

Gerber and Hurley, Inc. and Teamsters Local No. 443, a/w the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 39-CA-1214

4 April 1984

DECISION AND ORDER

**BY CHAIRMAN DOTSON AND MEMBERS
HUNTER AND DENNIS**

On 26 August 1983 Administrative Law Judge James F. Morton issued the attached decision. The Respondent filed exceptions and a supporting brief.

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

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The judge found that the Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally removing the position of counterman from the certified unit and thereby withdrawing recognition from the Union as the exclusive representative of the employee who held that position. The Respondent has excepted to the judge's rejection of its affirmative defense that the instant proceedings are barred by Section 10(b) and his findings and conclusions on the merits. We find merit in the Respondent's exceptions.

The Respondent sells and distributes roofing materials at its warehouse and office facility located in West Haven, Connecticut. In July 1981 the Union filed a petition for an election in a unit consisting of the Respondent's "drivers, warehousemen, and yardmen" and excluding, *inter alia*, office clerical employees and salesmen. At a preelection conference the Respondent requested that employee McMinn be included in the unit assertedly because he worked more than 50 percent of his time in the warehouse; the rest of the time McMinn worked at the counter. The Union reluctantly consented to include McMinn in the unit and the parties signed a stipulated election agreement. McMinn was included on the eligibility list furnished by the Respondent and voted without challenge in the election. The Union won the election, five votes to one, and was certified on 4 September 1981.

Following certification the parties met four or five times for negotiations that culminated in the execution of a collective-bargaining agreement on 20 November 1981. The agreement expressly covered two classifications: straight driver-warehouse and trailer driver-warehouse. Within a few days

after the contract was signed the Union's business agent Buonpane appointed a steward and asked him to pass out insurance forms and signature cards to the employees. Shortly thereafter the steward informed Buonpane that McMinn either did not want to, or was not allowed to, sign a card. Buonpane testified that he spoke with the Respondent's president Schnipper about McMinn "in the latter part of 1981 and into the spring of 1982." On 14 April 1982 Buonpane wrote a letter to Schnipper stating, *inter alia*, that McMinn "is part of the bargaining unit" and that the Union "will pursue this issue through legal means." Buonpane also wrote that the Respondent had insisted on including McMinn in the unit as a warehouseman and "[b]ased on those issues I didn't negotiate a separate rate or classification for Joseph McMinn."

On 26 April the Respondent's attorney responded in a letter to Buonpane that McMinn, whom the attorney described as a "salesman," no longer performed any warehouse duties and therefore the Union's request that he be included in the unit was inappropriate. The Union filed the instant unfair labor practice charge on 15 June 1982.

The judge found that the Respondent could not rely on Section 10(b) as a matter of law because it withdrew recognition of McMinn's position during the certification year. Moreover, regarding the Respondent's 10(b) defense on the facts, the judge found that the "first unequivocal notice" given to the Union of such withdrawal of recognition occurred with the 10(b) period, *i.e.*, in connection with the Respondent's 26 April letter, although finding that the Respondent had made earlier indirect approaches to the Union "outside the negotiations" to gain the Union's consent to exclude McMinn. Further, on the merits, the judge rejected the Respondent's argument that the parties, by the contract, had agreed to exclude McMinn. He also found that McMinn's duties were not changed until 16 April when he received a raise, and that any such change in duties appears to have been nominal. Based on the above, the judge concluded that the Respondent unilaterally removed the position of counterman from the unit and thereby withdrew recognition from the Union with respect to that position in violation of Section 8(a)(1) and (5).

As an initial matter we find, contrary to the judge, that the instant proceedings are barred by the 6-month limitations period of Section 10(b). First, regarding the judge's finding that the Respondent could not rely on Section 10(b) as a matter of law because the withdrawal of recognition of McMinn's position occurred during the certification year, we disagree with the judge's characterization of the Respondent's conduct as a with-

drawal of recognition. It is clear from the record that McMinn was included in the unit in the first place only because he assertedly spent more than half his time in the warehouse performing unit work. Thus, McMinn's duties as a counterperson never formed the basis for his inclusion in the unit; the Union never claimed to be representative of the counterperson's position, nor was it ever recognized as such. Consequently there could be no withdrawal of recognition when the Respondent changed McMinn's duties so that he no longer worked in the warehouse, regardless of when the change in duties occurred.

Further, concerning the judge's finding that there was no factual basis for the limitations period of Section 10(b) to apply, we disagree with the judge's finding that the Union did not receive notice of the "withdrawal of recognition" until it was advised by the Respondent's 26 April letter that McMinn no longer performed warehouse work. Rather, we find that the Union was on notice that McMinn no longer worked in the warehouse apparently as early as the start of contract negotiations in September 1981, and at least around the time of the execution of the contract on 20 November 1981.

We derive support of this finding from the testimony of union representative Buonpane himself. On direct examination Buonpane testified that there was no discussion of McMinn during the negotiating sessions. On being asked when he first learned that there was a dispute concerning McMinn, Buonpane indicated that it was a short time after the contract was signed, i.e., when the steward reported back to him that McMinn did not sign a card. Buonpane further testified that he first talked to Schnipper about this in the "latter part of 1981," when Schnipper "said that McMinn no longer did any warehouse work and he was strictly a counterperson, and he didn't feel a [sic] though he should be part of the bargaining unit."

On cross-examination Buonpane was asked to deny that Schnipper "during those [bargaining] sessions and before the contract was concluded" informed him that McMinn no longer performed any unit work. Buonpane responded as follows:

That was Mr. Snipper's [sic] position all along in all the conversations I ever had with him, but I don't believe that during the regular direct negotiations that at any particular time did Mr. Snipper [sic] raise the point that—oh, his contention all long was that Mr. McMinn shouldn't be part of the bargaining unit.

I don't recollect whether it was discussed specifically during the negotiations or afterward.

After the election, that was always Mr. Snipper's [sic] position.

Later, in response to a question posed by the judge, to wit, "as of the time that you signed that contract and when you were negotiating the contract, as I understand it, you had been told by Mr. Snipper [sic] that McMinn was no longer doing warehouse work. Right?" Buonpane answered, "Right."

Thus it is apparent, by Buonpane's own admissions, that some discussion of McMinn's status occurred during or at the time of the bargaining sessions, which undeniably was more than 6 months prior to the filing of the charge in June 1982. It is further apparent that as a result of these discussions the Union was aware that McMinn no longer was performing unit work, a fact that the Respondent merely reiterated in its letter of 26 April.

McMinn's testimony is not inconsistent with this finding. Although the judge stated that McMinn testified that his duties as a counterperson did not change until he was told on 16 April, when he was given a raise, that he was no longer to perform warehouse work, the record does not clearly support such a finding. Thus, on direct examination McMinn was asked, "Since the election, have you worked in the warehouse at all?" to which he responded, "No." On cross-examination the following exchange occurred:

Q. [By Respondent's counsel] After the union election, did you ever work in the warehouse any more?

A. [By McMinn] No, not since.

Q. In fact, didn't Mr. Snipper [sic] tell you, "That's it. You are now exclusively a sales person."

A. Yes.

Q. Didn't you in fact *subsequently* receive a raise commensurate with that promotion? [Emphasis added.]

A. I did.

Later, when the judge asked McMinn when he received the raise, McMinn responded, "One year, 1-1/2 years or so. As soon as I was totally inside the office." It subsequently was stipulated that McMinn received a raise on 16 April 1982.

Thus, on the one hand it appears that McMinn stopped working in the warehouse immediately after the election, which would have been about a year and a half prior to the hearing in this case, and that he received the pay raise subsequent to the change in his duties. On the other hand it appears that the change in duties and the pay raise may have occurred about the same time, i.e., in April 1982. In any event the record provides only

equivocal support for the judge's finding that McMinn's duties were changed on 16 April. In our view such ambiguous testimony by McMinn is insufficient to rebut the Respondent's 10(b) defense.

Even assuming that the judge correctly found that the instant proceedings were not barred by the provisions of Section 10(b), we still would not find that the Respondent violated its duty to bargain with the Union. As we have found above, the Respondent did not "withdraw recognition" from the Union as to the position held by McMinn. All that was involved here was the change in the job duties of one individual. This change in McMinn's duties merely operated to take him out of the unit, much as when a unit employee is promoted to a supervisory position. The Board has held that an employer is not obligated to bargain about such a change in personnel so long as it does not involve the abolition of unit jobs.¹ There has been no showing here that the change in McMinn's duties had any adverse impact on the unit, such as a decrease in the amount of unit work. If anything the change in McMinn's duties would have had a favorable impact on the unit; that is, if he no longer performed warehouse work, most likely more warehouse work became available for the regular driver/warehouse employees to perform. In these circumstances we cannot find that the Respondent had an obligation to bargain with the Union about the change in McMinn's job duties or status. Accordingly, we find that the Respondent's unilateral action with respect to McMinn did not constitute a refusal to bargain in violation of Section 8(a)(1) and (5).

ORDER

The complaint is dismissed.

¹ See, e.g., *Central Cartage*, 236 NLRB 1232, 1258 (1978); *KONO-TV-Mission Telecasting Corp.*, 163 NLRB 1005, 1008 (1967).

DECISION

STATEMENT OF THE CASE

JAMES F. MORTON, Administrative Law Judge. The General Counsel of the National Labor Relations Board issued a complaint on August 4, 1982, against Gerber and Hurley, Inc. (herein Respondent), after having investigated the underlying unfair labor practice charges filed on June 15, 1982, by Teamsters Local No. 443, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (herein the Union). That complaint alleges that Respondent has violated Section 8(a)(1) and (5) of the National Labor Relations Act (herein the Act) by having since about December 20, 1981, "failed to recognize and bargain with the Union as the exclusive representative of its employee, Joseph E.

McMinn." McMinn was alleged in the complaint to have been employed in the unit for which the Union has been certified. Respondent filed an answer to that complaint which denies that Respondent violated the Act as alleged and which asserts, as an affirmative defense, that litigation of that issue was barred by reason of the 6-month limitation period set forth in Section 10(b) of the Act. I heard this case in Hartford, Connecticut, on March 8, 1983.

Based on the entire record, including my observation of the demeanor of the witnesses, and after full consideration of the briefs filed by the General Counsel and by Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is engaged as a wholesaler and retailer of roofing materials at its facility in West Haven, Connecticut. Its answer admits, in essence, that the volume of its operations meets the Board's jurisdictional standard for nonretail business enterprises.

II. THE UNION

Based on the parties' stipulation at the hearing, I find that the Union is a labor organization as defined in Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Relevant Facts*

Respondent's facility in West Haven consists of a warehouse and an adjacent office. It employs two trailer-drivers, two straight truckdrivers, a warehouseman, a counterman, and an unspecified number of salesmen and office clerical employees. The truckdrivers perform warehouse duties on those occasions when they are not on the road.

On July 17, 1981, the Union filed a petition in Case 39-RC-228 for an election among the four drivers and the one warehouseman. At a conference held in that case, Respondent insisted that its counterman, Joseph McMinn, had to be included in the voting unit. It represented to the Union that McMinn spent more than 50 percent of his working time performing warehousemen's duties. In an uncontroverted statement set out in a letter later sent to Respondent by the Union, the Union had reluctantly accepted this representation and agreed that McMinn could vote. Respondent and the Union then signed a Stipulation for Certification Upon Consent Election for an election among employees in the following unit:

All full-time and regular part-time drivers, warehousemen and yardmen employed by (Respondent) at its West Haven, Connecticut location excluding all office clerical employees, salesmen and guards, professional employees and supervisors as defined in the Act.

Pursuant to the terms of that stipulation, Respondent furnished an *Excelsior* list which contained the names and addresses of the six employees eligible to vote in the unit. McMinn was listed as one of the six. He voted without challenge in the election held on August 27, 1981. The Union won and was certified as the exclusive bargaining representative therefor on September 4, 1981.

Thereafter, the Union's business representative, Anthony Buonpane, met with Respondent's president and Respondent's counsel four or five times before reaching agreement on a 3-year contract. Buonpane testified before me that Respondent's president had, after the election, expressed the "contention all along . . . that Mr. McMinn shouldn't be part of the bargaining unit." Buonpane's testimony, on cross-examination, indicates that Respondent's president, in furtherance of that effort, stated that McMinn no longer did unit work. It appears that the Union ignored those comments. Buonpane also testified that, in the contract negotiations sessions, there was no discussion of McMinn and no statements then by Respondent's president or counsel that McMinn was no longer performing unit work. The collective-bargaining agreement reached is effective November 20, 1981, to November 19, 1984. Article I thereof provides that Respondent recognizes the Union as the representative "of all employees in the classifications of work covered by this Agreement." Exhibit A to the contract provides an hourly wage rate in 1981 of \$6.40 for the classification, straight driver-warehouse, a rate of \$7.40 for the classification, trailer driver-warehouse. As noted earlier, the four truckdrivers occasionally perform warehouse work. There is no separate hourly rate or classification expressly listed in Exhibit A for the one unit employee who works full time in the warehouse and no express classification for counterman, i.e., McMinn. The testimony of the Union's representative indicates that the warehouse employee was paid in 1981 at the \$6.40 rate and that that rate was also to be applied to McMinn's position.

After the contract was signed, the Union's steward passed out insurance forms and membership cards to the employees who voted in the election. He later informed Buonpane that McMinn said that he did not want "to sign a card or [that Respondent] didn't want to allow [him] to sign a card at that time." Buonpane testified that he then spoke with Respondent's president, Carl Schnipper, about that report. This was in late 1981 or early in 1982. Buonpane related that Schnipper informed him then, for the first time, that McMinn was "not part of the bargaining unit." Buonpane offered to negotiate a special rate for McMinn but Schnipper declined. On April 14, Buonpane wrote Schnipper that it was Respondent who had insisted on putting McMinn in the unit, that the Union had initially opposed this effort, and that the Union changed its position because of Respondent's assurances, at the representation case conference, that McMinn "spent a majority of his time" as a warehouseman. Buonpane concluded his letter by suggesting that Schnipper may be following the wrong legal advice and asked for an early reply.

Respondent's counsel replied by letter dated April 26, 1982, to Buonpane's letter. Therein, Respondent referred to McMinn as "a salesman" who "no longer performs

any warehouse" duties. The letter concludes that "therefore [the Union] request that he be included in the unit is totally inappropriate.

McMinn testified that his duties as counterman did not change until he was told by Respondent on April 16, 1982, when given a raise (from \$6.32 an hour to \$7.62 an hour) that he was no longer to perform warehouse work.¹ He further testified that, as of the hearing, he occasionally goes into the warehouse "to look at materials" but not to work there.

B. Analysis

I shall first treat with Respondent's affirmative defense that Section 10(b) of the Act bars any determination of the merits, or lack thereof, in this case. It is now settled that the duty to bargain gives rise to an obligation continuing for at least the certification year.² As it is obvious that Respondent, during the year immediately following the Union's certification, effectively has withdrawn recognition from the Union as bargaining representative for the position McMinn held, both when he voted and until after Respondent notified the Union of its effective withdrawal of recognition, I find that Respondent cannot, as a matter of law, rely on Section 10(b) as a defense. As a factual matter also, I find no merit to Respondent's contention. The onus is on Respondent to establish that the actionable conduct occurred more than 6 months before the unfair labor practice charge was filed.³ The uncontroverted evidence is that Respondent's president had on various occasions expressed the opinion to the Union's business representative that McMinn should not be kept in the unit and, in connection therewith, asserted that McMinn no longer did bargaining unit work. Respondent however never broached that subject during the course of the five negotiations sessions leading up to agreement on the terms of the current contract. At best then, this evidence indicates that Respondent, outside of the bargaining sessions, sought the Union's agreement to exclude McMinn from the unit even though he was included initially at Respondent's insistence. There is no evidence that the Union assented to that wish. Rather, its conduct consistently indicates that it ignored the request, perhaps justifiably so. When Respondent asserted, however, that McMinn's duties had been changed to those of a salesman, and that McMinn was no longer in the unit, the Union immediately contested Respondent's attempt to exclude McMinn unilaterally. The uncontroverted testimony establishes that the first unequivocal notice given by Respondent to the Union that it unilaterally withdrew recognition from the Union as McMinn's representative took place within the 10(b) period. There is no doubt that Respondent had made earlier repeated, indirect approaches to the Union to secure its consent to remove McMinn from the unit and that those efforts were ignored and not pursued in the course of the contract negotiations. It would not, in my view, promote the inter-

¹ The present contractual rates in force range from \$7.40 to \$8.40 an hour.

² *Dardanell Enterprises*, 250 NLRB 377, 379 (1980).

³ *Al Bryant, Inc.*, 260 NLRB 128, 133-134 (1982).

ests of good-faith bargaining to require a party, such as the Union here, to press for a formal unequivocal resolution of McMinn's unit placement while the parties are seeking to work out the provisions of an initial contract. The fact that Respondent itself did not broach the subject of McMinn's unit placement as a matter to be definitively resolved during those negotiations suggests that Respondent was not then openly engaged in any unilateral action contrary to the position it had openly taken in the course of the representation case proceedings as to McMinn's unit placement.

On both legal and factual bases then, I find that Respondent has not established that these proceedings are barred by the provisions of Section 10(b) of the Act.

Respecting the merits of this case, Respondent relies on the recognition clause of the current contract and the fact that there is no express classification for McMinn's counterperson position set out in Exhibit A, annexed to that agreement. In essence, Respondent is contending that the parties, by the express terms of the contract, had agreed to exclude the counterperson position. That contention clearly lacks merit as the uncontroverted evidence established that McMinn's unit placement was never alluded to in the negotiations. In that regard, I note that Exhibit A contains no classification for the job of the one individual who performs warehouseman's duties exclusively and, yet, he is concededly in the unit. More significantly, I note that Respondent's letter of April 14, 1982, does not suggest that the parties had, by the contract provisions, agreed to exclude McMinn. Rather, Respondent asserted in that letter that McMinn's duties had been changed to those of a salesman and argued that McMinn thus is outside the unit. In fact, however, as McMinn's testimony discloses, his duties were not changed until 2 days later at the earliest when he was given a raise. Moreover, the change that took place appears to have been but nominal.

Respondent, in the 10(b) period, has attempted to remove the position of counterperson, including McMinn, from the certified unit, has unilaterally withdrawn recognition from the Union as the exclusive representative therefor and has thereby violated its duty to bargain collectively with the Union.⁴

CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Section 10(b) of the Act does not bar further proceeding in this case.

4. Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally removing the employee performing counterperson duties from the unit and contract coverage without prior notice to, bargaining with, or consent of, the Union.

5. The unfair labor practices set out in paragraph 4 affects commerce as defined in the Act.

On these findings of fact and conclusions of law and on the entire record, I recommend the issuance of the following⁵

ORDER

Respondent, Gerber and Hurley, Inc., West Haven, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally withdrawing recognition from and refusing to recognize Teamsters Local No. 443, a/w the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America as the sole and exclusive collective-bargaining representative of the individual it employs as a counterperson at its West Haven, Connecticut location, including Joseph McMinn, without prior notice to, bargaining with, or consent of Teamsters Local No. 443.

(b) Unilaterally failing and refusing to apply any collective-bargaining agreement between Respondent and Teamsters Local No. 443 to the employee working as counterperson, including Joseph McMinn, without prior notice to, bargaining with, and consent of Teamsters Local No. 443.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act.

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

(a) Apply all the terms and conditions of any collective-bargaining between Respondent and Teamsters Local No. 443 to the employee performing the duties of counterperson, including Joseph McMinn, unless and until Respondent has obtained the consent of Teamsters Local No. 443 to remove the employee so classified from the coverage of any agreement.

(b) Make whole any employee performing the counterperson's duties, including Joseph McMinn, for any loss of wages and benefits, with interest, such employee may have suffered, and Teamsters Local No. 443 any loss of dues suffered, with interest thereon, as a result of Respondent's failure to apply the collective-bargaining agreement now in force.⁶

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its West Haven, Connecticut facility copies of the attached notice marked "Appendix."⁷ Copies of

⁵ 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.

⁶ Interest shall be computed in the manner prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977). See generally *Isis Plumbing Co.*, 138 NLRB 716, 717-721 (1962).

⁷ 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 Na-

Continued

⁴ *El Centro Community Mental Health Center*, 266 NLRB 1 (1983).

the notice, on forms provided by the Officer-in-Charge of Subregion 39, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt 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.

(e) Notify the Officer-in-Charge in writing within 20 days from the date of this Order what steps Respondent has taken to comply.

ational 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 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 the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT unilaterally refuse to recognize Teamsters Local No. 443, a/w the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, as the sole and exclusive bargaining representative of any employee classified as counterperson, including Joseph McMinn, without prior union notice, bargaining, and consent.

WE WILL NOT unilaterally refuse to apply all the terms and conditions of our collective-bargaining agreement with the Union, to any employee classified as counterperson, including Joseph McMinn, without prior notice to, bargaining with, and consent of the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed under Section of the Act.

WE WILL apply all the terms and conditions of our collective-bargaining agreement with the Union to any employee classified as counterperson, including Joseph McMinn, until and unless we notify the Union of our desire to remove the classification and the employee(s) within that classification from the coverage of the agreement, the Union has had an opportunity to bargain concerning the terms for such removal, and consented thereto.

WE WILL make whole any employee classified as counterperson, including Joseph McMinn, for any loss of wages and benefits they may have suffered, and the Union for any loss of dues suffered, with interest, by reason of our failure to apply the terms of our collective-bargaining agreement with the Union to that classification.

GERBER AND HURLEY, INC.