General Kinetics, Inc. and/or General Kinetics, Inc., Debtor-in-Possession *and* International Brotherhood of Electrical Workers, Local Union No. 459, AFL–CIO. Case 6–CA–35509

September 28, 2007

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

The General Counsel seeks a default judgment in this case on the ground that the Respondent has failed to file an answer to the amended complaint. Upon a charge and amended charge filed by the Union on February 21 and March 29, 2007, respectively, the General Counsel issued the complaint on April 2, 2007, against General Kinetics, Inc. and/or General Kinetics, Inc., Debtor-in-Possession (collectively called the Respondent), alleging that it has violated Section 8(a)(5) and (1) of the Act. The Respondent failed to file an answer.

On June 18, 2007, the General Counsel filed a Motion for Default Judgment with the Board. Thereafter, on June 25, 2007, 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 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 Default Judgment

Section 102.20 of the Board's Rules and Regulations provides 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 stated that unless an answer was filed by April 16, 2007, all the allegations in the complaint could be considered admitted. Further, the undisputed allegations in the General Counsel's motion disclose that the Region, by letter dated June 6, 2007, notified the Respondent that unless an answer was filed within 3 business days of the receipt of the letter, a motion for default 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 Default Judgment.[1]

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a Virginia corporation with an office and place of business in Johnstown, Pennsylvania (the Respondent's facility), has been engaged in the manufacture of blast-proof cabinetry for high-tech electronics. During the 12-month period ending January 31, 2007, the Respondent, in conducting its business operations described above, sold and shipped from its Johnstown, Pennsylvania facility goods valued in excess of $50,000 directly to points located outside the Commonwealth of Pennsylvania.

Since about February 9, 2007, the Respondent has been a debtor-in-possession with full authority to continue its operations and to exercise all powers necessary to administer its business.

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 International Brotherhood of Electrical Workers, Local Union No. 459, AFL–CIO (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, the following individuals held the positions set forth opposite their respective names and have been supervisors of the Respondent within the meaning of Section 2(11) of the Act and agents of the Respondent within the meaning of Section 2(13) of the Act:

Larry Heimendinger	—President & Chief Executive Officer
Richard Munczenski	—Vice President & Manager
Franco DeBlasio	—Chief Financial Officer
Jennifer Cline	—Human Resources Manager

The employees of the Respondent described in the collective-bargaining agreement between the Respondent and the Union, which was effective from June 1, 2004, through May 31, 2007, constitutes a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

At all material times, the Union has been the exclusive collective-bargaining representative of the unit and has been recognized as such by the Respondent. This recognition has been embodied in successive collective-

[1] The complaint states that about early to mid-January 2007, the Respondent notified the Union that it intended to file a bankruptcy petition. The General Counsel's motion notes that the Respondent has filed a bankruptcy petition with the United States Bankruptcy Court, Western District of Pennsylvania (Case Number 07-70111-BM). It is well established 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, e.g., *Cardinal Services*, 295 NLRB 933 fn. 2 (1989), and cases cited there. Board proceedings fall within the exception to the automatic stay provisions 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).

bargaining agreements, the most recent of which was effective from June 1, 2004, through May 31, 2007.

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

About early to mid-January 2007, the Respondent advised the Union that the Respondent intended to cease its manufacturing operations, close its facility, and file a bankruptcy petition.

On or about January 17, 2007, the Union requested that the Respondent bargain collectively about the effects of the closure of its facility.

Since about January 17, 2007, the Respondent has failed and refused to bargain collectively about the effects of the closure of its facility.

The subject set forth above relates to wages, hours, and other terms and conditions of employment of the unit and is a mandatory subject for the purposes of collective bargaining.

Since about January 17, 2007, the Union, by letter, has requested that the Respondent furnish the Union with information related to the closure of the Respondent's facility.

On about February 5, 2007, while at the Respondent's facility, the Union verbally renewed its request that the Respondent furnish the Union with information related to the closure of the Respondent's facility, and also requested the following information:

(a) A copy of the seniority list for all employees in the unit and their respective rates of pay.

(b) A complete list of unit employees who participate in the 401(k) plan, set forth in article VII, section 2 of the collective-bargaining agreement.

(c) Identification of each unit employee's level of contribution to the 401(k) plan.

(d) Documentary proof that the Respondent had deposited into the unit employees' respective 401(k) plan accounts the deductions that the Respondent had made from the unit employees' paychecks for participation in the 401(k) plan.

(e) A summary of the vacation benefits to which each unit employee was entitled pursuant to article V of the collective-bargaining agreement for 2006 and 2007.

(f) Documents showing the number of floating holidays that each unit employee had used during 2007, pursuant to article VI of the collective-bargaining agreement.

(g) Documents showing that the employees laid off by the Respondent in 2006 had previously been made whole by the Respondent for all outstanding contractual benefits.

(h) Identification, by employee, of all outstanding monies owed to the unit employees by the Respondent for the health insurance deductibles that the unit employees have paid since July 2006, pursuant to article VII of the collective-bargaining agreement.

On about February 7, 2007, while at the Respondent's facility, the Union verbally requested that the Respondent provide the Union with a copy of the unit employees' 401(k) plan.

The information requested by the Union is necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the unit.

Since about January 17, 2007, the Respondent has failed and refused to provide the Union with the requested information described above.

Since about January 21, 2007, the Respondent has failed to continue in effect all the terms and conditions of the collective-bargaining agreement by:

(a) Failing and refusing to remit to its unit employees regular and overtime wages, as required by articles III and IV of the collective-bargaining agreement.

(b) Failing and refusing to remit to its unit employees vacation benefits, as required by article V of the collective-bargaining agreement.

(c) Failing and refusing to remit to its unit employees floating holiday benefits, as required by article VI of the collective-bargaining agreement.

(d) Failing and refusing to provide its unit employees with hospitalization and other health insurance benefits, as required by article VII of the collective-bargaining agreement.

(e) Failing and refusing to make 401(k) plan contributions to its unit employees' 401(k) plan accounts, as required by article VII, section 2 of the collective-bargaining agreement.

The subjects set forth above relate to wages, hours, and other terms and conditions of employment and are mandatory subjects for the purpose of collective bargaining.

The Respondent engaged in the conduct described above without the Union's consent.

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 and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) 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, to remedy the Respondent's unlawful failure to bargain with the Union about the effects of its decision to cease its manufacturing operations and close its Johnstown, Pennsylvania facility, we shall order the Respondent to bargain with the Union, on request, about the effects of that decision. As a result of the Respondent's unlawful conduct, however, the 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.

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 unit employees for losses suffered as a result of the violations and to recreate in some practicable manner a situation in which the parties' bargaining position is not entirely devoid of economic consequences for the Respondent. We shall do so by ordering the Respondent to pay backpay to the unit employees in a manner similar to that required in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968), as clarified by *Melody Toyota*, 325 NLRB 846 (1998).[2]

Thus, the Respondent shall pay its unit 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 until the occurrence of the earliest of the following conditions: (1) the date the Respondent bargains to agreement with the Union on those subjects pertaining to the effects of ceasing manufacturing operations and closing its facility on its employees; (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 unit employees exceed the amount they would have earned as wages from the date on which the Respondent ceased doing business at the facility 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 unit 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 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).

Additionally, having found that the Respondent violated Section 8(a)(5) and (1) by failing to furnish the Union with relevant and necessary information requested on January 17, February 5 and 7, 2007, we shall order the Respondent to provide the Union with the requested information.

Further, having found that the Respondent has violated Section 8(a)(5) and (1) since about January 21, 2007, by failing and refusing to continue in effect all the terms and conditions of the June 1, 2004, to May 31, 2007 collective-bargaining agreement by failing to remit to the unit employees regular and overtime wages, vacation benefits and floating holiday benefits, failing to provide the unit employees with hospitalization and other health insurance benefits, and failing to make the contractually required contributions to the unit employees' 401(k) plan accounts, we shall order the Respondent to make whole its unit employees for any loss of earnings and other benefits they have suffered as a result of the Respondent's unlawful conduct, in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, supra.

In addition, having found that the Respondent has violated Section 8(a)(5) and (1) by unilaterally failing to remit contractually required payments to the unit employees' 401(k) plan accounts since January 21, 2007, we shall order the Respondent to make all contractually-required contributions to the unit employees' 401(k) plan accounts that have not been remitted since that date, including any additional amounts due the plan accounts in accordance with *Merryweather Optical Co*., 240 NLRB 1213, 1216 fn. 7 (1979), and to make the unit employees whole for any loss of interest they may have suffered as a

[2] See also *Live Oak Skilled Care & Manor*, 300 NLRB 1040 (1990). Neither the complaint nor the motion specify the impact, if any, on the unit employees of the Respondent's decision to close. Thus, we do not know whether, or to what extent, the refusal to bargain about the effects of this decision had an impact on the unit employees. In these circumstances, we shall permit the Respondent to contest the appropriateness of a *Transmarine* backpay remedy at the compliance stage. See, e.g., *Buffalo Weaving & Belting*, 340 NLRB 684, 685 fn. 3 (2003); and *ACS Acquisition Corp.*, 339 NLRB 736, 737 fn. 2 (2003).

result of the failure to remit such payments. The Respondent shall also provide the unit employees with hospitalization and other health insurance benefits and reimburse the unit employees for any expenses ensuing from the Respondent's failure to provide hospitalization and other health insurance benefits, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981), with interest as prescribed in *New Horizons for the Retarded*, supra.

Finally, in view of the fact that the Respondent's facility is closed, we shall order the Respondent to mail a copy of the attached notice to the Union and to the last known addresses of the unit employees who were employed by the Respondent since January 17, 2007, in order to inform them of the outcome of this proceeding.

ORDER

The National Labor Relations Board orders that the Respondent, General Kinetics, Inc. and/or General Kinetics, Inc., Debtor-in-Possession, Johnstown, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain collectively and in good faith with the International Brotherhood of Electrical Workers, Local Union No. 459, AFL–CIO as the exclusive collective-bargaining representative of the employees in the unit about the effects of its decision to cease manufacturing operations and close its Johnstown, Pennsylvania facility. The appropriate unit is described in the June 1, 2004, to May 31, 2007 collective-bargaining agreement between the Respondent and the Union.

(b) Failing and refusing to provide the Union with information that is necessary for and relevant to the Union's performance of its duties as the exclusive collective-bargaining representative of the unit employees.

(c) Failing and refusing to continue in effect all the terms and conditions of the collective-bargaining agreement with the Union, by failing to remit to the unit employees regular and overtime wages, vacation benefits and floating holiday benefits, failing to provide the unit employees with hospitalization and other health insurance benefits, and failing to make required contributions to the unit employees' 401(k) plans, as required by the collective-bargaining agreement.

(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) On request, bargain with the Union concerning the effects on the unit employees of the Respondent's decision to cease manufacturing operations and close its Johnstown, Pennsylvania facility, and reduce to writing and sign any agreement reached as a result of such bargaining.

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

(c) Provide the Union with the information it requested by letter dated January 17 and orally on February 5 and 7, 2007.

(d) Make the unit employees whole for any loss of earnings and other benefits they may have suffered as a result of its failure since January 21, 2007, to continue in effect all the terms and conditions of the June 1, 2004, to May 31, 2007 collective-bargaining agreement, as set forth in the remedy section of this Decision.

(e) Restore the unit employees' hospitalization and other health insurance benefits and reimburse the unit employees for any expenses ensuing from the Respondent's failure to provide hospitalization and other health insurance benefits since January 21, 2007, with interest, as set forth in the remedy section of this Decision.

(f) Remit all contractually-required contributions to the unit employees' 401(k) plans that have not been made since January 21, 2007, including any additional amounts due the plan accounts, and make the unit employees whole for any loss of interest they may have suffered as a result of the failure to remit such payments, as set forth in the remedy section of this Decision.

(g) 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.

(h) Within 14 days after service by the Region, duplicate and mail, at its own expense and after being signed by the Respondent's authorized representative, copies of the attached notice marked "Appendix"[3] to the Union and to all unit employees who were employed by the Respondent at any time since January 17, 2007.

(i) 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.

[3] If this Order is enforced by judgment of a United States court of appeals, the words in the notice reading "Mailed by Order of the National Labor Relations Board" shall read "Mailed 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 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 bargain collectively and in good faith with the International Brotherhood of Electrical Workers, Local Union No. 459, AFL–CIO as the exclusive collective-bargaining representative of the employees in the unit, about the effects of our decision to cease manufacturing operations and close our Johnstown, Pennsylvania facility. The appropriate unit is described in our June 1, 2004, to May 31, 2007 collective-bargaining agreement with the Union.

WE WILL NOT fail and refuse to provide the Union with information that is necessary for and relevant to the Union's performance of its duties as the exclusive collective-bargaining representative of the unit employees.

WE WILL NOT fail and refuse to continue in effect all the terms and conditions of our collective-bargaining agreement with the Union, by failing and refusing to remit to the unit employees regular and overtime wages, vacation benefits, floating holiday benefits, failing and refusing to provide unit employees with hospitalization and other health insurance benefits, and failing and refusing to make required contributions to the unit employees' 401(k) plans.

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, bargain with the Union concerning the effects on the unit employees of our decision to cease manufacturing operations and close our Johnstown, Pennsylvania facility, and reduce to writing and sign any agreement reached as a result of such bargaining.

WE WILL pay the unit employees limited backpay in connection with our failure to bargain over the effects of our decision to cease manufacturing operations and close our Johnston, Pennsylvania facility, as required by the Decision and Order of the Board.

WE WILL provide the Union with the information it requested by letter dated January 17 and orally on February 5 and 7, 2007.

WE WILL make whole the unit employees for any loss of earnings and other benefits they may have suffered as a result of our failure since January 21, 2007, to continue in effect all the terms and conditions of the June 1, 2004, to May 31, 2007 collective-bargaining agreement, including our failure to remit regular and overtime wages, vacation benefits and floating holiday benefits, our failure to provide hospitalization and other health insurance benefits, and our failure to make required contributions to the unit employees' 401(k) plan accounts.

WE WILL restore the unit employees' hospitalization and other health insurance benefits and reimburse the unit employees for any expenses ensuing from our failure to provide hospitalization and other health insurance benefits since January 21, 2007, with interest.

WE WILL make all contractually-required contributions to the unit employees' 401(k) plan accounts that have not been made since January 21, 2007, including any additional amounts due the plan accounts, and make the unit employees whole for any loss of interest they may have suffered as a result of the failure to remit such payments.

GENERAL KINETICS, INC. AND/OR GENERAL KINETICS, INC., DEBTOR-IN-POSSESSION