

Mistletoe Express Service of Texas, Inc.¹ and Teamsters, Chauffeurs, Warehousemen, Helpers and Food Processors, Local Union No. 657, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Petitioner. Case 23-RC-5024

28 February 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS
ZIMMERMAN AND HUNTER

Upon a petition duly filed on 7 August 1981 under Section 9(c) of the National Labor Relations Act, a hearing was held before Hearing Officer Ruben R. Armendariz. Following the hearing and pursuant to Section 102.67 of the National Labor Relations Board Rules and Regulations and Statements of Procedure, this case was transferred to the Board for decision on 2 June 1982. Thereafter, briefs were duly filed by the Employer, the Petitioner, and the Intervenor.²

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the hearing officer's rulings made at the hearing and finds that they are free from prejudicial error. They are hereby affirmed.

On the entire record in this case, including the Employer's, the Petitioner's, and the Intervenor's briefs, the Board finds

1. The parties stipulated, and we find, that the Employer is engaged in commerce within the meaning of the Act, and that it will effectuate the purposes of the Act to assert jurisdiction herein.

2. The labor organizations involved claim to represent certain employees of the Employer.

3. In the spring or early summer of 1981, Mistletoe Express Service, Inc.,³ a package express delivery service operating 11 facilities in Oklahoma, Texas, Kansas, Arkansas, and Tennessee, acquired all of the stock of Texas Tex-Pack which was similarly engaged in a package express delivery service within the State of Texas, from 5 facilities located south of Dallas and Fort Worth and renamed the company Mistletoe Express Service of Texas, Inc.⁴

¹ The petition was amended at the hearing to reflect the correct name of the Employer.

² International Brotherhood of Motor Expressmen's Unions, affiliated with the National Federation of Independent Unions, was permitted to intervene at the hearing on the basis of a contractual interest in the employees involved.

³ Hereinafter referred to as the Parent Company.

⁴ Hereinafter referred to as the Employer.

The employees of the Parent Company were represented by the Intervenor who, subsequent to such acquisition, attempted to organize the unrepresented employees of the Employer. Following the presentation of cards by the Intervenor and a card check by Sidney Upsher, the president of both the Parent Company and the Employer, a contract was executed on 4 August 1981, containing by reference the existing contract between the Intervenor and the Parent Company.⁵ A recognition agreement was executed on 4 August. On 6 August the parties met and negotiated provisions concerning wages and hours. A contract between the parties was signed on 7 August 1981.

The existing contract between the Parent Company and the Intervenor contained a "NEW FACILITIES" clause:

NEW FACILITIES

Whenever a new branch terminal (one which has regular salaried employees in company owned trucks) is opened by the company during the life of this agreement, the company will extend to that new facility the terms and conditions of work specified in this agreement. Wages and hours will be negotiable. The company will recognize the union as the bargaining agent for the employees at that terminal subject to the exceptions set out in Section 2.

The employee complement of the Employer is approximately 200 employees. The Parent Company employs approximately 650 employees. For the most part, the board of directors for the Parent Company and for the Employer are the same.

Following the acquisition, the Parent Company implemented all rates, tariffs, and procedures regarding fringe benefits, vacations, holidays, and sick pay for both companies.

On 7 August 1981 the Petitioner filed a petition seeking to represent all dock employees, drivers, and garage employees of the San Antonio, Austin, and Corpus Christi, Texas terminals of the Employer, thereafter amended to include Waco and Laredo. The Employer informed the Board that a contract already covered such employees. On 17 and 21 August 1981 the Petitioner filed unfair labor practice charges against the Employer and the In-

⁵ Sidney Upsher, president of the Employer, signed a statement with the Intervenor which contained the following:

The National Brotherhood of Motor Expressmen's Union have presented, Mistletoe Express of Texas. One hundred sixty-six (166) authorization cards signed, of a possible one hundred and ninety-seven (197).

tervenor alleging violations of Section 8(a)(1) and (2) and Section 8(b)(1)(A).⁶

On 1 April 1982 the Petitioner's counsel wrote a letter to the Regional Director for Region 23 which read as follows:

In view of the General Counsel's having sustained Petitioner Charging Party's appeal of Cases No. 23-CA-8630 and 23-CB-2580, Teamster Local 657 herewith requests to proceed to an election in the representation matter.

On 21 April 1982 the Petitioner's counsel again wrote to the Regional Director with the following request:

You will note that on behalf of Petitioner, Teamsters Local 657, that I earlier submitted a request to proceed to an election in this matter. In furtherance of that request, please accept this letter as a further request to proceed under the terms of *Carlson Furniture Industries, Inc.*, 157 NLRB 851 (1966). In particular, Teamsters Local 657 is willing to proceed to an election understanding that intervenor union may appear on the ballot in any election directed by the Board; that if a majority of the ballots in the election are cast for intervenor that union may be certified unless meritorious objections are filed; and if the intervenor is certified, no further action on the 8(a)(2) charges presently pending will be taken.

My client is anxious to proceed to an election in this matter and would prefer to resolve the contested issues through the Board's R. case procedures rather than to await disposition through the protracted C. case.

On 4 May 1982 the Board, through its Executive Secretary, notified the Regional Director for Region 23 that he was authorized to process the

⁶ Cases 23-CA-8630 and 23-CB-2580. The Regional Director dismissed the unfair labor practice charges on 1 October 1981. Subsequently, the petition also was dismissed on 5 October 1981. On 26 March 1982 the General Counsel, through the Office of Appeals, sustained the Charging Party's (the Petitioner's) appeal on grounds that:

The contentions that the Employer unlawfully assisted the Charged Union (Intervenor); granted recognition to the Charged Union when it was not the designated representative of a majority of the employees; and granted recognition to the Charged Union at a time when there was a real question concerning representation, and that the Charged Union accepted recognition at a time when it was not the designated representative of a majority of the employees raised issues warranting Board determination based upon record testimony developed at a hearing before an Administrative Law Judge. Accordingly, the case is remanded to the Regional Director with instructions to issue appropriate Section 8(a)(1) and (2) and Section 8(b)(1)(A) complaints, absent settlement.

No complaints have issued.

representation petition to a conclusion and honor the *Carlson* waiver.⁷

On 7 May 1982 the Regional Director for Region 23 informed the Employer that a representation hearing would be held on the representation petition. On 11 May 1982 the Employer protested holding the representation hearing due to the Board's "blocking charge" policy. A formal notice of representation hearing issued on 11 May 1982. Thereafter, the Employer filed its motion for withdrawal of notice of hearing on 20 May 1982. The Acting Regional Director for Region 23 denied the motion on 21 May 1982.

At the opening of the representation hearing on 26 May 1982 the Employer objected to proceeding on the representation matter in light of the pending unfair labor practice charges. The Employer's objection to the hearing was overruled by the hearing officer. The Employer requested permission to file a special appeal from the hearing officer's ruling pursuant to Section 102.65(c) of the Board's Rules and Regulations. Also on 26 May 1982 the Petitioner filed a handwritten opposition to the Employer's motion to appeal the hearing officer's denial of its request to appeal to the Board the hearing officer's denial of its "Motion to Withdraw Notice of Hearing."⁸ The Employer's request for permission to take a special appeal from the ruling was denied by the Regional Director for Region 23.

The Petitioner contends that the Employer's position is in error inasmuch as the pendency of the unfair labor practice proceeding does not bar the processing of the petition; that the Casehandling Manual is merely the General Counsel's suggested procedure for handling cases and it is not Board law; that the Petitioner has executed the *Carlson* waiver, it does not seek disgorgement of the Intervenor, and its waiver applies to both the Employer and the Intervenor; and that full processing of the unfair labor practice charges will, as a practical matter, require many years of litigation and in effect obliterate the Section 7 rights of the employees.

⁷ Member Zimmerman approved the *Carlson* waiver at that time. He has reconsidered his position on this issue and has determined that his prior approval of this waiver was ill-advised.

In *Carlson*, the petitioner sought to proceed to an election notwithstanding that the Board had found that the employer had violated Sec. 8(a)(2). The Board concluded that, as the employer's violation of Sec. 8(a)(2) was related at least in part to the unresolved question concerning representation of the employer's employees, the desires of the employees may best be determined in an election by secret ballot.

⁸ The Petitioner, in its written opposition to the Employer's "Motion to Withdraw Notice of Hearing," made the following statement: "Further, by way of clarification, Petitioner seeks no disgorgement remedy and its *Carlson* waiver relates to both the pending CA and CB cases."

The Employer contends that the pending 8(a)(2) charges block the processing of the representation proceeding; that none of the sections of the Board's Casehandling Manual, i.e., Sections 11730, 11730.4, 11730.4(c), 11730.5, 11730.7, and 11730.9, provides for the unblocking of the representation case; that the Petitioner's waiver does not provide that it will waive objections based on conduct which occurred prior to the filing of its petitions; that the *Carlson* waiver is simply not effective unless there is an outstanding order requiring the employer to withdraw recognition of the allegedly illegally assisted union; and that the issuance of the notice of hearing is contrary to the precedent established in the Board's decision in *Town & Country*.⁹ For the reasons set forth below we shall deny the Petitioner's request for a *Carlson* waiver in this proceeding.

In the *Town & Country* case,¹⁰ the petitioner notified the Acting Regional Director that it would waive objections based on conduct occurring prior to the filing of the petition, and that, if the intervenor were certified, no further action should be taken to enforce those portions of the Board's Order relating to 8(a)(2) findings in the unfair labor practice proceeding. The petitioner also stated that it sought a disgorgement remedy. The Board found that the petitioner, in effect, still demanded litigation of the charges, findings of violations, and a remedy pursuant thereto; that the issues raised by the petitioner's charges and its petition rested on the resolution of the unfair labor practice charges; and that the contract between the employer and the intervenor constituted a bar to the proceeding unless the employer's recognition of the intervenor was itself violative of Section 8(a)(2) and Section 8(b)(1)(A) and (2) of the Act.

The Board concluded that making such a determination in a representation case would be contrary to established Board policy that unfair labor practice allegations are not properly litigable in a representation proceeding; that a party asserting such allegations may litigate them only in an unfair labor practice proceeding designed to adjudicate such matters; and that the petitioner's request to proceed should be denied.

The Petitioner here argues that the holding of *Town & Country* does not apply because it does not seek a disgorgement and, therefore, unlike the peti-

tioner in *Town & Country*, it does not demand violation findings and an appropriate remedy.

We reject the Petitioner's argument and find, as we did in the *Town & Country* case, that the petition should be held in abeyance. The charges allege that the Employer unlawfully assisted the Intervenor; that the Employer granted recognition to the Intervenor when it was not the designated representative of a majority of the employees, at a time when there was a real question concerning representation; and that such conduct violated Section 8(a)(1) and (2). The charges against the Intervenor allege that it accepted recognition at a time when it was not the designated representative of a majority of the employees, and that such conduct by the Intervenor violated Section 8(b)(1)(A). Here, as in the *Town & Country* case, no hearing has yet been held on these charges and no violation findings are outstanding.

The issues raised by the Petitioner's aforesaid unfair labor practice charges and the current representation petition required a resolution of the unfair labor practice charges. The existing contract between the Employer and the Intervenor may constitute a bar to the representation case proceeding unless the Employer and the Intervenor have engaged in conduct violative of Section 8(a)(1) and (2) and Section 8(b)(1)(A) of the Act. The Board has often held that it will not litigate unfair labor practice allegations in a representation proceeding. As we stated in the *Town & Country* case, a party asserting such allegations may litigate them only in an unfair labor practice proceeding designed to adjudicate such matters. *Carlson* waiver is appropriate only when the unfair labor practices have been litigated or when unusual circumstances not present here warrant such a waiver.¹¹ Accordingly, we hereby deny the petitioner's request to proceed herein.

ORDER

It is hereby ordered that the instant proceeding shall be remanded to the Regional Director to be held in abeyance and for further action by the Regional Director at an appropriate time following resolution by the General Counsel or the Board of the aforementioned unfair labor practices charged by the Petitioner.

⁹ 194 NLRB 1135 (1972).

¹⁰ See above.

¹¹ See, e.g., *New York Shipping Assn.*, 107 NLRB 364 (1953).