has been engaged as a contract carrier. Annually,

¹ The name of the Charging Party has been changed to reflect the new official name of the International Union.

until it ceased operation about March 8, 1991, Respondent Toledo, in the course and conduct of its business operations, performed interstate transportation services valued in excess of \$50,000 in States other than the State of Ohio. Accordingly, we find that Respondents Weatherly and Toledo are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The General Counsel alleged, the Respondents admit, and we find that Local No. 20, International Brotherhood of Teamsters, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICE

The following employees of the Respondents (individually unit A and unit B and collectively the units) constitute units appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

Unit A

All full-time and regular part-time production employees, including all plant employees, packaging employees, warehouse and storage employees, sanitation employees, transport drivers, bakery production employees, and seasonal employees employed by Weatherly Frozen Food Group, Inc. d/b/a Vroman Foods, at its Toledo, Ohio facility, but excluding all other employees, maintenance employees, office clerical employees, managers, guards and supervisors as defined in the Act.

Unit B

All full-time and regular part-time road drivers, including seasonal drivers, employed by Toledo Frigid Lines, Inc., at its Toledo, Ohio facility, but excluding owner operators, independent contractors, mechanics, office clerical employees, professional employees, guards and supervisors as defined in the Act.

At all times material, the Union has been recognized by Respondent Weatherly as the designated exclusive collective-bargaining representative of the employees in unit A, based on Section 9(a) of the Act. Recognition has been embodied in successive collective-bargaining agreements, the most recent of which is effective by its terms for the period December 10, 1989, to November 7, 1992.

At all times material, the Union has been recognized by Respondent Toledo as the designated exclusive collective-bargaining representative of the employees in unit B, based on Section 9(a) of the Act. Such recognition has been embodied in successive collective-bargaining agreements, the most recent of which is effective

tive by its terms for the period December 2, 1989, to November 7, 1992.

The parties' collective-bargaining agreements require the Respondents to establish and fund a defined benefit pension plan either through a group annuity contract (or contracts), a trust, or a combination of group annuity contract(s) and a trust. The Respondents are required to make contributions as necessary to meet the funding requirements of the Employee Retirement Income Security Act of 1974 (ERISA) and of the Internal Revenue Code. The parties' collective-bargaining agreements also require the Respondents to provide specified vacation benefits to the unit employees. The Respondents admit that on February 19, 1991, and again on May 4, 1991, they informed the Union that they would not comply with their obligations to provide vacation benefits under those contractual provisions. On February 19, 1991, the Union learned for the first time that the Respondents had failed to fund the pension plans called for in their respective collective-bargaining agreements. Since that date, the Respondents have continued to fail and refuse to fund the pension plans. The Respondents admit that they engaged in the above-described acts and conduct without the consent of the Union and without having afforded the Union an opportunity to negotiate and bargain as the exclusive representative of the Respondents' employees in the units.

On March 8, 1991, the Respondents informed the Union that their facilities would close. Respondent Toledo closed its facility shortly thereafter. Respondent Weatherly continues in operation to date. On March 18, 1991, the Union made a written request to bargain over the effects of these closures, to which the Respondents have not replied. Respondent Toledo closed its facility without having afforded the Union an opportunity to negotiate and bargain as the exclusive representative of its employees with respect to the effects of Respondent Toledo's closure of its facility.

The Respondents raise no defense for their actions.

The General Counsel, relying on *St. Louis Gateway Hotel*, 286 NLRB 863 (1987), and *Redway Carriers*, 274 NLRB 1359, 1405 (1985), argues that the Respondents' failure to pay unit employees their vacation pay violates the Act. Relying on *Raymond Prats Sheet Metal Co.*, 285 NLRB 194 (1987), the General Counsel also argues that the failure to fund the contractually mandated pension plan also violates the Act. Finally, relying on *Barney's Club*, 288 NLRB 803 (1988), and *St. Louis Gateway Hotel*, supra, the General Counsel asserts that Respondent Toledo's failure to bargain over the effects of its decision to close its facility likewise violated the Act.²

²Because Respondent Weatherly continues in operation, the General Counsel has moved to amend the complaint to delete the allega-

Based on the parties' submissions, we find that Respondent Toledo has failed to bargain over the effects of its decision to close its facility and the Respondents have failed to make contributions to the contractually required defined benefit pension funds and have failed to pay vacation benefits to their unit employees as required under their collective-bargaining agreements and they have thereby violated Section 8(a)(5) and (1) of the Act.³

CONCLUSIONS OF LAW

1. Weatherly Frozen Food Group, Inc. d/b/a Vroman Foods is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Toledo Frigid Lines, Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

3. Local No. 20, International Brotherhood of Teamsters, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

4. The appropriate collective-bargaining units are:

Unit A

All full-time and regular part-time production employees, including all plant employees, packaging employees, warehouse and storage employees, sanitation employees, transport drivers, bakery production employees, and seasonal employees employed by Weatherly Frozen Food Group, Inc. d/b/a Vroman Foods, at its Toledo, Ohio facility, but excluding all other employees, maintenance employees, office clerical employees, managers, guards and supervisors as defined in the Act.

Unit B

All full-time and regular part-time road drivers, including seasonal drivers, employed by Toledo Frigid Lines Inc., at its Toledo, Ohio facility, but excluding owner operators, independent contractors, mechanics, office clerical employees, profes-

tion that Respondent Weatherly failed to bargain over the effects of the closure. The motion is granted.

³In Member Oviatt's view, there are limited circumstances, not present here, in which an employer's financial inability to pay constitutes a defense to an allegation that it unilaterally and unlawfully ceased contractually required payments to union benefit funds. To make this defense successfully, an employer must establish that it continued to recognize—and did not repudiate—its contractual obligations. To satisfy this requirement, an employer must prove that its nonpayment was followed by its request to meet with the union to discuss and resolve the nonpayment problem. In so doing, an employer demonstrates its adherence to the contract and the bargaining process. In such circumstances, Member Oviatt would find that an employer's nonpayment of contractually required benefit fund payments would not violate Sec. 8(a)(5) of the Act. See *Zimmerman Painting & Decorating*, 302 NLRB 856 (1991); *Tammy Sportswear Corp.*, 302 NLRB 860 (1991).

sional employees, guards and supervisors as defined in the Act.

5. At all times material, the above-named labor organization has been and is now the designated exclusive collective-bargaining representative of all employees in the appropriate units for the purposes of collective bargaining by virtue of Section 9(a) of the Act.

6. The Respondents have committed unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act by failing and refusing to establish and fund a defined benefit pension fund as required by their respective collective-bargaining agreements, and by failing and refusing to make vacation payments to their unit employees as required by their respective collective-bargaining agreements.

7. Respondent Toledo has committed unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act by failing to bargain over the effects of the closure of its facility.

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

REMEDY

Having found that the Respondents have engaged in certain unfair labor practices in violation of Section 8(a)(5) and (1) of the Act, we shall order them to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

We have found that the Respondents have violated Section 8(a)(5) and (1) of the Act by failing and refusing to make contractually required pension contributions and by failing to make contractually required vacation payments to their unit employees. In order to remedy these unfair labor practices, we shall order the Respondents to transmit the required pension contributions to the pension funds, with any interest or other sums applicable to the payments to be computed in accordance with the Board's decision in *Merryweather Optical Co.*, 240 NLRB 1213, 1216 (1979). We shall also order the Respondents to make the unit employees whole for any loss of pension plan credits or benefits they may have suffered as a result of the Respondents' failure to make the contractually required pension fund contributions, *Kraft Plumbing & Heating*, 252 NLRB 891 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), and with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

We further order that the Respondents grant vacation pay to their employees as provided in their respective contracts, retroactive to February 19, 1991, to be computed in the manner set forth in *Ogle Protection*

Service, supra, and with interest to be computed in the manner prescribed in *New Horizons*, supra.

Having found that Respondent Toledo closed its facility without notice to the Union and without affording the Union an opportunity to bargain over the effects of the closing, we shall order that the former employees be paid limited backpay from 5 days after the date of receipt of this decision⁴ until the occurrence of the earliest of the following conditions: (1) the date that Respondent Toledo bargains to agreement with the Union on those subjects pertaining to the effects of its decision to close the Toledo facility; (2) a bona fide impasse in bargaining; (3) the failure of the Union to request bargaining within 5 days of Respondent Toledo's giving notice of its desire to bargain with the Union; or (4) the subsequent failure of the Union to bargain in good faith; but in no event shall the sum paid to any of these employees exceed the amount he or she would have earned as wages from the date Respondent Toledo closed its plant, to the time he or she secured equivalent employment elsewhere, or the date on which Respondent Toledo shall have offered to bargain, whichever occurs sooner; provided, however, that in no event shall this sum be less than what these employees would have earned for a 2-week period at the rate of their normal wages when last in Respondent Toledo's employ. *Transmarine Corp.*, 170 NLRB 389 (1968). Interest on all such sums shall be paid in the manner prescribed in *New Horizons*, supra.

ORDER

The National Labor Relations Board orders that:

A. Respondent Weatherly Frozen Food Group, Inc. d/b/a Vroman Foods, Toledo, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain with Local No. 20, International Brotherhood of Teamsters, AFL-CIO by unilaterally failing to make vacation payments to its unit employees and failing to make required pension contributions, as required by the collective-bargaining agreement.

(b) 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) Make all vacation payments and all payments to the contractually required defined benefit pension plan that have not been paid and that would have been paid in the absence of the Respondent's unlawful failure to make those payments, and make the employees whole in the manner set forth in the remedy section of this decision.

⁴*Emsing's Supermarket*, 307 NLRB 421 (1992).

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

(c) Post at its facility in Toledo, Ohio, copies of the attached notice marked "Appendix A."⁵ Copies of the notice, on forms provided by the Regional Director for Region 8, 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.

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

B. Respondent Toledo Frigid Lines, Inc., Toledo, Ohio, its officers, agents, successors, and as signs, shall

1. Cease and desist from

(a) Failing and refusing to bargain with Local No. 20, International Brotherhood of Teamsters, AFL-CIO by unilaterally failing to make vacation payments to its unit employees and failing to make pension contributions, as required by the collective-bargaining agreement.

(b) Unlawfully refusing to bargain collectively with the Union over the effects of the closure of the Toledo facility.

(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) Make all vacation payments and all payments to the contractually required defined benefit pension plan that have not been paid and that would have been paid in the absence of the Respondent's unlawful failure to make those payments up until the time the Respondent closed its facility on March 8, 1991, and make the employees whole, in the manner set forth in the remedy section of this decision.

(b) On request, bargain collectively with the Union over the effects of the closure of the Toledo facility and reduce to writing any agreement reached as a result of bargaining.

⁵If 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."

(c) Pay the former employees their normal wages for the period 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, time-cards, 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 its facility in Toledo, Ohio, and mail to the last known address of all former employees in the appropriate bargaining unit copies of the attached notice marked "Appendix B."⁶ Copies of the notice, on forms provided by the Regional Director for Region 8, 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.

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

⁶If 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 A

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 with Local No. 20, International Brotherhood of Teamsters, AFL-CIO by failing to make contractually required defined benefit pension plan contributions and vacation payments to our 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 make the pension fund contributions which we have withheld, with interest, pursuant to the collective-bargaining agreement between ourselves and the Union.

WE WILL make contractually required vacation payments, with interest, to our unit employees.

WE WILL make whole our employees in the unit for any losses directly attributable to our withholding of the pension contributions, with interest. The appropriate unit is:

All full-time and regular part-time production employees, including all plant employees, packaging employees, warehouse and storage employees, sanitation employees, transport drivers, bakery production employees, and seasonal employees employed by Weatherly Frozen Food Group, Inc. d/b/a Vroman Foods, at its Toledo, Ohio facility but excluding all other employees, maintenance employees, office clerical employees, managers, guards and supervisors as defined in the Act.

WEATHERLY FROZEN FOOD GROUP,
INC. D/B/A VROMAN FOODS

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
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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 with Local No. 20, International Brotherhood of Teamsters, AFL-CIO by failing to make contractually required defined benefit

pension plan contributions and vacation payments to our unit employees.

WE WILL NOT refuse to bargain with the Union over the effects of the closure of the Toledo, Ohio facility.

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 transmit the defined benefit pension fund contributions which we have unlawfully withheld, with interest, pursuant to the collective-bargaining agreement between ourselves and the Union.

WE WILL make contractually required vacation payments, with interest, to our unit employees.

WE WILL, on request, bargain collectively with the Union over the effects of closing the Toledo facility.

WE WILL pay the laid-off employees their normal wages for the period set forth in the remedy section of this decision.

WE WILL make whole our employees in the unit for any losses directly attributable to our withholding of the pension contributions, with interest. The appropriate unit is:

All full-time and regular part-time road drivers, including seasonal drivers, employed by Toledo Frigid Lines, Inc., at its Toledo, Ohio facility, but excluding owner operators, independent contractors, mechanics, office clerical employees, professional employees, guards and supervisors as defined in the Act.

TOLEDO FRIGID LINES, INC.