

Mount Hope Trucking Company, Inc. and Local 560, International Brotherhood of Teamsters, AFL-CIO. Cases 22-CA-18400 and 22-CA-18691

November 23, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND RAUDABAUGH

On April 29, 1993, Administrative Law Judge James F. Morton issued the attached decision.¹ The General Counsel and the Respondent filed exceptions and a supporting brief, and the Respondent filed a brief in opposition to the General Counsel's exceptions.

The National Labor Relations 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,² and conclusions, to provide a new remedy,³ and to adopt the recommended Order as modified below.

1. We adopt the judge's finding that the Respondent violated Section 8(a)(5) of the Act in August 1992⁴ when it unilaterally changed the insurance carrier for the unit employees' health insurance plan. The consolidated complaint also alleges that the Respondent further violated Section 8(a)(5) "[o]n or about March 23, 1992," by "implement[ing] changes in the terms and conditions of employment of the unit employees, including changes in health care benefits and wages." At the outset of the hearing, the General Counsel withdrew the March allegation relating to unilateral changes in health care benefits. The General Counsel continued to allege, however, that the Respondent violated the Act by its March wage changes.

Regarding this last allegation, it is well established that where, as here, the parties are bargaining over a successor agreement, the expired contract continues to define wages and benefits for the unit employees and the employer is required to maintain the status quo until the parties reach a new agreement or bargain to impasse.⁵ It is undisputed that the Respondent in this case granted the employees a wage increase before notifying the Union. While the Respondent does not

claim that the parties had reached a bargaining impasse, the Respondent has attempted to justify its conduct by arguing in effect that the Union abandoned the bargaining process and thereby waived the right to object to the wage change. The credited evidence, as fully set out in the judge's decision, does not establish that the Union ever engaged in delaying tactics here or in any manner led the Respondent to believe that it was free to act unilaterally.⁶ Under these circumstances, we find that the Respondent has not established a clear and unmistakable waiver by the Union of the right to bargain about changes in terms and conditions of employment. See generally *Metropolitan Edison v. NLRB*, 460 U.S. 693 (1983). We therefore conclude that the Respondent further violated Section 8(a)(5) in March by unilaterally granting the unit employees a wage increase.⁷

2. At the close of the hearing, the General Counsel moved to amend the consolidated complaint to allege that the Respondent also violated Section 8(a)(5) when it bypassed the Union and dealt directly with the unit employees concerning their terms and conditions of employment. The General Counsel relied on testimony by the Respondent's president, Robert Carballal, regarding his conversations with employees about the parties' failure to reach a new collective-bargaining agreement. The judge deferred ruling on the General Counsel's motion until he received the parties' briefs.

In his decision, the judge denied the motion to amend because he found that the issue of the Respondent's alleged direct dealing had not been fairly and fully litigated. He further concluded that, in any event, the evidence did not warrant finding a violation on the merits because the wage issue that Carballal discussed with the unit employees was a matter that the Respondent previously had submitted to the Union.

Without passing on the issue of whether the General Counsel's proposed amendment was proper, we find that the evidence regarding Carballal's discussions with the unit employees did not rise to the level of unlawful direct dealing. We emphasize that during his testimony on this subject Carballal stated that the Union's shop steward, Robertson, was present when Carballal spoke with about 10 unit employees concerning the parties' failure to reach a successor agreement while they waited to load their trucks. Because the record fails to disclose whether it was Carballal or the employees themselves who initiated this conversation and because the Union's agent, Robertson, was present to represent its interests, we find that the record is too

¹ An erratum was issued on May 10, 1993.

² The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

³ We shall modify the judge's remedy to make whole the unit employees for those losses, if any, that they suffered because of the Respondent's unilateral changes violating Sec. 8(a)(5) of the Act.

⁴ All dates are in 1992, unless otherwise noted.

⁵ *NLRB v. Cauthorne*, 691 F.2d 1023, 1025 (D.C. Cir. 1982); *NLRB v. Carilli*, 648 F.2d 1206, 1214 (9th Cir. 1981).

⁶ See *Intermountain Rural Electric Assn.*, 305 NLRB 783, 786 (1991).

⁷ We do not, however, reach the judge's findings regarding whether the Respondent unlawfully changed health insurance benefits in March 1992 as the General Counsel had withdrawn this allegation of the complaint.

vague and the evidence does not affirmatively establish that Carballal dealt directly with the unit employees in violation of Section 8(a)(5). The General Counsel, in arguing that the Respondent engaged in unlawful direct dealing, also relies on Carballal's testimony that he "poke to employees from time-to-time" and that he had "a group of administrators who deal with the truckers, who talk to the men on a regular basis." The skimpy evidence regarding these conversations, however, fails to establish that Carballal and his "administrators" ever made any promises of benefits to the unit employees or otherwise attempted to erode the Union's position as their bargaining agent. For these reasons, we conclude that the General Counsel has failed to meet his burden of showing that the Respondent violated the Act. Thus, even assuming the matter was fully litigated, we find no merit to this allegation.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the purposes of the Act.

Having found that the Respondent made unlawful unilateral changes in the employees' wages and health insurance benefits, we shall order the Respondent to rescind these changes in employees' terms and condition of employment if the Union so requests. We shall also order the Respondent to make whole the unit employees for those losses, if any, that they suffered as a result of these unilateral changes, with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).⁸

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Mount Hope Trucking Company, Inc., Wharton, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

"(a) Rescind the unilateral wage increase granted the unit employees in March 1992, as well as the August 1992 change in health insurance carriers if the Union so requests."

2. Insert the following as paragraph 2(b), and reletter the subsequent paragraphs accordingly.

"(b) Make whole the unit employees for those losses, if any, that they suffered because of the 1992 unilateral changes in wages and health insurance carriers, with interest as provided for in the remedy section of this Decision and Order."

3. Substitute the attached notice for that of the administrative law judge.

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.

WE WILL NOT make changes in your contract without bargaining in good faith with Local 560, International Brotherhood of Teamsters, AFL-CIO (the Union).

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL rescind the unilateral wage increase granted the unit employees in March 1992, as well as the August 1992 change in health insurance carriers, if the Union so requests.

WE WILL make whole the unit employees for those losses, if any, that they suffered because of the 1992 unilateral changes in wages and health insurance carriers, with interest.

WE WILL notify the Union in writing that we are willing to bargain collectively with it for a renewal contract.

MOUNT HOPE TRUCKING COMPANY,
INC.

Julie Kaufman, Esq. and *Gregory Alvarez, Esq.*, for the General Counsel.

Ernest R. Stolzer, Esq. (Rains & Pogrebin, P.C.), of Mineola, New York, for Mount Hope Trucking Company, Inc.
Paul Montalbano, Esq. (Schneider, Cohen, Solomon, Leder & Montalbano), of Cranford, New Jersey, for Local 560, International Brotherhood of Teamsters, AFL-CIO.

DECISION

STATEMENT OF THE CASE

JAMES F. MORTON, Administrative Law Judge. The complaint alleges that the Respondent, Mount Hope Trucking Company, Inc., has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act) by having changed the terms and conditions of employment, including wage rates and health insurance coverage, of its drivers without having bargained collectively thereon with their exclusive representative therefor, the Union, Local 560, International Brotherhood of Teamsters, AFL-CIO. The Respondent denies having bargained in bad faith.

I heard this case in Newark, New Jersey, on January 13, 1993. At the close of the hearing, the General Counsel

⁸See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

moved to amend the complaint to allege that the Respondent, in violation of Section 8(a)(1) and (5), bargained directly with its employees, bypassing the Union, respecting those changes. The Respondent opposed the motion. My ruling thereon appears below.

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

FINDINGS OF FACT

I. JURISDICTION—LABOR ORGANIZATION

The Respondent, a New Jersey corporation with its facility in Wharton, New Jersey, transports rock and gravel to construction sites. It annually derives more than \$50,000 for transporting this material to sites outside New Jersey.

The Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

The Union represents a unit of approximately 100 drivers employed by the Respondent. Its last collective-bargaining agreement with the Respondent for this unit was effective from September 1, 1988, to August 31, 1991. This agreement stated, inter alia, that the Respondent will maintain all conditions of employment in effect as of the signing of that agreement except those which are improved by the express terms of the agreement. The record discloses that the Respondent, on September 1, 1988, had its own health care plan, not the union plan, in effect;¹ the agreement did not make any reference to it. Thus, the Respondent's plan continued in effect throughout the term of the 1988–1991 agreement.

On September 30, 1991, the Respondent's president, Robert Carballal, and representatives of the Union signed a memorandum of agreement whereby the 1988–1991 agreement was extended for 3 years except for the changes, including wage increases, noted in the memorandum. One of changes was that the "Union Welfare will replace Company Plan." That memorandum, as was true of two later memorandums, was subject to ratification not only by the unit employees but also, separately, by the Union's executive board. The unit employees rejected the agreement.

On October 15, 1991, a second tentative agreement was reached. It provided for, inter alia, the continuation of the "Company medical and dental plan" throughout the proposed 3-year contract. The unit employees ratified this agreement; however, the Union's trustees rejected it.

The parties resumed bargaining and on December 17, 1991, a third memorandum of understanding was signed. This one provided for the substitution of the union welfare plan for the company plan as of January 1, 1992. The drivers rejected that agreement.

A union business agent, Richard Diaz, testified that he was present when Fred Messina, who was then the business agent dealing with the Respondent, telephoned Carballal on December 23, 1991. Diaz testified credibly that he heard

¹One of three tentative agreements reached after September 1, 1991, adopted the "current company medical and dental plan"; the other two would have substituted, for that plan, the "Union Welfare Plan" in 1992.

Messina ask to speak with Carballal, that Messina then said that the employees rejected the December 17 agreement, and that Messina twice stated that bargaining should resume.²

On February 1992, Diaz was designated by the Union to replace Messina in servicing the unit of the Respondent's drivers. Diaz and Carballal were then negotiating a contract for employees of another company which occupied the same premises used by the Respondent.

On March 23, 1992, Carballal sent Diaz a letter, with which was enclosed a copy of the October 15, 1991 memorandum of understanding. Carballal stated, in his letter, that the enclosure "reflects the terms of the new contract as (he understands) them." That memorandum, as noted above, provided, inter alia, that the unit employees would continue to be covered by the "Company medical and dental plan."

Diaz called Carballal on receiving the March 23 letter, told him that his proposal was not accepted and that the Union wanted to return to the bargaining table. Carballal said that he felt it was a fair offer, that there would be no more bargaining and, in essence, that the Respondent was then putting the terms of that agreement into effect.

The Respondent contends that it was justified in its implementation of the salary changes as set out in the October 15 memorandum because the Union did nothing to pursue negotiations after the employees rejected the December 17 memorandum of agreement, because labor place was essential as the construction season was just beginning and because its employees were demanding it.

The unilateral implementation of the increases in the wages and certain other benefits of the unit employees, violates the duty to bargain collectively as defined in the Act. See *Outboard Marine Corp.*, 307 NLRB 1333 (1992); *Wightman Center*, 301 NLRB 573 (1991). In view of the observation above, that there was no change in the health benefits plan in the expired contract in that the one set out in the October 15 memorandum, which the Respondent continued to implement, is the same as in the expired contract, there is no merit to the complaint allegation of a unilateral change in health care benefits.³

In August 1992, the Respondent changed its health plan insurance carrier and put into effect a different health plan for its unit employees. This was done without affording the Union the opportunity to negotiate about the change. This

²General Counsel, over the Respondent's objection, sought to admit into evidence a hearsay statement that Messina made to Diaz just after that telephone conversation ended. According to Diaz, Messina said to him then that "[Carballal is] not going back to the table." General Counsel contends that this statement is admissible under Rule 803(1) of the Federal Rules of Evidence as a present sense impression. There is no allegation or contention that the Respondent has refused to meet with the Union. The hearsay statement has no direct relevance to the issues before me and, in any event, is of little probative value as to the resolution of those issues. In that regard, cf. *T.L.C. of St. Petersburg*, 307 NLRB 605 (1992).

³The General Counsel's brief asserts that the Respondent's implementation of the October 15 memorandum of agreement constituted an unlawful change in the health care provisions contained in the December 17 memorandum of agreement. Suffice it to note that the Union rejected the December 17 memorandum too. The General Counsel's brief asserted that the Respondent's plan is better than the Union's. The Union has not conceded that point.

unilateral change was made in derogation of the Respondent's duty to bargain collectively.

There remains for consideration the motion by General Counsel to amend the complaint to allege that the Respondent bargained directly with its drivers, bypassing the Union, and thereby engaged in an unfair labor practice within the meaning of Section 8(a)(1) and (5) of the Act. The motion was made just before the hearing closed. The Respondent objected. I reserved ruling pending receipt of briefs. General Counsel's brief states that the issue had been fully litigated, and that the evidence warrants a finding of unlawful direct dealing.

As noted above, the Respondent has contended that it implemented the contract changes, as set out in the October 15 memorandum, in good faith and not to undermine the Union's status as bargaining representative. In pursuing that contention, its president, Carballal, testified that he had reached an accord with the Union's business agent on three separate occasions and each time, the agreement was not ratified. He testified that in early March 1992, he happened to be near one of the Respondent's asphalt plants where about 10 drivers, including the shop steward, were waiting for their trucks to be loaded. In the conversation he had with them then, they expressed concern that they had no contract and they indicated that they wanted the changes as set out in the October 15 memorandum. That was the only one of the three memorandums of agreements that the drivers had ratified. Carballal testified that it was then that he made the decision to put the October 15 changes into effect. There is no contention that the Respondent dealt directly with its employees as to the August 1992 insurance changes.

During his cross-examination, the General Counsel adduced from Carballal affirmative responses to questions asking if he had his administrators talk with the drivers from time to time to find out what they wanted and asking, as an example, if he would stop his car to talk with a group of drivers to find out what they wanted. When asked, however, if he had "agreed" to give them the changes they wanted, he answered that he did not agree to anything but that he "implemented" the changes.

I cannot find that the issue of alleged unlawful direct dealing was fairly or fully litigated. The record evidence thereon is that about 10 of the 100 drivers told Carballal one day that they wanted a contract, that they told him they wanted the only agreement they ratified, and that Carballal had instructed his supervisors to communicate with the drivers to keep them happy.

For a violation to be found on an issue not alleged in the complaint it must have been fairly and fully litigated at the hearing. *Wayside Realty Group*, 281 NLRB 357 (1986). It is obvious from the record that the Respondent did not have fair notice, during the course of the questions put to Carballal, that the matter of unlawful direct dealing was being inquired into or that the inquiries might lead to a motion to amend the complaint. Nor can it be said that the record fully presents the specific facts as to the issue itself. Thus, while Carballal's responses admit to discussions with the drivers as to contract terms which possibly could support a prima facie finding of a violation, it may well be that the Union's steward initiated the discussion, asking Carballal for a wage increase. If the latter, it is doubtful if the direct deal-

ing allegation would have merit. As the issue involved was not fairly and fully litigated, I deny the motion to amend.⁴

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization as defined in Section 2(5) of the Act.

3. The Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act by having changed the wages, terms, and conditions of its drivers without having bargained collectively thereon with the Union as their exclusive representative for such purposes.

4. These unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

5. The General Counsel's motion to amend the complaint to allege direct dealing with employees is denied as the issue was not fairly and fully litigated.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, it is necessary to order the Respondent to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The unilateral contract changes implemented by the Respondent in 1992 do not appear to have caused losses to any of the unit employees. Should losses attributable to these changes be discovered during the compliance phase of this case, they can be pursued at that stage, with appropriate interest thereon.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁵

ORDER

The Respondent, Mount Hope Trucking Company, Inc., Wharton, New Jersey, its officers, agents, representatives, and assigns, shall

1. Cease and desist from

(a) Changing any of the wages, hours, or other conditions of employment of its drivers without bargaining thereon in good faith with Local 560, International Brotherhood of Teamsters, AFL-CIO (the Union).

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the unilateral contract changes implemented in 1992 if the Union so requests.

⁴Nor would I be disposed to find merit as to the alleged direct dealing, were this motion granted. The test therefor is whether the direct communication contains proposals or ideas which were not first submitted to the Union at the bargaining table. *United Technologies Corp.*, 274 NLRB 1069, 1074 (1988). The matter the drivers discussed with Carballal, i.e., the wage increase clearly was one that had been submitted to the Union.

⁵If 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.

(b) Notify the Union in writing that it is willing to bargain collectively with the Union for a renewal collective-bargaining agreement.

(c) Post at its facility in Wharton, New Jersey, copies of the attached notice marked "Appendix."⁶ Copies of the no-

⁶If 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."

tice on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are altered, defaced, or covered by any other material.

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