Greenleaf Motor Express, Inc. and Ashtabula Chemical Corp. *and* Chauffeurs, Teamsters, Warehousemen and Helpers of America, Local Union No. 377, affiliated with International Brotherhood of Teamsters, AFL–CIO.[1] Case 8–CA–18908

December 17, 1991

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

On February 21, 1989, Administrative Law Judge Thomas A. Ricci issued the attached decision in this proceeding. The Respondent filed exceptions and a supporting brief. Thereafter, on April 16, 1990, the Board remanded the proceeding to the judge for further hearing and the taking of additional evidence.[2] On December 26, 1990, the judge issued the attached supplemental 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 reviewed the decision, the supplemental 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 Supplemental Decision and Order.

Contrary to the judge, we find that the General Counsel has failed to meet his evidentiary burden to show that the Respondent unlawfully reduced the wages of its employees in violation of Section 8(a)(5) and (1). We shall, therefore, dismiss the complaint in its entirety.

The Respondent is a motor carrier engaged in the transportation of hazardous chemicals. It operates a fleet of trucks and trailers for this purpose and employs a crew of over-the-road drivers. Pursuant to agreement with the Union, these employees were to be compensated according to the following wage formula:

> The Employer agrees to pay each employee eighteen (18) percent of all gross revenues that each employee directly produces (reduced by pension and health and welfare costs as provided elsewhere in this agreement), and additionally, [$15.00] per load for each load that each employee is authorized by the employer to load and which each employee actually loads. Each employee shall receive [$10.00] per hour [for waiting time spent] beyond the [2] consecutive hours detention at a customers location.

The issue in this case concerns the meaning of the agreement's phrase, ''all gross revenues that each employee directly produces,'' and its application to the circumstances that arose around January 1, 1986, as described below.

In late 1985, the Respondent discovered that it would be unable to secure continuation of its insurance coverage, in part because of the nature of the hazardous materials it transported. Without such insurance coverage, the Respondent recognized that it would be unable to maintain its necessary Interstate Commerce Commission (ICC) and Ohio Public Utility Commission permits to do business. With its insurance coverage set to expire on December 31, 1985, and faced with the prospect of liquidation, the Respondent entered into a series of agreements with another motor carrier, Leaseway Bulk Services.

Under the terms of these agreements, commencing January 1, 1986, the Respondent leased to Leaseway its entire fleet of tractors and trailers, agreed to become Leaseway's management agent, and transferred its operating permits to Leaseway. Leaseway then commenced the servicing of the Respondent's customers pursuant to tariffs filed with ICC by Leaseway that determined the amount to be charged to each customer. Leaseway used the tractors and trailers leased from the Respondent. The vehicles were driven by the Respondent's unit employees and serviced in the Respondent's garage. Customers (the shippers of the hazardous materials) paid their delivery fees to Leaseway, which retained 17 percent of the payment and forwarded the remainder to the Respondent. Thus, instead of receiving 100 percent of its former delivery fee when it serviced customers directly under its own tariffs, commencing January 1, 1986, the Respondent effectively received 83 percent of the delivery fee under the Leaseway tariffs.

Beginning the second week of January 1986, the Respondent calculated employees' wage rates on the basis of the gross revenues received by the Respondent from each route, i.e., the gross revenue charged by Leaseway less the 17 percent retained by Leaseway. On January 10, 1986, the Union asked the Respondent why employees' net pay had been reduced, and the Respondent offered to meet and discuss the issue. The parties met on January 31, 1986. The Union offered to negotiate wages if the Respondent would agree to restore payment as it existed prior to January 1, 1986. When the Respondent declined to do so, negotiations ceased. On February 4, 1986, the Union filed the instant charge.

At the hearing, the General Counsel argued that prior to January 1, 1986, there was a contractual formula used to calculate wages, but, on that date, the Respondent ''modified that formula'' resulting in a reduction of wages, i.e., that unit employees were enti-

[1] The name of the Charging Party has been changed to reflect the new official name of the International Union.

[2] 298 NLRB 227.

tled, by contract, to the full 18 percent of the revenues they produced, not merely the revenues produced for the Respondent.[3] Conversely, the Respondent argued that under the terms of the wage compensation arrangement, the Respondent was obligated to pay its drivers 18 percent of all gross revenues produced by the drivers for the Respondent and, therefore, the Respondent properly applied the 18-percent wage entitlement to all the revenues that it, in return, received from Leaseway.[4]

Inasmuch as both the General Counsel and the Respondent agree that the governing source of the employees' wage entitlement is the established formula tied to ''all gross revenues that each employee directly produces,'' it is evident that, in order to prevail on the complaint, the General Counsel bears the evidentiary burden to show that the Respondent failed to comply with that formula and thereby effectively changed employees' wages unilaterally. On this record, we find that the General Counsel has failed to meet this burden.

We are unable to conclude that the Respondent unilaterally altered the wage compensation formula. The Respondent continued to a pay drivers at an 18-percent rate after January 1986, as it had before. As it had done in the past, the Respondent calculated that 18-percent figure based on the revenues it received from the employees' driving services. Employees received less money than they had before because the Respondent's gross revenues were lower, a variable evidently contemplated by the parties when they agreed to a percentage-based compensation formula, according to the testimony of the Respondent's negotiator, Higley.

We do not find compelling the contention of the General Counsel that the term ''all gross revenues that each employee directly produces'' necessarily means, *on its face*, that the 18-percent wage deduction refers to something other than the gross revenues produced for the Respondent, i.e., that it must mean the total cost to the customers of the service performed by the driver.

Prior to 1986, the Respondent billed its customers based on its own published tariffs and directly received from those customers all the ''gross revenues'' that were billed and collected. Thus, when the parties agreed to a wage formula tied to gross revenues, there was no entity, other than the Respondent, that billed and collected ''gross revenues.'' Accordingly, it is not unreasonable to argue, as does the Respondent, that the most logical interpretation of the wage compensation formula is that it is tied to revenues produced *for the Respondent*.[5] Commencing in 1986, however, the Respondent no longer billed customers based on its own published tariffs, and it did not receive the full amount of the cost to the customer of the services its driver provided. Those revenues were received from customers by Leaseway pursuant to its own tariffs. In these circumstances, it does not necessarily follow that ''gross revenues,'' as used in the wage formula, must mean the gross revenues that the drivers produced for Leaseway rather than the gross revenues produced for the Respondent. Further, it does not necessarily follow that the term ''all gross revenues that each employee directly produces,'' by definition, refers only to the driver, irrespective of the motor carrier that is billing and collecting the revenues referred to in the wage agreement.[6]

Thus, there is nothing in the wage compensation formula, as written, that compels the interpretation advanced by the General Counsel.[7] As the General Coun-

[3] Although the complaint does not allege that the charged violation was Sec. 8(d) in character and specifically alleges that the Respondent engaged in a unilateral reduction without prior notice to the Union and without having afforded the Union an opportunity to bargain, the parties litigated the case under the theory that a wage compensation formula was in effect and covered the circumstances that arose on January 1, 1986. We also note that the complaint does not allege that the Respondent was obligated to bargain over the decision to enter into the arrangement with Leaseway.

[4] At the remand hearing the Respondent introduced evidence concerning the parties' bargaining history as it pertains to the wage compensation formula. That bargaining history shows that employees formerly were compensated based on a flat mileage formula and that, at the Respondent's suggestion, the parties agreed in 1982 to a new formula, the current one, tied to a percentage of gross revenues. According to the testimony of the Respondent's chief negotiator, Richard Higley, the Respondent informed the Union and its membership at that time that under the new formula employees would be facing the same risks and rewards as the Respondent, depending on whether revenues increased or decreased. Higley testified that he discussed with the Union and its membership that employees' wages would be based on a percentage of all gross revenues that the driver produced directly for the Respondent. At the original hearing, Union Business Agent Frank Licate testified on direct examination that the term ''revenue'' was intended to mean ''the drivers' revenue.'' On cross-examination, however, Licate testified that ''it's the gross revenue that is generated by Greenleaf.'' There is no evidence that the parties in 1982 considered how a gross revenues formula would apply to circumstances such as that specifically arising in 1986.

[5] Higley's testimony that in 1982 he discussed with the Union that the percentage would be applied to gross revenues that the driver produced directly for the Respondent is consistent with this interpretation.

[6] The parties' use of the word ''directly'' in the wage agreement does not materially advance the General Counsel's contention. Higley testified without contradiction that ''directly'' simply distinguishes between billed services actually performed by the driver and other billed services not performed by the driver, such as weight or cleaning services performed by other employees, or for rental charges. Thus, the inclusion of ''directly'' simply reflects the parties' understanding that the driver receives no payment whatsoever for billed services performed by other employees.

[7] The judge concluded, in agreement with the General Counsel, that the drivers necessarily were entitled to 18 percent of the amount received by customers for driving services because, to find otherwise, would result in the insertion into the contract of the wording ''for Greenleaf.'' At the time of the wage agreement in 1982, however, inclusion of the Respondent's name would have been superfluous, because no other entity received ''gross revenues'' and, thus,

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sel submitted no evidence either that the parties contemplated such an interpretation when agreement on the wage formula was reached or that any past practice supports the interpretation advanced by the General Counsel,[8] we find that the General Counsel has not carried his evidentiary burden to show that the Respondent altered unilaterally the established wage compensation formula in violation of Section 8(a)(5) and (1).[9] Accordingly, we shall dismiss the complaint.

ORDER

The complaint is dismissed.

as a practical matter, its omission had no bearing on the employees' wages at that time. As noted, Higley's testimony regarding the parties' bargaining history supports this interpretation.

[8] At the remand hearing, the General Counsel introduced no evidence and did not cross-examine the Respondent's witness, Higley.

[9] Cf. *Plasterers Local 627 (Jack Hart Concrete)*, 274 NLRB 1286, 1287–1288 (1985).

SUPPLEMENTAL DECISION

THOMAS A. RICCI, Administrative Law Judge. On February 21, 1989, I issued a decision in this proceeding, finding that the Respondent had violated Section 8(a)(5) of the Act and ordering affirmative remedial action. On April 16, 1990, at the request of the Respondent, the Board remanded the proceeding for further hearing to take evidence to be offered by the Respondent relative to the ''Parties' Applicable Bargaining History'' as it might relate to the critical issue presented in this proceeding. The remand hearing was held at Cleveland, Ohio, on October 4, 1990. Briefs were filed by the General Counsel and the Respondent.

On the record, and from my observation of the witness, I make the following

FINDINGS OF FACT

The basic question underlying this case is whether the Respondent, early in 1986, unilaterally reduced the pay rate for its drivers without first bargaining with their established representative, here the Charging Party. For 4 years, since 1982, there had been a contract in effect between the parties. It reads as follows:

> The employer agrees to pay each employee eighteen (18) percent of all gross revenues that each employee directly produces (reduced by patient and health and welfare costs as provided elsewhere in this agreement), and additionally, ($15) per load for each load that each employee is authorized by the employer to load and which each employee actually loads. Each employee shall receive ($10) per hour (for waiting time spent) beyond the (2) consecutive hours detention at a customer's location.

From January 1986 on, instead of paying the drivers 18 percent of the gross revenues their work produced, the Respondent paid them much less. It did that because, unable to obtain the necessary insurance for its transportation of hazardous materials, it put another company's name on its trucks, which made it possible to continue its business as usual. The other company, which had the necessary insurance, permitted the Respondent use of its name in return for 17 percent of the amount paid by the Respondent's customers for the transportation of their materials. The Respondent's position is that because it had to pay part of its income to another company, the drivers had to give up part of their wages.

The collective-bargaining agreement then in effect contains no such provision. Insofar as the employees were concerned, their work did not change an iota; they served the same customers of the Respondent, and they drove the same trucks. In short, the fact that the name on the truck was changed had no effect on the work for which they had always been paid what the contract called for.

I am under the impression that what the Respondent told the Board, when it asked that the proceeding be remanded for further proof, is that before 1986 the parties had understood that in a case like this—where the company had to pay somebody else for part of what the employees' work produced—the employees would bear the brunt.

At the remand hearing the Respondent was given unlimited opportunity to offer whatever proof it wished to produce. All it came forth with was the oral testimony of Richard Higley, an agent of the Respondent and a man who had negotiated the 1982 contract on behalf of the Respondent. There is not the slightest evidence in his entire story that even begins to support the assertion that the parties had ever agreed to the unilateral changes in pay which the Company put in effect in 1986. My decision issued on February 21, 1989, will stand without change.

Higley spoke at great length about the reason why the Company, in 1982, changed its method for paying the truckdrivers from a mileage to a percentage basis. Before that time drivers were paid so much a mile for their driling the Company's trucks, as are many drivers on the road. From then on, they would receive a percentage of what the customers paid to the Respondent for the work performed by the individual drivers in making each and every delivery. All this talk about why the Company, Respondent, did what it did in 1982, and how it all benefited the drivers, is completely irrelevant to the question here presented. An employer's reason for signing a contract with a union, which, among other things, establishes the pay rate, cannot change the meaning of the plain language of the contract. Every employer hopes to make an increased profit during the life of the contract. If he so succeeds he does not have to pay more to the employees. If he earns less than he hoped, he is not therefore free to pay them less.

Higley also spoke at length about how at a meeting with the drivers in 1982 he made clear to them that as to any money the Company received from its customers for work that was performed by employees other than the drivers, no part of that money was to go to the drivers. Higley called these ''accesorily charges,'' and listed them as including weighing the truck, cleaning the truck, advanced loading work, and standby charges while the truck was idle and not being driven by anyone, etc. The witness explained that pay for these kinds of miscellaneous services performed by other employees, the drivers involved in this case got nothing.

Again, all these factual statements on the record have nothing to do with this case. If an employer has different categories of employees, and some do this work, while others do that, of course neither class gets paid for what the others perform. I can understand Higley having explained all that to these drivers at the time, but with the concept of percentage of money received by the Company being involved there is no charge here of wrongdoing by the Respondent in not paying these drivers for any work performed by others. The documents offered in evidence even show that on one occasion at least one of the drivers did perform an ''accessorial service,'' and was paid for it. This case stays limited to the Company not paying the drivers for work ''driving the truck.'' They had 18 percent coming to them of what the customers paid for that work which they, the drivers, and nobody else performed. The Respondent also stopped paying that without bargaining with the Union and in direct violation of the collective-bargaining agreement then in effect.

That Higley was completely off base in his testimony at the remand hearing is most clearly shown by the sole example which he described as proof that the parties had agreed to interpret the existing contract as the Respondent now asserts. This Company has no authority to make any deliveries into Canada. Some of its customers want their product trucked to Canadian towns and cities. When such a deal is made the Respondent arranges with a Canadian trucking company to truck the hazardous materials from the border of the two countries in and through Canadian territory. The Respondent's drivers haul the load to the border, where the drivers of the Canadian company hook the loads to their own trailers and then truck the material to its final destination. Because the shipping customers of the Respondent pay according to weight and mileage, they pay two separate amounts to the Respondent—one for the trucking work performed by the Respondent's own drivers and one for the driving done by the Canadian companies.

The Respondent now compares the money paid by its customers for the work performed by Canadian drivers to the amount retained by the American company for use of its name on the Respondent's truck. Because its drivers are not entitled to be paid for work performed by the Canadian company drivers, they are also not entitled to 18 percent of the money the Respondent pays the second American company for use of its name on its trucks. There is absolutely no analogy between the two situations. I find the defense argument completely without merit .

Accordingly, I reaffirm my decision exactly as issued of February 21, 1989.