Capital Iron Works Company *and* Boilermakers Local Lodge 83, affiliated with International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, AFL–CIO. Case 17–CA–24499

March 15, 2010

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, amended charge, and second amended charge filed by the Union on April 29, June 29, and July 27, 2009, respectively, the General Counsel issued the complaint on July 29, 2009, against Capital Iron Works Company, the Respondent, alleging that it has violated Section 8(a)(5) and (1) of the Act. The Respondent failed to file an answer.

On August 26, 2009, the General Counsel filed a Motion for Default Judgment with the Board. Thereafter, on August 27, 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 the answer must be received on or before August 12, 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 August 13, 2009, advised the Respondent that unless an answer was received by August 20, 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 in part. As discussed below, we deny the motion with respect to the Respondent's alleged failure to remit to the Union dues deducted from employee paychecks. We grant the motion as to the remaining allegations.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times the Respondent, a corporation, with an office and place of business located at 701 Southeast Adams Street, Topeka, Kansas, has been engaged in the fabrication of steel.

During the 12-month period ending December 31, 2008, the Respondent, in conducting its business operations described above, purchased and received at its Topeka, Kansas facility goods valued in excess of $50,000 directly from points located outside the State of Kansas, and sold and shipped goods valued in excess of $50,000 from its Topeka, Kansas facility directly to points outside the State of Kansas.

We find that at all material times the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that Boilermakers Local Lodge 83, affiliated with International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, AFL–CIO (the Union), has been a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

At all material times, Mike Buckner has held the position of the Respondent's owner/president and has been a supervisor of the Respondent within the meaning of Section 2 (11) of the Act and an 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 collective bargaining within the meaning of Section 9(b) of the Act:

[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 *Teamsters Local 523 v. NLRB*, 590 F.3d 849 (10th Cir. 2009); *Narricot Industries, L.P. v. NLRB*, 587 F.3d 654 (4th Cir. 2009); *Snell Island SNF LLC v. NLRB*, 568 F.3d 410 (2d Cir. 2009), petition for cert. filed 78 U.S.L.W. 3130 (U.S. Sept. 11, 2009) (No. 09-328); *New Process Steel v. NLRB*, 564 F.3d 840 (7th Cir. 2009), cert. granted 130 S.Ct. 488 (2009); *Northeastern Land Services v. NLRB*, 560 F.3d 36 (1st Cir. 2009), petition for cert. filed 78 U.S.L.W. 3098 (U.S. Aug. 18, 2009) (No. 09-213). But see *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009), petition for cert. filed 78 U.S.L.W. 3185 (U.S. Sept. 29, 2009) (No. 09-377).

> All production and maintenance employees, including truck drivers, employed by Respondent at its facility located at 701 Southeast Adams Street, Topeka, Kansas, but excluding office employees, professional employees, guards and supervisors as defined in the Taft-Hartley Act, and those excluded from the unit by the National Labor Relations Board certification in Case 17–RC–3895.

On August 30, 1962, the Union was certified as the exclusive collective-bargaining representative of the unit, and since then, based on Section 9(a) of the Act, it has been the exclusive collective-bargaining representative of the unit.

A. Refusals to Bargain

The complaint alleges that, on about July 7, 2008, the Union and the Respondent reached complete agreement on terms and conditions of employment of the unit to be incorporated in a collective-bargaining agreement (the collective-bargaining agreement). Since about February 9, 2009, the Union has requested that the Respondent execute a written contract containing the agreement. Since about February 9, 2009, however, the Respondent has failed and refused to execute the collective-bargaining agreement. By this conduct, the Respondent has failed and refused to bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

In addition, the complaint alleges that, during the 6-month period preceding the filing of the charge through the date of the complaint, the Respondent has failed to grant employees a 50-cent periodic wage increase in accordance with the collective-bargaining agreement. The complaint also alleges that since about March 15, 2009, the Respondent has failed to make 401(k) contributions for hours that employees worked in 2008. The complaint further alleges that, since about February 2009, the Respondent has failed to reimburse employees for safety glasses at the monetary level specified in the collective-bargaining agreement. The foregoing subjects relate to wages, hours, and other terms and conditions of employment of the unit and are mandatory subjects for the purposes of collective bargaining. Further, the Respondent engaged in the conduct described above without prior notice to the Union and without affording the Union an opportunity to bargain with the Respondent with respect to this conduct and the effects of this conduct. Accordingly, the Respondent refused to bargain in violation of Section 8(a)(5) and (1) of the Act.

B. Failure to Remit Dues Deductions from Employee Paychecks

The complaint further alleges that, at all material times, the Respondent has failed and refused to remit to the Union moneys deducted from employee paychecks pursuant to dues-checkoff authorizations for the months of December 2008 and May 2009. In addition, the complaint alleges that, in late April 2009, the Respondent delayed in remitting to the Union moneys deducted from employee paychecks pursuant to dues-checkoff authorizations for the months of January 2009 through March 2009. The complaint alleges that these are mandatory subjects for the purpose of collective bargaining, that the Respondent engaged in the conduct without prior notice to the Union and without affording the Union an opportunity to bargain, and that the Respondent thereby refused to bargain with the Union in violation of Section 8(a)(5).[2]

We decline to grant default judgment with respect to these allegations. The General Counsel's complaint does not allege the effective date of the parties' collective-bargaining agreement or that the agreement contained a dues-checkoff provision. In similar circumstances, the Board declined to grant the General Counsel's motion for default judgment alleging that an employer's failure to remit union dues violated Section 8(a)(5) because the General Counsel's complaint did not allege the effective date of the parties' collective-bargaining agreement or whether the agreement included a dues-checkoff provision. See *Quality Assured Products*, 297 NLRB No. 137 (not reported in Board volumes), enfd. 929 F.2d 701 (6th Cir. 1991). Nothing herein precludes the General Counsel from amending the complaint to address this pleading deficiency. In addition, a new hearing is not required if, in the event of an amendment to the complaint, the Respondent again fails to answer, thereby admitting evidence that would permit the Board to find the violations alleged and order an appropriate remedy. In such circumstances, the General Counsel may file a new motion for default judgment with respect to the amended complaint allegations.

C. Information Requests

The complaint alleges that, on about April 10, 2009, the Union requested in writing that the Respondent provide the Union a copy of the following documents for the period of July 1, 2008, to the date of the request:

> (1) All payroll records and other documents related to payment of performance based pay to bargaining unit employees;

[2] The complaint actually alleges that the Respondent's refusal to bargain violated "Section 8(a)(1) and (5) and Section 8(d) of the Act." However, the 8(a)(1) allegation appears to be a derivative of the 8(a)(5) allegation rather than an independent 8(a)(1) allegation. See, e.g., *Advanced Telephonics, Inc.*, 341 NLRB 317, 318 fn. 3 (2004); and *ABF Freight System, Inc.*, 325 NLRB 546 fn. 3 (1998).

(2) All payroll records for all employees who are not at the top of their classification;

(3) All records, copies of checks and other documents related to the Company's reimbursement payment to unit employees for prescription glasses;

(4) All 401(k) contribution records.

In addition, the complaint alleges that, on about May 14, 2009, the Union requested in writing that the Respondent provide the Union with an accounting of the dues moneys remitted to the Union by check #16099. The complaint further alleges that the above-stated 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. At all material times, and continuing through the date of the complaint, the Respondent has failed and refused to furnish the Union with the requested information. The Respondent has thereby violated Section 8(a)(5) and (1).

CONCLUSION OF LAW

By failing and refusing to execute a written contract embodying the terms of the collective-bargaining agreement reached on July 7, 2008, failing to grant employees a periodic wage increase in accordance with the collective-bargaining agreement, failing to make 401(k) contributions for hours that employees worked in 2008, failing to grant reimbursements for safety glasses as required in the collective-bargaining agreement, and failing and refusing to provide the Union with the information it requested on April 10 and May 14, 2009, the Respondent failed and refused to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees within the meaning of Section 8(d) of the Act, and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) of the Act, 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, having found that the Respondent has violated Section 8(a)(5) and (1) by failing and refusing, since about February 9, 2009, to execute a written contract that incorporates the terms of the collective-bargaining agreement reached by the parties on about July 7, 2008, we shall order the Respondent to execute and implement a written contract containing the collective-bargaining agreement and give retroactive effect to its terms. We shall also order the Respondent to make the unit employees whole for any loss of earnings and other benefits they may have suffered as a result of the Respondent's refusal to execute the collective-bargaining agreement 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]

Further, having found that the Respondent has violated Section 8(a)(5) and (1) by failing to grant employees a periodic wage increase in accordance with the collective-bargaining agreement and by failing to reimburse employees for safety glasses at the monetary level specified in the collective-bargaining agreement, we shall order the Respondent to make Darren Janssen, Gary King, and Christopher Ortega whole with respect to the failure to grant the wage increase, and employee Kermit Schrenk whole with respect to the failure to pay reimbursement for safety glasses, with interest, as prescribed in *New Horizons for the Retarded*, supra.

Having found that the Respondent has violated Section 8(a)(5) and (1) by failing to make the 401(k) contribution for hours that unit employees worked in 2008, we shall order the Respondent to make such contributions to the 401(k) plan, including any additional amounts due the plan in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).[4] We shall also order the Respondent to reimburse the unit employees for any expenses ensuing from its failure to make the required contributions, in accord with *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981). Such amounts should be computed in the manner set forth in *Ogle Protection Service*, supra, with interest as prescribed in *New Horizons for the Retarded*, supra.

Having found that the Respondent has violated Section 8(a)(5) and (1) by failing and refusing to provide the Union with information it requested on April 10 and May 14, 2009, we shall order the Respondent to provide the Union with the requested information.

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[3] In the complaint, the General Counsel seeks an Order requiring that the Respondent pay quarterly compounded interest on all 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).

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

ORDER

The National Labor Relations Board orders that the Respondent, Capital Iron Works Company, Topeka, Kansas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain collectively and in good faith with Boilermakers Local Lodge 83, affiliated with International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, AFL–CIO, the Union, by failing to execute a written contract (the collective-bargaining agreement) with the Union as the exclusive collective-bargaining representative of the following unit:

> All production and maintenance employees, including truck drivers, employed by Respondent at its facility located at 701 Southeast Adams Street, Topeka, Kansas, but excluding office employees, professional employees, guards and supervisors as defined in the Taft-Hartley Act, and those excluded from the unit by the National Labor Relations Board certification in Case 17–RC–3895.

(b) Failing to grant employees a periodic wage increase in accordance with the collective-bargaining agreement.

(c) Failing to make 401(k) contributions on behalf of unit employees for hours worked in 2008.

(d) Failing to reimburse employees for safety glasses at the monetary level specified in the collective-bargaining agreement.

(e) Failing and refusing to furnish the Union information that is relevant and necessary to its role as the exclusive collective-bargaining representative of the unit.

(f) 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) Execute and implement a written contract containing the collective-bargaining agreement reached by the parties on July 7, 2008, give retroactive effect to the terms and conditions of the agreement, and make the unit employees whole for any loss of earnings and other benefits attributable to our unlawful conduct, with interest, in the manner set forth in the remedy section of this decision.

(b) Make employees Darren Janssen, Gary King, and Christopher Ortega whole for losses due to the failure to grant a periodic wage increase in accordance with the collective-bargaining agreement, with interest as set forth in the remedy section of this decision.

(c) Make all required 401(k) contributions that have not been made for hours worked by unit employees in 2008, including any additional amounts due the plan, and make whole the unit employees for any loss of interest that they may have suffered and any expenses ensuing from the Respondent's unlawful failure to make the 401(k) contributions for hours worked in 2008, as set forth in the remedy section of this decision.

(d) Make employee Kermit Schrenk whole for losses due to the failure to reimburse him for safety glasses at the monetary level specified in the collective-bargaining agreement, with interest as set forth in the remedy section of this decision.

(e) Furnish the Union with the information that it requested on April 10 and May 14, 2009.

(f) Within 14 days after service by the Region, post at its facility in Topeka, Kansas, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 17, 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 October 2008.

(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 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. March 15, 2010

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[5] 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."

Wilma B. Liebman, Chairman

Peter C. Schaumber, Member

(SEAL) 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 Boilermakers Local Lodge 83, affiliated with International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, AFL–CIO, by failing to execute a written contract (the collective-bargaining agreement) with the Union as the exclusive collective-bargaining representative of the following unit:

All production and maintenance employees, including truck drivers, employed by us at our facility located at 701 Southeast Adams Street, Topeka, Kansas, but excluding office employees, professional employees, guards and supervisors as defined in the Taft-Hartley Act, and those excluded from the unit by the National Labor Relations Board certification in Case 17–RC–3895.

WE WILL NOT fail to grant you a periodic wage increase in accordance with the collective-bargaining agreement.

WE WILL NOT fail to make 401(k) contributions for hours worked by our employees.

WE WILL NOT fail to reimburse you for safety glasses at the monetary level specified in the collective-bargaining agreement.

WE WILL NOT fail and refuse to furnish the Union information that is relevant and necessary to its role as the exclusive collective-bargaining representative of 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 execute and implement a written contract containing the collective-bargaining agreement reached by us and the Union on July 7, 2008, WE WILL give retroactive effect to the terms and conditions of the agreement, and WE WILL make the you whole for any loss of earnings and other benefits you may have suffered because of our unlawful conduct, with interest.

WE WILL make whole employees Darren Janssen, Gary King, and Christopher Ortega for our failure to grant a periodic wage in accordance with the collective-bargaining agreement, with interest.

WE WILL make all required 401(k) contributions that have not been made for hours worked by our employees in 2008, including any additional amounts due the plan, and WE WILL make whole our unit employees for any loss of interest that they may have suffered and any expenses ensuing from our unlawful failure to make the 401(k) contributions for hours worked in 2008.

WE WILL make whole employee Kermit Schrenk for our failure to reimburse him for safety glasses at the monetary level specified in the collective-bargaining agreement, with interest.

WE WILL furnish the Union with the information that it requested on April 10 and May 14, 2009.

CAPITAL IRON WORKS CO.