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Kane Steel Company and United Auto Workers of America, Amalgamated Local Union No. 2327 and Teamsters Local Union No. 429. Cases 4-CA-37179 and 4-CA-37274

July 13, 2010

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS BECKER
AND PEARCE

The General Counsel seeks a default judgment in this case on the ground that the Respondent has failed to file an answer to the consolidated complaint. Upon a charge filed by United Auto Workers of America, Amalgamated Local Union No. 2327 (the UAW) in Case 4-CA-37179 on November 25, 2009, and a charge and amended charge filed by Teamsters Local Union No. 429 (the IBT) (collectively, the Unions) in Case 4-CA-37274 on January 12 and February 24, 2010, respectively, the General Counsel issued the consolidated complaint March 22, 2010, against Kane Steel 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 April 20, 2010, the General Counsel filed a Motion for Default Judgment with the Board. On April 22, 2010, 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 a 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 consolidated complaint affirmatively stated that unless an answer was received by April 5, 2010, the Board may find, pursuant to a motion for default judgment, that the allegations in the consolidated complaint are true. Further, the undisputed allegations in the General Counsel's motion disclose that the Region, by letter dated April 7, 2010, notified the Respondent that unless an answer were received by April 14, 2010, a motion for default judgment would be filed with the Board.

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 New Jersey corporation with facilities in Millville, New Jersey (the Millville plant), and in Pottsville, Pennsylvania (the Pottsville plant), has been a distributor of steel and steel-related products.

During the calendar year preceding issuance of the consolidated complaint, the Respondent, in conducting its business operations described above, purchased and received at the Millville plant and at the Pottsville plant goods valued in excess of \$50,000 directly from points outside the Commonwealth of Pennsylvania and the State of New Jersey.

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 the Unions are labor organizations 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 below 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:

Clifford Kane	President
John Buchter	General Manager (Pottsville plant)
Donald Hatter	Shift Supervisor (Pottsville plant)

At all material times, Lynn Pielacha was a payroll clerk of the Respondent working at the Pottsville plant and was an agent of the Respondent within the meaning of Section 2(13) of the Act with respect to conduct referred to below in paragraph 3.

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

All production and maintenance employees, including warehousemen, driver and helpers, receiving and shipping employees within the plant-wide unit, but excluding all office clerical employees, technical employees, including draftsmen, guards, watchmen and supervisors as defined in the National Labor Relations Act.

At all material times, the UAW has been the designated exclusive collective-bargaining representative of the Millville unit and has been recognized as the representative by the Respondent. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which, the Millville Agreement, is effective by its terms from February 1, 2009, to January 31, 2012.

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

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

Truckdrivers, helpers, yardmen, shear men, burners, crane operators, mechanics and all other production employees, but specifically excluding office and clerical employees, watchmen and supervisors as defined by the National Labor Relations Act.

At all material times, the IBT has been the designated exclusive collective-bargaining representative of the Pottsville unit and has been recognized as the representative by the Respondent. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which, the Pottsville Agreement, is effective by its terms from January 1, 2008, to December 31, 2010.

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

The Respondent has engaged in the following conduct.

1. About November 13, 2009, the Respondent ceased its operations at the Pottsville plant. The Respondent engaged in this conduct without prior notice to the IBT and without affording the IBT an opportunity to bargain with the Respondent with respect to the effects of this conduct.

2. About November 25, 2009, the Respondent ceased its operations at the Millville plant. The Respondent engaged in this conduct without prior notice to the UAW and with affording the UAW an opportunity to bargain with the Respondent with respect to the effects of this conduct.

3. On about November 18, 2009, by email to Lynn Pie-lacha, the IBT requested the Respondent to furnish the IBT with "a list of each union employees['] unused vacations for 2009." The information requested by the IBT, as described above, is necessary for, and relevant to, the performance of its duties as the exclusive collective-bargaining representative of the Pottsville Unit. Since

about November 18, 2009, the Respondent has failed and refused to furnish the IBT with the requested information.

4. About early November 2009, the Respondent ceased paying Pottsville unit employees their accrued vacation pay as required by article 22 of the Pottsville Agreement.

5. Since early November 2009, the Respondent ceased paying Millville unit employees: (1) their accrued vacation pay as required by article 11 of the Millville Agreement; (2) their accrued holiday pay as required by article 10 of the Millville Agreement; (3) severance pay as required by article 33 of the Millville Agreement; and (4) the 401(k) contributions as required by article 39 of the Millville Agreement.

The subjects set forth above in paragraphs 1, 2, 4, and 5 relate to wages, hours, and other terms and conditions of employment of the Millville and Pottsville units and are mandatory subjects for the purposes of collective bargaining.

The Respondent engaged in the conduct described above in paragraph 4 without the consent of the IBT during the term of the Pottsville Agreement and without having afforded the IBT an opportunity to bargain with the Respondent with respect to this conduct. The Respondent engaged in the conduct described above in paragraph 5 without the consent of the UAW during the term of the Millville Agreement and without having afforded the UAW an opportunity to bargain with the Respondent with respect to this conduct.

CONCLUSIONS OF LAW

1. By the conduct described above in paragraphs 1, 2, and 3, the Respondent has failed and refused to bargain collectively and in good faith with the exclusive collective-bargaining representatives of its employees in violation of Section 8(a)(5) and (1) of the Act.

2. By the conduct described above in paragraphs 4 and 5, the Respondent has failed and refused to bargain collectively and in good faith with the exclusive collective-bargaining representatives of its employees within the meaning of Section 8(d) of the Act, in violation of Section 8(a)(5) and (1) of the Act.

3. 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, to remedy the Respondent's unlawful failure to bargain with the Unions about the effects of its decision to close its Mill-

ville, New Jersey and Pottsville, Pennsylvania facilities, we shall order the Respondent to bargain with the Unions, 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 representatives. Meaningful bargaining cannot be assured until some measure of economic strength is restored to the Unions. 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 employees in the Millville and Pottsville units in a manner similar to that required in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968), as clarified by *Melody Toyota*, 325 NLRB 846 (1998).¹

Thus, the Respondent shall pay its Millville unit and Pottsville 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 represented by that Union; (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*, 283 NLRB 1173 (1987).²

In addition, having found that the Respondent violated Section 8(a)(5) and (1) by failing and refusing to furnish the IBT with relevant and necessary information requested on about November 18, 2009, we shall order the Respondent to provide the IBT union with the requested information.

Further, having found that the Respondent violated Section 8(a)(5) and (1) by ceasing, since early November 2009, to pay the Millville unit and Pottsville unit employees their accrued vacation pay as required by article 11 of the Millville Agreement and article 22 of the Pottsville Agreement, respectively, and ceasing to pay the Millville unit employees their accrued holiday pay and severance pay, as required by articles 10 and 33 of the Millville Agreement, respectively, 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*, 183 NLRB 682 (1970), enf. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, supra.

Additionally, having found that the Respondent violated Section 8(a)(5) and (1) by ceasing to make contributions to the 401(k) plan as required by article 39 of the Millville Agreement, we shall order the Respondent to make all such contributions that have not been made since early November 2009, 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.³ We shall also order the Respondent to

¹ See also *Live Oak Skilled Care & Manor*, 300 NLRB 1040 (1990). Neither the consolidated complaint nor the motion specifies 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).

² 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, 516 fn. 1 (2008), citing *Rogers Corp.*, 344 NLRB 504 (2005).

³ 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

reimburse 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*, supra, with interest as prescribed in *New Horizons for the Retarded*, supra.

Finally, in view of the fact that the Respondent's Millville, New Jersey and Pottsville, Pennsylvania facilities are closed, we shall order the Respondent to mail a copy of the attached notice to the Unions and to the last known addresses of its Millville unit and Pottsville unit employees who were employed by the Respondent at any time since November 1, 2009, in order to inform them of the outcome of this proceeding.

ORDER

The National Labor Relations Board orders that the Respondent, Kane Steel Company, Millville, New Jersey and Pottsville, 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 United Auto Workers of America, Amalgamated Local Union No. 2327 (the UAW), as the exclusive collective-bargaining representative for the employees in the Millville unit described below, and with Teamsters Local Union No. 429 (the IBT), as the exclusive collective-bargaining representative for the employees in the Pottsville unit described below, about the effects on the unit employees of its decision to close its Millville, New Jersey and Pottsville, Pennsylvania, facilities and by failing to give the Unions prior notice of its decision to close those facilities. The appropriate units are:

The Millville unit:

All production and maintenance employees, including warehousemen, driver and helpers, receiving and shipping employees within the plant-wide unit, but excluding all office clerical employees, technical employees, including draftsmen, guards, watchmen and supervisors as defined in the National Labor Relations Act.

The Pottsville unit:

Truckdrivers, helpers, yardmen, shear men, burners, crane operators, mechanics and all other production employees, but specifically excluding office and clerical employees, watchmen and supervisors as defined by the National Labor Relations Act.

(b) Failing and refusing to furnish the IBT with the information it requested on November 18, 2009, which is relevant and necessary to the IBT's performance of its duties as the exclusive bargaining representative of the employees in the Pottsville unit.

(c) Ceasing to pay its Pottsville unit employees their accrued vacation pay as set forth in its collective-bargaining agreement with the IBT.

(d) Ceasing to pay its Millville Unit employees their accrued vacation pay, accrued holiday pay, severance pay and to make 401(k) contributions as set forth in its collective-bargaining agreement with the UAW.

(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 IBT about the effects on the Pottsville unit employees of its decision to close its Pottsville facility on November 13, 2009; and bargain collectively and in good faith with the UAW about the effects on the Millville unit employees of its decision to close its Millville facility on November 25, 2009, and reduce to writing and sign any agreements reached as a result of such bargaining.

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

(c) Furnish the IBT with the information it requested on November 18, 2009.

(d) Pay the Pottsville unit employees their accrued vacation pay, with interest, in the manner set forth in the remedy section of this decision.

(e) Pay the Millville unit employees their accrued vacation pay, accrued holiday pay, and severance pay, with interest, in the manner set forth in the remedy section of this decision.

(f) Make all 401(k) contributions required by the Millville Agreement that have not been made since about November 2009, including any additional amounts due the plan, and make whole Millville 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.

(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, timecards, personnel records and reports, and all other records, including an electronic copy of such records if

amount of such reimbursement will constitute a setoff to the amount that the Respondent otherwise owes the fund.

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”⁴ to the Unions and to all unit employees who were employed by the Respondent at its Millville, New Jersey and Pottsville, Pennsylvania facilities at any time since November 1, 2009.

(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.

Dated, Washington, D.C. July 13, 2010

Wilma B. Liebman, Chairman

Craig Becker, Member

Mark Gaston Pearce, 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.

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

⁴ 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.”

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to bargain collectively and in good faith with United Auto Workers of America, Amalgamated Local Union No. 2327 (the UAW), as the exclusive collective-bargaining representative for the employees in the Millville unit described below, and with Teamsters Local Union No. 429 (the IBT), as the exclusive collective-bargaining representative for the employees in the Pottsville unit described below, about the effects on our unit employees of our decision to close our Millville, New Jersey and Pottsville, Pennsylvania facilities and by failing to give the Unions prior notice of our decision to close those facilities. The appropriate units are:

The Millville unit:

All production and maintenance employees, including warehousemen, driver and helpers, receiving and shipping employees within the plant-wide unit, but excluding all office clerical employees, technical employees, including draftsmen, guards, watchmen and supervisors as defined in the National Labor Relations Act.

The Pottsville unit:

Truck drivers, helpers, yardmen, shear men, burners, crane operators, mechanics and all other production employees, but specifically excluding office and clerical employees, watchmen and supervisors as defined by the National Labor Relations Act.

WE WILL NOT fail and refuse to furnish the IBT with the information it requested on November 18, 2009, which is relevant and necessary to the performance of its duties as the exclusive bargaining representative of the employees in the Pottsville unit.

WE WILL NOT cease to pay our Pottsville unit employees their accrued vacation pay as set forth in our collective-bargaining agreement with the IBT.

WE WILL NOT cease to pay our Millville unit employees their accrued vacation pay, accrued holiday pay, severance pay and to make 401(k) contributions as set forth in our collective-bargaining agreement with the UAW.

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, on request, bargain collectively and in good faith with the IBT about the effects on the Pottsville unit employees of our decision to close our Pottsville facility on November 13, 2009; bargain collectively and in good faith with the UAW about the effects on the Millville unit employees of our decision to close our Millville fa-

cility on November 25, 2009; and reduce to writing and sign any agreements reached as a result of such bargaining.

WE WILL pay the Millville unit and Pottsville unit employees their normal wages, with interest.

WE WILL furnish the IBT with the information it requested on November 18, 2009.

WE WILL pay the Pottsville unit employees their accrued vacation pay, with interest.

WE WILL pay the Millville unit employees their accrued vacation pay, accrued holiday pay, and severance pay, with interest.

WE WILL make all 401(k) contributions required by the Millville Agreement that have not been made since early November 2009, including any additional amounts due the plan, and WE WILL make whole the unit employees for any loss of interest they may have suffered and any expenses ensuing from our failure to make the contractually-required contributions.

KANE STEEL COMPANY