BLSI, LLC *and* International Union of Operating Engineers, Local 18, AFL–CIO. Case 9–CA–46091

July 5, 2011

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS BECKER AND HAYES

The Acting 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 International Union of Operating Engineers, Local 18, AFL–CIO on November 5, 2010, the Acting General Counsel issued a complaint on January 24, 2011, against BLSI, LLC (the Respondent), alleging that it has violated Section 8(a)(1) and (5) of the Act by failing and refusing to bargain with the Union. Although properly served copies of the charge and complaint, the Respondent failed to file an answer.

On February 22, 2011, the Acting General Counsel filed a Motion for Default Judgment with the Board, together with a memorandum in support of the motion. On February 23, 2011, the Respondent, by Thomas W. Kendo Jr., filed a Response to Motion for Default Judgment. Therein, Kendo stated that the Respondent's owner, Gordon L. Wray Jr., is deceased, and that he (Kendo) is the administrator of Wray's estate. Kendo further stated that Wray's estate is insolvent, and that the Respondent will cease to exist when the estate closes. Kendo requests that the Motion for Default Judgment be denied and this case dismissed on the ground that continuation of the case would be a waste of the Board's time and resources.

On February 25, 2011, the Acting General Counsel filed a reply to the Respondent's Response to Motion for Default Judgment, urging the Board to reject the Respondent's dismissal request and grant the Acting General Counsel's motion. That day, 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 did not file a response to the Board's notice.

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 complaint affirmatively states that an answer must be received on or before February 7, 2011, and that if no answer is 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 and exhibits attached to the Acting General Counsel's Memorandum in Support of Motion for Default Judgment disclose as follows. The Region, by letter dated February 4, 2011, advised Kendo that an answer must be received on or before February 7, 2011. Subsequently, by letter dated February 8, 2011, the Region notified Kendo that unless an answer was received by close of business on February 11, 2011, a motion for default judgment would be filed with the Board requesting that all allegations of the complaint be deemed admitted as true. The Region also instructed Kendo to request an extension of time, if necessary, before February 11, 2011. No answer or request for extension of time was received by that date.

In its Response to Motion for Default Judgment, the Respondent asks the Board to deny the Acting General Counsel's motion because prosecution of this case would waste the Board's time and resources. That assertion is not responsive to the matter at hand.[1] No answer to the complaint having been timely filed, the sole issue before us in ruling on the Acting General Counsel's motion is whether the Respondent has shown good cause for that failure. The Respondent makes a variety of representations in its response, but it offers no explanation why it failed to file an answer. In addition, the Respondent did not file a response to the Board's Notice to Show Cause.

Even construing the representations in Respondent's Response to Motion for Default Judgment as the Respondent's explanation for failing to file an answer, they fail to constitute good cause. The fact that the estate of Wray, the Respondent's deceased owner, is insolvent, as Kendo states, does not constitute good cause for failing to file an answer. See *Dong-A Daily North America,* 332 NLRB 15, 15–16 (2000). Neither does the death of Wray. See *Frank E. Laviero Co.*, 305 NLRB 94, 94 fn. 3 (1991). The Respondent, a limited liability company, survives the death of its owner. Id. Moreover, a respondent's asserted cessation of operations does not excuse it from filing an answer to a complaint. *Gardner Electrical Corp.*, 356 NLRB No. 154, slip op. at 1 fn. 2 (2011). The Respondent's failure to promptly request an exten-

[1] Nor is the Respondent's assertion necessarily true, as the duty to bargain under Sec. 8(a)(5) includes a duty to bargain concerning the effects of a decision to close a business. *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 677 fn. 15 (1981).

sion of time to file an answer is an additional factor demonstrating lack of good cause. *Day & Zimmerman Services*, 325 NLRB 1046, 1047 (1998). Accordingly, good cause has not been shown.

In the absence of good cause being shown for the failure to file a timely answer, we deem the allegations in the complaint admitted as true, and we grant the Acting 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 limited liability company with a facility located in Dayton, Ohio, has been engaged in the business of ground maintenance and site preparation for buildings, building pads, parking lots, and gravel installs. During the 12-month period ending January 24, 2011, the Respondent, in conducting its operations described above, purchased and received at its Dayton, Ohio location goods valued in excess of $50,000 directly from points outside the State of Ohio. 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, Rodney "Rusty" Trimbach and James "Mark" Gordon 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.

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

> All full-time and regular part-time heavy equipment operators employed by the [Respondent], but excluding all laborers, landscape employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

On August 19, 2010, the Union was certified as the exclusive collective-bargaining representative of the unit, and at all material times since that date, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the unit.

About August 24, 2010, the Union requested in writing that Respondent bargain collectively with it as the exclusive collective-bargaining representative of the unit. Since that date, the Respondent has failed and refused to bargain with the Union as the exclusive collective-bargaining representative of the unit, in violation of Section 8(a)(1) and (5) of the Act.

CONCLUSION OF LAW

By the conduct described above, the Respondent has been failing and refusing to bargain collectively with the Union as the exclusive collective-bargaining representative of the unit 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)(1) and (5) of the Act by failing and refusing to bargain with the Union, we shall order it to cease and desist therefrom and to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement. To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962).

ORDER

The National Labor Relations Board orders that the Respondent, BLSI, LLC, Dayton, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain with the Union as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(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) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time heavy equipment operators employed by the [Respondent], but excluding all laborers, landscape employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in Dayton, Ohio, copies of the attached notice marked "Appendix."[2] Copies of the notice, on forms provided by the Regional Director for Region 9, 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. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by e-mail, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means.[3] 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 August 24, 2010.

(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. July 5, 2011

Wilma B. Liebman, Chairman

Craig Becker, Member

Brian E. Hayes, 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 with International Union of Operating Engineers, Local 18, AFL–CIO (the Union) as the exclusive collective-bargaining representative of our employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time heavy equipment operators employed by [us], but excluding all laborers, landscape employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

BLSI, LLC

[2] 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."

[3] In *J. Picini Flooring*, 356 NLRB No. 9 (2010), the Board recently decided that its remedial notices are to be distributed electronically in appropriate circumstances. For the reasons stated in his dissenting opinion in *J. Picini Flooring*, Member Hayes would not require electronic distribution of notices.