WF Coal Sales Inc., a Successor to Cobalt Coal Ltd and its Subsidiaries *and* United Mine Workers of America, District 17. Case 09–CA–157523

January 29, 2019

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN AND EMANUEL

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 filed by United Mine Workers of America, District 17 (the Union) on August 6, 2015, the General Counsel issued a complaint on June 30, 2016, against WF Coal Sales, Inc., a Successor to Cobalt Coal Ltd and its Subsidiaries (the Respondent), alleging that it has violated Section 8(a)(5) and (1) of the National Labor Relations Act. The Respondent failed to file an answer.

On August 24, 2016, the General Counsel filed with the National Labor Relations Board a Motion for Default Judgment. Thereafter, on August 30, 2016, 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 Board issued a Supplemental Notice to Show Cause on November 29, 2016. The Respondent again 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 July 14, 2016, 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 5, 2016, advised the Respondent that unless an answer was received by August 12, 2016, a motion for default judgment would be filed. Nevertheless, the Respondent failed to file an answer.[1]

In the absence of good cause being shown for the failure to file an answer, 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 has been a corporation with an office in Premier, West Virginia, and has been engaged in the mining of coal at its facility in Hensley, West Virginia.

Annually, the Respondent, in conducting its operations described above, sold and shipped from its Hensley, West Virginia facility goods valued in excess of $50,000 directly to Alpha Natural Resources, Inc., which operates a coal preparation plant located in the State of West Virginia, and is an enterprise directly engaged in interstate commerce that shipped goods valued in excess of $50,000 directly to points located outside the State of West Virginia.

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, the following individuals held the positions set forth 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:

Edward Brantley	Controller
Robert "Bobby" Wright	President
Bob Hedrick	Vice-President

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] The motion for default judgment indicates that the charge was served by regular mail to the West Virginia address of the Respondent's president. The complaint was initially served by certified mail to the West Virginia address, but was returned as undeliverable. The complaint was later served by certified mail to the South Carolina address of the Respondent's president, and tracking information provided by the U.S. Postal Service shows that document was delivered. In addition, the motion for default judgment was served by certified mail to the Respondent's West Virginia address, the Respondent's South Carolina address, and to the Respondent's attorney's North Carolina address (although the attorney did not enter an appearance), as well as by electronic mail to the Respondent. Other than the initial copy of the complaint, there is no indication that any copies of the complaint or the motion for default judgment sent to the Respondent or its counsel were returned.

> All full-time and regular part-time production and maintenance employees employed by the Respondent at its Route 7, Hensley, West Virginia, Westchester Mine facility, but excluding all contract employees, all office clerical employees, and all professional employees, guards and supervisors as defined in the Act.

Since about April 14, 2014, and at all material times, the Union has been the designated exclusive collective-bargaining representative of the unit and since then, the Union has been recognized as the representative by the Respondent. This recognition has been embodied in a Memorandum of Understanding, which is dated April 14, 2014.

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

About May 6, 2015, and continuing thereafter, the Respondent contracted out bargaining unit work to subcontractor McClay Energy, Inc. The Respondent engaged in such conduct 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 and without first bargaining with the Union to a good-faith impasse.

CONCLUSION OF LAW

By the conduct described above, the Respondent has been failing and refusing to bargain collectively and in good faith with the Union as the exclusive collective-bargaining representative of its unit employees, in violation of Section 8(a)(5) and (1) of the Act.[2] The Respondent's unfair labor practices described above 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 violated Section 8(a)(5) and (1) of the Act by subcontracting unit work without prior notice to the Union and without affording the Union an opportunity to bargain with the Respondent with respect to this conduct or its effects, we shall order the Respondent, on request, to bargain with the Union about these decisions and the effects of these decisions. In addition, we shall order the Respondent to restore the status quo ante by transferring the work it subcontracted back to unit employees. We shall also order the Respondent to make the unit employees whole for any loss of earnings and other benefits suffered as result of the unlawful subcontracting, and to reinstate any unit employees who were laid off as a result of the unlawful subcontracting.

Backpay shall be computed in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), if employees are no longer employed by the Respondent, and in accordance with *Ogle Protection Service,* 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), if employees remain employed by the Respondent, with interest as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).[3] In addition, we shall order the Respondent to compensate the unit employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards and to file a report with the Regional Director for Region 9 allocating backpay to the appropriate calendar years for each employee, in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016). The Respondent shall also be required to remove from its files any and all references to the unlawful layoffs if employees were laid off as a result of the unlawful subcontracting, and to notify each of the employees in writing that this has been done and that the unlawful conduct will not be used against them in any way.

If employees are no longer employed by the Respondent as a result of the unlawful subcontracting, in accordance with *King Soopers*, Inc., 364 NLRB No. 93 (2016), we shall also order the Respondent to compensate unit employees for their search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center,* supra.

ORDER

The National Labor Relations Board orders that the Respondent, WF Coal Sales Inc., a Successor to Cobalt Coal Ltd and its Subsidiaries, Premier, West Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Failing and refusing to bargain collectively and in good faith with the Union, United Mineworkers of

[2] It is well-established that subcontracting bargaining unit work is a mandatory subject of bargaining, affecting wages, hours, and other terms and conditions of employment. *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 210 (1964).

[3] The effects of the subcontracting on unit employees, including whether they remained employed in other positions with the Respondent, are not clear from the language of the complaint. Accordingly, we leave this remedial issue to be determined at the compliance stage of the proceedings.

America, District 17, over subcontracting bargaining unit work and its effects without prior notice to the Union.

(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 about subcontracting of bargaining unit work and its effects for the following unit:

> All full-time and regular part-time production and maintenance employees employed by us at our Route 7, Hensley, West Virginia, Westchester Mine facility, but excluding all contract employees, all office clerical employees, and all professional employees, guards and supervisors as defined in the Act.

(b) Restore the status quo ante by transferring the work it subcontracted back to unit employees.[4]

(c) Within 14 days from the date of this Order, if unit employees whose work was subcontracted no longer work for the Respondent, offer the unit employees full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(d) Make all unit employees whole for any loss of earnings and other benefits they may have suffered as a result of the Respondent's unlawful subcontracting, in the manner set forth in the remedy section of this decision.

(e) Remove from its records all references to the unlawful layoffs, if unit employees whose work was subcontracted no longer work for the Respondent, and notify each of the unit employees in writing that this has been done and that the layoffs will not be used against them in any way.

(f) Compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 9, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

(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 14 days after service by the Region, post at its facility in Hensley, West Virginia, copies of the attached notice marked "Appendix."[5] 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 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. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If 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 May 6, 2015.

(i) Within 21 days after service by the Region, file with the Regional Director for Region 9 a sworn certification of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

Dated, Washington, D.C. January 29, 2019

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John F. Ring, Chairman

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Lauren McFerran, Member

[4] At the compliance stage of the proceedings, the Respondent will be permitted to argue and present supporting evidence that restoring the status quo ante would be unduly burdensome. *San Luis Trucking. Inc*., 352 NLRB 211 fn. 5 (2008); *Allied General Services*, 329 NLRB 568, 569 (1999); *Lear Siegler, Inc.*, 295 NLRB 857 (1989).

[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."

William J. Emanuel, 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 the Union, United Mineworkers of America, District 17, over subcontracting bargaining unit work and its effects without prior notice to the Union.

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 about subcontracting of bargaining unit work and its effects for the employees in the following unit:

> All full-time and regular part-time production and maintenance employees employed by us at our Route 7, Hensley, West Virginia, Westchester Mine facility, but excluding all contract employees, all office clerical employees, and all professional employees, guards and supervisors as defined in the Act.

WE WILL restore the status quo ante by transferring the work we subcontracted back to unit employees.

WE WILL, if you no longer work for us as a result of our unlawful conduct, offer you full reinstatement to your former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to your seniority or any other rights or privileges previously enjoyed.

WE WILL remove from our records all references to the unlawful layoffs, if you no longer work for us as a result of our unlawful conduct, and notify you in writing that this has been done and that the layoffs will not be used against you in any way.

WE WILL make you whole for any loss of earnings and other benefits you may have suffered as a result of our unlawful subcontracting, less any net interim earnings, plus interest, plus reasonable search-for-work and interim employment expenses if you no longer work for us as a result of our unlawful conduct.

WE WILL compensate our unit employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 9, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

WF COAL SALES, INC., A SUCCESSOR TO COBALT COAL LTD AND ITS SUBSIDIARIES

The Board's decision can be found at http://www.nlrb.gov/case/09-CA-157523 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street S.E., Washington, DC 20570, or by calling (202) 273-1940.