Thoele Asphalt Paving, Inc. *and* Teamsters Local Union No. 682, affiliated with International Brotherhood of Teamsters. Case 14–CA–29453

August 27, 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 failed to file an answer to the complaint. Upon a charge filed by Teamsters Local Union No. 682, affiliated with International Brotherhood of Teamsters (the Union) on September 3, 2008, the General Counsel issued the complaint on April 21, 2009, against Thoele Asphalt Paving, Inc. (the Respondent), alleging that it has violated Section 8(a)(5) and (1) of the Act. The Respondent failed to file an answer.

On May 21, 2009, the General Counsel filed a Motion for Default Judgment with the Board. Thereafter, on May 26, 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 Judgment[1]

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 an answer must be received on or before May 5, 2009. The complaint further stated that if no answer was filed, the Board may find, pursuant to a motion for default judgment, that the allegations in the complaint are true. Further, the undisputed allegations in the General Counsel's motion disclose that the Region, by letter dated May 11, 2009, notified the Respondent that unless an answer was received by May 18, 2009, 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.[2]

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a Missouri corporation with a facility located in St. Charles, Missouri (the Respondent's facility), has been engaged in the construction industry as a material hauler and paving contractor. During the 12-month period ending March 31, 2009, the Respondent, in conducting its business operations described above, provided services valued in excess of $50,000 to Dave Kolb Grading, Inc.

At all material times, Dave Kolb Grading, Inc., a Missouri corporation with its headquarters located in St. Charles, Missouri, has been engaged in the construction industry as a contractor providing grading, paving, and excavation services.

During the 12-month period ending March 31, 2009, Dave Kolb Grading, Inc., in conducting its business operations described above, performed services valued in excess of $50,000 in states other than the State of Missouri, and purchased and received at its headquarters and jobsites located within the State of Missouri goods valued in excess of $50,000 directly from points outside the State of Missouri.

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 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, Michael G. Thoele has held the position of the Respondent's president and has been a supervisor of the Respondent within the meaning of Section 2(11) of the Act and agent of the Respondent within the meaning of Section 2(13) of the Act.

The following employees of the Respondent (the unit), constitute a unit appropriate for the purposes of collec-

[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).

[2] In granting the General Counsel's Motion for Default Judgment, Member Schaumber notes that the issues which he addressed in his dissent in *Goer Mfg. Co.*, 341 NLRB 732, 734 (2004), are not present here.

tive bargaining within the meaning of Section 9(b) of the Act:

> All regular full-time dump truck drivers in the Eastern Missouri geographical jurisdiction of the Union, EXCLUDING all office clerical and professional employees, guards, supervisors and all other employees.

Since about April 7, 2005, and at all material times, the Union has been the designated collective-bargaining representative of the unit and has been recognized as such by the Respondent. This recognition has been embodied in successive collective-bargaining agreements, the first of which was executed on April 7, 2005, and was effective from April 1, 2005 through March 31, 2008. The second collective-bargaining agreement was executed on April 3, 2008, and is effective from April 1, 2008 through March 31, 2013.

At all times since April 7, 2005, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the unit.

Since about March 10, 2008, the Respondent has failed to continue in effect all the terms and conditions of the parties' collective-bargaining agreements by failing to provide unit employees with medical insurance as required by article X of the collective-bargaining agreements.

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.

The Respondent engaged in the conduct described above without prior notice to the Union and without the Union's consent.

CONCLUSION OF LAW

By the conduct described above, the Respondent has failed and refused to bargain collectively and in good faith with the Union as the exclusive collective-bargaining representative of the 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 has violated Section 8(a)(5) and (1) by failing since about March 10, 2008 to continue in effect all the terms and conditions of its April 1, 2005–March 31, 2008 and April 1, 2008–March 31, 2013 collective-bargaining agreements by failing to provide unit employees with medical insurance as required by article X of the agreements, we shall order the Respondent to restore the employees' medical insurance benefits and reimburse the employees for any loss of benefits or expenses ensuing from the Respondent's failure, since about March 10, 2008, to provide medical insurance, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. 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).[3]

ORDER

The National Labor Relations Board orders that the Respondent, Thoele Asphalt Paving, Inc., St. Charles, Missouri, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain collectively and in good faith with Teamsters Local Union No. 682, affiliated with International Brotherhood of Teamsters, as the exclusive collective-bargaining representative of the employees in the following appropriate unit by failing to continue in effect the terms and conditions of the April 1, 2005–March 31, 2008 and April 1, 2008–March 31, 2013 collective-bargaining agreements by failing to provide the unit employees with medical insurance as required by article X of the agreements. The unit is:

> All regular full-time dump truck drivers in the Eastern Missouri geographical jurisdiction of the Union, EXCLUDING all office clerical and professional employees, guards, supervisors and all other employees.

(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) Restore the unit employees' medical insurance benefits and reimburse the employees for any loss of benefits or expenses ensuing from the Respondent's unilateral failure to provide contractually-required medical insurance since March 10, 2008, with interest, as set forth in the remedy section of this decision.

[3] In the complaint, the General Counsel seeks compound interest computed on a quarterly basis for any 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)

(b) Within 14 days after service by the Region, post at its facility in St. Charles, Missouri, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the Respondent's authorized representative, shall be posted by the Respondent 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. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 10, 2008.

(c) 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 27, 2009

Wilma B. Liebman, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[4] 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."

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 Teamsters Local Union No. 682, affiliated with International Brotherhood of Teamsters, as the exclusive collective-bargaining representative of the employees in the following appropriate unit by failing to continue in effect the terms and conditions of the April 1, 2005–March 31, 2008 and April 1, 2008–March 31, 2013 collective-bargaining agreements by failing to provide the unit employees with medical insurance as required by article X of the agreements. The unit is:

> All regular full-time dump truck drivers in the Eastern Missouri geographical jurisdiction of the Union, EXCLUDING all office clerical and professional employees, guards, supervisors and all other 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 restore your medical insurance benefits and reimburse you for any loss of benefits or expenses ensuing from our unilateral failure to provide contractually-required medical insurance since March 10, 2008, with interest.

THOELE ASPHALT PAVING, INC.