**Aerosol Specialties, LLC Debtor-In-Possession a*nd* Teamsters, Local 984.** Case 26–CA–23289

December 29, 2009

DECISION AND ORDER

BY CHAIRMAN AND LIEBMAN AND MEMBER SCHAUMBER

The General Counsel seeks a default judgment in this case on the ground that the Respondent has withdrawn its answer to the June 30, 2009 complaint and failed to file an answer to the September 30, 2009 consolidated complaint and compliance specification. Upon a charge and amended charges filed by the Union on January 30, April 21, and May 27, 2009,[1] the General Counsel issued an order consolidating complaint and compliance specification, and notice of hearing on September 30, 2009, alleging that the Respondent has violated Section 8(a)(5) and (1) of the Act. The Respondent failed to file an answer to the consolidated complaint and compliance specification.

On October 28, 2009, the General Counsel filed a Motion for Default Judgment with the Board. Thereafter, on October 30, 2009, 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.

Ruling on Motion for Default Judgment[2]

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. Similarly, Section 102.56 of the Board's Rules and Regulations provides that the allegations in a compliance specification will be taken as true if an answer is not filed within 21 days from service of the compliance specification. In addition, the consolidated complaint and compliance specification affirmatively stated that unless an answer was filed by October 21, 2009, the Board may find, pursuant to a motion for default judgment, that the allegations in the consolidated complaint and compliance specification are true. By electronic mail correspondence dated September 30, 2009, the Respondent confirmed that it would not be filing an answer to the consolidated complaint and compliance specification. In the absence of good cause being shown for the failure to file a timely answer, we grant the General Counsel's Motion for Default Judgment.[3]

On the entire record, the Board makes the following

[1] The original charge and first amended charge were filed by the Union against Shilo, Incorporated d/b/a Speer Products, Incorporated on January 30 and April 21, 2009, respectively. On May 27, 2009, the Union filed a second amended charge naming only the Respondent, Aerosol Specialties, LLC, as the charged party in this case. On June 30, 2009, the General Counsel issued a complaint and notice of hearing against the Respondent. On July 13, 2009, the Respondent filed an answer to the complaint. Subsequently, by letter dated August 12, 2009, the Respondent withdrew its answer to the complaint, confirmed its understanding that upon withdrawal of the answer, the General Counsel would issue a consolidated complaint and compliance specification, and advised the General Counsel that it would not file an answer to the consolidated complaint and compliance specification. The Respondent also indicated that it understood that the General Counsel would then file a motion for default judgment and pursue that claim in the United States Bankruptcy Court for the Western District of Tennessee. On August 19, 2009, the Regional Director issued an Order approving the Respondent's request to withdraw its answer to the complaint. The withdrawal of an answer has the same effect as a failure to file an answer, i.e., the allegations in the complaint must be considered to be true. See *Maislin Transport*, 274 NLRB 529 (1985).

[2] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act. See *Narricot Industries, L.P. v. NLRB*, ___ F.3d ___, 2009 WL 4016113 (4th Cir. Nov. 20, 2009); *Snell Island SNF LLC v. NLRB*, 568 F.3d 410 (2d Cir. 2009), petition for cert. filed 78 U.S.L.W. 3130 (U.S. Sept. 11, 2009) (No. 09-328); *New Process Steel v. NLRB*, 564 F.3d 840 (7th Cir. 2009), cert. granted ___ S.Ct. ___, 2009 WL 1468482 (U.S. Nov. 2, 2009); *Northeastern Land Services v. NLRB*, 560 F.3d 36 (1st Cir. 2009), petition for cert. filed 78 U.S.L.W. 3098 (U.S. Aug. 18, 2009) (No. 09-213); *Teamsters Local 523 v. NLRB*, ___ F.3d ___, 2009 WL 4912300 (10th Cir. Dec. 22, 2009). But see *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009), petition for cert. filed 78 U.S.L.W. 3185 (U.S. Sept. 29, 2009) (No. 09-377).

[3] The designation of "debtor in possession" as part of the Respondent's name and the August 12, 2009 letter from the Respondent's attorney to the Region indicate that the Respondent is involved in bankruptcy proceedings. However, it is well established that the institution of bankruptcy proceedings does not deprive the Board of jurisdiction or authority to entertain and process an unfair labor practice case to its final disposition. See, e.g., *Cardinal Services*, 295 NLRB 933 fn. 2 (1989), and cases cited there. Board proceedings fall within the exception to the automatic stay provisions for proceedings by a governmental unit to enforce its police or regulatory powers. See id., and cases cited therein; *NLRB v. 15th Avenue Iron Works, Inc.*, 964 F.2d 1336, 1337 (2d Cir. 1992). Accord: *Ahrens Aircraft, Inc. v. NLRB*, 703 F.2d 23 (1st Cir. 1983).

## FINDINGS OF FACT

### I. JURISDICTION

At all material times, the Respondent, a Delaware corporation with an office and place of business in Memphis, Tennessee, has been engaged in the manufacture of pet insecticides and/or chemical specialty products.

During the 12-month period ending May 31, 2009, the Respondent, in conducting its business operations described above, sold and shipped from its Memphis, Tennessee facility goods valued in excess of $50,000 directly to points located outside the State of Tennessee.

During the 12-month period ending May 31, 2009, the Respondent, in conducting its business operations described above, purchased and received at its Memphis, Tennessee facility goods valued in excess of $50,000 directly from points located outside the State of Tennessee.

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, Teamsters, Local 984, 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:

| | | |
|---|---|---|
| Tom Kirkpatrick | - | Interim CEO |
| Mark George | - | Plant Manager |
| Dave Lichtle | - | Human Resources Manager (until about January 20, 2009) |

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

> INCLUDED: All production, general maintenance, warehouse, compounding and quality control employees employed by the Respondent at its Memphis, Tennessee facility.
>
> EXCLUDED: All executives, office clerical employees, professional and technical employees, plant engineers, salesmen, guards and supervisors as defined in the Act.

On August 20, 1974, the Union was certified in Case 26-RC-4830 as the exclusive collective-bargaining representative of the unit and, since about December 21, 2007, has been recognized as the exclusive collective-bargaining representative of the unit by the Respondent. This recognition was embodied in a collective-bargaining agreement effective from September 1, 2008 through August 31, 2009.

At all times since August 20, 1974, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the unit.

In about November 2008, the Respondent unilaterally changed its personal leave policy.

In about December 2008, the Respondent unilaterally changed its vacation leave policy.

The subjects set forth above relate to wages, hours, and other terms and conditions of employment of the unit and are mandatory subjects for purposes of collective bargaining.

The Respondent engaged in the conduct set forth above without affording the Union notice and an opportunity to bargain about these changes.

## CONCLUSION OF LAW

By the acts and conduct described above, the Respondent has failed and refused to bargain collectively and in good faith with the exclusive collective-bargaining representative of its unit employees 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 violated Section 8(a)(5) and (1) of the Act by unilaterally changing its personal leave and vacation leave policies, we shall order the Respondent to bargain, on request, with the Union concerning those policy changes, and to make unit employees whole by paying them the amounts set forth in the compliance specification, plus interest accrued to the date of payment as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), and minus tax withholdings required by Federal and State laws.[4]

## ORDER

The National Labor Relations Board orders that the Respondent, Aerosol Specialties, LLC, Memphis, Tennessee, its officers, agents, successors, and assigns, shall

1. Cease and desist from

[4] The General Counsel seeks compound interest computed on a quarterly basis for any backpay awarded. Having duly considered the matter, we are not prepared at this time to deviate from our current practice of assessing simple interest. See, e.g., *Glen Rock Ham*, 352 NLRB 516, 516 fn. 1 (2008), citing *Rogers Corp.,* 344 NLRB 504 (2005).

(a) Failing and refusing to recognize and bargain with Teamsters, Local 984, as the exclusive collective-bargaining representative of the unit employees, by unilaterally changing its personal leave and vacation leave policies without giving prior notice to the Union and without affording the Union the opportunity to bargain with respect to that conduct. The appropriate unit is:

INCLUDED: All production, general maintenance, warehouse, compounding and quality control employees employed by the Respondent at its Memphis, Tennessee facility.

EXCLUDED: All executives, office clerical employees, professional and technical employees, plant engineers, salesmen, guards and supervisors as defined in 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) Make whole the following unit employees for the Respondent's failure since November 2008 to continue in effect its personal leave and vacation leave policies, by paying them the amounts following their names, plus interest accrued to the date of payment, as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), and minus tax withholdings required by Federal and State laws:

| | |
|---|---|
| Lurline Brown | $168.16 |
| Dorothy Briars | 84.08 |
| Ron Gatewood | 512.96 |
| Ann Golden | 90.96 |
| Roberin Golden | 636.72 |
| Frederick Hurt | 288.80 |
| Dorothy Mack | 335.04 |
| Dorothy Moss | 84.08 |
| Ruthie Nelson | 252.24 |
| Ann Robertson | 101.20 |
| Letha Scott | 89.60 |
| Doris Threatt | 168.16 |
| Glenda Threatt | 168.16 |
| Total Backpay: | $2,980.16 |

(b) On request, bargain with the Union concerning changes to personal leave and vacation leave policies.

(c) Within 14 days after service by the Region, post at its facility in Memphis, Tennessee, copies of the attached notice marked "Appendix.[5] Copies of the notice, on forms provided by the Regional Director for Region 26, 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 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 November 2008.

(d) 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 29, 2009

Wilma B. Liebman, Chairman

Peter C. Schaumber, 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 recognize and bargain with Teamsters, Local 984, as the exclusive collective-bargaining representative of the unit employees, by unilaterally changing our personal leave and vacation

[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."

leave policies without giving prior notice to the Union and without affording the Union the opportunity to bargain with respect to that conduct. The appropriate unit is:

> INCLUDED: All production, general maintenance, warehouse, compounding and quality control employees employed by us at our Memphis, Tennessee facility.
>
> EXCLUDED: All executives, office clerical employees, professional and technical employees, plant engineers, salesmen, guards and supervisors as defined in 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.

WE WILL make whole the following unit employees for our failure since November 2008 to continue in effect our personal leave and vacation leave policies, by paying them the amounts following their names, plus interest:

| | |
|---|---|
| Lurline Brown | $168.16 |
| Dorothy Briars | 84.08 |
| Ron Gatewood | 512.96 |
| Ann Golden | 90.96 |
| Roberin Golden | 636.72 |
| Frederick Hurt | 288.80 |
| Dorothy Mack | 335.04 |
| Dorothy Moss | 84.08 |
| Ruthie Nelson | 252.24 |
| Ann Robertson | 101.20 |
| Letha Scott | 89.60 |
| Doris Threatt | 168.16 |
| Glenda Threatt | 168.16 |
| Total Backpay | $2,980.16 |

WE WILL, on request, bargain with the Union concerning changes to personal leave and vacation leave policies.

AEROSOL SPECIALTIES, LLC DEBTOR-IN-POSSESSION