

First National Supermarkets, Inc. and Ronald Hoopes, an Individual. Case 34-CA-4201

April 30, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
CRACRAFT AND OVIATT

On February 8, 1990, Administrative Law Judge Raymond P. Green issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed a brief in opposition to the Respondent's exceptions.

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 briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

Charging Party Ronald Hoopes was discharged from his position as a driver with the Respondent on January 18, 1988.¹ Pursuant to the parties' collective-bargaining agreement, Hoopes filed a grievance regarding his discharge, and on April 28 an arbitrator concluded that Hoopes was discharged for just cause. Thereafter, Hoopes filed an unfair labor practice charge with Region 34 of the National Labor Relations Board alleging that he had been unlawfully discharged. The Regional Director dismissed the charge.

On July 11, Hoopes filed an additional grievance alleging that he was owed by the Respondent 1 week of vacation pay for 1987 and 3 weeks of vacation pay for 1988. Although the Respondent initially asserted that Hoopes was not entitled to any vacation pay, the Respondent offered to settle the grievance by paying Hoopes 3 weeks of vacation pay if Hoopes would sign a release. The release provided that Hoopes, in exchange for the vacation pay, would "release and forever discharge" the Respondent and the Union

from any and all grievances, complaints[,] charges, and/or claims of any kind which are now pending or which could be filed in the future relating to or arising out of my total employment and my termination with [the Respondent.]

Hoopes refused to sign the release. On March 1, 1989, Hoopes filed a charge with Region 34 alleging that the Respondent violated the Act by requiring him to "sign a release which waives his right to file charges with the National Labor Relations Board." Thereafter, the Respondent notified the Region that it was withdrawing the requirement that Hoopes sign the release in order to receive the 3 weeks of vacation pay.

¹ All subsequent dates refer to 1988, unless otherwise indicated.

Hoopes received the vacation pay without signing the release.

On April 13, 1989, a complaint issued in this proceeding alleging that the Respondent violated Section 8(a)(1) of the Act by requiring Hoopes to sign the release as a condition to settlement of a grievance.

The judge found the instant release to be unlawfully overbroad. In so finding, the judge reviewed several cases in which the Board has considered whether a release used by an employer was too broad, and noted that the Board has found a release to be violative of the Act if it prohibits the filing of unfair labor practice charges concerning future incidents. *Mandel Security Bureau*, 202 NLRB 117, 119 (1973). See *Coca-Cola Bottling of Los Angeles*, 243 NLRB 501 (1979); *Postal Service*, 234 NLRB 820 (1978). Thus, the judge, in agreement with the General Counsel, appeared to interpret the language of the release prohibiting Hoopes from filing any future charges arising out of his "total employment . . . and termination" to include any future reemployment of Hoopes by the Respondent and hence to prohibit the filing by Hoopes of any unfair labor practice charges regarding future labor disputes.² Accordingly, the judge found that the Respondent violated the Act. We do not agree.

While the phrase "total employment" may appear ambiguous in isolation, we think its meaning becomes evident when examined in the context of the release itself, as well as the circumstances surrounding Hoopes' discharge. The release was proffered to Hoopes after a lengthy dispute commencing with his discharge, which was the subject of grievance and arbitration proceedings as well as an unfair labor practice charge, followed by Hoopes' claim that he was owed vacation pay. In this context, it seems evident that the release referred to these claims and any others Hoopes might raise relating to his "total employment" with the Respondent through to his discharge. We therefore construe the phrase "total employment" narrowly and find that it is limited to Hoopes' past employment with the Respondent until his discharge in January 1988. See *Coca-Cola Bottling of Los Angeles*, supra (Board implicitly interpreted a release providing "that no actions of any kind will ensue" narrowly based on the entire document and the surrounding circumstances).

We reject our dissenting colleague's interpretation because it ignores the context in which releases are generally negotiated with a terminated employee. Through such a broadly worded release, an employer

² The judge also rejected the Respondent's contention that it remedied any violation of the Act by rescinding its requirement that the release be signed. The judge found that the release form at issue was a form customarily used by the Respondent and, therefore, its use had prospective consequences regarding other employees of the Respondent. We note that the record indicates that the release form proffered to Hoopes was one of several forms used by the Respondent. Accordingly, we do not adopt any suggestion by the judge that the release form in the instant case is the only such form used by the Respondent.

is seeking final repose for all claims which have arisen out of any and all aspects (i.e., the total) of the employment being concluded.³ It is highly doubtful that the parties are thinking about the prospects of any future association together. At least there is no evidence in the record to support such a likelihood. Thus, it simply would not be reasonable to conclude that the parties, by signing the present release, intended to compromise the rights and obligations that would grow out of any future employment relationship, the possibility of which is wholly speculative. In the absence of any evidence pertaining to reemployment customs which might give this “total employment” release a different meaning, we conclude that our interpretation is the most sensible.⁴ Accordingly, we disagree with our colleague that the release here has an unlawful tendency to restrain.

Additionally, we reject the General Counsel’s contention that the release would prohibit Hoopes from filing a future unfair labor practice charge based on an unlawful recommendation by the Respondent to a prospective employer of Hoopes. Such a charge would not arise out of Hoopes’ past employment but rather would involve subsequent conduct by the Respondent, and hence would not be precluded by the instant release.

For these reasons, we find that the release is limited to Hoopes’ past employment with the Respondent and is therefore not violative of the Act. We shall, accordingly, dismiss the complaint.

ORDER

The complaint is dismissed.

MEMBER OVIATT, dissenting.

Contrary to the majority, I would adopt the judge’s finding that the Respondent violated Section 8(a)(1) of the Act by requiring Hoopes to sign a unlawfully broad release in order to settle his grievance.

Unlike the majority, I find the wording of the release to be clear and unambiguous. The release requires Hoopes to refrain from any future grievances, complaints, charges, and/or claims arising out of his “total employment and . . . termination.” This unambiguously precludes any claims Hoopes might have arising not only out of his employment prior to his termination, but also any claims that might arise out of any future employment he might have with the Respondent. To construe this provision otherwise can only be achieved by ignoring the plain meaning of the

³Thus, in addition to settling claims under the NLRA, the release arguably reaches those actionable under Federal and state laws governing other facets of the employment relationship—OSHA covering health and safety in the workplace, ERISA covering pensions, the EEO laws covering racial and other forms of discrimination, and workers’ compensation covering income replacement for workplace injuries, just to name a few. Whether or not a release of this sort would be enforceable under those various laws, of course, is a question that is not before us.

⁴See Restatement 2d, Contracts § 202(3)(a) (1979).

word “total.” The fact that the release resulted from a certain series of events that occurred in the past does not change the meaning of the word “total.”¹

Further, were the wording here ambiguous, I would find that the party creating the ambiguity in this unilaterally drafted release was responsible for any tendency to restrain resulting from the ambiguity. There is no question here of the parties’ jointly including ambiguous language in the release, which might justify the Board in considering the surrounding circumstances in an effort to determine the parties’ true meaning. The Respondent alone dictated the terms of the release.²

I further disagree with the majority’s rejection of the General Counsel’s contention that the release would prohibit Hoopes from filing a future unfair labor practice charge based on an unlawful recommendation by the Respondent to a prospective employer of Hoopes. Their finding that such a charge would involve subsequent behavior by the Respondent, and hence would not be precluded by the instant release, misses the point. The question to be considered under our statute is not whether a charge in that situation would be precluded (i.e., whether the Board would not entertain a charge), but whether the language of the release would have the tendency to unlawfully restrain the employee from approaching the Board with a charge. I believe it would.

For the foregoing reasons, I would adopt the judge and find that the Respondent violated Section 8(a)(1) of the Act.

¹The majority’s reliance on *Coca-Cola Bottling of Los Angeles*, 243 NLRB 501 (1979), to support its resolution of the perceived ambiguity here is misplaced. In that case, the settlement agreement resolving a grievance over an employee’s suspension unambiguously precluded his maintaining any charge or claim filed in conjunction with his suspension. As the Board stated, “the settlement agreement is limited to the suspension that occurred on or about April 25, 1978; it does not prohibit Estrada from filing under [sic] labor practice charges concerning future incidents or preclude him from engaging in protected concerted activity.” There was no ambiguity in the settlement agreement, and there certainly was no restriction on any of the employee’s contractual or statutory rights arising from his “total employment.”

²The majority treats the release here as one tailored by the parties to settle the specific grievances of Charging Party Hoopes. The facts are otherwise. The release was one of several standard forms used by the Respondent.

Rita C. Lisko Esq., for the General Counsel.
Andrew C. Meyer Esq. and *Paul A. Monahan Esq. (Duvin, Cahn & Barnard)*, for the Respondent.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. This case was heard by me on December 6, 1989. The charge was filed on March 1, 1989, and the complaint was issued on April 13, 1989. In substance, the complaint alleged that the Respondent violated Section 8(a)(1) of the Act by requiring Ronald Hoopes to sign a release waiving his right to file charges with the National Labor Relations Board.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICE

Ronald Hoopes was employed by the Respondent as a driver at its distribution center located in Windsor Locks, Connecticut. He was discharged on January 18, 1988. In this regard, Hoopes filed a grievance with his Union, Local 559 International Brotherhood of Teamsters, Chauffers, Warehousemen and Helpers of America, concerning his discharge and after a hearing, an arbitrator issued a decision on April 28, 1988, and concluded that Hoopes was fired for just cause.

On June 23, 1988, Hoopes filed an unfair labor practice charge alleging that the Respondent discharged him because of his protected concerted activity. That charge was dismissed by the Regional Director after concluding that the charge had no merit.

On July 11, 1988, 7 months after his discharge, Hoopes filed a grievance with his Union alleging that he was entitled to week's vacation pay for 1987 and 3 weeks' vacation pay for 1988. This grievance was processed by Union Business Agent Robert Bell.

In relation to the vacation pay grievance, the Company took the position that it had no merit. As to the claim for 1987, the Company asserted that since Hoopes had not taken his vacation by the end of the year, that vacation time was lost under the terms of the contract. As to the 1988 claim, the Company asserted that Hoopes did not in fact have the requisite work hours to be eligible for vacation pay. It also asserted that Hoopes' claim was not filed timely under the terms of the contract.

Notwithstanding the contentions of the Company, the Union continued to press Hoopes' claim and the Company ultimately, in October 1988, offered to settle the claim by offering a settlement of 3 weeks' vacation pay. This offer was relayed to Hoopes by Bell with an accompanying release. Bell was given to understand that the checks payable to Hoopes (dated November 3, 1988), would not be provided to him, until and unless Hoopes signed the release. This release, which was customarily used by the Employer, reads as follows:

This is a Release Agreement between Ronald Hoopes, First National Supermarkets, Inc. and Local 559, of the IBT.

I, Ronald Hoopes, in exchange for receipt of the First National Supermarkets' checks #603889, 603898, and 603899, and other good and valuable considerations, do hereby release and forever discharge First National Supermarkets, Inc. (including all officers, agents, employees and representatives) and Local 559 IBT (including all its officers, agents, employees and

representatives) from any and all grievances, complaints charges, and/or claims of any kind which are now pending or which could be filed in the future relating to or arising out of my total employment and my termination with First National Supermarkets.

In WITNESS WHEREOF, I have voluntarily signed this release on this _____ day of _____, 1988.

APPROVED BY FIRST NATIONAL SUPERMARKETS, INC.

/s/Frank MacDonald

On February 17, 1989, Hoopes wrote to Bell stating that he did not want to sign the release and on March 1, he filed the instant charge alleging that the Company violated the Act by requiring him to sign the release in order to receive the money.

On March 31, 1989, during the pendency of the charge's investigation, the Company by its counsel, notified the Regional Office of the Board that it would rescind the requirement that Hoopes sign the release and that it would release the vacation checks to him without further ado. This was repeated to the Board agent again on April 3, 1989, and on April 5 the Company notified the Union that the checks should be sent to Hoopes without requiring him to sign the release.

Ultimately, Hoopes did receive the checks and cashed them without signing any release.

III. DISCUSSION

In relation to the settlement of a grievance filed by Hoopes, the Company insisted until March 31, 1989, that he sign a general release which released and forever discharged both the Company and the Union "from any and all grievances, complaints, charges, and/claims of any kind which are not pending or which could be filed in the future relating to or arising out of my employment and my termination with First National Supermarkets." The General Counsel contends that the language of this release is too broad and, by its terms, would prohibit Hoopes from filing any kind of future unfair labor practice charge arising out of his past or his possible future employment with the Company. Moreover, as the evidence shows that the language used in the release is language commonly used by the Company to resolve grievances, she contends that its overbroad nature would adversely affect other employees with respect to their access to the Labor Board.

The Company for its part, contends that the language of the release can only relate back to Hoopes' former employment and cannot be interpreted prospectively as he was discharged for cause. (Presumably it would also contend that given the nature of the events leading to his discharge, there is no reason to believe that it would ever re-employ Hoopes.)

In *Mandel Security Bureau*, 202 NLRB 117, 119 (1973), the Board found that the Company violated the Act when it promised to reinstate an employee, provided that he cease filing petitions and that he withdraw an unfair labor practice charge. The administrative law judge stated:

I find that a condition of Black's return was withdrawal of the charges and forbearance from future charges and concerted activities. Even though Black himself may have been partially responsible for instigating this deal,

future rights of employees as well as the rights of the public may not be traded away in this manner.

In *Postal Service*, 234 NLRB 820, 821 (1978), the Board in distinguishing the facts from *Mandel*, supra, stated:

In the instant case, unlike *Mandel*, the complaint does not allege that Delph had either engaged in protected concerted activities or filed charges with the Board. The reduction in discipline was conditioned upon Delph's promise not to grieve or appeal his suspension; i.e., not to overturn the settlement of that one dispute, and not, as was the case in *Mandel*, upon the withdrawal of any charges filed, or on any promise to refrain from filing such charges or engaging in protected activity in the future.

Respondent in imposing such a condition . . . in exchange for reducing the discharge to a suspension, sought merely to "buy its peace" by preventing Delph from litigating the matter in the future. As is evident from the agreement, Delph is precluded from appealing the suspension, and only the suspension by means of various procedures. There was no requirement that he refrain from filing charges with the Board or that he refrain from engaging in protected concerted activities. It was, in short, simply an agreement to settle one dispute . . . and did not extend or apply to any right to grieve other matters which might arise in the future.

Finally, in *Coca-Cola Bottling Co. of Los Angeles*, 243 NLRB 501 (1979), the Board dismissed a complaint alleging the use of an allegedly overbroad release, which provided inter alia, that "any charges with any governmental administrative agency, including, but not limited to, the National Labor Relations Board, will be dropped and withdrawn by Estrada as a condition of his reinstatement and further that no actions of any kind will ensue." In distinguishing this case from *Mandel*, supra, the Board stated:

The settlement agreement was the product of negotiations during which each of the parties made concessions. Estrada, in return for his agreement, received a reduction in the discipline originally assessed against him and was allowed to return to work. Respondent, in turn, obtained a final settlement of the matter without having to engage in litigation. Furthermore, unlike the cases cited by the General Counsel, the settlement agreement is limited to the suspension that occurred on or about April 5, 1978; it does not prohibit Estrada from filing under labor practice charges concerning future incidents or preclude him from engaging in protected concerted activity.

In my opinion, the cited cases although drawing an exceedingly fine legal line, lead to the conclusion that the release used by the employer in the present case was too broad. Therefore, I shall conclude that insistence on its execution by Hoopes would be violative of Section 8(a)(1) of the Act.

The Company argues, however, that although it initially insisted that Hoopes execute the release as a condition of receiving the settled amount of money, it dropped this condi-

tion prior to the issuance of the complaint and released his check without requiring him to execute the release. Nevertheless, the evidence shows that the release form is a form which is customarily used and the Company has not indicated or shown that it intends to alter, modify, or change the form in future cases. Thus, it is my opinion that it cannot be argued that the present case is trivial or de minimus, having no prospective consequence insofar as the employees are concerned. I therefore believe that the cases cited by the Respondent regarding de minimus violations are distinguishable.¹

Finally, the Company contends, relying on *NLRB v. Texas Natural Gasoline Corp.*, 253 F.2d 322 (5th Cir. 1958), that as Hoopes was not an employee at the time the release was proffered for him to sign, the Company cannot have violated Section 8(a)(1) of the Act, because it did not threaten, restrain, or coerce an employee.

Section 2(3) of the Act states:

The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment

The fact that action is taken against a person who at the time of the action is not employed by the Respondent does not necessarily provide a defense to 8(a)(1) allegations. For example in *Madison South Convalescent Center*, 260 NLRB 816, 823 (1982), the Board concluded that an employer violated the Act by discriminatorily failing to hire job applicants in an attempt to dissipate a bargaining unit. Also in *Advance Window Corp.*, 291 NLRB 226 (1989), the Board held that an employer violated the Act by recommending that another employer not hire a former employee who was a union organizer.

In *Allied Chemical Workers Local 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971), the Supreme Court held that retired employees were not employees within the meaning of Section 2(3) of the Act. It therefore held that the company had no obligation to bargain over a midterm change in benefits for retirees under Section 8(a)(5) of the Act. The Court, although acknowledging that the Board has found violations involving persons who have not been initially hired (such as applicants for hire or registrants at hiring halls), and cases where the persons have quit or where their employers have gone out of business, distinguished pensioners and stated:

Yet all of these cases involved people who, unlike the pensioners here, were members of the active work force available for hire and at least in that sense could be identified as "employees." No decision under the Act is cited, and none to our knowledge exists in which an individual who has ceased work without expectation of further employment has been held to be an "employee." [Id. at 168.]

¹ See *Bellinger Shipyards*, 227 NLRB 620 (1976); *Wichita Eagle Publishing Co.*, 206 NLRB 55 (1973); and *Musicians Local 76 (Jimmy Wakely Show)*, 202 NLRB 620 (1973).

In my opinion, the fact that Hoopes was not employed by the Respondent at the time of the alleged violation cannot serve to immunize the Respondent. First, the events which led up to the grievance and were the subject of the settlement and release, all occurred during the time of his employment. Second, the release in question appears to be uniformly used by the Employer in the context of grievance settlements under the present collective-bargaining agreement. Therefore, unless remedied the action involving Hoopes may be repeated vis-a-vis other of the Respondent's employees thereby affecting their Section 7 rights. Third, unlike the pensioners in the *Pittsburgh Plate Glass* case, supra, there is no evidence that Hoopes has retired or withdrawn from the work force.

CONCLUSION OF LAW

By requiring a grievant under the collective-bargaining agreement to execute a release which requires him to forgo any and all unfair labor practice charges, which could be filed in the future, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

[Recommended Order omitted from publication.]