

Ratliff Trucking Corporation, Inc. and William Covington

The Ratliff Employees' Organization and William Covington. Cases 7-CA-32181 and 7-CB-8841

April 30, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT
AND RAUDABAUGH

On April 28, 1992, Administrative Law Judge Leonard M. Wagman issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondents each filed briefs in opposition to the General Counsel'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,¹ and conclusions and to adopt the recommended Order.

We agree with the judge that the consolidated complaint must be dismissed. The same union-security clause language, the maintenance and enforcement of which is alleged to be unlawful in the instant case, also was contained in the clause at the time of the settlement of a prior unfair labor practice case in which the lawfulness of the union-security clause also was challenged—but only on the basis of *other* language. The language alleged to be unlawful in the instant case was not alleged to be unlawful in the prior case, nor was it reserved from the scope of the settlement agreement by the parties. In light of the intervening settlement, therefore, the maintenance and enforcement of the preexisting language cannot properly be alleged as being unlawful in the instant case.

As our dissenting colleague agrees, the issue before us is the application of *Hollywood Roosevelt Hotel*, 235 NLRB 1397 (1978), to the complaint in this case, in light of a previous settlement agreement disposing of unfair labor practice charges pertaining to the union-security clause contained in article 1, section 2 of the Respondents' 1990-1993 collective-bargaining agreement. We agree with our colleague that, if the unfair labor practices alleged here were "specifically reserved from the settlement," then the *Hollywood Roosevelt* rule would not operate to bar the complaint. Contrary

¹ We therefore find it unnecessary to pass on the judge's alternative finding that the union-security clause at issue did not exceed the "financial core" relationship permitted by the Act, nor do we find it necessary to pass on the impact of the recently published Notice of Proposed Rulemaking (57 Fed.Reg. 43635 (1992)) concerning the Union's obligations under *Communications Workers of America v. Beck*, 487 U.S. 735 (1988). Finally, we note that our decision here does not necessarily preclude a complaint on the union-security clause in a subsequent collective-bargaining agreement.

to our colleague, we find no merit in the General Counsel's argument that the settlement agreement contains a sufficiently specific reservation, and we therefore affirm the judge's dismissal of the complaint.

The reservation language on which our colleague relies is as follows:

This Settlement Agreement settles only the unfair labor practices alleged in the above-captioned case, and does not constitute a settlement of any other case. It does not preclude persons from filing, or the National Labor Relations Board from prosecuting, unfair labor practice charges against the Charged Party based on events which precede the date of the approval of this Settlement Agreement.

To be sure, this is broad language that would permit the General Counsel to proceed in any case that can properly be defined as an "other" case or that concerns any distinct "event" preceding the date of the settlement. This clearly afforded the General Counsel broad latitude to proceed on other charges. We disagree, however, that the unfair labor practices alleged in this case can be properly described as constituting either an "other" case or one involving different presettlement "events."

The entire union-security clause of the 1990-1993 contract was before the General Counsel in the cases disposed of by the settlement, and the language that the General Counsel now alleges is unlawful—"remain members in good standing"—even appeared in the same sentence as the language previously singled out as the fatal flaw in the clause. In our view, the Respondents could therefore reasonably believe that the settlement disposed of the legality vel non of the entire clause, at least during the term of the contract in which it was contained. In other words, in order for the General Counsel to relitigate this clause and call it a new, or "other" case, we believe that what was required was, as the judge described it, a *specific* reservation of the right to proceed on "the union-security clause's unaltered provisions."²

We find too clever by half our dissenting colleague's contention that there is a "new" clause resulting from a distinct presettlement "event" by virtue of the Respondents' having taken the trouble, prior to signing the settlement agreement, of amending article 1, section 2 to correct what the General Counsel was then alleging as its illegality. Although, as the General Counsel points out, he did not require the parties to

² Although the discharge of employee Covington pursuant to the clause might superficially seem like a separate event, it is inextricably bound up with the status of the clause itself. The sole basis for alleging that Covington's discharge for refusal to pay dues was unlawful was the assertedly unlawful language in the clause under which his discharge was sought.

amend the clause and retain the “member in good standing” language, the parties could nevertheless reasonably have believed that this was a sensible and practical way of complying with the requirements of the settlement. Treating such good-faith compliance with the settlement as grounds for a new complaint—at least in the absence of specific notice that other parts of the clause under scrutiny might soon come under attack—seems to us out of keeping with the spirit of *Hollywood Roosevelt*.

Finally, contrary to our colleague, we find no support for the General Counsel’s position in the fact that the Charging Party in the present proceeding is different from the charging party in the cases disposed of by the settlement. As the Board held in *E.S.I. Meats*, 270 NLRB 1430, 1431 (1984), the fact that the charges which initiated the settled cases and those underlying subsequent cases “were filed by different charging parties . . . is insufficient to change the rules barring litigation of discoverable presettlement conduct.”

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

MEMBER RAUDABAUGH, dissenting.

My colleagues have dismissed the complaint on the procedural ground that a settlement agreement in an earlier case bars the complaint in the instant case. I disagree.

In the earlier case, employee Lewis alleged that the union-security clause failed to accord employees the required statutory grace period of 30 days. In order to rectify that problem, the Respondents negotiated and agreed on a new union-security clause which modified the grace period language. The case was settled on that basis.

The charge in the instant case, filed by a different employee, alleges that the new union-security clause is unlawful for a wholly different reason. It alleges that the clause unlawfully requires that employees be “members in good standing.”

In sum, the settled case dealt with the issue of whether the clause provided for an adequate grace period. The complaint in the instant case alleges that, quite apart from the grace period, the clause is unlawful because it requires “membership in good standing.” Thus, a new and different charging party has filed a new and different charge alleging a new and different violation.

Concededly, the new union-security clause was agreed to prior to the settlement agreement in the prior case. And, under *Hollywood Roosevelt Hotel*, 235 NLRB 1397 (1978), a settlement agreement disposes of all issues involving presettlement conduct. However, *Hollywood Roosevelt* also teaches that presettlement conduct remains vulnerable to attack if such conduct is

specifically reserved from the settlement. In the instant case, the parties did precisely that. The settlement provided as follows:

This Settlement Agreement settles only the unfair labor practices alleged in the above-captioned case, and does not constitute a settlement of any other case. It does not preclude persons from filing, or the National Labor Relations Board from prosecuting, unfair labor practice charges against the Charged Party based on events which precede the date of the approval of this Settlement Agreement. The General Counsel shall have the right to use the evidence obtained in the investigation of the above captioned case in the litigation of any other unfair labor practice case; and any Judge, the National Labor Relations Board, or any other tribunal may rely on such evidence in making findings of fact or conclusions of law.

Thus, the settlement agreement specifically reserved out “any other case.” My colleagues seek to avoid this plain language by arguing that the instant case and the settled case are one and the same. I disagree. The instant case is 7–CA–32181, 7–CB–8841, filed by employee Covington, and alleging that the words “membership in good standing” are unlawful. The settled case was 7–CA–30942, 7–CB–8429, filed by employee Lewis, and alleging that there was an insufficient statutory grace period. Based on the above, I submit that the instant case and the settled case are not one and the same.¹

Moreover, the settlement agreement permits the prosecution of charges based on “events” which precede the settlement agreement. The settlement agreement was entered into in December 1990. The events which form the basis for the instant case are the original agreement on the union-security clause in June 1990 and the agreement on a new union-security clause on November 7, 1990. Thus, these events preceded the settlement and were reserved from it.²

¹ My reference to different charging parties is simply part of my showing that the instant case is not the same as the settled case. Thus, the instant case was reserved from the settlement of the prior one. I recognize that, *absent a reservation*, there is a settlement bar as to presettlement conduct, even if charging parties are different. Thus, I have no quarrel with *E.S.I. Meats*, 270 NLRB 1430 (1984), cited by my colleagues. I simply consider that case irrelevant to a settlement agreement containing a reservation clause like the one in the instant case.

² Since the instant charges were not filed until August 1991, the alleged violation concerning the clause began in February 1991. See Sec. 10(b) of the Act. In this sense, the alleged violation occurred after the settlement and would not be immune under *Hollywood Roosevelt*, even apart from the reservation clause. Similarly, the discharge of Covington occurred in March 1991 and was based on the union-security clause that was being maintained at that time. However, inasmuch as the General Counsel relies solely on the reservation clause, I do not rely on the arguments set forth in this footnote.

My colleagues contend that the union-security clause that was entered into on November 7 was not an “event” because it was part of the settlement of the prior case. However, the only part of the November 7 clause that was tied to the settlement was the “grace period” aspect of the clause. The “membership in good standing” aspect of the clause was reaffirmed on November 7, and the reaffirmation had nothing whatever to do with the settlement. Moreover, even if that reaffirmation is not an event, the original agreement on the clause (in June 1990) was clearly an event, and it clearly predated the settlement.

In view of the above, I think it plain that the settlement agreement, by its reservation language, preserved the General Counsel’s right to litigate other cases based on presettlement events.

Dennis Boren, Esq., for the General Counsel.

Paul H. Bibeau, Esq., of Farmington, Michigan, for the Respondent Company.

Gayle S. Boesky, Esq., of Southfield, Michigan, for the Respondent Union.

DECISION

STATEMENT OF THE CASE

LEONARD M. WAGMAN, Administrative Law Judge. This case was tried in Detroit, Michigan, on January 30, 1992. The original charge in Case 7-CA-32181 was filed by William Covington, an individual (Covington), on August 7, 1991.¹ Covington filed the original charge in Case 7-CB-8841 on September 7, an amended charge in Case 7-CA-32181 on September 9, and an amended charge in Case 7-CB-8841 on September 9. On these charges, the Regional Director for Region 7 issued the consolidated complaint in these cases on September 19, alleging that the Respondents, Ratliff Trucking Corporation, Inc. (Ratliff) and Ratliff Employees’ Organization (the Union), had violated, respectively, Section 8(a)(1) and (3) and Section 8(b)(1)(A) and (2) of the National Labor Relations Act, 29 U.S.C. § 151 et seq. (the Act), by maintaining an unlawful union-security provision, and by terminating Covington’s employment because he failed to pay dues to the Union, as required by that provision.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs² filed by the General Counsel, Ratliff, and the Union, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, Ratliff, a corporation, is a motor carrier engaged in the local and interstate transportation of freight

¹ All dates are in 1991, unless otherwise indicated.

² Counsel for the General Counsel’s unopposed motion to correct the official record, dated February 20, 1992, is granted, as amended to reflect the proper title of the Union’s counsel. The corrections are set out in the appendix below. [The appendix has been omitted from publication.]

and commodities at its terminal in Canton, Michigan, where it annually realizes revenues exceeding \$50,000 from its transportation of goods originating in the State of Michigan directly to points located outside the State of Michigan. Ratliff admits, the Union concedes, and I find that Ratliff is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Ratliff and the Union admit that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

Since June 1, 1990, Ratliff and the Union have been parties to and have maintained a 3-year collective-bargaining agreement covering Ratliff’s employees. Article 1, section 2 of this contract, as originally drawn and executed, included the following union-security clause:

Section 2. Union Shop.

a. All present employees who are members of the Union on the effective date of this agreement shall remain members of this Union in good standing as part of their condition of employment. All present employees who are hired hereafter shall become and remain members in good standing of the Union as a condition of their employment on/or before the 30th day following the effective date of this agreement.

b. Upon request by the Union the Employer shall be required to terminate any employee covered by the terms of this contract who is not in compliance with paragraph 2.a. above.

On charges filed by employee Robert Matthew Lewis against Ratliff and the Union, the Regional Director for Region 7 issued a complaint on September 25, 1990, alleging, inter alia, that the clause, quoted above, “requires as a condition of employment that employees join Respondent Union earlier than the statutory grace period accorded them under Section 8(a)(3) of the Act.” The complaint also alleged that by maintaining that security clause, Ratliff was violating Section 8(a)(1) of the Act, and the Union was violating Section 8(b)(1)(A) and (2) of the Act.

Thereafter, on December 14, 1990, the Regional Director approved informal settlement agreements between employee Lewis and the Company, in Case 7-CA-32181,³ and between employee Lewis and the Union, in Case 7-CB-8429. The latter agreement, received in evidence, included the following clause:

This Settlement Agreement settles only the unfair labor practices alleged in the above-captioned case, and does not constitute a settlement of any other case. It does not preclude persons from filing, or the National Labor Relations Board from prosecuting, unfair labor practice charges against the Charged Party based on events which precede the date of the approval of this Settlement Agreement.

³ The record in the instant cases did not show that the Regional Director had approved a settlement between the Charging Party and the Company in Case 7-CA-32181. However, I have taken judicial notice of the Board’s records reflecting the settlement and the Regional Director’s approval.

ment Agreement. The General Counsel shall have the right to use the evidence obtained in the investigation of the above captioned case in the litigation of any other unfair labor practice case; and any Judge, the National Labor Relations Board, or any other tribunal may rely on such evidence in making findings of fact or conclusions of law.

Pursuant to the approved settlement agreement, the Union posted a notice to employees in which it declared:

WE WILL cease giving effect to the Union Security Clause pursuant to Article 1, Section 2 of the collective-bargaining agreement, which requires as a condition of employment that employees join our membership earlier than the 30-day statutory grace period accorded them under Section 8(a)(3) of the Act.

On November 7, 1990, Ratliff and the Union amended the union-security clause in their collective-bargaining agreement to conform to the settlement agreement, as follows:

All present employees who are members of the Union on the effective date of this agreement shall remain members of this Union in good standing as part of their condition of employment. All employees who are not members of this Union in good standing and all employees hired on or after the effective date of this agreement shall become members of Union within ten (10) days after the thirtieth (30th) day following the date of employment or the effective date of this agreement whichever is later and shall remain a member of Union for the duration of this agreement.

William Covington, a truckdriver, began working for Ratliff on January 2, 1985. Ratliff terminated Covington on April 2, 1990, and reinstated him approximately 3 months later. Covington went on medical leave of absence on or about September 21, 1990. Covington was current in his payment of dues to the Union in August. However, he paid no dues to the Union for September and the ensuing months until his discharge on March 28.

The Union's initial written notice announcing Covington's arrears in dues reached him on February 2. Attached to the letter to Covington was a second letter to the Union's members, regarding dues arrears and the Union's intent to enforce the union-security clause. On March 7, Covington received written warning that if he failed to pay his back dues, totaling \$40, by March 14, the Union would consider him to be "a member not in good standing of this Union." On March 25, the Union notified Covington that he was "a member not in good standing of this Union," because he had not complied with the union-security clause. By letter of the same date, the Union notified Ratliff that Covington was "a member not in good standing of this Union as defined in our By-Laws." Continuing, the letter stated:

Per our contract with your Company, Article 1 Section 2a, that states, all employees shall remain members in good standing of this Union. [Covington] has failed to do so.

We are requesting that William Covington be terminated as per our contract, Article 1, section 2b.

Ratliff complied with the Union's request by discharging Covington on March 2. In its letter to Covington, Ratliff asserted, in substance, that it was discharging him for failure to pay dues to the Union as required by the collective-bargaining agreement's union-security clause. Covington received the discharge letter on April 1. On August 7, Covington filed the initial unfair labor practice charges in the above cases.

B. Analysis and Conclusions

The Union and Ratliff contend that under Board law, the informal settlements in Cases 7-CA-30942 and 7-CB-8429 require dismissal of the allegations before me that the amended security clause and the implementation of that clause by discharging Covington for nonpayment of union dues violated the Act. The General Counsel argues that the reservation language in the settlement agreement, the continuing nature of the union-security clause violation, and the allegation that Covington was terminated unlawfully pursuant to that clause remove the settlements as bars to the consolidated complaint before me.

The Board has long held that "a settlement agreement disposes of all issues involving presettlement conduct unless prior violations of the Act were unknown to the General Counsel, not readily discoverable by investigation, or specifically reserved from the settlement by the mutual understanding of the parties. [Citation omitted.]" *Hollywood Roosevelt Hotel*, 235 NLRB 1397 (1978). In December 1990, at the time of the settlement in Cases 7-CA-30942 and 7-CB-8429, the General Counsel's agent, the Regional Director, had before him the union-security clause language which had been embodied in the contract between Ratliff and the Union since June 1990. That provision required all "present employees" of Ratliff to remain members of this Union in good standing." However, the settlement in those cases dealt with provision of the same clause which did not give Ratliff employees, who were not members of the Union, or new Ratliff employees, hired after the effective date of the collective-bargaining agreement, the 30-day grace period required by Section 8(a)(3) of the Act. The General Counsel permitted the "good standing" language to go unchallenged.

The Union and Ratliff cured the grace period violation to the General Counsel's satisfaction. The Union posted a notice to employees, reciting the proposed amendment to the union-security clause. Ratliff and the Union fully complied with the settlement agreements. They then had good grounds for believing that the amended union-security clause satisfied the requirements of Section 8(a)(3) of the Act.

Under Board policy, such belief would have been unwarranted, if the General Counsel had specifically reserved the unaltered portions of the union-security clause from the settlement by mutual understanding of the parties. *Steves Sash & Door Co.*, 164 NLRB 468, 473 (1967). However, the reservation clause in the settlement agreement, set forth above, at 3, does not specifically reserve the union-security clause's unaltered provisions.

Applying the policies found in *Hollywood Roosevelt Hotel*, supra, and in *Steves Sash & Door Co.*, supra, I find that the consolidated complaint before me must be dismissed. The amended union-security clause, on which the unfair labor practices alleged in the complaint rests, is presettlement conduct, which may not be considered as evidence to support

the General Counsel's case. Thus, I cannot find that the union-security clause, and Covington's discharge pursuant to that clause, violated the Act, as alleged.

Assuming that the settlement in Cases 7-CA-30942 and 7-CB-8429 did not preclude litigation of the issues in the instant cases, I find that neither the union-security clause nor Covington's discharge pursuant to that clause violated the Act. Examining the amended union-security clause in the current collective-bargaining agreement between Ratliff and the Union, I find that it does not exceed the "financial core" relationship permitted by the Act. *NLRB v. General Motors Corp.*, 373 U.S. 734, 742 (1962); *Hotel & Restaurant Employees Local 54 (Atlantis Casino)*, 291 NLRB 989, 991, 993 (1988). The Union's bylaws, the letters from the Union to Covington, and the union-security clause show that the timely payment of dues and an initiation fee were the only requirements for membership in good standing for Covington and the other members of the bargaining unit. Covington's refusal to pay dues to the Union after August 1990 subjected him to lawful discharge under section 2b. of the collective-bargaining agreement. I shall, therefore, recommend dismissal of the consolidated complaint.

CONCLUSIONS OF LAW

1. Ratliff Trucking Corporation, Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Ratliff Employees' Organization is a labor organization within the meaning of Section 2(5) of the Act.

3. Neither Ratliff Trucking Corporation, Inc. nor the Ratliff Employees' Organization has committed any of the unfair labor practices alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴

ORDER

The consolidated complaint is dismissed.

⁴If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.