

**Highland Superstores, Inc., Debtor-in-Possession  
and Local 243, International Brotherhood of  
Teamsters, AFL-CIO.** Case 7-CA-33697

June 27, 1994

DECISION AND ORDER

BY MEMBERS STEPHENS, DEVANEY, AND COHEN

On June 23, 1993, Administrative Law Judge Leonard M. Wagman issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel filed an answering brief to the Respondent'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,<sup>1</sup> and conclusions and to adopt the recommended Order.

The judge found that the Respondent violated Section 8(a)(1) by threatening employees with termination and withdrawal of its severance package proposal if they handbilled in support of the Union's consumer boycott and by threatening employees with a continuing loss of employment so long as they handbilled. The judge also concluded that the Respondent violated Section 8(a)(3) by locking out its unit employees because they in fact handbilled. Finally, in the judge's view, the Respondent violated Section 8(a)(5) when it withdrew, as threatened, its severance package proposal from the bargaining table in reprisal for the employees' participation in the handbilling.

We agree with the judge based on the specific facts of this case. In our view, an employer can ordinarily take economic action in response to economic action by the union, provided that the employer's action is in support of a lawful bargaining position. In the instant case, the Respondent locked out its employees and withdrew its offer of severance benefits in response to the economic action of the Union (handbilling in support of a consumer boycott). However, we are persuaded that the Respondent acted to punish the employees for their handbilling, rather than in support of its bargaining position. In this regard, we note that the Respondent threatened its employees that, if they handbilled, they would no longer work for the Respondent. This conduct was a threat to terminate, not simply a threat to lockout. In addition, the Respondent

did not explain, until the hearing, that its lockout was in support of its bargaining position. Thus, at the time of the lockout, neither the employees nor the Union understood that acquiescence to the Respondent's bargaining position could avert the lockout.

In these circumstances, we adopt the judge's finding that the lockout was a punishment of the employees for their handbilling. Similarly, the withdrawal of the offer of severance benefits was another aspect of that punishment, and therefore was also unlawful.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Highland Superstores, Inc., Plymouth, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

MEMBER DEVANEY, concurring.

I concur in the result.

*Richard F. Czubai, Esq.*, for the General Counsel.

*A. David Mikesell, Esq.*, of Detroit, Michigan, for the Respondent.

*Jim Cianciola, Esq.*, of Detroit, Michigan, for the Charging Party.

DECISION

STATEMENT OF THE CASE

LEONARD M. WAGMAN, Administrative Law Judge. This case was tried in Detroit, Michigan, on February 19, 1993. The charge was filed on September 8, 1992,<sup>1</sup> and the complaint was issued on October 21. The complaint alleges that the Company, Highland Superstores, Inc., violated Section 8(a)(1) of the National Labor Relations Act (29 U.S.C. § 151, et seq.) by threatening its employees, who were in a bargaining unit represented by the Union, Local 243, International Brotherhood of Teamsters, AFL-CIO, with termination, and withdrawal of a proposal regarding severance wages and benefits if they handbilled, and by threatening the same employees with continued loss of work as long as they handbilled. The complaint also alleged that the Company locked out its employees in violation of Section 8(a)(3) and (1) of the Act, and withdrew its severance package proposal from the bargaining table in violation of Section 8(a)(5) and (1) of the Act. The Company filed a timely answer in which it denied committing the alleged unfair labor practices.

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

FINDINGS OF FACT

I. JURISDICTION

The Company, a corporation, with an office and facility in Plymouth, Michigan, has been engaged in the retail sale of

<sup>1</sup>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), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

<sup>1</sup>All dates are in 1992 unless otherwise indicated.

appliances and related products. During the calendar year ending December 31, 1991, the Company, in the course of conducting its retail business, derived gross revenues in excess of \$500,000. During the same year, the Company purchased and received at its Plymouth, Michigan facility goods valued in excess of \$50,000 directly from points outside the State of Michigan. The Company admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Company also admits, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

## II. ALLEGED UNFAIR LABOR PRACTICES

At the time of the hearing in this case, the Company was operating 30 retail electronic and appliance stores spread over Michigan, Ohio, and Indiana. Also, at the time of the hearing, the Company was operating under a Federal bankruptcy proceeding under Chapter 11, which began on August 24. At all times material, the Union was the recognized collective-bargaining representative of the home delivery drivers, helpers, and store stock drivers employed at the Company's Plymouth, Michigan facility. The Company and the Union executed their last 3-year collective-bargaining agreement on September 1, 1989. The parties began negotiations for successor contract in July. At the outset, the Company announced its intention to subcontract the unit's delivery work. The Company saw the subcontracting of its delivery work as a cost-cutting measure. The Union was opposed to the subcontracting of bargaining unit work.

In the course of contract negotiations, the Company offered a severance package as part of its proposal regarding the subcontracting of the delivery drivers' work. The severance package covered pay and fringe benefits. The parties failed to reach agreement on a contract, but agreed to extend the 1989 contract beyond its August 31 expiration date, on a day-to-day basis.

On September 4, the Company learned that the Union intended to handbill the public during the annual Labor Day parade, on Sunday, September 6, and later, on the same day, at company stores. The Union's expressed purpose was to urge consumers to boycott the Company in protest against the announced subcontracting of the bargaining unit employees' delivery work.

By letter dated September 4, and signed by Vice President Judy Thomas, the Company reacted to the Union's contemplated boycott. In the first paragraph of her letter, Thomas asserted the Company's understanding that the Union intended to begin its boycott during the coming weekend and reviewed the status of the parties' negotiations. In the second paragraph, Thomas cautioned the Union, as follows:

In view of these circumstances, please be advised that if a public appeal of any nature against [the Company] is carried out by the Union, the offer of the Company, now outstanding, for severance pay, insurance and other benefits for your members shall be immediately withdrawn. Further, should any public appeal be made by the Union contrary to the interests of [the Company]: (1) the collective bargaining agreement between the parties will be considered to be terminated immediately; and (2) effective Tuesday, September 8, 1992, plans will be implemented to out source home delivery and

stock delivery work. Please contact the undersigned if there are any questions or you wish to discuss this matter further.

On Saturday, September 5, after home delivery driver Larry Samuels and his helper, Larry Loca, had completed their deliveries, a company supervisor directed them to Vice President Thomas' office. Thomas gave them a copy of the letter she had written to the Union on the previous day, to which I have referred in the preceding paragraph, and a copy of a memorandum addressed to "All Plymouth Home Delivery Drivers and Helpers and Stock Drivers." The memorandum called attention to the attached letter which had been sent to the Union on September 4, summarized the status of contract negotiations between the Company and the Union, and set forth the proposed severance package as stated in the letter to the Union. The last two paragraphs of the memorandum cautioned the employees as follows:

As we state in the letter to the union, should the union go forward with its plans to demonstrate at our stores, this severance/benefits offer will be automatically withdrawn. Also, should that occur, the company will begin use of an outside carrier immediately, and the union contract will be terminated.

Under these trying circumstances for the company and in view of our Chapter 11 filing, the offer we have made is the best available. Because these developments are of importance to you as well as [the Company], you are entitled to know the facts. At this point, what you elect to do is up to you.

Thomas clearly articulated the Company's attitude toward the contemplated employee handbilling in support of the Union's boycott. As Samuels read over the letter and the memorandum, he heard Loca ask a question about the day-to-day contract extension. Thomas answered the question with a yes. She also warned that if the employees passed out one handbill, they would no longer have a job, adding, in substance, that they could not expect to handbill on one day, and work there the following day.

On the same day, Thomas also confronted employees Tim Doughty and Bill Plimbal with copies of the letter to the Union and the memorandum to the Company's employees. After the two employees had read the messages on both of the documents, Thomas repeated the warnings she had given to employees Samuels and Loca. If the employees distributed a single handbill, they would no longer work for the Company, and the Company would withdraw the severance package proposal. Vice President Thomas gave copies of the letter to the Union and the memorandum to all her two-man delivery teams, as they returned to the Company's terminal, on September 5.

In her testimony before me, Thomas denied telling the employees that they would be terminated if they handbilled in support of the Union's boycott. At the hearing before me in this case, counsel for the Company asked Thomas: "What was the company position at that time with respect to the status of these employees?" Thomas answered:

The company's position was that we could not allow associates to ask our customers not to shop at the stores, but yet work for us and go into customers'

homes and say not at [the Company]. There was no way we could allow that to happen.

Thomas went on to testify, in substance, that the Company did not terminate any of the bargaining unit employees in the course of the Union's boycott.

During the Labor Day parade, company employees passed out union flyers urging consumers to refrain from patronizing the Company because it was "firing" its drivers and "replacing them with other, 'cheaper,' drivers." The bargaining unit employees distributed the flyers to spectators along the route of the parade, in downtown Detroit. After the parade, bargaining unit employees distributed the Union's handbill at company stores in the Detroit metropolitan area. The employees continued to handbill at the Company's stores for sometime after Labor Day.

On the morning of Tuesday, September 8, company employees appeared for work at the Company's premises, at their usual reporting time. However, security guards prevented them from entering the company facility. I find from bargaining unit employee Samuels' testimony that when he reported for work on September 8, a security guard asked him to state his name. Whereupon, the guard checked a list of names and told Samuels there was no work for him. Samuels left the gate and proceeded to a church parking lot, across the street from the company premises. From there, he observed the security guards at the company gate turning away the home delivery drivers and the stock drivers, all members of the bargaining unit. The Company did not recall Samuels, who was off from work for the next 9 weeks, after which Home Delivery Service hired him.

Employee Tim Doughty, a driver, arrived at the Company's gate on the morning of September 8, and found Supervisor Henry Bowers standing there. Bowers told Doughty that there was no work "today," and urged him to talk to the union employees standing across the street, in the parking lot. Doughty learned at the parking lot that the Company was subcontracting the unit employees' driving. Doughty continued to handbill after Bowers had turned him away. The Company did not recall Doughty. After 8 weeks' unemployment, Home Delivery Service hired him.

Union Agent Tom Ziembovic approached Supervisor Bowers on the morning of September 8 and asked for an explanation of what was happening at the Company's gate. Bowers asserted that there was no work for the employees. When Ziembovic asked if the Company had laid them off, Bowers replied only that there was no work for them. Ziembovic received the same response when he asked if the men were locked out, and when he asked if they had been fired. Finally, Bowers said that he was under instructions to say only that there was no work for the employees.

On the evening of September 8, the Company and the Union engaged in negotiations. Supervisor Henry Bowers, Vice President Judy Thomas, and Attorney David Mikesell attended for the Company. The Union's representatives included Tom Ziembovic, and Secretary-Treasurer and Business Representative Jim Cianciolo.<sup>2</sup> Cianciolo asked Attorney

Mikesell what the status of the bargaining unit employees was. Mikesell answered that the employees would not be working because they were involved in the handbilling and the boycotting of the Company. Cianciolo repeated the question. Mikesell answered that employees would not be working because of the handbilling, and beyond that, Cianciolo was free to draw his own conclusions.

I find that the Company locked out its drivers and helpers on and after September 8. The Board has recognized that "[l]ockouts are generally permissible in anticipation of a strike or in support of an employer's legitimate bargaining position," (citing *American Ship Building v. NLRB*, 380 U.S. 300 (1965)). There has been no showing, nor does the company claim, that a strike threat motivated its decision to lock out its employees. However, the Company in its brief, and in testimony of Vice President Thomas, asserts that it resorted to the lockout to support its insistence upon subcontracting its home delivery work. Reviewing the record, I find that the great weight of the credited testimony and the Company's writings show that the employees' support for the union boycott was the only motive for the lockout. The Company's letter to the Union, the Company's memorandum to its drivers and helpers, Vice President Thomas' remarks to the drivers and helpers on September 5, Attorney Mikesell's response to the Union's question regarding the status of the locked-out employees, on September 8, showed only one motive, the handbilling by employees.

The first time "bargaining position" surfaced was at the hearing before me, when Vice President Thomas, in response to a leading question by Attorney Mikesell, agreed that Company decided to support its bargaining position regarding subcontracting its driving by using the lockout as "a means of applying pressure." However, this answer did not square with her earlier testimony to the effect that the Company had decided to withhold work from the drivers and helpers because they were handbilling in support of the Union's consumer boycott. Accordingly, I have credited Thomas' earlier, full forthright testimony that the handbilling was the cause of the lockout, and have rejected her response which was inconsistent with that testimony. In sum, I find that the credited testimony and the documentary evidence show that there is no merit to the Company's claim that it locked its employees out to pressure the Union at the bargaining table. Instead, I find that the credited testimony and the Company's writings establish that the employees' handbilling in support of the Union's boycott was the sole provocation for the lockout, which began on September 8, and continued for 9 weeks. I also note that the Company has not offered to reinstate the unit employees.

It is well settled that Section 7 of the Act protects employees engaged in picketing or handbilling their employer in support of a union boycott, where they are protesting the employer's decision to reduce or shut down its operations or otherwise terminate their jobs. E.g., *Ordman's Park & Shop*, 292 NLRB 953, 956 (1989). Here, the Company's drivers and helpers were handbilling in support of the Union's

<sup>2</sup>Tom Ziembovic testified to the best of his recollection about a meeting on September 23, at which the Union asked Attorney Mikesell about the status of the bargaining unit employees, whom the Company had barred from its premises. However, Jim Cianciolo firmly recalled that the meeting at which that topic arose, occurred

on September 8, the same day as the inception of the lockout. As Cianciolo seemed more certain, and as he was able to link the meeting to the lockout in a logical sequence, I have credited his assertion that September 8 was the date at which the Union asked Attorney Mikesell about the status of the bargaining unit employees.

consumer boycott in protest of the Company's announced plan to subcontract the delivery driving which was the work of the handbilling employees. The handbills asked consumers to make their purchases elsewhere to show their support for employees in their effort to press the Company to change its mind about subcontracting the unit employees' work. There was no showing that the unit employees cast aspersions upon the Company's service or upon the products it delivered to its customers. Compare *NLRB v. Electrical Workers IBEW Local 1229 (Jefferson Standard)*, 346 U.S. 464 (1953). I find that this handbilling was protected union activity, and that locking its drivers and helpers out in retaliation for their participation in that activity, the Company violated Section 8(a)(3) and (1) of the Act. *Riverside Cement Co.*, 296 NLRB 840, 842 (1989).

I also find that the Company's threats to subcontract its delivery driving and to withdraw its severance package proposal, as contained in its letter of September 4 to the Union and in its memorandum to its employees, dated September 5, interfered with, restrained and coerced its employees in the exercise of their right to handbill in support of the Union's consumer boycott. Accordingly, I find that by those threats, the Company violated Section 8(a)(1) of the Act. Further, I find that the Company violated Section 8(a)(1) of the Act, on September 5, when Vice President Thomas warned the employees that the Company would withhold work from them if they handbilled in support of the Union's consumer boycott. Again, on September 8, the Company violated Section 8(a)(1) of the Act, when its attorney, David Mikesell, warned the union representatives that the Company would withhold work from its employees as long as they handbilled in support of the Union's consumer boycott.

The record shows that in its letter of September 4 to the Union, and in its memorandum of September 5 to its employees, the Company announced that as soon as the Union's boycott began, the severance pay, insurance, and other benefits for the bargaining unit employees "shall be immediately withdrawn." The Company has neither retracted nor countermanded that unlawful threat. Accordingly, I find that the Company has withdrawn its severance package, proposal from the bargaining table in reprisal for the employee's participation in handbilling in support of the Union's boycott. By this conduct, the Company showed bad faith, and thus violated Section 8(a)(5) and (1) of the Act. *15th Avenue Iron Works*, 279 NLRB 643, 657 (1986).

#### CONCLUSIONS OF LAW

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

2. Local 243, International Brotherhood of Teamsters, AFL-CIO is labor organization within the meaning of Section 2(5) of the Act.

3. At all times material to this case, the Union has been the exclusive collective-bargaining representative of all the home delivery drivers, helpers, and store stock drivers employed at the Company's Plymouth, Michigan facility.

4. By threatening bargaining unit employee with loss of employment and withdrawal of an offer of a severance package if they handbilled in support of the Union's boycott, the Company has violated Section 8(a)(1) of the Act.

5. By locking out its bargaining unit employees because they assisted the Union's boycott against the Company by handbilling, the Company violated Section 8(a)(3) and (1) of the Act.

6. By withdrawing its severance package proposal from the bargaining table, the Company violated Section 8(a)(5) and (1) of the Act.

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

#### REMEDY

Having found that the Company is engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Having found that the Company unlawfully locked out the bargaining unit employees in retaliation for the employees' protected concerted activity in support of the Union's, I shall recommend that the Company offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of the lockout to the date of a proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Having found that the Company has refused to bargain with the Union in good faith, with respect to a severance proposal, and has thus violated Section 8(a)(5) and (1) of the Act, I shall recommend that the Company be required to bargain collectively with the Union as the exclusive representative of all employees in the bargaining unit and, if an understanding is reached, embody such understanding in a signed agreement.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>3</sup>

#### ORDER

The Respondent, Highland Superstores, Inc., Plymouth, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with loss of employment, the withdrawal of a bargaining proposal, or other reprisals because they engage in handbilling other protected concerted activity in support of Local 243, International Brotherhood of Teamsters.

(b) Withholding work from employees in retaliation for their protected concerted activities.

(c) Failing and refusing to bargain collectively, on request, with Local 243, International Brotherhood of Teamsters, AFL-CIO as the exclusive collective-bargaining representative of all the home delivery drivers, helpers, and store stock drivers employed at the Respondent's Plymouth, Michigan facility with respect to the rates of pay, wages, hours of employment, and other terms and conditions of employment.

<sup>3</sup>If 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.

(d) 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) Offer to all bargaining unit employees, who the Respondent locked out on and after September 8, 1992, full reinstatement to their former positions of employment or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges previously enjoyed, and make them whole for any losses of pay each may have suffered by reason of the discrimination against them in the manner set forth in the remedy section of this decision.

(b) On request, bargain with the Local 243 International Brotherhood of Teamsters, AFL-CIO, as the exclusive representative of all the home delivery drivers, helpers and store stock drivers employed at the Respondent's Plymouth, Michigan facility, with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

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

(d) Post at its facility in Plymouth, Michigan, copies of the attached notice marked "Appendix."<sup>4</sup> Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon 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 not altered, defaced, or covered by any other material.

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

<sup>4</sup>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 threaten employees with loss of employment, the withdrawal of a bargaining proposal, or other reprisals because they engage in handbilling or other protected concerted activity in support of Local 243, International Brotherhood of Teamsters.

WE WILL NOT withhold work from employees in retaliation for their protected concerted activities.

WE WILL NOT fail and refuse to bargain collectively, on request, with Local 243, International Brotherhood of Teamsters, AFL-CIO as the exclusive collective-bargaining representative of all the home delivery drivers, helpers, and store stock drivers employed at our Plymouth, Michigan facility, with respect to the rates of pay, wages, hours of employment, and other terms and conditions of employment.

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 offer to reinstate all bargaining unit employees who we locked out on and after September 8, 1992, to their former positions of employment or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges previously enjoyed, and make them whole for any losses of pay each may have suffered by reason of the discrimination against them, plus interest.

WE WILL, on request, bargain with Local 243, International Brotherhood of Teamsters, AFL-CIO as the exclusive representative of all the home delivery drivers, helpers, and store stock drivers employed at our Plymouth, Michigan facility, with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

HIGHLAND SUPERSTORES, INC.