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Asher Candy, Inc. and Sherwood Brands, Inc., A Single Employer, and Sherwood Brands, LLC, Alter Ego of Sherwood Brands, Inc., both d/b/a Sherwood Brands, Inc. LLC; Sherwood Brands, Inc., Debtor-in-possession and Sherwood Brands, LLC, Debtor-in-possession and Local 102, Bakery, Confectionary, Tobacco Workers & Grain Millers International Union, AFL-CIO. Case 29-CA-26761

February 8, 2012

SECOND SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HAYES
AND GRIFFIN

The Acting General Counsel seeks default judgment in this case on the ground that the Respondents have failed to file an answer to the amended compliance specification.¹

On October 24, 2006, the Board issued a Decision and Order² that, among other things, directed Respondent Asher Candy, Inc. and Sherwood Brands, Inc. LLC, as a single employer, to make whole its laid-off unit employees for loss of earnings and other benefits resulting from the Respondent's unfair labor practices in violation of Section 8(a)(5) and (1) of the Act. On November 27, 2007, the United States Court of Appeals for the District of Columbia Circuit enforced the Board's Order.³

Thereafter, a controversy having arisen over the amount of backpay and other benefits owed the unit employees, on March 28, 2008, the Regional Director for Region 29 issued a compliance specification and notice of hearing. On February 19, 2009, the Board issued a Supplemental Decision and Order,⁴ ordering that the Respondent, inter alia, pay to the unit employees the amounts set forth in the appendices, plus interest, minus tax withholdings required by Federal and State laws. On

¹ The underlying pleading in this proceeding was entitled, "Notice of Hearing." In the Order Transferring Proceeding to the Board and Notice to Show Cause issued on October 21, 2011, the Board indicated, at fn. 1, that it viewed the notice of hearing as an amended compliance specification, directed the Region to so amend the name of the pleading, and instructed the parties to refer to the pleading's name as amended. An Order amending the name of the pleading issued on November 10, 2011.

² 348 NLRB 993 (2006).

³ Nos. 06-1368 and 06-1393.

⁴ 353 NLRB 959 (2009).

October 15, 2009, the United States Court of Appeals for the Second Circuit enforced the Board's Order.⁵

A further controversy having arisen over whether Sherwood Brands, Inc., Sherwood Brands, LLC, Sherwood Brands, Inc., debtor-in-possession, and Sherwood Brands, LLC, debtor-in-possession should be held jointly and severally liable for the amount of backpay due to the unit employees, the Regional Director for Region 29 issued an amended compliance specification on August 17, 2011, notifying the Respondents that they should file timely answers complying with the Board's Rules and Regulations. Although properly served with copies of the amended compliance specification, the Respondents failed to file an answer.⁶

By letter dated September 8, 2011, counsel for the Acting General Counsel advised Respondents' counsels that if an answer was not filed by September 15, 2011, a motion for default judgment would be filed. In a letter dated September 16, 2011, counsel for Sherwood Brands, Inc. replied that "No Answers are required by the debtor entities. All proceedings before the National Labor Relations Board against the Answer dated entities are Stayed as a matter of law."⁷

On September 26, 2011, the Acting General Counsel filed a Motion for Default Judgment with the Board. On October 21, 2011, 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 Respondents filed no response. The allegations in the motion and in the amended compliance specification 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 102.56(a) of the Board's Rules and Regulations provides that a respondent shall file an answer within 21 days from service of a compliance specification. Section 102.56(c) provides that if the respondent

⁵ No. 09-1307-ag.

⁶ The envelope containing the amended compliance specification mailed to Sherwood Brands, Inc. and Asher Candy, Inc. was returned as undeliverable, but the amended compliance specification was successfully served on counsel for Sherwood Brands, Inc. Thereafter, counsel for Sherwood Brands, LLC advised counsel for the Acting General Counsel that Sherwood Brands, LLC had filed a Chapter 11 bankruptcy petition. In response, by letter dated September 2, 2011, addressed to counsel for Sherwood Brands, LLC, counsel for the Acting General Counsel informed him that Board unfair labor practice proceedings are excepted from the automatic stay provision of the Bankruptcy Code. Thereafter, counsel for Sherwood Brands, Inc. acknowledged receipt of the September 2, 2011 letter during a phone call with counsel for the Acting General Counsel on September 6, 2011.

⁷ This letter is attached to the motion as Exh. J.

fails to file an answer to the specification within the time prescribed by this section, the Board may, either with or without taking evidence in support of the allegations of the specification and without further notice to the respondent, find the specification to be true and enter such order as may be appropriate.

According to the uncontroverted allegations of the Motion for Default Judgment, the Respondents, despite having been advised of the filing requirements, have failed to file an answer to the amended compliance specification. In the absence of good cause for the Respondents' failure to file an answer, we deem the allegations in the amended compliance specification to be admitted as true, and grant the Acting General Counsel's Motion for Default Judgment.⁸

On the entire record, the Board makes the following

FINDINGS OF FACT

Sherwood Brands, Inc. is a North Carolina corporation with its principal place of business located at 1803 Research Boulevard, Suite 201, Rockville, Maryland. On July 1, 2011, Sherwood Brands, Inc. filed a Chapter 11 petition in the United States Bankruptcy Court for the District of Maryland in Case No. 11-28309.

Sherwood Brands, LLC is a North Carolina corporation with its principal place of business located at 1803 Research Boulevard, Suite 201, Rockville, Maryland. On July 1, 2011, Sherwood Brands, LLC filed a Chapter 11 petition in the United States Bankruptcy Court for the District of Maryland in Case No. 11-28307.

At all material times, Sherwood Brands, Inc. operated as a holding company. The following companies are wholly-owned subsidiaries of Sherwood Brands, Inc.: Sherwood Brands, LLC, Sherwood Brands of Rhode Island Inc., and Sherwood Foods, Inc.

At all material times, the following individuals have held the positions listed below for Sherwood Brands, Inc. and its wholly owned subsidiaries, including Sherwood Brands, LLC, Sherwood Brands of Rhode Island Inc., and Sherwood Foods, Inc.:

Uziel Frydman—COO and President
Amir Frydman—CEO and Vice President

⁸ Although Sherwood Brands, Inc. and Sherwood Brands, LLC have filed Chapter 11 bankruptcy petitions, 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, 933 fn. 2 (1989), and cases cited therein. 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 *NLRB v. 15th Avenue Iron Works, Inc.*, 964 F.2d 1336 (2d Cir. 1992); *Cardinal Services*, 295 NLRB at 933 fn. 2; accord: *Ahrens Aircraft, Inc. v. NLRB*, 703 F.2d 23 (1st Cir. 1983).

Christopher Willi—CFO and Treasurer

At all material times, Sherwood Brands, Inc. and Sherwood Brands, LLC have done business as and have also been known as Sherwood Brands, Inc. LLC.

On November 3, 2006, Asher Candy, Inc. and Sherwood Brands, Inc. jointly filed with the United States District Court for the District of Columbia a petition for review of the Board Decision and Order reported at 348 NLRB 993, that named Sherwood Brands, Inc. LLC as one of the two single employer Respondents.⁹

At all material times prior to December 2006, all revenues generated by Sherwood Brands, Inc.'s wholly owned subsidiaries, including Sherwood Brands, LLC, Sherwood Brands of Rhode Island Inc., and Sherwood Foods, Inc. were deposited into bank account(s) registered to Sherwood Brands, Inc.

At all material times prior to December 2006, all payroll expenses incurred by Sherwood Brands, Inc.'s wholly owned subsidiaries, including Sherwood Brands, LLC, Sherwood Brands of Rhode Island Inc., and Sherwood Foods, Inc., were paid from various bank accounts registered to Sherwood Brands, Inc.

On about December 20, 2006, Sherwood Brands, Inc. transferred \$20,756 from its collateral reserve account xxxxxx0849 at BB&T Bank to Sherwood Brands, LLC Master account xxxxxx1486 at BB&T Bank.

On about December 28, 2006, Sherwood Brands, Inc. transferred \$1,071,795.83 from its collateral reserve account xxxxxx0849 at BB&T Bank to Sherwood Brands, LLC Agent account xxxxxx1516 at BB&T Bank.

Between January 1 and March 9, 2007, Sherwood Brands, Inc. made deposits into its collateral reserve account xxxxxx0849 at BB&T Bank in the following amounts: January 2007—\$18,181.98; February 2007—\$142,967.73; and March 2007—\$12,923.25.

Between January 1 and March 9, 2007, Sherwood Brands, Inc. transferred all of the deposits listed above from its collateral reserve account xxxxxx0849 at BB&T Bank to Sherwood Brands, LLC Agent account xxxxxx1516 at BB&T Bank.

On about March 9, 2007, when Sherwood Brands, Inc. closed its collateral reserve account at BB&T Bank,

⁹ We take administrative notice of the fact that in the court proceeding discussed above the Respondents affirmatively stated in their petition for review that Sherwood Brands, Inc. (rather than Sherwood Brands, Inc. LLC) was the aggrieved party. In addition, as noted above, the undisputed allegations in the amended compliance specification state that Sherwood Brands, Inc. and Sherwood Brands, LLC have done business as and have also been known as Sherwood Brands, Inc. LLC. Accordingly, we find that Sherwood Brands, Inc. is the entity found to be a single employer with Asher Candy in case 348 NLRB 993, and we have modified the case caption to reflect this.

Sherwood Brands, Inc. caused all electronic vendor payments sent to its collateral reserve account to be credited to either the Sherwood Brands, LLC Agent account xxxxxx1516 or Master account xxxxxx1486 at BB&T Bank.

At all material times prior to December 2006, Sherwood Brands, Inc. funded the payroll of its wholly owned subsidiaries Sherwood Brands of Rhode Island Inc. and Sherwood Foods, Inc. with funds from its BB&T Bank account xxxxxx8445.

At all material times since December 2006, Sherwood Brands, LLC, through its BB&T Bank Operating account xxxxxx1451 has funded the payroll of Sherwood Brands, Inc.'s wholly owned subsidiaries Sherwood Brands of Rhode Island Inc. and Sherwood Foods, Inc.

The transfer on December 28, 2006 of \$1,071,795.83 from Sherwood Brands, Inc. to Sherwood Brands, LLC described above occurred at times when Sherwood Brands, Inc. was either insolvent or rendered insolvent by said transactions. The transfers of funds on December 28, 2006, and between January 1 and March 9, 2007 by Sherwood Brands, Inc. described above were made without Sherwood Brands, Inc. receiving equivalent value from Sherwood Brands, LLC in exchange for the funds which it was transferred. These transfers constituted fraudulent conveyances against the interests of the Board.

Sherwood Brands, Inc. does not currently have any funds on deposit with BB&T Bank or with any non-BB&T Bank. Sherwood Brands, Inc., by fully depleting its accounts at BB&T Bank, as described above, has rendered itself insolvent and unable to satisfy its remedial obligations to the Board under the January 26, 2008 Court Judgment.

Based on the facts and conduct set forth above, Sherwood Brands, LLC is an alter-ego of Sherwood Brands, Inc., and is jointly and severally liable with Respondents Asher Candy, Inc., Sherwood Brands, Inc. LLC, Sherwood Brands, Inc., Sherwood Brands, Inc., debtor-in-possession, and Sherwood Brands, LLC, debtor-in-possession, to comply with the Board Order and Court Judgment.

By virtue of the fact that Sherwood Brands, Inc. is an adjudicated single employer with Respondent Asher Candy, Inc., Sherwood Brands, Inc. is bound by the Supplemental Board Order dated February 19, 2009, and the Court Judgment entered on September 10, 2009.

Based on the facts and conduct set forth above, we find that Asher Candy, Inc., Sherwood Brands, Inc., Sherwood Brands, LLC, Sherwood Brands, Inc., debtor-in-possession, and Sherwood Brands, LLC, debtor-in-possession are jointly and severally liable to comply with the Board's Supplemental Decision and Order and the Court's Judgment enforcing the Board's Supplemental Decision and Order.

ORDER

The National Labor Relations Board orders that the Respondents, Asher Candy, Inc., Sherwood Brands, Inc., Sherwood Brands, LLC, Sherwood Brands, Inc., debtor-in-possession, and Sherwood Brands, LLC, debtor-in-possession, their officers, agents, successors, and assigns, shall jointly and severally make whole the unit employees named in the Board's Supplemental Decision and Order reported at 353 NLRB 959 by paying them the amounts set forth therein, with interest to the date of payment as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), minus tax withholdings required by Federal and State laws.¹⁰

TOTAL AMOUNT DUE—\$279,523.20

Dated, Washington, D.C. February 8, 2012

Mark Gaston Pearce, Chairman

Brian E. Hayes, Member

Richard F. Griffin, Jr., Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

¹⁰ The Board has declined to apply its new policy, announced in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), enf. denied on other grounds sub nom., *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011), of daily compounding of interest on backpay awards, in cases such as this, that were already in the compliance stage on the date that decision issued. *Rome Electrical Systems, Inc.*, 356 NLRB No. 38, slip op. at 1 fn. 2 (2010).