

Local 851, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and Purolator Courier Corp. Case 29-CP-453

22 December 1983

DECISION AND ORDER

**BY CHAIRMAN DOTSON AND MEMBERS
ZIMMERMAN AND HUNTER**

On 29 March 1983 Administrative Law Judge Steven Fish issued the attached decision. The Respondent filed exceptions and the Charging Party filed an opposition and motion to strike, and an answering brief to the Respondent's exceptions.¹

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

The Board has considered the record in light of the exceptions and the opposition and brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Local 851, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, its officers, agents, and representatives, shall take the action set forth in the recommended Order.

¹ In its opposition and motion to strike the Respondent's exceptions, the Charging Party contends that the exceptions should be stricken and rejected because they fail to comply with Sec. 102.46(b) and (j) of the Board's Rules and Regulations in that they do not set forth specifically the portions of the judge's decision to which exceptions are taken, they do not designate by precise citation of page the portions of the record relied on, and, though the exceptions are in the nature of a brief and exceed 20 pages, these contain no subject index or alphabetical table of cases and other authorities. Although the Respondent's exceptions do not conform in all particulars with Sec. 102.46 they are not so deficient as to warrant striking. Moreover, the Charging Party has not shown prejudice as a result of any deficiency. In light of all these circumstances, the Charging Party's motion is denied. *Serendipity-Un-Ltd.*, 263 NLRB 768 (1982).

DECISION

STATEMENT OF THE CASE

STEVEN FISH, Administrative Law Judge: Pursuant to charges filed in Case 29-CP-453 by Purolator Courier Corp., herein called the Charging Party, Purolator, or the Employer, the Regional Director for Region 29 issued a complaint and notice of hearing on October 16, 1981,¹ alleging that Local 851, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and

¹ All dates are in 1981 unless otherwise indicated.

Helpers of America, herein called the Respondent or the Union, violated Section 8(b)(7)(c) of the Act.

On October 23, the Union filed four representation petitions in Cases 29-RC-5570, 29-RC-5571, 29-RC-5572, and 29-RC-5573, seeking elections at each of four of Purolator's locations in the Metropolitan area.²

On October 26, the Regional Director consolidated these representation cases for hearing. On October 27, the Regional Director issued an order consolidating the representation cases with the instant unfair labor practice complaint for hearing. The consolidated hearing was held before me in Brooklyn, New York, and New York, New York, on various days in November and December 1981, and May 12, 1982, when the hearing was closed. On that date I granted the General Counsel's motion to sever the RC cases from the instant CP case, and referred said R cases to the Board for decision.

On March 7, 1983, the Board issued a Decision and Order in the representation cases,³ dismissing all of the petitions filed by the Union.

Briefs have been received from the parties and have been carefully considered.

Based on the entire record including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Purolator, a Delaware corporation, with facilities in Long Island City, Plainview, and Elmsford, New York, and Westwood, New Jersey, as well as other facilities throughout the United States, is engaged in the business of providing delivery, and pickup services for banks, governmental agencies, health care institutions, and other customers. Annually, the Employer provides services valued in excess of \$50,000 directly to customers located outside the State of New York. The parties have stipulated and I so find that Purolator is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION

The Respondent admits and I so find that it is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

From October 1 to October 14, the Respondent picketed at the Employer's four terminals located in the Greater New York Metropolitan area, which are set forth above. The parties have stipulated and I so find that an object of said picketing was to force or require Purolator to recognize and bargain with the Respondent as the representative of its employees at these four locations, or to force or require Purolator's employees to

² These facilities are located in Long Island City, Plainview, and Elmsford, New York, and in Westwood, New Jersey.

³ 266 NLRB 384.

accept the Respondent as their collective-bargaining representative.⁴

It is also conceded and I find that the Respondent admits to membership, and is affiliated with an organization which admits to membership, employees other than guards within the meaning of Section 9(b)(3) of the Act.

Thus the main issue ultimately litigated at the hearing before me was the guard status of the Respondent's employees employed in its North East Region.⁵

In dismissing the petitions filed by the Respondent in the representation cases, the Board noted that it had recently considered the guard status of the Employer's courier-guards in its Texas-Oklahoma region,⁶ and its Memphis, Tennessee, facility.⁷ The Board noted that it had, in part based on testimony that the Employer's courier-guard position is identical throughout the country, found its courier guards to be statutory guards, and dismissed the petitions therein.

The Board in the instant representation cases found that, of some 570 employees in the Employer's northeast region, more than 500 are courier-guards. Thus, it framed the primary issue presented as to whether the Union had been able to distinguish the courier-guards it seeks to represent from those in the previous cases, and found that it had not.

The Board held therefore that the courier-guards employed by the Employer in its northeast region are guards within the meaning of Section 9(b)(3) of the Act.

The Board also noted that the hearing concerned the guard status of other employee classifications sought by the Union. The Board found that there was substantial question whether some of the employees in these classifications are statutory guards.⁸

⁴ The Respondent was seeking recognition in a unit of employees including courier guards, but excluding clerical employees and supervisors.

⁵ As noted above the complaint relates to picketing to force recognition of employees at the Employer's four plants located in the Greater Metropolitan area, i.e., Elmsford, Long Island City, and Plainview, New York, and Westwood, New Jersey, which was consistent with the units petitioned for by the Respondent in its R case petitions. However, at the hearing before me, the parties stipulated that the smallest appropriate unit, if any, encompasses the Employer's northeast region, which includes, in addition to the locations referred to above, facilities located in Buffalo, Albany, and Rochester, New York. Thus, testimony was adduced concerning the guard status of employees at all of these locations.

⁶ *Purolator Courier Corp.*, 254 NLRB 599 (1981).

⁷ *Purolator Courier Corp.*, 265 NLRB 659 (1982).

⁸ The Board did not specify which classifications they were referring to in this portion of the discussion. It appears from the record that the classifications referred to are mechanics, utility terminal guards, and courier-guard, nondrivers, formerly called sorters by Purolator. The record revealed with respect to the latter classification that the Employer had employed individuals as "sorters," but that in 1981 the classification was changed to courier-guard, nondriver. In addition about that time, Purolator instituted a cross-training program with respect to these employees, with the intent of eventually eliminating the classification, although there were some employees who previously performed sorting duties at the time of the hearing. At various times throughout this proceeding the record disclosed that the Employer employed from 20-38 employees in this classification in its locations in the Greater New York area, employed solely at its Long Island City and Westwood facilities. In any event the record establishes that approximately 90 percent of Purolator's employees employed at the four locations which are the subject of the instant complaint are courier-guards, and were found by the Board to be statutory guards in its decision.

The Board then added, "having eliminated from any appropriate unit the major component of the Employer's work force, the courier-guards, we are not prepared to make a determination that some of these other employees constitute one or more appropriate units."

Accordingly, the Board concluded that the record afforded no basis on which to find any appropriate unit in the proceeding and dismissed the petitions filed by the Union.

B. Analysis

Section 9(b)(3) of the Act prohibits the Board from certifying as an appropriate unit a unit consisting of guards and nonguards, and that no labor organization can be certified to represent a unit of guards, if such labor organization admits to membership employees other than guards.

Since the Board has determined that the courier-guards employed by Purolator in its northeast region, including those employed at its Greater New York area locations, are statutory guards, and the Respondent admittedly is a "nonguard" union, it is clear that the Respondent cannot be certified to represent a unit consisting of such employees in whole or in part.

The Board has consistently held that a union such as the Respondent herein violates Section 8(b)(7)(C) of the Act by picketing for recognition in such circumstances since a valid question concerning representation cannot be raised, and that picketing for any period of time by a nonguard union to represent a unit of guards is unlawful under that Section of the Act.⁹

The Respondent in addition to contending that Purolator's courier-guards are not guards within the meaning of the Act¹⁰ also makes various other arguments in support of its position that no 8(b)(7)(C) violation has been established.

The Respondent argues initially that a question concerning representation was raised herein by its petitions, and notes particularly the fact that the Regional Director in his notice of hearing in the representation cases held that it appears that "questions affecting commerce have arisen concerning the representation of employees," described in the petitions.

The short answer to this contention is simply that the Board has decided this issue in its decision by dismissing all of the Respondent's petitions in their entirety, and finding in effect that no valid question concerning representation was raised by the Respondent's petitions.

Additionally, the petitions were filed, and the Regional Director's notice of hearing was issued subsequent to the cessation of the picketing and the alleged unlawful conduct of the Respondent.

Accordingly, the Respondent's reliance on the Regional Director's issuance of a notice of hearing in the repre-

⁹ *Teamsters Local 639 (Dunbar Armored Express)*, 211 NLRB 687 (1974); *Teamsters Local 71 (Wells Fargo)*, 221 NLRB 1240 (1975), *enfd.*, 553 F.2d 1368 (D.C. Cir. 1977); *Teamsters Local 344 (Purolator Security)*, 228 NLRB 1379 (1977), *enfd.*, 568 F.2d 12 (7th Cir. 1977); *Teamsters Local 282 (General Contractors Assn. of New York)*, 262 NLRB 528 (1982).

¹⁰ The Board's finding to the contrary *supra* is of course binding on me.

sentation cases is misplaced, and I attach no significance to this action in deciding whether the Respondent has violated the Act as alleged.

The Respondent also argues that even assuming that all of the employees sought to be represented by it are guards, and no certification can issue, the Act is still not violated, since an election could be held. The Respondent relies on the expedited election provision of Section 8(b)(7)(C) which it contends authorizes elections without regard to the existence of a question concerning representation.

The Respondent's position in this regard is essentially the position taken by Member Fanning in various dissenting opinions that he has issued,¹¹ but whose views have never been adopted by the Board. Accordingly, I reject the Respondent's arguments in this respect.

Finally, the Respondent contends that no violation can be found as long as at least two Purolator employees in the northeast region are nonguard employees. The Respondent argues that the Union's petitions have created a valid question concerning representation, since an election could be directed in a unit of nonguard employees, and the Union at the instant hearing indicated a willingness to proceed to an election in any unit deemed appropriate by the Board.

These contentions of the Respondent must be rejected for a number of reasons. Initially it is noted that the Board's decision in the representation case found that the extensive hearing herein did not provide a basis for a direction of election in any appropriate unit; in effect concluding that no valid question concerning representation has been raised by the petitions filed by the Union. Although the Board's decision does suggest that some of the employees of Purolator petitioned for by the Respondent may not be guards, and arguably suggests the possibility of the existence of an alternative appropriate unit upon a fuller record and an appropriate rationale, such an ultimate finding would not exonerate the Respondent's conduct.

Although the record discloses that the Respondent at the hearing herein took the position that it would agree to an election in any unit found appropriate by the Board, there is no evidence in this record that its picketing was motivated in whole or in part by recognition in such a unit. The record on this issue consists of a stipulation that an object of the picketing was to secure recognition in an overall unit of Purolator's employees in its Greater New York locations, a unit which in fact has been found to consist of 90 percent guards. It is ludicrous to suggest, as does the Respondent, that this record contains any basis for finding that an objective of the picketing to have been for recognition in an appropriate unit. Finally, even if it could be construed that an additional objective of the Respondent's picketing was to obtain recognition confined to an appropriate unit of nonguards, the Act would still be violated. It is sufficient for purposes of Section 8(b)(7)(C) that an object of the picketing be unlawfully motivated,¹² and it is admitted

that at least an object of the picketing was recognition for a unit including guards.

Accordingly, based on the foregoing, I conclude that the Respondent's picketing herein has violated Section 8(b)(7)(C) of the Act and I so find.

IV. THE REMEDY

Having found that the Respondent has violated Section 8(b)(7)(C) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

CONCLUSIONS OF LAW

1. Purolator Courier Corp. is an employer within the meaning of Section 2(6) and (7) of the Act.

2. The Respondent, Local 851, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent is not currently certified as the representative of any of Purolator's employees at their locations in Long Island City, Plainview, and Elmsford, New York, or Westwood, New Jersey.

4. By picketing at the above four locations of Purolator from October 1 to October 14, 1981, with an object of forcing Purolator to recognize or bargain with the Respondent as the collective-bargaining representative of its employees, the Respondent has violated Section 8(b)(7)(C) of the Act.

5. The unfair labor practices found above have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing the free flow of commerce.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended

ORDER¹³

The Respondent, Local 851, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, its officers, agents, and representatives, shall

1. Cease and desist from picketing, or causing to be picketed, Purolator Courier Corp., where an object thereof is forcing or requiring said Employer to recognize or bargain with the Respondent as the collective-bargaining representative of employees who function as guards, or forcing or requiring employees who function as guards for such employer, to accept or select the Respondent as their collective-bargaining representative.

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

¹¹ *Teamsters Local 282 (General Contractors Assn.)*, supra; *Teamsters Local 71 (Wells Fargo)*, supra; *Teamsters Local 344 (Purolator Security)*, supra.

¹² See *Teamsters Local 282 (General Contractors Assn.)*, supra.

¹³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Post at its business office copies of the attached notice marked "Appendix."¹⁴ Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members 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.

(b) Furnish the Regional Director for Region 29 signed copies of said notice for posting by Purolator Courier Corp., if willing, in places where notices to employees are customarily posted.

(c) Notify the Regional Director for Region 29 in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

¹⁴ 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."

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT picket, or cause to be picketed, Purolator Courier Corp., where an object thereof is forcing or requiring said Employer to recognize or bargain with us as a collective-bargaining representative of its guard employees, or forcing or requiring guard employees of such Employer, to accept or select us as their collective-bargaining representative.

LOCAL 851, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA