

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

**Asher Candy, Inc. and Sherwood Brands, Inc., LLC,
A Single Employer**

and

Case No. 29-CA-26761

**Local 102, Bakery, Confectionery, Tobacco Workers
and Grain Millers International Union, AFL-CIO**

***Nancy Lipin, Esq., for the General Counsel.
Uziel Frydman, President, Sherwood Brands, Inc., for the Respondent
Ray Aquilino, Business Agent, for the Charging Party.***

DECISION

Statement of the Case

Howard Edelman, Administrative Law Judge. This case was tried in Brooklyn, New York on May 24, 25, and June 1, 2, and 3, 2005.

On February 2, 2005 and on April 11, 2005, Local 102, Bakery, Confectionery, Tobacco Workers and Grain Millers International Union AFL-CIO, herein called the Union, filed charges against Asher Candy, Inc. and Sherwood Brands, Inc., a single employer.

Consistent with these charges the Regional Director of Region 29 issued on April 12, 2005, a complaint and amended complaints on May 24 and June 1, 2005 alleging violations of Sections 8(a)(1) and (5) of the Act.

The issues presented in the complaints are whether Respondent Asher and Respondent Sherwood are a single employer.

Whether Respondent Employers, as a single employer failed to provide severance and accrued vacation pay upon the closure of Respondent Asher, as provided by its collective bargaining agreement between Respondent Asher and the Union in violation of Section 8(a)(1) and (5) of Act.

Whether Respondent Employers closed the Respondent Asher facility without notice to the Union and laid off its total workforce without giving the Union the opportunity to bargain about the affects of such action.

It is admitted in Respondents answer that at all material times, Respondent Asher, a domestic corporation, with its principal office and place of business located at 1815 Gilford Avenue, New Hyde Park, New York, herein called the New Hyde Park facility, has been in the business of manufacturing and selling candy canes in the State of New York, and that during the past year, which period is representative of its annual operations generally, Respondent Asher, in the course and conduct of its operations, purchased and received at its New Hyde

Park facility, goods and materials valued in excess of \$50,000 directly from suppliers located outside the State of New York.

5 It is also admitted that at all material times, Respondent Sherwood, a domestic corporation, with its principal office and place of business located at 1803 Research Boulevard, Suite 201, Rockville, Maryland, herein called the Maryland facility, has been engaged in the business of manufacturing and marketing confectionary products, and that during the past year, which period is representative of its annual operations generally, Respondent Sherwood, in the course and conduct of its operations, purchased and received at its Maryland facility, goods and materials valued in excess of \$50,000 directly from suppliers located outside the State of Maryland.

10 I find that Respondent Employers are engaged in interstate commerce within the meaning of Section 2(2), (6) and (7) of the Act.

15 It is admitted that Uziel Frydman is the President of both Respondent Asher and Respondent Sherwood. In addition, Frydman tried this case on behalf of Respondent Employers ¹

20 It is admitted that Christopher J. Willi is the Chief Financial Officer for both Respondent Asher and Respondent Sherwood.

It is also admitted that James Spampinato is the General Manager of Respondent Asher.

25 It is also admitted that the above named individuals are supervisors within the meaning of Section 2(11) of the Act.

30 The relevant facts of this case, with the exception of when or if Respondent Employers gave notice to the Union of its intention to layoff and close the Asher facility, were entirely admitted by Frydman in his opening statement, and by questions put to him, Willi and Spampinato by General Counsel, pursuant to Federal Rules of Procedure 611(c), and testimony by Frydman, Willi and Spampinato when presenting their case, as well as cross examining General Counsel's witnesses.

35 Over the last approximately 20 years, Asher had several different owners. In April of 2002, Respondent Sherwood bought Asher. At the time of the purchase, Jim Spampinato and several partners owned Asher. Spampinato, a longtime Asher employee, has held various positions with Asher, including President, Plant Manager, Operations Manager and Comptroller. After Sherwood bought Asher, Spampinato worked as Respondent Asher's General Manager. In his capacity as General Manager, he was responsible for the day-to-day operations of the plant. Asher generally operated on a seasonal basis, hiring employees from January through April, and laying employees off in and around October. Asher's workforce was very stable and there were many long term, skilled employees who returned year after year to make and ship candy canes. In addition, there was no history of strikes or other labor unrest at Asher. Respondent Asher's New Hyde Park facility closed on October 29 2004.

45 Respondent Sherwood manufactures, markets and distributes numerous lines of candies, cookies and gift baskets. Until March of 2005, Respondent Sherwood was publicly traded on the American Stock Exchange. Respondent Sherwood has several subsidiaries,

50 ¹ Frydman is not an attorney.

including facilities located in Virginia, Massachusetts, Rhode Island, Maryland and the 2002 purchase of Respondent Asher. After Respondent Asher closed, the manufacturers of candy canes formerly manufactured by Respondent Asher are now manufactured at Respondent Sherwood's facilities in Brazil.

5 The Union represented the employees at the Asher facility since 1992, in a unit consisting of:

10 All full-time and part-time production and maintenance employees including all temporary employees, excluding office sales employees and supervisors as defined in Section 2(11) of the Act.

When Respondent Sherwood purchased Respondent Asher it assumed the Union contract which expired on June 30, 2002.

15 Shortly before this contract expired, Ray Aquilino, the Union Representative negotiated with Willi and Spampinato and executed a signed document titled "Memorandum of Agreement between Local 102 and Asher." The first provision in the MOA states: "Terms of contract – 3 years." There were 5 other terms, 4 of which related to wages, and one to a "Rest Period."

20 The Union contends that the MOA was a continuation of the 1999-2002 collective bargaining agreement as modified by the MOA, and expired on June 30, 2005.

25 Frydman, representing Respondent Employers contends that the contract expired June 30, 2002 and was not renewed, that there was no existing collective bargaining agreement after June 30, 2002. In this connection he makes two contentions. First that the MOA was not titled as a collective bargaining agreement and therefore the MOA means nothing. Secondly, he contends that neither he nor Willi signed a document titled collective bargaining agreement a contract between the Union and Respondent Asher. It is true that the Union prepared a single document which contained the provisions of the 1999-2002 agreement and the modifications set forth in the MOA with an expiration date of June 30, 2005 which Willi, Frydman and Spampinato refused to sign. Notwithstanding their signatures on the terms of the MOA, I find the MOA which provides a term of three years is clearly a collective bargaining agreement which includes all the 1999-2000 terms as modified by the MOA.

35 Moreover, when Frydman was examined by Counsel for the General Counsel he admitted the terms of 1999 bargaining agreement as modified by the MOA were being complied with. Spampinato also admitted under cross examination that all the terms of the 1999-2002 agreement as modified by the MOA, were being complied with "until this problem about the severance package." Frydman specifically admitted that vacation pay was due under the MOA as modified by the 1999-2000 collective bargaining agreement, herein called "Respondent Asher's collective bargaining agreement," and testified that it would be paid stating that, "the amount is not too much." To date accrued vacation pay has not been paid to the employees.

45 Further evidence that Frydman knew he was liable for the severance pay is set forth in Respondent Employers' Securities Exchange Commission, (SEC) Form 10K dated October 28, 2004, signed by Frydman within a few days after Asher's closure on October 29, 2004 states:

50 As of October 8, 2004, the Company had approximately 61 full-time employees and approximately 112 part-time or seasonal employees. Of the Company's full-time workforce, 16 are located at the Company's principal office in Rockville, MD. The Company

has approximately 36 full and part-time employees in Virginia, approximately 75 full, part-time and seasonal employees in Rhode Island and Massachusetts and 46 full, part-time and seasonal employees in its New Hyde Park, NY facility. Management believes that the Company's relationship with its employees is good. The 40 employees at the Asher Candy facility are the Company's only employees represented by labor unions under a collective bargaining agreement. The closure of the Asher Candy facility in New Hyde Park, New York in November 2004 will have an effect on the entire 40 employees at the facility. The Company will provide the required State of New York timetable for severance associated with each remaining employee under the union contract at the time the facility is closed. The Union contract stipulates that severance will be based on seniority of employment at the New Hyde Park, New York facility. The potential liability to the Company for severance could be up to approximately \$155,000. [Emphasis added.]²

I conclude Respondent Employer's failure to pay severance and vacation pay is a unilateral change in violation of Section 8(a)(1) and (5) of the Act. See, *Champion International Corp.*, 339 NLRB 672 (2003), a case similar to this instant case, finding that the failure to pay employees earned vacation pay, and unilaterally implementing preconditions for severance pay are unilateral changes in violation of Section 8(a)(1) and (5) of the Act.

Closure of Respondent Asher

Frydman and Spampinato admitted under cross examination by General Counsel that they laid off the employees and effectively closed the Asher facility on October 29, 2004. Spampinato admitted that he knew "a while before" the actual closure date was scheduled to take place. Frydman admitted he never informed the Union of the closure, although it was he who made the decision to close the Asher facility sometime before Spampinato had knowledge.

Aquilino credibly testified he first became aware of the closure of the Asher facility on or about October 29. When he visited the Asher facility he observed that a few employees were moving machinery about. It was clear that production was over.

I find at this time October 29, the deed was done and that effective bargaining could not take place. *First National Maintenance Corp.*, 452 U.S. 666, 681 (1981).

Moreover, under these circumstances, the Union cannot be found to have waived any right to bargain as Respondent Employers presented it with a fait accompli. See, e.g., *Champion Int'l Corp.*, 339 NLRB No. 80 at 29 (2003) and cases cited therein. I find that Respondent Employers violated Section 8(a)(1) and (5) of the Act in this regard.

To remedy this violation it is requested that Respondent Employers be ordered to bargain with the Union, on request, about the effects of its decision to close. In addition, Respondent Employers should be ordered to pay backpay to the laid off employees in the manner prescribed in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968).

² This SEC form is also evidence of a single employer.

The Single Employer Issue

The criteria that establish a single employer are set out in *RBE Electronics of S.D., Inc.*, 320 NLRB 80 (1995) and *Mercy Hospital of Buffalo*, 336 NLRB 1284 (2001) as follows:

5 The Board applies four factors in evaluating whether two entities constitute a single Employer: 1) interrelation of operations; 2) common management; 3) centralized control of labor relations and 4) common ownership or financial control. *Hydrolines, Inc.*, 305 NLRB 416, 417 (1991).

10 No one factor is controlling, and all factors do not have to be met in order for two entities to constitute a single employer. However, the Board has held that the first three factors are the most significant, and the third factor – centralized control of labor relations – is “of particular importance because it tends to demonstrate ‘operational integration.’” *RBE Electronics of S.D., Inc., supra*; *Hydrolines, Inc., supra*; *Mercy Hospital of Buffalo, supra*.

15 During this five day trial Frydman, acting as the representative of Respondent during his opening statement, his testimony under Section 611(c) and his own testimony in defense of the allegations alleged in the complaint, made admission after admission which was corroborated by the testimony of Willi and Spampinato. Given all the evidence it is clear that Respondent
20 Employers constitute a single employer under the requirements of *RBE Electronics, supra*.

 In addition, there were voluminous records submitted by both General Counsel and Respondent that corroborate the testimony in the trial record.

25 There is no credibility as to the facts relating to the single employer issue.

 Counsel for General Counsel in her brief, concisely states as follows:

30 In this case, the record evidence is clear that there is no arm’s length relationship between Respondent Employer, and all four factors used to evaluate single employer status are present. First, the top management at Respondent Sherwood and Respondent Asher are the same – Uziel Frydman, Amir Frydman
35 and Chris Willi – and Respondent Sherwood made all pension and dues payments to the Union on Sherwood Brands checks, approved all expenditures of any significance, processed and funded Respondent Asher’s payroll from a Sherwood corporate account, transferred employees among its facilities, made the
40 decision to eliminate certain shifts and approved overtime hours in non-emergency situations. Respondent Sherwood also made the decision to close Respondent Asher and not pay severance to the employees. In several recent documents filed with the SEC, Respondent Sherwood consistently characterized Respondent
45 Asher as part of Sherwood itself. Its website also shows that Sherwood markets its products, including Asher Candy Canes, as Sherwood Brands products and directs its message to Sherwood Brands customers.

50 Based on the above, it is clear that all four factors have been met and that Respondent Employers cannot, under any view of the undisputed facts, be considered to have an arm’s

length relationship.

Respondent's defense to this entire case was essentially that he, Frydman, had an absolute right to terminate the Asher facility, of Sherwood's facilities without notice to the Union, and that such termination would exclude any contract liability. Respondent's reason for the closure of the Asher facility was that the price of sugar in the United States was too high and much cheaper in Brazil.

Accordingly, I conclude that Respondent Asher and Respondent Sherwood are a single employer and as such was bound by the terms of the 1999–2002 agreement as modified by the MOA which expired in June 30, 2005.

Accordingly, I find that Respondents are required to meet the obligations of the collective bargaining agreement and pay to its employees, vacation pay and severance pay as set forth in the bargaining agreement.

Additionally, I find the failure to make such payments constitute unilateral changes in violation of Section 8(a)(1) and (5) of the Act. See, *Champion International Corp., supra*.

Conclusions of Law

1. At all times material herein Respondent Asher is an employer as defined in Section 2(2), (6) and (7) of the Act.

2. Respondent Sherwood is an employer as defined in Section 2(2), (6) and (7) of the Act.

3. At all times material herein Respondent Asher and Respondent Sherwood constitute a single integrated business enterprise and a single employer within the meaning of the Act.

4. The Union is a labor organization within the meaning of Section 2(5) of the Act.

5. At all times material herein, Respondent's Asher and Respondent Sherwood have been parties to a collective bargaining agreement with the Union, covering a unit of Respondent Asher's employees:

All full-time and part-time production and maintenance employees, including all temporary employees, excluding office sales employees and supervisors as defined by Section 2(11) of the Act.

6. On or about October 29, 2004, Respondent Employers terminated Respondent Asher's business operations and laid off its unit employees without notice to the Union of the termination of its business operations and the layoff of its employees³ in violation of Section 8(a)(1) and (5) of the Act.

7. Respondent Employers failed to pay to Respondent Asher's employees, accrued vacation pay and severance pay as set forth in Respondent Asher's collective bargaining

³ Approximately 4 unit employees worked until on or about early February 2005 moving machinery and performing cleaning operations. Production work ceased on October 29, 2004.

agreement in violation of Section 8(a)(1) and (5) of the Act. ⁴

Remedy

5 Having found Respondent Employees have engaged in the unfair labor practices described above I shall recommend an Order requiring Respondent Employers to cease and desist and to take certain affirmative action described below.

10 1. With respect to the termination and closure of Respondent Asher facility Respondent Employers must bargain with the Union on request, about the effects of its decision to close the Asher facility. In addition, Respondent Employers shall be ordered pay backpay to the laid off unit employees in the manner set forth and prescribed in *Transmarine Navigation Corp., supra*.

15 2. Pay to its employees all vacation and severance pay due pursuant to the terms of the parties' collective bargaining agreement.

20 3. With respect to Respondent Employers layoff of employees and its failure to pay its employees accrued vacation pay and severance pay pursuant to the terms of Respondent Asher's collective bargaining agreement with the Union, backpay, vacation pay and severance pay will be computed in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1956) with interest as prescribed by *New Horizon for the Retarded*, 283 NLRB 1173 (1987).

Upon these findings and conclusions of law , I issue the following recommended ⁵

ORDER

25 Respondent Employers, Asher Candy Inc. and Sherwood Inc., a single employer, its officers, successors and assigns shall

30 1. Cease and desist from

(a) Failing to provide to Local 102 Bakery, Confectionary, Tobacco Workers & Grain Millers International Union, AFL-CIO, herein called the Union, adequate notice of a layoff and closure of Respondent Asher Candy, Inc.

35 (b) Refusing to pay its employees severance and vacation pay pursuant to the terms of the Union's collective bargaining with Respondent Employers.

40 (c) In any like or related manner interfere with, restrain, or coerce 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) Within 14 days of this Order Respondent Employers must bargain with the Union on

45 ⁴ By a facsimile dated October 9, 2005, Respondent Employers state that during the week of October 10, 2005 they will pay accrued vacation pay.

50 ⁵ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

request about the effects of its decision to layoff its employees and close Respondent Asher’s facility.

(b) Within 14 days of this Order, Respondent Employers must pay backpay to the laid off employees in the manner set forth and described in the Remedy provision of this decision.

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(c) Within 14 days of this Order, Respondent Employers must pay to its employees all vacation pay, and severance pay due pursuant to the terms of Respondent Employers’ collective bargaining agreement with the Union as set forth above in the Remedy provision of this decision.

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(d) Within 14 days after service by the Region, mail at its own expense signed copies of the attached notice marked “Appendix.”⁶ to all unit employees employed by Respondent Asher during the years 2004 and 2005.

15 Dated, Washington, D.C.

Howard Edelman
Administrative Law Judge

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⁶ 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.”

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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 to provide to Local 102 Bakery, Confectionary, Tobacco Workers & Grain Millers International Union, AFL-CIO, herein called the Union, adequate notice of a layoff and closure of Respondent Asher Candy, Inc.

WE WILL NOT refuse to pay our employees severance and vacation pay pursuant to the terms of the Union's collective bargaining.

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

WE WILL within 14 days of this Order bargain with the Union on request about the effects of our decision to layoff our employees and close Asher's facility.

WE WILL within 14 days of this Order, pay backpay to the laid off employees in the manner set forth and described in the Remedy provision of this decision.

WE WILL within 14 days of this Order, pay to our employees all vacation pay, and severance pay due pursuant to the terms of our collective bargaining agreement with the Union as set forth above in the Remedy provision of this decision.

ASHER CANDY, INC. AND SHERWOOD BRANDS, INC., LLC

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

One MetroTech Center (North), Jay Street and Myrtle Avenue, 10th Floor
Brooklyn, New York 11201-4201
Hours: 9 a.m. to 5:30 p.m.
718-330-7713.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL COMPLIANCE OFFICER, 718-330-2862.