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Fuel Systems, Inc. and International Brotherhood of Teamsters, Local Union No. 710. Case 13–CA–45208

August 12, 2009

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

The General Counsel seeks a default judgment in this case on the ground that the Respondent has withdrawn its answer to the complaint. Upon a charge filed on April 3, 2009, by International Brotherhood of Teamsters, Local Union No. 710, the Union, the General Counsel issued the complaint on May 22, 2009, against Fuel Systems, Inc., the Respondent, alleging that it has violated Section 8(a)(5) and (1) of the Act. On June 4, 2009, the Respondent filed an answer to the complaint. However, by letter dated June 10, 2009, the Respondent withdrew its answer.

On June 16, 2009, the General Counsel filed a Motion for Default Judgment with the Board. On June 22, 2009, the Union filed a response in support of the General Counsel's Motion. On June 18, 2009, 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.

Ruling on Motion for Default Judgment¹

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 June 5, 2009, all the

¹ Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act. See *Snell Island SNF LLC v. NLRB*, 568 F.3d 410 (2d Cir. 2009); *New Process Steel v. NLRB*, 564 F.3d 840 (7th Cir. 2009), petition for cert. filed 77 U.S.L.W. 3670 (U.S. May 22, 2009) (No. 08-1457); *Northeastern Land Services v. NLRB*, 560 F.3d 36 (1st Cir. 2009), rehearing denied No. 08-1878 (May 20, 2009). But see *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009), petitions for rehearing denied Nos. 08-1162, 08-1214 (July 1, 2009).

allegations in the complaint would be considered admitted. As set forth in the General Counsel's Motion, by letter dated June 4, 2009, the Trustee in Bankruptcy, by his attorney, filed an answer to the complaint.² However, by letter dated June 10, 2009, the Trustee, through his attorney, withdrew its answer. The withdrawal of an answer has the same effect as a failure to file an answer, i.e., the allegations in the complaint must be considered to be true.³

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

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a Delaware corporation, with an office and place of business located at 5852 W. 51st Street, Chicago, Illinois, has been engaged in the business of manufacturing fuel tanks.

During the calendar year preceding issuance of the complaint, a representative period, the Respondent, in conducting its business operations described above, sold and shipped goods and materials valued in excess of \$50,000 to points directly outside the State of Illinois from its Chicago facility.

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 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:

Brenda Ritsema	Director of Human Resources
Bob Tipton	Plant Manager

² Although the Respondent has filed for bankruptcy, 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, 933 fn. 2 (1989), and cases cited therein. Board proceedings fall within the exception to the automatic stay provisions of the Bankruptcy Code 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).

³ See *Maislin Transport*, 274 NLRB 529 (1985).

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

All regular full-time and regular part-time employees working at the Employer's facility currently located at 5852 W. 51st Street, Chicago, Illinois; but excluding all other employees, office clerical employees and guards, professional employees and supervisors as defined in the National Labor Relations Act.

On January 29, 2008, the Union was certified as the exclusive collective-bargaining representative of the unit, and at all times since January 29, 2008, based on Section 9(a) of the Act, the Union has been, and continues to be, the exclusive collective-bargaining representative of the unit.

About September 1, 2008, the Respondent and the Union entered into a collective-bargaining agreement with respect to terms and conditions of employment of the unit, which was to remain in effect until August 31, 2011 (the agreement).

Since about October 3, 2008, the Respondent has failed to continue in effect all the terms and conditions of the agreement by failing to make required contributions to the Teamsters-National 401(k) savings plan.

Since about March 13, 2009, the Respondent has failed to continue in effect all the terms and conditions of the agreement by failing to pay its employees for all their unused vacation days.

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

About March 13, 2009, the Respondent closed its Chicago, Illinois facility without giving advance notice of its decision to the Union.

About March 17, 2009, the Union, by Tom Coffey, requested that the Respondent bargain collectively with the Union about the effects of its decision to close its Chicago, Illinois facility.

Since about March 17, 2009, the Respondent has failed and refused to bargain collectively with the Union about the effects of its decision to close its Chicago, Illinois facility.

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

About March 17, 2009, the Respondent repudiated the agreement by engaging in the conduct described above.

Since about March 17, 2009, the Union, by Tom Coffey, has requested that the Respondent furnish the Union with the following information:

(i) a description of the number of unused vacation, sick, and personal days accrued by each bargaining unit employee as of March 13, 2009;

(ii) documents evidencing the hours worked by each bargaining unit employee from September 1, 2008 to March 13, 2009; and

(iii) documents evidencing the amounts paid into the Teamsters-National 401(k) Saving Plan on each bargaining unit employee's behalf from September 1, 2008 to March 13, 2009.

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 March 17, 2009, the Respondent has failed and refused to furnish the Union with the information it requested.

CONCLUSION OF LAW

By the conduct described above, the Respondent has failed and refused to bargain collectively and in good faith with the exclusive collective-bargaining representative of its unit employees in violation of Section 8(a)(5) and (1) of the Act. The Respondent's unfair labor practices affect commerce within the meaning of 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, having found that the Respondent violated Section 8(a)(5) and (1) of the Act by repudiating its collective-bargaining agreement with the Union and failing and refusing to continue in effect all the terms and conditions of the agreement by failing to make contractually-required contributions to the Teamsters-National 401(k) savings plan since about October 3, 2008, we shall order the Respondent to make all such contributions that have not been made since that date, including any additional amounts due the plan in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979), and to make whole the unit employees for any loss of interest they may have suffered as a result of the failure to make such payments.⁴ We shall also order the Respondent to reim-

⁴ To the extent that an employee has made personal contributions to the 401(k) savings plan that have been accepted by the plan in lieu of the Respondent's delinquent contributions during the period of the delinquency, the Respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the Respondent otherwise owes the fund.

burse unit employees for any expenses ensuing from its failure to make the contractually-required contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891, 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed 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*, 283 NLRB 1173 (1987).⁵

In addition, having found that the Respondent has violated Section 8(a)(5) and (1) by failing and refusing to continue in effect all the terms and conditions of the agreement by failing to pay its employees for all their unused vacation days, we shall order the Respondent to make the unit employees whole for any loss of earnings and other benefits attributable to its unlawful conduct. All amounts due to employees shall be computed in accordance with *Ogle Protection Service*, supra, with interest as prescribed in *New Horizons for the Retarded*, supra.

Moreover, having found that the Respondent violated Section 8(a)(5) and (1) by failing and refusing to furnish the Union with relevant and necessary information requested on March 17, 2009, we shall order the Respondent to provide the Union with the requested information.

Further, to remedy the Respondent's unlawful failure to give the Union prior notice of its decision to close its Chicago, Illinois facility and to bargain with the Union about the effects of its decision, we shall order the Respondent to bargain with the Union, on request, about the effects of its 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 re-create in some practicable manner a situation in which the parties' bargaining posi-

⁵ In the complaint, the General Counsel seeks compound interest computed on a quarterly basis for any backpay or other monetary awards. Having duly considered the matter, we are not prepared at this time to deviate from our current practice of assessing simple interest. See, e.g., *Glen Rock Ham*, 352 NLRB 516 fn. 1 (2008), citing *Rogers Corp.*, 344 NLRB 504 (2005).

tion 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).⁶

Thus, the Respondent shall pay the 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 the closing of 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 employees exceed the amount they would have earned as wages from the date on which the Respondent ceased its operations 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 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*, 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 October 3, 2008, in order to inform them of the outcome of this proceeding.

⁶ 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).

ORDER

The National Labor Relations Board orders that the Respondent, Fuel Systems, Inc., Chicago, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain collectively and in good faith with International Brotherhood of Teamsters, Local Union No. 710, as the exclusive collective-bargaining representative for the unit described below, about the effects on the unit employees of its decision to close its Chicago, Illinois facility and by failing to give the Union prior notice of its decision to close its Chicago, Illinois facility. The appropriate unit is:

All regular full-time and regular part-time employees working at the Employer's facility currently located at 5852 W. 51st Street, Chicago, Illinois; but excluding all other employees, office clerical employees and guards, professional employees and supervisors as defined in the National Labor Relations Act.

(b) Failing to make the contractually-required contributions to the Teamsters-National 401(k) savings plan.

(c) Failing and refusing to pay its unit employees for all their unused vacation days as set forth in its collective-bargaining agreement with the Union.

(d) Failing and refusing to furnish the Union with information it requested on March 17, 2009, which is relevant and necessary to the Union's performance of its duties as the exclusive bargaining representative of the employees in the unit.

(e) 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 collectively and in good faith with the Union about the effects on the unit employees of its decision to close its Chicago, Illinois facility on March 13, 2009, and reduce to writing and sign any agreement reached as a result of such bargaining.

(b) Make all contractually-required contributions to the Teamsters-National 401(k) savings plan that have not been made since about October 3, 2008, including any additional amounts due the plan, and make whole the unit employees for any loss of interest they may have suffered, and any expenses ensuing from its failure to make the contractually-required contributions as set forth in the remedy section of this decision.

(c) Pay the unit employees for all their unused vacation days, with interest, in the manner set forth in the remedy section of this decision.

(d) Furnish the Union with the information it requested on March 17, 2009.

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

(f) 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, 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.

(g) 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"⁷ to the Union and to all unit employees who were employed by the Respondent at its Chicago, Illinois facility at any time since October 3, 2008.

(h) 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.

Dated, Washington, D.C. August 12, 2009

Wilma B. Liebman, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD
APPENDIX
NOTICE TO EMPLOYEES
MAILED 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 mail and obey this notice.

⁷ If this Order is enforced by a 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."

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 International Brotherhood of Teamsters, Local Union No. 710, as the exclusive collective-bargaining representative of our unit employees about the effects on our employees of our decision to close our Chicago, Illinois facility and by failing to give the Union prior notice of our decision to close our Chicago, Illinois facility. The appropriate unit is:

All regular full-time and regular part-time employees working at our facility currently located at 5852 W. 51st Street, Chicago, Illinois; but excluding all other employees, office clerical employees and guards, professional employees and supervisors as defined in the National Labor Relations Act.

WE WILL NOT fail and refuse to make contractually-required contributions to the Teamsters-National 401(k) savings plan.

WE WILL NOT fail and refuse to pay our unit employees for all their unused vacation days as set forth in our collective-bargaining agreement with the Union.

WE WILL NOT fail and refuse to furnish the Union with information that is relevant and necessary to its role as the exclusive collective-bargaining representative of the employees in the unit.

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 collectively and in good faith with the Union about the effects on our unit employees of our decision to close our Chicago, Illinois facility, and reduce to writing and sign any agreement reached as a result of such bargaining.

WE WILL make all contractually-required contributions to the Teamsters-National 401(k) savings plan that have not been made since October 3, 2008, including any additional amounts due the plan, and WE WILL make whole our unit employees for any loss of interest they may have suffered and any expenses ensuing from our failure to make the contractually-required contributions.

WE WILL pay our unit employees for all their unused vacation days, with interest.

WE WILL furnish the Union with the information it requested on March 17, 2009.

WE WILL pay our unit employees their normal wages for the period set forth in the Decision and Order of the National Labor Relations Board, with interest.

FUEL SYSTEMS, INC.