

Mistletoe Express Service and National Brotherhood of Motor Expressmen's Union. Cases 17-CA-13834, 17-CA-13840, 17-CA-13840, 17-CA-13851, and 17-CA-14020

December 20, 1990

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND RAUDABAUGH

Upon charges filed by the Union on May 7 and 27, June 26, September 23, and October 29, 1987, and September 7, 1988, the General Counsel of the National Labor Relations Board issued a consolidated complaint against Mistletoe Express Service, the Respondent, alleging that it has violated Section 8(a)(5) and (1) of the National Labor Relations Act. The Respondent filed an answer admitting in part and denying in part the allegations of the consolidated complaint, and requesting that the consolidated complaint be dismissed.

The Respondent, which had filed a voluntary petition under Title 11 of the United States Code in the United States Bankruptcy Court for the Western District of Oklahoma, was a debtor in possession until on or about July 21, 1989, when a trustee was appointed by order of the U.S. Bankruptcy Court.

On January 19, 1990, the General Counsel approved a settlement agreement proposed to settle and resolve all allegations of unfair labor practices set forth in the consolidated complaint and to liquidate certain monetary claims against the Respondent arising from the alleged unfair labor practices. On March 20, 1990, the trustee for the Respondent filed a motion to approve the settlement agreement with the U.S. Bankruptcy Court. On June 20, 1990, subsequent to notice to the other creditors of the pending motion, the U.S. Bankruptcy Court approved the settlement agreement. Subsequently, on September 14, 1990, the Respondent filed an amended answer to the consolidated complaint, admitting all the allegations set forth in the consolidated complaint.

On October 3, 1990, the General Counsel filed a Motion for Summary Judgment. On October 4, 1990, 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.

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

Ruling on Motion for Summary Judgment

The pleadings raise no litigable issue that would require a hearing. The amended answer filed September

14, 1990, pursuant to the settlement agreement and with approval by the U.S. Bankruptcy Court, admits all the substantive allegations in the consolidated complaint. Further, pursuant to the settlement agreement, the Respondent has consented to the issuance of a Board order.

In the absence of good cause being shown why the motion should not be granted and in light of the Respondent's admitting all the substantive allegations, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, an Oklahoma corporation, has an office and place of business in Oklahoma City, Oklahoma, where it is engaged in the transportation of freight and commodities in interstate commerce. During the 12 months preceding the issuance of the complaint, the Respondent, in the course and conduct of its trucking operations, derived gross revenues in excess of \$50,000 for the transportation of freight and commodities from the State of Oklahoma directly to points outside the State of Oklahoma. During the same period, the Respondent purchased and received goods, material, equipment, and supplies valued in excess of \$50,000 at its Oklahoma City, Oklahoma location directly from points located outside the State of Oklahoma. 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 is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The Union is the collective-bargaining representative of the employees in the following appropriate unit:

All regular full-time employees employed in the classifications of Driver/Sales, Unassigned Driver/Sales, Dock, Rate Clerk A, Rate Clerk B, Bill/On-Hand Clerk, Head Mechanic, Body Shop Mechanic, Shop Utility, Linehaul Driver, and Unassigned Linehaul Driver, at the following terminals of the Employer: Memphis, Little Rock, Fort Smith, Muskogee, Tulsa, Wichita, Enid, Lawton, Oklahoma City, Dallas, Houston, Kansas City, Waco, Temple, Austin, San Antonio, Laredo, Tyler, Longview, and Corpus Christi, but EXCLUDING part-time employees, Company executives, department managers, all clerical employees, sales representatives, computer operators, porters, all other supervisors or managers as defined in the Act, and others whose principal duties fall in any of these classifications.

The Respondent has recognized the Union as the exclusive bargaining representative of the unit employees for approximately 40 years, and the Respondent and the Union have been parties to successive collective-bargaining agreements, with an agreement effective by its terms to March 1, 1988, and a subsequent agreement effective by its terms to March 1, 1991.

On or about April 29, 1987, the Respondent, unilaterally and without prior notice to or bargaining with the Union, implemented a random drug testing policy and procedure with respect to unit employees. Between April 30 and September 4, 1987, the Respondent discharged approximately 38 employees in the unit pursuant to the unilaterally implemented random drug testing program.

Since on or about April 29, 1987, the Respondent has systematically, unnecessarily, and unduly delayed the processing of grievances notwithstanding the fact that the third step of the grievance procedure contained in the collective-bargaining agreement effective to March 1, 1988, requires that a hearing on a grievance is to be held not more than 10 days after receipt of the grievance by the president of the Respondent or his designated representative. On or about August 13, 1987, the Respondent systematically and arbitrarily denied third-step grievances without a full and fair hearing. By these acts, the Respondent has failed and refused to abide by the collective-bargaining agreement effective to March 1, 1988, without agreement of the Union, without prior notice to the Union, and without having afforded the Union an opportunity to negotiate and bargain as the exclusive bargaining representative of the Respondent's unit employees with respect to such acts and the effects of such acts.

By letter dated May 4, 1987, the Union, through its president, Ralph E. Hawkins, requested the Respondent to furnish information related to the hourly rate paid to each casual employee employed by the Respondent for the pay periods between March 25 and April 29, 1987. By letters dated June 8 and 22, 1987, the Union renewed its request. On or about May 12, 1987, at a bargaining session with the Respondent at its Oklahoma City, Oklahoma location, the Union orally requested the Respondent to furnish the Union with information regarding the types of drug related tests that the Respondent was conducting on its employees and the procedures being utilized for the testing of employees. During that bargaining session, the Union also requested that the Respondent furnish the Union with the test results of each employee who had been terminated by the Respondent as a result of the Respondent's drug testing of employees. By letter dated July 28, 1987, the Union requested that the Respondent furnish the Union with copies of all MVR Reports submitted by employees to the Respondent and copies of all MVR Reports supplied to the Respondent by the State of Arkansas.

By letter dated September 18, 1987, the Union repeated its request for this information.

Since on or about May 4 and 12, July 28, and August 13, 1987, the Respondent has failed and refused to furnish the Union with the requested information that is necessary for, and relevant to, the Union's performance of its function as the exclusive representative of the unit. Since on or about May 12, 1987, the Respondent has failed and refused to bargain in good faith with the Union regarding the conditions under which employee drug test results would be furnished. Since on or about August 13, 1987, the Respondent has failed and refused to bargain in good faith with the Union regarding the conditions under which employee polygraph tests would be furnished.

Since on or about July 1, 1988, the Respondent has, unilaterally and without prior notice to or bargaining with the Union, discontinued health insurance coverage for certain unit employees by failing to pay premiums for such coverage and by failing to remit amounts deducted from the employees' pay for such coverage.

By the acts and conduct described above, the Respondent has failed and refused, and is failing and refusing, to bargain collectively and in good faith with the representative of its employees. Accordingly, we find that the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing and refusing to bargain collectively with the Union by unilaterally implementing a random drug testing program and discharging employees pursuant to the unilaterally implemented drug testing program, by failing and refusing to abide by the collective-bargaining agreement by delaying the processing of grievances and denying third-step grievances without a hearing, by failing to provide the Union with necessary and relevant information, and by discontinuing health insurance coverage by failing to pay premiums and to remit amounts deducted from employees' pay for such coverage, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1), and 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.

We shall order the Respondent to cease and desist from making unilateral changes in the unit employees' terms and conditions of employment by refusing to honor its collective-bargaining agreement with the Union. We shall also order the Respondent to with-

draw, rescind, and cancel the random drug testing program that it unlawfully implemented. We shall further order the Respondent to provide the Union with the requested information necessary for, and relevant to, the Union's performance of its function as the exclusive collective-bargaining representative of unit employees. To remedy the Respondent's unlawful refusal to continue health insurance coverage for certain unit employees, we shall order the Respondent to pay all premiums and remit amounts deducted from employees' pay for such coverage, and to make whole all affected unit employees for any losses incurred by virtue of its failure to make such payments. *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981). This shall include reimbursing employees for any contributions they themselves may have made, with interest, for the maintenance of health insurance coverage.

Finally, we shall order the Respondent to offer each employee discharged under the unilaterally implemented drug testing program immediate and full reinstatement to his former job or, if his job no longer exists, to a substantially similar position, without prejudice to any rights and privileges that he may have, and that the Respondent make him whole for any loss of earnings and other benefits that he may have suffered by reason of the discharge by payment to him of the sum equal to that which he would have normally earned in pay and benefits from his date of discharge, until the Respondent offers reinstatement, less any net interim earnings as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).¹

ORDER

The National Labor Relations Board orders that the Respondent, Mistletoe Express Service, Oklahoma City, Oklahoma, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain in good faith with the National Brotherhood of Motor Expressmen's Union by unilaterally implementing a random drug testing program and discharging employees pursuant to such program, by failing to abide by the terms of the collective-bargaining agreement by delaying the processing of grievances and denying third-step grievances without a hearing, by failing to furnish the Union with information that is relevant and necessary to its role as the exclusive bargaining representative of the unit employees, and by discontinuing health insurance cov-

erage of certain unit employees by failing to pay premiums and to remit amounts deducted from the employees' pay for such coverage.

(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) Cancel, withdraw, and rescind the random drug testing program unlawfully put into effect.

(b) On request, furnish the Union with the requested information that is relevant and necessary to its role as the exclusive bargaining representative of the unit employees.

(c) Make all payments of health insurance premiums and remit amounts deducted from employees' pay for such health insurance coverage required as a result of the obligations of the Respondent for health insurance coverage of unit employees.

(d) Make unit employees whole by reimbursing them for expenses ensuing from the failure to pay health insurance premiums and to remit amounts deducted from employees' pay for health insurance coverage.

(e) Offer each employee discharged under the unilaterally implemented drug testing program immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of his discharge in the manner set forth in the remedy section of this decision.

(f) Remove from its files any references to the unlawful discharges of those employees and notify each employee in writing that this has been done and that the discharge will not be used against him in any way.

(g) 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.

(h) Post at its facility in Oklahoma City, Oklahoma, copies of the attached notice marked "Appendix."² Copies of the notice, on forms provided by the Regional Director for Region 17, 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 employees are customarily posted. Reasonable steps shall be taken

¹We note that the settlement agreement approved by the General Counsel limits the Respondent's net backpay liability to the discharged employees to \$190,000. We leave the resolution of the backpay amount to each discriminatee to compliance proceedings.

²If 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."

by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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

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.

WE WILL NOT refuse to bargain in good faith with the National Brotherhood of Motor Expressmen's Union by unilaterally implementing a random drug testing program and discharging employees pursuant to such program, by failing to abide by the terms of the collective-bargaining agreement, by delaying the processing of grievances and denying third-step grievances without a hearing, by failing to furnish the Union with information that is relevant and necessary, and by discontinuing health insurance coverage of certain unit employees by failing to pay premiums and remit amounts deducted from employees' pay for such coverage, for our employees in the following appropriate unit:

All regular full-time employees employed in the classifications of Driver/Sales, Unassigned Driver/Sales, Dock, Rate Clerk A, Rate Clerk B, Bill/On-Hand Clerk, Head Mechanic, Body Shop Mechanic, Shop Utility, Linehaul Driver, and Unassigned Linehaul Driver, at the following terminals of the Employer: Memphis, Little Rock, Fort Smith, Muskogee, Tulsa, Wichita, Enid, Lawton, Oklahoma City, Dallas, Houston, Kansas City, Waco, Temple, Austin, San Antonio, Laredo, Tyler, Longview, and Corpus Christi, but EX-

CLUDING part-time employees, Company executives, department managers, all clerical employees, sales representatives, computer operators, porters, all other supervisors or managers as defined in the Act and others whose principal duties fall in any of these classifications.

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 cancel, withdraw, and rescind the random drug testing program we unlawfully put into effect.

WE WILL, on request, furnish the Union with the requested information that is relevant and necessary to its role as the exclusive bargaining representative of the unit employees.

WE WILL make all payments of health insurance premiums and remit amounts deducted from employees' pay for such health insurance coverage required as a result of our obligations for health insurance coverage of unit employees.

WE WILL make unit employees whole by reimbursing them for expenses ensuing from our failure to pay premiums and remit amounts deducted from their pay for health insurance coverage.

WE WILL offer each employee discharged under the unilaterally implemented drug testing program immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges.

WE WILL make whole, with interest, each employee discharged under the unilaterally implemented drug testing program for any loss of earnings or other benefits he may have suffered as a result of his discharge.

WE WILL notify each employee discharged under the unilaterally implemented drug testing program that we have removed from our files any reference to his unlawful discharge and that his discharge will not be used against him in any way.

MISTLETOE EXPRESS SERVICE