

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Edward Hotel Michigan, LLC d/b/a Edward Hotel & Convention Center d/b/a Edward Hotel, Edward Hotel Detroit, LLC, Edward Hotel Management, LLC, Edward Hotel Holdings, Inc. and Local 324, International Union of Operating Engineers (IUOE), AFL–CIO. Case 07–CA–240810

May 19, 2020

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN
AND EMANUEL

The General Counsel seeks a default judgment in this case on the ground that Edward Hotel Michigan, LLC d/b/a Edward Hotel & Convention Center d/b/a Edward Hotel, Edward Hotel Detroit, LLC, Edward Hotel Management, LLC, and Edward Hotel Holdings, Inc. (the Respondents) failed to file an answer to the complaint.

Upon a charge filed by Local 324, International Union of Operating Engineers, AFL–CIO (the Union) on May 3, 2019, the General Counsel issued a complaint on July 30, 2019, alleging that the Respondents violated Section 8(a)(5) and (1) of the National Labor Relations Act by failing to bargain collectively and in good faith with the Union as the exclusive collective-bargaining representative of its employees. The Respondents failed to file an answer. On August 23, 2019, the General Counsel filed with the National Labor Relations Board a Motion for Default Judgment.

On August 28, 2019, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. On September 11, 2019, the Respondents filed a response opposing the Board’s Notice to Show Cause. The Respondents’ response did not include an answer to the complaint, request an extension of time to file an answer, or otherwise refute the complaint allegations that the Respondents have failed and refused to bargain in good faith with the Union in violation of Section 8(a)(5) and (1). The allegations in the General Counsel’s motion are therefore undisputed.¹

¹ By its response to the Notice to Show Cause, the Respondents argued that, after the facility’s closure in December 2018, the Respondents “suffered a number of incidents leading to the delay of discovering information” related to this matter including “multiple flooding incidents affecting the physical filing system that the [Respondents] kept of their employees.” The response did not include an answer to the complaint allegations, nor did it request an extension to file an answer under Section 102.22 of the Board’s Rules and Regulations. On September 17, 2019,

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 amended complaint affirmatively stated that unless an answer was received by August 13, 2019, the Board may find, pursuant to a motion for default judgment, that the allegations in the amended complaint are true. Further, the undisputed allegations in the General Counsel’s motion disclose that the Region, by letter dated August 15, 2019, advised the Respondent that unless an answer was received by August 22, 2019, a motion for default judgment would be filed. Nonetheless, the Respondent failed to file an answer.

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 Respondents have been limited liability companies with an office and place of business in Dearborn, Michigan and have been engaged in the operation of a hotel in Dearborn, Michigan (the Dearborn facility).

At all material times, the Respondents have been affiliated business enterprises with common officers, ownership, directors, management, and supervision; have formulated and administered a common labor policy; have shared common premises and facilities; have provided services for and made sales to each other; have interchanged personnel with each other; have interrelated operations with common operation of a hotel at the Dearborn facility; and have held themselves out to the public as a single-integrated business enterprise.

Based on their operations described above, at all material times, the Respondents have constituted a single-integrated business enterprise and a single employer within the meaning of the Act.

During the year preceding issuance of the complaint, the Respondents, in conducting their business operations described above, derived gross revenues in excess of

the General Counsel filed a reply to the Respondents’ response to the Notice to Show Cause, arguing that “control of [the Respondents’] files . . . [has] no relevance to whether the Respondents satisfied the procedural requirements of Section 102.20 of the Board’s Rules and Regulations” and has no impact on the Respondents’ failure to file a timely answer to the complaint issued on July 30, 2019. We agree with the General Counsel.

\$100,000 and purchased and received at the facility goods valued in excess of \$5000 directly from points outside the State of Michigan.

We find that the Respondents have been at all material times 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 Respondents within the meaning of Section 2(11) of the Act and agents of the Respondents within the meaning of Section 2(13) of the Act:

- Paul Bernard — Maintenance Director of Edward Hotel Management, LLC
- Diane Tinney — Human Resources Manager of Edward Hotel Management, LLC
- Richard Hazem — CEO of Edward Hotel Management, LLC

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

All full-time and regular part-time assistant chief engineers – energy managers, shift engineers, skilled maintenance employees, general maintenance employees, general maintenance assistants employed by Respondents at their Dearborn Michigan facility; but excluding professional employees and guards and supervisors as defined by the Act.

Since about April 1, 2016, and at all material times, the Respondents have recognized the Union as the exclusive collective-bargaining representative of the unit. This recognition has been embodied in a letter of agreement between the Respondents and the Union dated August 1, 2016. At all times since at least April 1, 2016, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the employees in the unit for the purpose of collective bargaining with respect to pay, wages, hours of employment, and other terms and conditions of employment.

The following events occurred, giving rise to this proceeding.

On about December 14, 2018, the Respondents ceased operations at the Dearborn facility and permanently laid off all skilled maintenance employees, general maintenance employees, and general maintenance assistant employees in the unit. On or about January 9, 2019, the Respondents permanently laid off all assistant chief engineers—energy managers and shift engineer employees—in the unit at the Dearborn facility. The Respondents engaged in the above-described conduct without prior notice to the Union and without affording the Union a meaningful opportunity to bargain over the effects of the Respondents' closure decision or over the effects of the Respondents' layoff decisions prior to announcing it to unit employees. By letter dated January 9, 2019, the Union requested that the Respondents bargain collectively with the Union as the exclusive collective-bargaining representative of the unit regarding the effects of the Dearborn facility closure.²

Since at least January 9, 2019, the Respondents have failed and refused to bargain collectively with the Union as the exclusive collective-bargaining representative of the unit regarding the effects of the Dearborn facility closure, including the permanent layoffs of unit employees, described above.

CONCLUSION OF LAW

By the conduct described above, the Respondents have 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 National Labor Relations Act and that the Respondents' unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the National Labor Relations Act.

REMEDY

Having found that the Respondents have engaged in certain unfair labor practices in violation of Section 8(a)(5) and (1) of the National Labor Relations Act, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

To remedy the Respondents' unlawful failure and refusal to bargain with the Union about the effects of the closing of the Respondents' facility, we shall order the Respondents to bargain with the Union, on request, about the effects of its closure of the Dearborn facility closing. As a result of the Respondents' unlawful conduct, however, the unit employees have been denied an opportunity to bargain through their collective-bargaining representative

² The complaint references December 8, 2018, as the date that the Respondents failed and refused to bargain with the Union. However, January 9, 2019, is the date that the Union first requested that the Respondents engage in bargaining over the effects of its decision to close

the Dearborn facility. We find it unnecessary to decide whether December 8 or January 9 is the operative date since the date on which the unfair labor practice occurred does not affect the remedy.

at a time when the Respondents 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 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 both to make whole the employees for losses suffered as a result of the violation and to recreate in some practicable manner a situation in which the parties' bargaining position is not entirely devoid of economic consequences for the Respondents. We shall do so by ordering the Respondents to pay backpay to the unit employees in a manner similar to that required in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968), as clarified by *Melody Toyota*, 325 NLRB 846 (1998).³

Accordingly, the Respondents shall pay their unit employees backpay at the rate of their normal wages when last in the Respondents' employ from 5 days after the date of this Decision and Order until occurrence of the earliest of the following conditions: (1) the Respondents bargain to agreement with the Union on those subjects pertaining to the effects of the closure on the unit employees; (2) the parties reach a bona fide impasse in bargaining; (3) the Union fails 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 Respondents' notice of its desire to bargain with the Union; or (4) the Union subsequently fails 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 Respondents ceased operations to the time they secured equivalent employment elsewhere, or the date on which the Respondents 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 Respondents' employ.⁴ Backpay shall be based on earnings that the unit

employees normally would have received during the applicable period and shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

Additionally, we shall order the Respondents to compensate the unit employees for any adverse tax consequences of receiving a lump-sum backpay award in accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014), and to file a report with the Regional Director for Region 7 allocating the backpay award to the appropriate calendar years for each employee in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016).

Further, in view of the fact that the Respondents' Dearborn facility is closed, we shall order the Respondents to mail a copy of the attached notice to the Union and to the last known addresses of its former unit employees in order to inform them of the outcome of this proceeding.

ORDER

The National Labor Relations Board orders that the Respondents, Edward Hotel Michigan, LLC d/b/a Edward Hotel & Convention Center d/b/a Edward Hotel, Edward Hotel Detroit, LLC, Edward Hotel Management, LLC, and Edward Hotel Holdings, Inc., Dearborn, Michigan, its officers, agents, successors, and assigns shall:

1. Cease and desist from

(a) Refusing to bargain collectively and in good faith with the Union as the exclusive collective-bargaining representative of the following unit, by failing and refusing to bargain over the effects of its decision to close the Dearborn facility:

All full-time and regular part-time assistant chief engineers—energy managers, shift engineers, skilled maintenance employees, general maintenance employees, general maintenance assistants employed by Respondents at their Dearborn Michigan facility; but excluding professional employees and guards and supervisors as defined by the Act.

speculative rather than actual consequences of failure to engage in effects bargaining); *Kadouri International Foods*, 356 NLRB 1201, 1201 fn. 1 (2011) (Member Hayes, dissenting in relevant part). We also observe that the United States Court of Appeals for the District of Columbia Circuit has expressed "concern[]" that the *Transmarine* remedy "may in some respects be punitive rather than remedial." *See Jet Trucking Corp. v. NLRB*, 221 F.3d 196, 196 (D.C. Cir. 2000) (unpublished per curiam). We would be willing to reconsider the 2-week-minimum backpay aspect of the *Transmarine* remedy in a future appropriate case.

³ See also *Live Oak Skilled Care & Manor*, 300 NLRB 1040 (1990).

⁴ We note that some Board members have expressed disagreement with *Transmarine's* 2-week-minimum backpay requirement, beginning with the dissent in *Transmarine* itself. See 170 NLRB at 391 (Member Jenkins, dissenting in part) ("Since I am unable to perceive any principle upon which my colleagues establish the minimum amount of backpay to be 'not less than' 2 weeks' pay, I would delete that portion of the remedy."); see also *IHS at West Broward*, 338 NLRB 239, 246 (2002) (Member Bartlett, concurring) (criticizing 2-week minimum as based on

(b) In any like or related manner refusing to bargain collectively and in good faith with the Union as the exclusive collective-bargaining representative of the unit.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Upon request, bargain collectively and in good faith with the Union with respect to the effects of its decision to close the Dearborn facility, including its permanent layoffs of unit employees.

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

(c) Within 14 days after service by the Region, duplicate and mail, at its own expense and after being signed by the Respondents' authorized representative, copies of the attached notice marked "Appendix" to the Union and to the skilled maintenance employees, general maintenance employees, and general maintenance assistant employees in the unit who were employed by the Respondents at any time since December 14, 2018, and to the assistant chief engineers, energy managers, and shift engineer employees in the unit who were employed by the Respondents any time since January 9, 2019.⁵

(d) Within 21 days after service by the Region, file with the Regional Director for Region 7 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

Dated, Washington, D.C. May 19, 2020

John F. Ring, Chairman

Marvin E. Kaplan, Member

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 refuse to meet and bargain with Local 324, International Union of Operating Engineers, AFL-CIO (the Union), over the effects of our decision to close the Dearborn facility, as the designated Section 9(a) collective-bargaining representative for the following unit employees:

All full-time and regular part-time assistant chief engineers – energy managers, shift engineers, skilled maintenance employees, general maintenance employees, general maintenance assistants employed by Respondents at their Dearborn Michigan facility; but excluding professional employees and guards and supervisors as defined by the Act.

WE WILL, upon request, bargain collectively and in good faith with the Union with respect to the effects of our decision to close the Dearborn facility, including the permanent layoffs of unit employees.

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

EDWARD HOTEL MICHIGAN, LLC D/B/A
EDWARD HOTEL & CONVENTION CENTER D/B/A
EDWARD HOTEL, EDWARD HOTEL DETROIT,
LLC, EDWARD HOTEL MANAGEMENT, LLC,
EDWARD HOTEL HOLDINGS, INC.

⁵ 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."

The Board's decision can be found at www.nlr.gov/case/07-CA-2408104 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, D.C. 20570, or by calling (202) 273-1940.

