

Carrico's Inc. d/b/a Parma Food Center and United Food and Commercial Workers Union, Local 880. Cases 8-CA-24441 and 8-CA-24718

March 31, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND RAUDABAUGH

Upon a charge filed by the Union July 6, 1992, a first amended charge filed August 7, 1992, a second amended charge filed September 28, 1992, and a third amended charge filed October 29, 1992, in Case 8-CA-24718, the General Counsel of the National Labor Relations Board issued a complaint against Carrico's Inc. d/b/a Parma Food Center, the Respondent, alleging that it has violated Section 8(a)(1) and (5) of the National Labor Relations Act. Upon a charge filed by the Union March 23, 1992, a first amended charge filed April 22, 1992, and a second amended charge filed May 4, 1992, in Case 8-CA-24441, the General Counsel of the National Labor Relations Board issued an order consolidating cases, amended consolidated complaint in Cases 8-CA-24441 and 8-CA-24718 against the Respondent, alleging that it has violated Section 8(a)(1) and (5) of the National Labor Relations Act.

The General Counsel alleges, with supporting documentary proof, the following facts concerning service of certain documents on Respondent. A copy of the third amended charge in Case 8-CA-24718 was sent by certified mail to Respondent on October 29, 1992, but was returned to the Region 8 office on October 30, 1992, as unclaimed by Respondent and marked "moved left no address." A copy of the third amended charge was sent by certified mail to Respondent, at Respondent's president Mark Carrico's address on November 2, 1992, and was received by Respondent on November 14, 1992.

A copy of the complaint and notice of hearing in Case 8-CA-24718 was sent to Respondent October 30, 1992, by certified mail, but was returned to the Region 8 office on October 31, 1992, as unclaimed by Respondent and marked "moved left no address." A copy was then sent by regular mail to Respondent at Respondent's president's address on November 5, 1992, and this copy was not returned to the Region 8 office as undelivered. In addition, a copy of the complaint was again sent by certified mail to Respondent, at Respondent's president's address, on November 10, 1992, and received by Respondent November 14, 1992.

A copy of the order consolidating cases, amended consolidated complaint and notice of hearing in Cases 8-CA-24718 and 8-CA-24441 was sent to Respondent by certified mail on January 26, 1993, and a copy was sent to Respondent, at Respondent's president's

address, by regular mail on January 26, 1993. The certified copy of the amended consolidated complaint mail was returned to the Region 8 office on January 27, 1993, by Respondent and marked "moved left no address." The regular mail copy of the amended consolidated complaint was not returned to the Region 8 office as undelivered.

Service of these documents was properly accomplished by deposit in the mail to the Respondent's last known address. *Mondie Forge Co.*, 309 NLRB No. 82 fn. 1 (Nov. 25, 1992). Moreover, a respondent's failure or refusal to claim certified mail or to provide for receiving appropriate service cannot defeat the purposes of the Act. *Ibid.* We therefore conclude that the Respondent was properly served all necessary documents.

Although properly served copies of the charges, amended charges, complaint and amended consolidated complaint, the Respondent has failed to file an answer.

On March 1, 1993, the General Counsel filed a Motion for Summary Judgment. On March 4, 1993, 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

Sections 102.20 and 102.21 of the Board's Rules and Regulations provide that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. The amended consolidated complaint states that unless an answer is filed within 14 days of service, "all the allegations in the complaint shall be considered to be admitted to be true and shall be so found by the Board." In the absence of good cause being shown for the failure to file a timely answer, 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, Carrico's Inc. d/b/a Parma Food Center, an Ohio corporation, with an office and place of business in Parma, Ohio, has been engaged in the retail sale of groceries. During the calendar year ending December 31, 1991, Respondent, in conducting its business operations, derived gross revenues in excess of \$500,000, and purchased and received at its Parma, Ohio facility products, goods, and materials valued in excess of \$50,000 directly from points located outside the State of Ohio. 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

1. The following employees (the grocery unit) constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All of the Respondent's food store employees at 7383 State Road, Parma, Ohio, but excluding meat employees in its store, regular office clerical personnel, managers, and other supervisors as defined in the National Labor Relations Act, as amended.

2. Since about May 1989, and at all material times, the Union has been the designated exclusive collective-bargaining representative of the grocery unit, and since then the Union has been recognized as the representative by Respondent. This recognition has been embodied in a collective-bargaining agreement (the grocery agreement), which was effective from May 26, 1989, to May 25, 1992.

3. At all times since May 1989, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the grocery unit.

4. The following employees of Respondent (the meat unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All of the Respondent's meat department employees in its retail store located at 7383 State Road, Parma, Ohio, excluding supervisors as defined in the National Labor Relations Act, as amended.

5. Since about May 1989, and at all material times, the Union has been the designated exclusive collective-bargaining representative of the meat unit and since then the Union has been recognized as the representative by Respondent. This recognition has been embodied in a collective-bargaining agreement (the meat agreement), which was effective from May 26, 1989, to May 25, 1992.

6. At all times since May 1989, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the meat unit.

7. About June 27 and 28, 1992, Respondent, by its President Mark Carrico, a supervisor of Respondent within the meaning of Section 2(11) and an agent of Respondent within the meaning of Section 2(13) of the Act, at Respondent's facility, interrogated employees regarding their intention to vote for a strike.

8. About June 27, 1992, Respondent, by Mark Carrico, at Respondent's facility, bypassed the Union and dealt directly with employees in the grocery unit

by soliciting an employee to take a layoff out of order of seniority.

9. (a) Since about January 6, 1992, Respondent has failed to credit former "Geraci's" employees with past service credit.

(b) About July 8, 1992, Respondent implemented its collective-bargaining proposals without first having reached a bargaining impasse.

(c) On or about July 16, 1992, Respondent closed its Parma, Ohio facility.

(d) The subjects set forth above in paragraphs 9(a), (b), and (c) relate to wages, hours, and other terms and conditions of employment of the units and are mandatory subjects for the purposes of collective bargaining.

(e) Respondent engaged in the conduct described above in paragraphs 9(a), (b) and (c) without prior notice to the Union and without affording the Union the opportunity to bargain with Respondent with respect to this conduct and the effects of this conduct.

10. Respondent failed to continue in effect all the terms and conditions of the agreements described above in paragraphs 2 and 5 by:

(a) Since about January 6, 1992, failing to submit health and welfare benefit contributions.

(b) Since about January 6, 1992, failing to submit pension benefit contributions.

(c) Since at least February 16, 1992, failing to enforce the new union-security provisions with respect to certain employees.

(d) Since about March 24, 1992, failing to enforce the new union-security provisions with respect to certain employees by having these same nonbargaining unit employees perform bargaining unit work.

(e) Since on or about the following dates, laying off the following employees out of order of seniority:

June 29, 1992	Mary Ward
July 2, 1992	Elda Cartellone
July 5, 1992	LaVerne McCann
July 6, 1992	Jose Rocha
July 7, 1992	Cynthia Carcioppolo

(f) Respondent engaged in the conduct described in paragraphs 10(a), (b), (c), (d), and (e) without the Union's consent.

(g) The terms and conditions of employment, described above in paragraphs 10(a), (b), (c), (d), and (e) are mandatory subjects for the purpose of collective bargaining.

11. (a) Since on or about July 7, 1992, certain employees of Respondent represented by the Union and employed at Respondent's facility ceased work concertedly and engaged in a protected strike.

(b) The strike described above in paragraph 11(a) was caused by Respondent's unfair labor practices described above in paragraphs 8, 9, and 10.

CONCLUSIONS OF LAW

1. By interrogating employees regarding their intention to vote for a strike the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By bypassing the Union and dealing directly with employees by soliciting an employee to take a layoff out of order of seniority; by failing to credit former "Geraci's" employees with past service credit, implementing collective-bargaining proposals without reaching impasse, and closing its facility, all without prior notice to the Union and without giving the Union an opportunity to bargain about this conduct and the effects of this conduct;¹ and by failing to continue all terms and conditions of its collective-bargaining agreements by failing to submit health, welfare and pension contributions, failing to enforce new union-security provisions, including having nonbargaining unit employees perform bargaining unit work, and laying off employees out of order of seniority, 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.

Specifically, having found that the Respondent has violated Section 8(a)(5) and (1) by failing to continue in effect certain terms and conditions of the collective-bargaining agreements,² including failing to make contractually required payments for health, welfare and pension benefits, we shall order the Respondent to make whole its unit employees for any losses they have suffered as a result of the Respondent's failure to continue in effect these terms and conditions of the collective-bargaining agreements, including making all health, welfare and pension payments that have not been made and that would have been made but for the Respondent's unlawful failure to make them, including any additional amounts applicable to such delinquent payments as determined in accordance with the criteria set forth in *Merryweather Optical Co.*, 240 NLRB 1213 (1979). In addition, the Respondent shall reim-

burse unit employees for any expenses ensuing from its failure to make such required payments, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

To remedy the Respondent's unlawful failure and refusal to bargain with the Union about the effects of closing its Parma, Ohio facility, we shall order it to bargain with the Union, on request, concerning the effects of that decision. Because of the Respondent's unlawful failure to bargain with the Union about the effects of the decision to close its Parma, Ohio facility, the unit employees have been denied an opportunity to bargain through their collective-bargaining representative at a time when the Respondent might still have been in need of their services and a measure of balanced bargaining power existed. Meaningful bargaining cannot be assured until some measure of economic strength is restored to the Union. A bargaining order alone, therefore, cannot serve as an adequate remedy for the unfair labor practice committed.

Accordingly, we deem it necessary in order to ensure that meaningful bargaining occurs and to effectuate the policies of the Act, to require not only that the Respondent bargain with the Union, on request, about the effects of the closure, but we shall also accompany our order with a limited backpay requirement designed both to make the employees whole for losses as a result of the Respondent's failure to bargain, and to recreate in some practicable manner a situation in which the parties' bargaining position is not entirely devoid of economic consequences for the Respondent. We shall do so by requiring the Respondent to pay backpay to unit employees in a manner similar to that required in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968).

The Respondent shall pay unit employees backpay at the rate of their normal wages when last in the Respondent's employ from 5 days after the date of this Decision and Order until the occurrence of the earliest of the following conditions: (1) The date the Respondent bargains to agreement with the Union on those subjects pertaining to the effects of the plant closure on unit employees; (2) a bona fide impasse in bargaining; (3) the failure of the Union to request bargaining within 5 days of the date of this Decision and Order, or to commence negotiations within the 5 days of the Respondent's notice of its desire to bargain with the Union; or (4) the subsequent failure of the Union to bargain in good faith.

In no event shall the sum paid to any of these employees exceed the amount they would have earned as

¹ Because the amended consolidated complaint does not specify why the decision to close Respondent's Parma, Ohio facility is a mandatory subject of bargaining, we will provide a remedy only for Respondent's failure to bargain over the effects of the decision.

² The consolidated amended complaint alleges, without further explanation, that Respondent failed to continue in effect all the terms and conditions of the collective-bargaining agreements by, inter alia, failing to enforce the union-security provisions by having certain nonbargaining unit employees perform bargaining unit work. Without any further indication of the requirements of the contractual "union security" provision, we are unable to fashion a remedy for this violation other than to order Respondent to cease and desist.

wages from the date on which the Respondent terminated its operations to the time they secured equivalent employment elsewhere, or the date on which the Respondent shall have offered to bargain, whichever occurs sooner; provided, however, that in no event shall this sum be less than the amount these employees would have earned for a 2-week period at the rate of their normal wages when last in the Respondent's employ. Interest on all sums shall be paid in the manner prescribed in *New Horizons for the Retarded*, supra.

Because we have found that employees engaged in an unfair labor practice strike, we will order that should it resume operation, Respondent, on the striking employees' unconditional offer to return, shall reinstate immediately the striking employees to their former positions or, if such are not available, to substantially equivalent positions, even if the Respondent is required to terminate strike replacements in order to make positions available for the returning strikers. *Workroom for Designers*, 274 NLRB 840, 856 (1985).

Finally, in view of the Respondent's closure of its facility, we shall order the Respondent to mail copies of the notice to all unit employees.

In order to remedy the other unlawful unilateral changes made by the Respondent with regard to mandatory subjects of bargaining, to wit, the failure to credit former "Geraci's" employees with past service credit and implementing, about July 8, 1992, its collective-bargaining proposals over mandatory subjects of bargaining without first having reached impasse, we shall order Respondent, on request of the Union, to reinstate the status quo and to make the unit employees whole, with interest, for any losses they may have suffered as a result of the Respondent's unlawful unilateral actions.

ORDER

The National Labor Relations Board orders that the Respondent, Carrico's Inc. d/b/a Parma Food Center, Parma, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees regarding their intention to vote for a strike.

(b) Bypassing United Food and Commercial Workers Union, Local 880, and dealing directly with employees by soliciting unit employees to take layoffs out of order of seniority. The units, which are appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act are as follows:

All of the Respondent's food store employees at 7383 State Road, Parma, Ohio, but excluding meat employees in its store, regular office clerical personnel, managers, and other supervisors as defined in the National Labor Relations Act, as amended.

All of the Respondent's meat department employees in its retail store located at 7383 State Road, Parma, Ohio, excluding supervisors as defined in the National Labor Relations Act, as amended.

(c) Failing to credit former "Geraci's" employees with past service credit or implementing collective-bargaining proposals relating to wages, hours, and other terms and conditions of employment for the bargaining units, which are mandatory subjects of bargaining, without reaching impasse, if, on any of these matters, there is no prior notice to the Union or if the Union is not given an opportunity to bargain with respect to this conduct or the effects of this conduct.

(d) Failing to bargain in good faith with the Union over the effects of its decision to close its Parma, Ohio facility.

(e) Failing to continue all terms and conditions of its collective-bargaining agreements which are mandatory subjects of bargaining, by failing to submit health, welfare and pension contributions, without notice to and bargaining with the Union.

(f) Failing to continue all terms and conditions of its collective-bargaining agreements, which are mandatory subjects of bargaining by failing to enforce the union-security provisions, including having nonbargaining unit employees perform bargaining unit work, or by laying off employees out of order of seniority, without notice to and bargaining with the union.

(g) 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) On request of the Union, restore the status quo and make employees whole, with interest, for its unlawful unilateral changes in failing to credit former "Geraci's" employees with past service credit and in implementing its collective-bargaining proposals.

(b) On request, bargain in good faith with the Union as the exclusive collective-bargaining representative of the unit employees with respect to the effects on employees of its decision to close its Parma, Ohio facility and, if an understanding is reached, embody the understanding in a signed agreement.

(c) Pay the unit employees terminated by Respondent when it closed its Parma, Ohio facility on or about July 16, 1992, their normal wages for the period set forth in the remedy section of this decision.

(d) Make the contractually required contributions to the fringe benefit funds and make unit employees whole, in the manner set forth in the remedy section of this decision for any loss of benefits or other expenses suffered as a result of the Respondent's failure to make the contractually required fringe benefit fund payments.

(e) Make unit employees whole for any losses in wages or benefits they may have suffered as a result of its unlawful failure to continue all terms and conditions of its collective-bargaining agreements, which are mandatory subjects of bargaining, by failing to enforce the union-security provisions, including having nonbargaining unit employees perform bargaining unit work, or by laying off employees out of order of seniority.

(f) Should Respondent resume operations, upon the striking employees' unconditional offer to return, reinstate immediately the striking employees to their former positions or, if such are not available, to substantially equivalent positions, terminating strike replacements, if necessary, in order to make positions available for the returning strikers.

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

(h) Mail an exact copy of the attached notice marked "Appendix"³ to United Food and Commercial Workers Union, Local 880, and to all employees in the units who were employed by Respondent at its Parma, Ohio facility. Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be mailed by the Respondent immediately upon receipt thereof as here directed.

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

³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the 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."

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

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

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

WE WILL NOT interrogate our employees regarding their intention to vote for a strike.

WE WILL NOT bypass United Food and Commercial Workers Union, Local 880, and deal directly with our employees by soliciting unit employees to take layoffs out of order of seniority. The units, which are appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act are as follows:

All of our food store employees at 7383 State Road, Parma, Ohio, but excluding meat employees in its store, regular office clerical personnel, managers, and other supervisors as defined in the National Labor Relations Act, as amended.

All of our meat department employees in our retail store located at 7383 State Road, Parma, Ohio, excluding supervisors as defined in the National Labor Relations Act, as amended.

WE WILL NOT fail to credit former "Geraci's" employees with past service credit or implement collective-bargaining proposals relating to wages, hours, and other terms and conditions of employment for the bargaining units, which are mandatory subjects of bargaining, without reaching impasse, if, on any of these matters, there is no prior notice to the Union or if the Union is not given an opportunity to bargain with respect to this conduct or the effects of this conduct.

WE WILL NOT fail to bargain in good faith with the Union over the effects of our decision to close our Parma, Ohio facility.

WE WILL NOT fail to continue all terms and conditions of our collective-bargaining agreements which are mandatory subjects of bargaining, by failing to submit health, welfare and pension contributions, without notice to and bargaining with the Union.

WE WILL NOT fail to continue all terms and conditions of our collective-bargaining agreements, which are mandatory subjects of bargaining by failing to enforce the union-security provisions, including having nonbargaining unit employees perform bargaining unit work, or by laying off employees out of order of seniority, without notice to and bargaining with the Union.

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, on request of the Union, restore the status quo and make our unit employees whole, with interest, for our unlawful unilateral changes in failing to credit former "Geraci's" employees with past service credit and in implementing our collective-bargaining proposals.

WE WILL, on request, bargain in good faith with the Union as the exclusive collective-bargaining represent-

ative of our unit employees with respect to the effects on these employees of our decision to close our Parma, Ohio facility and, if an understanding is reached, embody the understanding in a signed agreement.

WE WILL pay the unit employees we terminated when we closed our Parma, Ohio facility on or about July 16, 1992, their normal wages for a period specified by the National Labor Relations Board, plus interest.

WE WILL make the contractually required contributions to the fringe benefit funds and make our unit employees whole for any losses suffered by them as a result of our failure to make the contractually required fringe benefit fund payments, plus interest.

WE WILL make our unit employees whole for any losses in wages or benefits they may have suffered as

a result of our unlawful failure to continue all terms and conditions of our collective-bargaining agreements, which are mandatory subjects of bargaining, by failing to enforce the union-security provisions, including having nonbargaining unit employees perform bargaining unit work, or by laying off employees out of order of seniority.

WE WILL, if we resume operations, on the striking employees' unconditional offer to return, reinstate immediately the striking employees to their former positions or, if such are not available, to substantially equivalent positions, terminating strike replacements, if necessary, in order to make positions available for the returning strikers.

CARRICO'S INC. D/B/A PARMA FOOD CENTER