

Teamsters Local Union No. 988, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO and Emery Worldwide, a CF Company. Case 16-CB-3497

June 10, 1991

DECISION AND ORDER

BY MEMBERS CRACRAFT, DEVANEY, AND OVIATT

On August 17, 1990, Administrative Law Judge Wallace H. Nations issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and the Charging Party filed answering briefs.¹

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.

As more fully detailed in the judge's decision, prior to April 17, 1989, the Respondent represented in separate units and maintained separate collective-bargaining agreements for the territorial representatives of Emery Air Freight and the courier guards of Purolator Courier Corporation, respectively.² On April 17, 1989, Consolidated Freightways, Inc. purchased Emery and its subsidiary Purolator. Thereafter, the name "Emery Worldwide, a CF Company" was used to identify the Emery and the Purolator terminal operations in Houston, Texas. Since then, the former Emery territorial representatives (approximately 47 employees) and the former Purolator courier guards (approximately 70 employees) have worn the same work uniform and performed similar pickup and freight delivery work. Separate seniority lists have been maintained for each unit, but no employee transfers between the units have occurred.³ Wages, benefits, and work rules have differed according to the terms of the contract for each unit. Labor relations for both units are administered by the same Emery Worldwide representatives, and there is common supervision. There is also some interchange

of company vehicles and customer service responsibilities between the units.

The most recent contract covering the former Purolator courier guards was effective November 2, 1988, through November 2, 1991. The most recent contract covering the former Emery territorial representatives was effective December 1, 1985, through November 30, 1988, but thereafter was extended on a day-to-day basis. In negotiations commencing in October 1989 for a successor contract for the former Emery employees, the Respondent sought to cover the former Emery territorial representatives and the former Purolator courier guards under one agreement.

On October 2, 1989, the Respondent also filed a grievance under article 1, Recognition, of the Emery contract.⁴ The Respondent sought the application of the extended 1985-1988 Emery contract to the former Purolator courier guards on the ground that the operations of Emery and Purolator had been merged and that there existed only a single Emery Worldwide unit covering the former Emery and Purolator employees. The Charging Party denied the grievance, citing article 1, section 2(b), of the Emery contract which excludes from coverage those employees who are already covered by an existing agreement. Since December 7, 1989, the Respondent has demanded arbitration of that grievance. Based on this demand for arbitration, the

⁴Art. 1, Recognition, provides:

Section 1. The Company recognizes the Union as the sole and exclusive collective bargaining agent for those job classifications hereinafter set forth and such classifications as may hereafter be added.

Section 2. The execution of this Agreement on the part of the Company shall cover the driver/dockmen employed by the Company at Houston, Texas excluding, however, the classifications set forth immediately below.

The following classifications of employees are specifically excluded from coverage of this Agreement:

(a) Confidential employees, supervisory, and professional employees within the meaning of the Labor Management Relations Act of 1947, as amended.

(b) Employees already covered by an existing Union Agreement. It is the intention of the parties hereto that the aforesaid exclusions shall be governed by the duties commonly and regularly performed by employees and shall not depend on mere title.

(c) Dispatchers exercising independent judgement [sic] with respect to the responsibility for directing the work or recommending hiring and firing.

(d) This agreed to Article also includes the work and additional job classifications or duties normally assigned to the bargaining unit employees such as tow motor/fork-lift operator even though all such work is performed under the driver/dockman classification.

Additional classifications or job title changes such as driver salesman, territorial representative shall not be interpreted to mean that such jobs or classifications fall outside of the bargaining unit.

Section 3. This Agreement shall not be applicable to those operations of the Company where the employees are covered by a collective bargaining agreement with a Union not signatory to this Agreement or to those employees who have not designated the Union as their collective bargaining agent. At such time as a majority of such employees in an appropriate bargaining unit designate the Union as their collective bargaining agent, they shall automatically be covered by this Agreement.

Section 4. The Union and the Company agree, so that there will be no misinterpretation at a later date, that the normal bargaining unit employees working for Emery Air Freight/Emery Worldwide is considered to be within the bargaining unit covered by this Contract.

¹The General Counsel and the Charging Party also filed separate motions to strike all or part of the Respondent's exceptions and brief. The Respondent filed an opposition to the motions. We deny the motions to strike, except as they pertain to appendix A of the Respondent's brief. Contrary to the assertions in support of the motions, the exceptions and supporting brief sufficiently identify the portions of the judge's decision the Respondent claims are erroneous. We strike appendix A, a copy of a purported collective-bargaining agreement reached after the hearing, because it is clearly outside the record.

²Emery acquired Purolator in June 1987.

³As noted by the judge, a December 6, 1989 grievance concerning a temporary transfer of a Purolator employee to cover the route of an absent Emery employee was sustained by the Joint Rail-Truck Arbitration & Texas Conference Joint Transfer Cartage and Garage Grievance Committee.

Charging Party filed the charge leading to the instant complaint.

In rejecting the Respondent's assertion that the two historical units have been merged into a single Emery Worldwide unit, the judge focused on (1) the separate seniority lists; (2) the different contracts for the units, with different terms and conditions of employment; (3) the lack of employee transfers between the units; and (4) the Respondent's December 6 filing of a grievance, after filing the October 2 grievance involved here, in which it contended that the units were separate and the work of one could not be transferred to the other. The judge then found that the Respondent's contention that the Emery and Purolator units had merged could not be maintained in good faith. He therefore concluded that the Respondent had violated Section 8(b)(1)(A) and (3) of the Act by seeking, through bargaining and contractual grievance-arbitration procedures, to compel the merger of the Emery and Purolator units and by insisting on the application of the Emery contract to the merged unit. For the reasons set forth below, we find that the Respondent Union's conduct did not violate the Act and we dismiss the complaint.

The judge relied on *Chicago Truck Drivers (Signal Delivery)*, 279 NLRB 904 (1986), and similar cases for the general proposition that, in the absence of consent, one party cannot lawfully force a merger of existing units on the other party. In *Signal Delivery*, the Board found that the respondent union's insistence on the arbitration of grievances seeking to merge three historically separate bargaining units violated Section 8(b)(1)(A) and (3) of the Act. These three units were at three separate facilities and one involved a separate employer. Thus, the proposed merger would have introduced not only multifacility but also multiemployer bargaining. In that case, the union sought to dovetail the three separate seniority lists for the units and through this dovetailing to accomplish a merger of the three units into one unit. Moreover, the Board in *Signal Delivery* found that the union wanted to force the merger of the units rather than obtain a declaration that a merger had already occurred through the integration of the employers' operations.

Although we do not disagree with the general proposition espoused by *Signal Delivery* and the other cases relied on by the judge, we do not consider it applicable to the facts of this case. A critical difference between those cases and the present case is that here the Respondent sought arbitration to determine whether, in fact, a merger had already occurred at some time after the Company's terminal operations had been combined. The Respondent's contention that a merger had occurred was not unreasonable, particularly in light of the facts that the employees of both units wear the same work uniform, perform similar work out of the same terminals, and have common supervision. In

addition, the Respondent notes that there is an interchange of vehicles and customer service responsibilities between the units, and labor relations for both units are administered by the same company representatives. The Respondent asserts that the only fact militating against finding a complete functional merger prior to the filing of the grievance is the existence of two collective-bargaining agreements with different terms and conditions of employment. In our view, however, the separate agreements appear to reflect the separate operations that existed when the agreements were negotiated. Likewise, the separate seniority lists, relied on by the judge, can be traced to the historical circumstance that the companies were previously separate entities. Similarly, the Respondent's pursuit of the grievance filed on December 6, 1989, asserting that the units were separate was not necessarily inconsistent with its merger grievance. There had been no arbitration decision resolving the merger issue.

In *Teamsters Local 483 (Ida Cal Freight)*, 289 NLRB 924 (1988), the Board dismissed a complaint alleging that the respondent union violated Section 8(b)(4)(ii)(A). The Board concluded that the respondent union's filing of a grievance and a 301 lawsuit to compel union representation of the owner-operators was not unlawful, even though the owner-operators were found to be independent contractors and not statutory employees. The Board reasoned that the union's contention that the owner-operators were statutory employees was not unreasonable and that the union's actions were consistent with the goal of obtaining an adjudication, through arbitration or court action, of the status of the owner-operators. There also had been no prior determination of the owner-operators' status. Under these circumstances, the Board concluded that the respondent union had a legitimate object in seeking a resolution of the issue involving the status of the owner-operators through grievance arbitration and through a 301 lawsuit.

Applying the analysis of *Ida Cal* to the facts in this case, we similarly find that the Respondent's grievance and contract bargaining proposal seeking a single unit of Emery and Purolator employees had a lawful objective. As discussed above, the Respondent's merger contention was not unreasonable. It also raised a bona fide contractual issue involving the application and interpretation of article 1 of the 1985-1988 Emery contract. Article 1, on its face, does not explain the effect, if any, on the scope of the unit when company operations are integrated with those of another company. In addition, this merger issue has not been determined through an adjudicatory process. Thus, in the absence of any other alleged coercion, we shall dismiss the complaint.

ORDER

The complaint is dismissed.

Tamara J. Gant, Esq., for the General Counsel.

James L. Hicks Jr., Esq., of Dallas, Texas, for the Respondent.

William C. Strock, Esq., of Dallas, Texas, for the Charging Party.

DECISION

STATEMENT OF THE CASE

WALLACE H. NATIONS, Administrative Law Judge. Based on a charge filed December 7, 1989, by Emery Worldwide, a CF Company (Emery or the Charging Party), the Regional Director for Region 16 issued a complaint on January 19, 1990, alleging that Teamsters Local Union No. 988, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO (Local 988 or Respondent) violated Section 8(b)(1)(A) and (3) of the National Labor Relations Act (the Act) by, since October 2, 1989, attempting through the grievance-arbitration process, to apply the terms of a collective-bargaining agreement covering Emery employees to persons covered by the Purolator Courier Corporation (Purolator) collective-bargaining agreement, thus seeking to compel the merger of two historically separate units.

Hearing was held in this matter on April 4, 1990, at Houston, Texas. Briefs were received from all parties on or about May 9, 1990. Based on the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Charging Party is a Delaware corporation with an office and place of business in Houston, Texas, where it is engaged in the air and ground transportation of freight and packages. It is admitted and I find that the Charging Party is now and has been at all times material to this decision an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is admitted and I find that the Respondent is now and has been at all times material to this decision a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Issue for Determination and Relevant Facts*

The complaint raises the issue of whether Respondent's insistence, in bargaining and in demands for arbitration, on changing the scope of the separately established and recognized Emery territorial representative and the Purolator Courier guard units violated Section 8(b)(1)(A) and (3) of the Act. The facts in this case are virtually undisputed and most were stipulated by all parties.

The route employees employed by Emery Air Freight are referred to as territorial representatives. For at least 18 years,

these employees have been covered by a collective-bargaining agreement between Emery and Respondent. They are currently covered by a collective-bargaining agreement which was effective December 1, 1985, through November 30, 1988, but which has been extended on a day-to-day basis pursuant to agreement. Since October 1989 Respondent and Emery have been engaged in negotiations for a new agreement.

In June 1987, Emery acquired Purolator Courier Corporation. In October 1988, Emery recognized Local 988 as the collective-bargaining representative for the Houston Purolator route employees, referred to as courier guards, and began negotiations, resulting in a collective-bargaining agreement covering the Houston Purolator courier guards for the period November 2, 1988, through November 2, 1991. At no time during the conduct of these negotiations between Respondent and Purolator did any representative of Respondent seek either to negotiate a joint contract to cover both the Purolator and Emery employees or to cover the Purolator employees with the existing Emery agreement.

In November or December 1988, Emery combined the Purolator and Emery Air Freight terminals in Houston. Since that time, there have been three terminals in Houston, with members of each bargaining unit at each terminal. The supervision at each of the three terminals in Houston is common for both units; that is, at each terminal both units share the same terminal manager, dispatchers and supervisors. Route employees from both units attend joint drivers' meetings at each terminal.

On April 17, 1989, Consolidated Freightways, Inc., purchased Emery and its wholly-owned subsidiary, Purolator. At that time, the Charging Party began changing its aircraft logos to read "Emery Worldwide, a CF Company." In June or July 1989, the Charging Party began using a single waybill and overnight package for the transportation of freight.

The territorial representative and courier guard unit employees perform similar types of work—i.e., the pickup and delivery of freight—save and except for the line haul driving, which is, and historically has been, performed only by employees in the courier guard unit. While the routes at Houston have continued to be separated by unit under the respective collective-bargaining agreements, a driver in either unit can pick up or deliver freight from customers who, prior to 1989, were exclusively Purolator or Emery customers. In servicing these routes, there is complete interchange of vehicles, except for the line haul vehicles, which continue to be utilized only by the employees in the Purolator Courier guard unit.

Despite the similarity of job function, there have been no transfers between the two units. In fact, when the Charging Party temporarily used a Purolator unit employee to cover the route of an absent Emery unit employee, Respondent filed a grievance on December 6, 1989, stating that an Emery employee should have been used to cover the absent Emery driver. The Joint Rail-Truck Arbitration Texas Conference Joint Transfer Cartage and Garage Grievance Committee sustained this grievance, finding merit in Respondent's contention that a Purolator employee should not have been used even to temporarily replace the absent Emery employee.

Except with respect to matters raised under the grievance procedure, the Charging Party has adhered to the terms and conditions set forth in the separate collective-bargaining

agreements. Pursuant to the terms of the separate agreements, layoffs, starting time/job posting, and bidding have differed. Further, as provided in the respective contracts, there are separate seniority lists, benefits, classifications, and pay. Employees at Houston have been laid off by separate bargaining unit pursuant to the respective bargaining agreements. Although the work rules governing both units are virtually identical, certain separate work rules are also contained in the respective agreements. Emery pays union checkoff for all represented employees at Houston on one check, despite separate invoice submission by unit by Respondent.

The Charging Party's operations include a single central hub located in Dayton, Ohio, which services the Houston terminals. Labor relations policies for both units are administered by Emery Worldwide Area Personnel and Labor Relations Manager Richard C. Weber. In Houston, the Charging Party's labor relations policies are administered by the same persons for each unit. There is a single telephone listing in Houston, and the telephone is answered either "Emery Worldwide" or "Emery Worldwide, A CF Company" at each terminal. As of April 2, 1990, all employees wear the same uniform, which consists of a red shirt with a pocket logo indicating "Emery Worldwide, A CF Company"; green pants with a red stripe down the side of the pant legs; and a cap with the logo "Emery Worldwide, A CF Company."

In negotiations between Respondent and Emery, which commenced in October 1989, Respondent originally sought to cover under one agreement the route employees of both Emery and Purolator throughout the nine-state area which comprises the Southern Conference of Teamsters. These demands were then modified to seek to cover under one agreement only the Houston Emery and Purolator route employees. This bargaining demand culminated in the filing of a grievance demanding application of the Emery collective-bargaining agreement covering (approximately 47) Emery territorial representatives to the Purolator Courier guard unit (approximately 70 employees). Respondent contends in the grievance that the operations of Emery and Purolator have been merged. The Charging Party denied the grievance, citing Section 2(b) of the collective-bargaining agreement, which excludes from coverage those employees that are already covered by an existing agreement. Since December 7, 1989, Respondent has demanded arbitration of that grievance. Respondent has insisted on this combined unit despite the separate bargaining history and the Charging Party's opposition.

B. Analysis and Conclusions

Before analyzing the parties' contentions, it first must be determined exactly what the Respondent seeks by its insistence on arbitration. The grievance which gives rise to this dispute states:

With the consolidation of Emery Worldwide and Purolator Courier into Emery Worldwide, a C.F. Company, Teamsters Local Union 988 is therefore taking the position with Emery Worldwide as the surviving company, in accordance with Article I—Recognition, that the surviving company and contract is the agreement between Emery Worldwide and Teamsters Local Union 988. Teamsters Local Union 988 is asking that all affected employees be made whole and the Emery

Worldwide contract cover all bargaining unit employees.

Respondent contends on brief that it is "both directly and in effect contending and seeking to arbitrate the issue of whether the Emery and Purolator units have been merged," and "what the effect of the merger will be upon those employees who were affected by the merger of the two operations." The Charging Party and the General Counsel both contend that the grievance seeks to force the merger of the two bargaining units and require that the terms of the Emery contract be applied to the Purolator bargaining unit. I agree with the latter view and believe that Respondent's position on brief is an attempt to avoid the applicability of the Board's decisions in a number of cases relied on by the General Counsel and the Charging Party.¹

It is well established that the enlargement of a bargaining unit is not a mandatory subject of bargaining under the Act. For this reason, in the absence of mutual consent, one party cannot force on the other an enlargement, alteration, or merger of an existing bargaining unit or units. *Chicago Truck Drivers*, supra at 906; *Utility Workers Local 111*, supra at 238; *Service Employees Local Union 32B-32J*, supra at 434.

In *Electrical Workers IBEW Local 323*, supra, the union sought, as here, to apply the terms of employment covering employees in one unit, the "commercial" unit, to those in another, the "residential" unit. The Board found not only that such insistence on a modification in unit scope violated Section 8(b)(3), but also that, by seeking to enforce the commercial agreement against the residential unit employees, the union had restrained and coerced those employees in violation of Section 8(b)(1)(A). In *Chicago Truck Drivers*, the Board cited favorably the previous holding in *Electrical Workers*, stating, 279 NLRB at 906:

. . . the Board found that the respondent union violated Section 8(b)(3) by demanding that negotiations be conducted on a broader basis than the established units, by insisting that the terms and conditions of employment governing employees in the "commercial" unit be applied to employees in the "residential" unit, and by seeking to enforce through the grievance-arbitration procedure the terms of the commercial agreement against work done by employees in the residential unit. In so finding, the Board explained that the violation of Section 8(b)(3) consisted in the respondent's unlawful efforts to enlarge the commercial unit to include the residential unit, i.e., the respondent could not lawfully demand the merger of the two historically separate units without the employer's consent.

Similarly, in *Service Employees Local 32B-32J*, supra, the respondent attempted to impose on an established unit a multiemployer association contract. The Board, in finding a violation of Section 8(b)(1)(A) and (3), specifically relied on the fact the respondent had previously consented to the separate unit. In the instant proceeding, the Respondent successfully negotiated a contract covering the Purolator unit, after

¹ *Chicago Truck Drivers (Signal Delivery)*, 279 NLRB 904, 907 (1986); *Service Employees Local 32B-32J (Allied Maintenance)*, 258 NLRB 430 (1981); *Electrical Workers IBEW Local 323 (Active Enterprises)*, 242 NLRB 305 (1979); and *Utility Workers IBEW Local 111 (Ohio Power Co.)*, 203 NLRB 230, 238-239 (1973).

Purolator became a subsidiary of Emery, without attempting to include the Emery unit in the negotiations or apply the provisions of the Emery agreement to the Purolator unit members. The Respondent also filed a grievance in December 1989, after the filing of the grievance under consideration herein, in which it successfully defended the separateness of the involved bargaining units with respect to job assignments.

In *Chicago Truck Drivers*, supra, the Board found that the respondent union violated Section 8(b)(3) by seeking to enforce, through the grievance-arbitration procedure, the merger of historically separate units without the employer's consent. In that case, the union filed a grievance and demanded arbitration, claiming that three historically separate units, two of which were comprised of employees of Signal Delivery Service, Inc., should be covered by one collective-bargaining agreement. The charging parties refused to arbitrate on the grounds that the matter was not grievable, but rather a subject for contract negotiations. The Board found that each of the three units was covered by a separate collective-bargaining agreement. Also, each unit had a separate seniority list and no employee was permitted to "bump" from one seniority list to another. Finally, it was found that the charging parties did not agree to a merger of the separate units. Given these factors, the union could not force a merger of the units and its effort to do so violated the Act.

Although the Respondent does not address the other cases cited above and relied on by the Charging Party and the General Counsel, it does seek to differentiate the situation here present from that in *Chicago Truck Drivers*, citing a portion of that decision reading (279 at 907):

Finally, the Union does not contend that its arbitration demands have a reasonable basis in fact or law. It is not seeking to arbitrate whether a merger has occurred, but is seeking to force, through arbitration, the merger of historically separate units.

Respondent contends that by its grievance, it is asserting "that there exists only one combined and merged unit, which has been merged under the terms of the Emery Agreement." "Where, as here, two union represented companies are merged, nothing in the statute prohibits arbitration of the issue of which company and contract is the survivor." Respondent then asserts on brief that the two historical units have been merged into a single Emery Worldwide unit. I believe that this assertion is contrary to the facts. The Respondent stipulated that there are in existence two separate and distinct collective-bargaining agreements covering the two bargaining units, that there are separate seniority lists for each unit, that there are no transfers between the two units and that employees within each of the units are subject to different terms and conditions of employment including, inter alia, wages, benefits, and contractual work rules. I would again note the Union's contention in December 1989, after the filing of the grievance herein involved, that the units were separate and the work of one cannot be transferred to the other.

I agree with the Charging Party that the circumstances presented are not ones where the Union can in good faith contend that the employer has merged the two bargaining units. I also agree that the Respondent is seeking to force through

bargaining and arbitration the merger of those two bargaining units. The Respondent's efforts to merge the two units deprive the Employer of the benefit of its bargain under the Purolator unit collective-bargaining agreement, which covers a substantially greater number of employees in its Houston operations and which was negotiated after the purchase of Purolator by Emery. In conclusion, for the reasons and in reliance on the cases set out above, I find that Respondent's actions in seeking through bargaining and the grievance-arbitration procedures to merge the historically separate Emery and Purolator bargaining units and to force the Emery territorial representative collective-bargaining agreement on the Purolator Courier guard unit are in violation of Section 8(b)(1)(A) and (3) of the Act.²

CONCLUSIONS OF LAW

1. Emery Worldwide, a CF Company, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Respondent, Teamsters Local Union No. 988, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By insisting on the merger of separate established bargaining units of Emery territorial representatives and Purolator Courier guards and by insisting on the arbitration of a grievance which demands the merger of such separate established bargaining units, a nonmandatory subject of bargaining, and insisting on the application of the collective-bargaining agreement covering the Emery territorial representative to the members of the Purolator Courier guard unit, the Respondent has refused to bargain collectively with Emery Worldwide, a CF Company and thereby has engaged in unfair labor practices within the meaning of Section 8(b)(3) of the Act.

4. By processing its grievance and insisting on arbitration of its grievance demanding the application of the Emery territorial representative collective agreement on the employees of Emery Worldwide, a CF Company in the Purolator Courier guard unit, the Respondent has restrained and coerced employees and thereby has engaged in unfair labor practices within the meaning of Section 8(b)(1)(A) of the Act.

5. The above-described unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, it is recommended that Respondent be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act, including withdrawal of its grievance and arbitration demands which seek to compel the merger of separate established bargaining units and the application of the Emery territorial representative collective-bargaining agreement upon the employees in the Purolator Courier guard bargaining unit.

[Recommended Order omitted from publication.]

²On brief, the General Counsel contends that Respondent's actions cannot be defended on a theory of accretion. Although I find that the General Counsel's arguments in this regard are persuasive, I do not find it necessary to discuss them in this decision as Respondent asserts no such defense to its actions.