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**Kadouri International Foods, Inc. and United Food and Commercial Workers, Local 342.** Case 29–CA–30342

April 29, 2011

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS PEARCE  
AND HAYES

On December 15, 2010, Administrative Law Judge Eleanor MacDonald issued the attached decision. The Respondent filed exceptions. The Acting General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge’s rulings, findings, and conclusions and to adopt the recommended Order.<sup>1</sup>

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Kadouri International Foods, Inc., Brooklyn, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

<sup>1</sup> For the reasons stated in his dissenting opinion in *J. Picini Flooring*, 356 NLRB No. 9 (2010), Member Hayes would not require electronic distribution of the notice.

In accord with the dissenting view of former Member Jenkins in *Transmarine Navigation Corp.*, 170 NLRB 389, 391 (1968), Member Hayes would delete that portion of the remedy requiring that the minimum backpay due employees should not be less than 2 weeks’ pay, without regard to actual losses incurred. See also the concurring opinion of former Member Bartlett in *Integrated Health Services*, 338 NLRB 239, 245–246 (2002) (expressing doubts whether the *Transmarine* remedy represents a permissible exercise of the Board’s remedial authority). Further, in accord with *NLRB v. Waymouth Farms, Inc.*, 172 F.3d 598, 600–601 (8th Cir. 1999), Member Hayes would limit the remedy only to those employees who were adversely affected by the Respondent’s unlawful action.

Dated, Washington, D.C. April 29, 2011

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Wilma B. Liebman, Chairman

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Mark Gaston Pearce, Member

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Brian E. Hayes, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Ashok Bokde, Esq., for the General Counsel.

DECISION

STATEMENT OF THE CASE

ELEANOR MACDONALD, Administrative Law Judge. This case was tried in Brooklyn, New York, on November 10, 2010. The complaint alleges that Respondent, in violation of Section 8(a)(1) and (5) of the Act, closed its Brooklyn facility, laid off its employees, and refused to respond to the Union’s request to bargain with respect to its conduct and the effects of the conduct. Respondent filed an answer denying that from January 1, 2009 to January 1, 2010, it purchased and received at its Brooklyn facility goods valued in excess of \$50,000 directly from suppliers located outside the State of New York. However, the answer admits that Respondent was an employer under the Act “up to the Summer of 2010.” The answer further denies that Respondent closed its Brooklyn facility and laid off its employees, denies that the Union requested bargaining and denies that it has refused to bargain. Respondent did not appear at the instant hearing and notified counsel for the General Counsel by letter and email that it would not have a representative present at the hearing.

On the entire record, including my observation of the demeanor of the witness, and after considering the brief filed by the General Counsel on December 6, 2010, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent admits that it is a domestic corporation with its principal office and place of business located at 234 Starr Street, Brooklyn, New York, where it was engaged in the wholesale distribution of specialty food products. On March 10, 2008, Respondent executed a commerce stipulation admitting that it annually purchased and received goods and materials valued in excess of \$50,000 directly from suppliers located outside the State of New York, and admitted that it is engaged in commerce within the meaning of the Act. On July 8, 2008, Respondent filed an answer in Case 29–CA–28864, admitting that it was an employer engaged in commerce within the meaning of the Act and that United Food and Commercial Workers, Local 342, is a labor organization within the meaning of the

Act. In the instant case, Respondent has admitted that it was an employer under the Act up to the summer of 2010, a time encompassing the alleged unfair labor practices. I find that 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 8(a)(5) of the Act.

## II. ALLEGED UNFAIR LABOR PRACTICE

On April 28, 2008, the Union was certified as the exclusive collective-bargaining representative of Respondent's employees in the following unit

All full-time and regular part-time truck drivers, production and warehouse employees, excluding office clerical workers, guards and supervisors as defined in Section 2(11) of the Act.

On August 22, 2008, Respondent executed a collective-bargaining agreement with the Union for its warehouse employees and drivers in "any and all of its locations in the State of New Jersey, the five boroughs of New York and the counties of Nassau and Suffolk in the State of New York." The agreement has a term from August 22, 2008, through September 1, 2011.

Jose Lopez is the union agent assigned to represent the unit employees at Respondent's Brooklyn location. Lopez testified that he was informed by an employee that Respondent was planning to sell or close the Brooklyn location. Lopez asked Respondent's owner, Ayal Kadouri, about the rumor, but Kadouri denied that he was selling or closing the Brooklyn facility.<sup>1</sup> Sometime later, a unit employee told Lopez that the employees heard that they would be going to a facility in the Bronx and that Kadouri would be taken over or would enter into a partnership. Lopez again confronted Ayal Kadouri. Kadouri told Lopez that he had engaged in conversations with "Bazzini" but that he was not trying to sell the business.

In June or July 2010, the unit employees informed Lopez that they were being moved to a Bronx location. Lopez telephoned Ayal Kadouri but was not able to speak to him. Lopez then visited the place in the Bronx described to him by the unit employees, a plant called Bazzini Nuts. Lopez met the plant manager and he asked to speak to Ayal Kadouri, but Kadouri was said not to be available. Lopez went a second time to Bazzini Nuts; although he was not able to find Ayal Kadouri he was able to speak to one of his brothers. Lopez told this Kadouri that he questioned the fact that the business was no longer in Brooklyn and that there had not been any notice to the Union. Lopez told Kadouri that the Union wanted a meeting for effects bargaining.

Lopez testified that he had visited the Brooklyn site and that it was completely closed.

I note that the complaint alleges that Respondent closed the Brooklyn facility and laid off its employees. However, Lopez did not testify about any layoffs. Lopez merely testified generally that "everybody went to work in the Bronx", but he did not

<sup>1</sup> Ayal (Al) Kadouri is admitted by Respondent to be an owner, supervisor, and agent of Respondent.

specify whether employees were laid off for a time before the move.

On July 30, 2010, by certified mail and by fax, Lopez sent a letter to Ayal Kadouri demanding that Respondent meet to negotiate an "Effect[s] Bargaining Agreement." Also on July 30, Lopez wrote to Respondent, demanding arbitration of a grievance defined as, "Failure to notify the Union of the intention to shut down the operation and failure to perform effects bargaining with the Union."

The Union has not received any response from Respondent to the request to meet and negotiate.

It is well established that a Union is entitled to notice that an employer is closing its facility and that it is entitled to negotiate about the effects of the decision on the employees. *Willamette Tug & Barge Co.*, 300 NLRB 282 (1990); *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981). Respondent violated the Act when it failed to provide notice to the Union that it was closing the Brooklyn facility and moving to the Bronx and when it failed to respond to the Union's July 30, 2010 request for effects bargaining.

## CONCLUSIONS OF LAW

1. United Food and Commercial Workers, Local 342, is the exclusive collective-bargaining representative of Respondent's employees in the following unit

All full-time and regular part-time truck drivers, production and warehouse employees, excluding office clerical workers, guards and supervisors as defined in Section 2(11) of the Act.

2. By failing to provide notice to the Union that it was closing the Brooklyn facility and by failing to respond to the Union's request for effects bargaining, Respondent violated Section 8(a)(1) and (5) of the Act.

## REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The complaint seeks a make-whole order pursuant to *Transmarine Navigation Corp.*, 170 NLRB 389 (1968), the traditional remedy for the failure to bargain over the effects of a plant closing. The answer asserts that the General Counsel is not entitled to a *Transmarine* remedy. As stated above, there was no testimony about how many unit employees were laid off before they were moved to the Bronx or whether employees were laid off in any other manner. However, Respondent presented no evidence to show why a *Transmarine* remedy is inappropriate in this case. Therefore, I find that a *Transmarine* remedy should be ordered but that its precise application shall be addressed in the compliance stage of the instant proceeding. The Respondent shall pay its laid off 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 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; and (4) the Union's subsequent failure to bargain in good faith, but 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 closed its Brooklyn facility 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; provided, however, that 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 laid off 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), plus daily compound interest as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>2</sup>

#### ORDER

The Respondent, Kadouri International Foods, Brooklyn, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing to provide notice to the Union that it is closing the Brooklyn facility or any facility.

(b) Refusing to bargain with the Union with respect to the effects of its decision to close the Brooklyn facility.

(c) 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) Pay to the employees limited backpay, in the manner set forth in the remedy section of the decision.

(b) On request, bargain collectively with the Union with respect to the effects on the unit employees of its decision to close its Brooklyn facility.

(c) 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.

(d) Within 14 days after service by the Region, post at its facility in Bronx, New York, copies of the attached notice

<sup>2</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

marked "Appendix"<sup>3</sup> in both English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 29, 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 addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. 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 its Brooklyn facility at any time since June 1, 2010.

(e) 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. December 15, 2010

#### 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 to provide notice to United Food and Commercial Workers, Local 342, that we are closing a facility.

WE WILL NOT refuse to bargain with the Union with respect to the effects on our employees in the following unit of our decision to close the Brooklyn facility.

All full-time and regular part-time truck drivers, production and warehouse employees, excluding office clerical workers, guards and supervisors as defined in Section 2(11) of the Act.

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.

<sup>3</sup> 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."

WE WILL pay to the unit employees limited backpay in the manner set forth in the Board's decision.

WE WILL on request bargain with the Union with respect to the effects on our employees of our decision to close the Brooklyn facility.

KADOURI INTERNATIONAL FOODS, INC.