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**Kephart Trucking Company and International Brotherhood of Teamsters, Local No. 125, AFL-CIO. Case 22-CA-109611**

January 6, 2014

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS JOHNSON  
AND SCHIFFER

The General Counsel seeks a default judgment<sup>1</sup> in this case on the ground that the Respondent has failed to file an answer to the complaint. Upon a charge filed by the International Brotherhood of Teamsters, Local No. 125, AFL-CIO (the Union) on July 22, 2013, the General Counsel issued a complaint on September 19, 2013, against Kephart Trucking Company (the Respondent) alleging that it violated Section 8(a)(5) and (1) of the Act. The Respondent failed to file an answer.

On November 4, 2013, the General Counsel filed a motion for default judgment with the Board. On November 6, 2013, 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 complaint affirmatively stated that unless an answer was received by October 3, 2013, the Board may find, pursuant to a motion for default judgment, that the allegations in the complaint are true. On October 1, 2013, the National Labor Relations Board closed due to a lapse in appropriated funds. As noted in the Federal Register notice posted on the Board's public website, the Agency granted, *sua sponte*, an extension of time to file or serve any document for which the grant of an extension is permitted by law. The terms of the extension were that for each day on which the Agency's offices were closed for all or any portion of the day, 1

<sup>1</sup> The General Counsel's motion requests summary judgment on the ground that the Respondent has failed to file an answer to the complaint. Accordingly, we construe the motion as a Motion for Default Judgment.

day would be added to the time for filing or service of the documents. The Agency's offices were closed for a total of 16 days. Under the Agency's terms, the Respondent's filing period was extended to October 21, 2013. By letter dated October 22, 2013, the Region extended that period until October 29, 2013, and advised the Respondent that unless an answer was filed, the Region would file a motion for default judgment. The Respondent failed to file an answer.

In the absence of good cause being shown for the failure to file an answer to the complaint, we deem the allegations in the complaint to be admitted as true, and 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 Pennsylvania corporation with an office and place of business in South Kearney, New Jersey (the South Kearney facility), has been engaged in the interstate transportation and freight management of solid waste.

During the 12-month period preceding issuance of the complaint, the Respondent, in conducting its business operations described above, purchased and received at its South Kearney facility goods and materials valued in excess of \$50,000 directly from suppliers located outside the State of New Jersey.

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, Timothy Kephart has held the position of the Respondent's owner and vice 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 drivers' 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 drivers, employed by the Employer at its 23 Second Street, South Kearney, New Jersey facility only. Excluded are all other office clerical employees, temporary employees, dispatchers, warehouse employees, mechanics, professional employees, office employees, managers, guards and supervisors as defined by the Act.

About July 12, 2010, the Union was certified as the exclusive collective-bargaining representative of the drivers' unit.

At all times since July 12, 2010, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the drivers' unit.

The following employees of the Respondent (the mechanics' 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 mechanics, employed by the Employer at its 23 Second Street, South Kearney, New Jersey facility only. Excluded are all other office clerical employees, temporary employees, dispatchers, warehouse employees, drivers, professional employees, office employees, managers, guards and supervisors as defined by the Act.

About September 16, 2010, the Union was certified as the exclusive collective-bargaining representative of the mechanics' unit.

At all times since September 16, 2010, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the mechanics' unit.

About June 14, 2013, the Union, by its labor counsel, Bruce Leder, requested to bargain over the effects of the Respondent's closure of its South Kearney facility.

Since about June 14, 2013, the Respondent failed and refused to bargain collectively with the Union about the effects of the closure of the South Kearney facility.

The effects of the closure of the South Kearney facility relate to the wages, hours, and other terms and conditions of employment of the drivers' unit and mechanics' unit, and are mandatory subjects for the purposes of collective bargaining.

#### CONCLUSION OF LAW

By the acts and conduct described above, the Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees, in violation of Section 8(a)(5) and (1) of the Act, and has thereby engaged in unfair labor practices affecting 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 take certain affirmative action designed to effectuate the policies of the Act. Specifically, to remedy the Respondent's unlawful failure and refusal to bargain

with the Union about the effects of its decision to close the South Kearney facility, we shall order the Respondent to bargain with the Union, on request, about the effects of that 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 representative at a time when the Respondent might still have been in need of their services and a measure of balanced bargaining power existed. Meaningful bargaining cannot be assured until some measure of economic strength is restored to the Union. A bargaining order alone, therefore, cannot serve as an adequate remedy for the unfair labor practices committed.

Accordingly, we deem it necessary, in order both 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 unit employees in a manner similar to that required in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968), as clarified in *Melody Toyota*, 325 NLRB 846 (1998).<sup>2</sup>

Thus, the Respondent shall pay its 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 its decision to close its South Kearney facility on the unit 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; 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

<sup>2</sup> See also *Live Oak Skilled Care & Manor*, 300 NLRB 1040 (1990). Neither the 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).

## KEPHART TRUCKING CO.

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 at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

Additionally, we shall order the Respondent to compensate the unit employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and to file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters for unit employees.

Finally, in view of the fact that the Respondent has closed its South Kearney facility, we shall order the Respondent to mail a copy of the attached notice to the Union and to the last known addresses of the unit employees who were employed by the Respondent at any time since June 14, 2013, in order to inform them of the outcome of this proceeding.

## ORDER

The National Labor Relations Board orders that the Respondent, Kephart Trucking Company, South Kearney, New Jersey, its officers, agents, successors, and assigns, shall

## 1. Cease and desist from

(a) Failing and refusing to bargain collectively and in good faith with International Brotherhood of Teamsters, Local No. 125, AFL-CIO (the Union) as the exclusive collective-bargaining representative of the employees in the following drivers' and mechanics' bargaining units by failing and refusing to bargain with the Union over the effects of the Respondent's decision to close its South Kearney, New Jersey facility:

## The Drivers' Unit

All full-time and regular part-time drivers, employed by the Employer at its 23 Second Street, South Kearney, New Jersey facility only. Excluded are all other office clerical employees, temporary employees, dispatchers, warehouse employees, mechanics, professional employees, office employees, managers, guards and supervisors as defined by the Act.

## The Mechanics' Unit

All full-time and regular part-time mechanics, employed by the Employer at its 23 Second Street, South Kearney, New Jersey facility only. Excluded are all other office clerical employees, temporary employees, dispatchers, warehouse employees, drivers, professional employees, office employees, managers, guards and supervisors as defined by the Act.

(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 collectively and in good faith with the Union concerning the effects of the Respondent's decision to close its South Kearney, New Jersey facility and reduce to writing and sign any agreement reached as a result of such bargaining.

(b) Pay the unit employees their normal wages for the period set forth in the remedy section of this decision, with interest.

(c) Compensate the unit employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

(d) 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.

(e) 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"<sup>3</sup> to the Union and to all unit employees who were employed by the Respondent at the time that it closed its facility about June 14, 2013.

(f) Within 21 days after service by the Region, file with the Regional Director for Region 22 a sworn certification of a responsible official on a form provided by the

<sup>3</sup> 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."

Region attesting to the steps the Respondent has taken to comply.

Dated, Washington, D.C. January 6, 2014

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Mark Gaston Pearce, Chairman

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Harry I. Johnson, III, Member

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Nancy Schiffer, 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
- Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to bargain collectively and in good faith with International Brotherhood of Teamsters, Local No. 125, AFL-CIO as the exclusive collective-bargaining representative of our unit employ-

ees set forth below by failing to bargain with the Union over the effects of our decision to cease operations of our South Kearney, New Jersey facility:

The Drivers' Unit

All full-time and regular part-time drivers, employed by us at our 23 Second Street, South Kearney, New Jersey facility only. Excluded are all other office clerical employees, temporary employees, dispatchers, warehouse employees, mechanics, professional employees, office employees, managers, guards and supervisors as defined by the Act.

The Mechanics' Unit

All full-time and regular part-time mechanics, employed by us at our 23 Second Street, South Kearney, New Jersey facility only. Excluded are all other office clerical employees, temporary employees, dispatchers, warehouse employees, drivers, professional employees, office employees, managers, guards and supervisors as defined by the Act.

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 collectively and in good faith with the Union concerning the effects on our unit employees of our decision to close our South Kearney, New Jersey facility on about June 14, 2013, and reduce to writing and sign any agreement reached as a result of such bargaining.

WE WILL pay the unit employees their normal wages for the period set forth in the Decision and Order of the Board, with interest.

WE WILL compensate our unit employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

KEPHART TRUCKING COMPANY