

Truck Drivers, Oil Drivers, Filling Station and Platform Workers' Union, Local No. 705, an affiliate of International Brotherhood of Teamsters, AFL-CIO (Pennsylvania Truck Lines) and Michael Matyas. Case 13-CB-13815

June 24, 1994

DECISION AND ORDER

BY MEMBERS STEPHENS, DEVANEY, AND COHEN

On July 2, 1993, Administrative Law Judge Robert A. Giannasi issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel filed an answering brief. The General Counsel also filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has 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 con-

¹ 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. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In agreeing with the judge that Steward Holmes is an agent of the Respondent, we rely on the following: Holmes, the only steward, supervised the picketing and kept picketing schedules and lists of the picketing employees (Holmes told picketing employees that the list would be used to determine who would receive strike benefits); he obtained dues-checkoff authorizations and initiation forms from new employees; he informed new employees about dues and fees; he settled disputes prior to the grievance stage; and he informed employees that they were supposed to strike and that they were to picket on their usual shift.

² The Respondent has excepted to the judge's finding that it caused the termination of certain of its street drivers, arguing that, at the hearing, the General Counsel abandoned the allegation in the complaint that the Respondent requested that the Employer discharge the alleged discriminatees. In this regard, we note that the complaint alleges, inter alia, both that the Respondent attempted to cause and caused the Employer to discharge or refuse to employ the alleged discriminatees and that the Respondent attempted to cause and caused the Employer "to refuse to grant seniority rights" to the alleged discriminatees. We further note that at the hearing, while the General Counsel stated that it was not his position that the Respondent attempted to get the Employer to discharge the alleged discriminatees, he also stated that, in attempting to prove that the Respondent violated Sec. 8(b)(2) and (1)(A), he was relying on the Respondent's request that the alleged discriminatees not be granted seniority. In view of the above and in view of the facts contained in the record and found by the judge, we conclude that the Respondent requested that certain laid-off street drivers who had accepted employment with All States Delivery be removed from Pennsylvania Truck Lines' seniority list of drivers and that Pennsylvania Truck Lines acceded to that request, thereby as established by the credible evidence and as found by the judge, effectively terminating those drivers. We amend the Conclusions of Law in accordance with this finding.

clusions² and to adopt the recommended Order as modified.³

AMENDED CONCLUSIONS OF LAW

Substitute the following for Conclusion of Law 2.

"2. By attempting to cause and causing PTL to refuse to grant seniority rights to and thus effectively terminate employees Michael Matyas, Manuel P. Gonzales, John Devens, Mark P. Lewis, Carl B. Bate, Armand Hernandez, James T. Herring, Aaron King, Rafael Rivera, Howard M. Anderson, and Melvin M. Williamson because they crossed and worked behind the Respondent's picket line, the Respondent violated Section 8(b)(2) and (1)(A) of the Act."⁴

We note that the General Counsel has excepted to the judge's failure to find that the Respondent, in addition to discriminating against the 11 employees named in the complaint, also discriminated against employee Rich Gurgul in requesting his removal from the seniority list. We find that the judge did not err in this regard since, as the judge noted, in addition to the fact that Gurgul was not named in the complaint, he was not listed in the parties' stipulation as having worked for All States. Further, while, as the General Counsel contends, at the hearing, employee Lewis identified drivers whom the Respondent removed from the seniority list and twice referred to someone described in the transcript as "Rich [inaudible]," no formal motion or stipulation was submitted posthearing to clarify this reference and no other evidence indicates that this person participated in any other protected activities. Further, we do not agree with our dissenting colleague's statement that Gurgul's exclusion resulted from a mere clerical reporting error. The burden was on the General Counsel, not the court reporter, to identify the discriminatees. By failing to amend the complaint, broaden the stipulation, pursue questioning regarding the identity and activities of "Rich [inaudible]," or otherwise timely assert that it sought relief as to a broader group of discriminatees, the General Counsel did not satisfy this burden as to Gurgul. Finally we disagree with our dissenting colleague's argument that Gurgul should be included because the Respondent did not contend that Gurgul was not similarly situated with the named discriminatees, or that it was prejudiced by the lack of testimony regarding Gurgul or by the General Counsel's failure to broaden the complaint to include him. Gurgul's status was not at issue in this proceeding until the General Counsel belatedly raised it in his posthearing brief to the judge. In these circumstances, the Respondent should not be penalized for not claiming "prejudice or failing to refute an issue which was neither alleged nor litigated at the hearing.

We also deny the General Counsel's exception regarding modification of the judge's proposed remedy to include other employees who were not specifically named in the complaint but who might be similarly situated to the named discriminatees.

³ The General Counsel has excepted to the judge's proposed remedy insofar as it fails to provide that the Respondent affirmatively request that the Employer reinstate the discriminatees to their former seniority and make them whole for all losses of wages and benefits suffered by them until they are actually reinstated by the Employer to their former seniority or to the date they obtain substantially equivalent employment elsewhere. We find merit in the General Counsel's exception and amend the remedy accordingly.

⁴ In adopting the judge's finding that the Respondent violated Sec. 8(b)(1)(A) and (2) by attempting to cause and by causing the Employer to deny the discriminatees seniority, we do not rely on the judge's characterization of the 8(b)(1)(A) violation as "derivative." *National Maritime Union*, 78 NLRB 971 (1948), enf. 175 F.2d 686 (2d Cir. 1949), cert. denied 338 U.S. 954 (1950). We do agree, how-

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ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Truck Drivers, Oil Drivers, Filling Station and Platform Workers' Union, Local No. 705, an affiliate of the International Brotherhood of Teamsters, AFL-CIO, Chicago, Illinois, its officers, agents, and representatives, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(b).

“(b) Causing or attempting to cause PTL to refuse to grant seniority rights to, and thus effectively terminate, any employees who cross and work behind Respondent’s picket lines or who refrain from engaging in other union or protected concerted activity.”

2. Substitute the following for paragraphs 2(a) and (b).

“(a) Immediately notify PTL in writing that it has no objection to restoring employees Michael Matyas, Manuel Gonzales, John Devens, Mark P. Lewis, Carl B. Bates, Armand Hernandez, James T. Herring, Aaron King, Rafael Rivera, Howard M. Anderson, and Melvin M. Williamson to the on-call seniority list and in fact request that PTL reinstate them to their former seniority and hence their jobs.

“(b) Make the above-named employees whole for any losses of wages and benefits suffered by them until they are actually reinstated by PTL to their former seniority or until they obtain substantially equivalent employment elsewhere.”

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

MEMBER DEVANEY, dissenting in part.

While I agree with my colleagues that the Respondent violated Section 8(b)(1)(A) by Steward Holmes’ threat to employee Matyas and also violated Section 8(b)(2) and (1)(A) by attempting to cause and causing the Employer, Pennsylvania Truck Lines, to refuse to grant seniority rights to certain of its street drivers because they crossed and worked behind the Respondent’s picket line, and while I also agree with my colleagues’ denial of the General Counsel’s exception regarding modification of the judge’s proposed remedy to include employees who might be similarly situated to the named discriminatees, I do not agree with my colleagues’ denial of the General Counsel’s exception regarding the judge’s failure to find that the Respondent also discriminated against employee Rich Gurgul in requesting his removal from the seniority list. In-

ever, that by causing the Employer to deny the discriminatees seniority because they exercised their Sec. 7 rights to work behind a picket line, the Respondent violated Sec. 8(b)(1)(A). See, e.g., *Laborers Local 373 (Arrow Enterprises)*, 282 NLRB 347, 348 (1986).

stead, I would leave the resolution of this issue to the compliance stage of this proceeding.

In this regard, I note that, in finding that the Respondent caused Pennsylvania Truck Lines to discriminate against 11 named drivers, the judge relied in part on the testimony of witness Mark Lewis, one of the discriminatees, thereby implicitly crediting his testimony. Importantly, Lewis is reported in the transcript as twice testifying that employee “Rich [inaudible],” like the discriminatees named in the complaint, accepted employment with All States Delivery and later was stricken from Pennsylvania Truck Lines’ seniority list. Essentially, it appears that the instant matter arose due to the court reporter’s failure on not one but two occasions during Lewis’ testimony to clarify this discriminatee’s surname. In addition, I note that subsequent to the General Counsel’s filing of exceptions on this issue, the Respondent could have contended but failed to contend either that the discriminatee is not similarly situated to the other name discriminatees or that it was prejudiced by the fact that the complaint was not amended or the stipulation broadened to include this discriminatee. Under the circumstances, I think it is inequitable to deny the General Counsel’s exception. I would leave this matter to compliance where I believe the identity of this discriminatee can be easily ascertained.

APPENDIX

NOTICE TO MEMBERS

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 threaten employees who cross our picket lines that they might be blackballed or lose benefits for doing so.

WE WILL NOT cause or attempt to cause PTL to remove from its seniority lists any employees who cross and work behind picket lines or who refrain from engaging in other union or protected concerted activities.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of their rights under Section 7 of the Act.

WE WILL notify PTL in writing that we have no objection to restoring employees Michael Matyas, Manuel P. Gonzales, John Devens, Mark P. Lewis, Carl B. Bates, Armand Hernandez, James T. Herring, Aaron King, Rafael Rivera, Howard M. Anderson, and Melvin M. Williamson to the on-call seniority list and request that PTL reinstate them to their former seniority.

WE WILL make the above-named employees whole for any loss of wages and benefits suffered by them until they are actually reinstated by PTL to their former seniority or until they obtain substantially equivalent employment elsewhere.

TRUCK DRIVERS, OIL DRIVERS, FILLING
STATION AND PLATFORM WORKERS'
UNION, LOCAL NO. 705, AN AFFILIATE
OF INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, AFL-CIO

Paul Hitterman, Esq., for the General Counsel.
Sherman Carmell, Esq., of Chicago, Illinois, for the Re-
spondent.

DECISION

STATEMENT OF THE CASE

ROBERT A. GIANNASI, Administrative Law Judge. This case was tried on May 3, 1993, in Chicago, Illinois. The complaint alleges that Respondent (the Union) violated Section 8(b)(1)(A) of the Act by threatening employees with reprisals, and Section 8(b)(2) by attempting to cause and causing an employer (Employer or PTL) to discriminate against employees in violation of Section 8(a)(3) of the Act. Respondent filed an answer denying the essential allegations in the complaint. The parties filed briefs which I received on June 11 and have read and considered.

Based on the entire record, including the stipulations and positions of the parties, as well as the testimony of the witnesses and my observation of their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTIONAL MATTERS

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

Pennsylvania Truck Lines, Inc. (the Employer or PTL) maintains a facility and place of business in Chicago, Illinois, where it is engaged in the interstate transportation of freight. During a representative 1-year period, PTL performed services valued in excess of \$50,000 in States other than Illinois. Accordingly, I find, as Respondent admits, that PTL is an employer engaged in commerce within the meaning of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

PTL employs about 95 to 100 drivers to transfer trailers and other freight between railheads from its Chicago facility. The drivers are represented by Respondent and covered under its Joint Area Cartage Agreement. The most recent agreement, which is effective through March 31, 1994, contains a union-security clause and a dues-checkoff provision. The events herein deal with PTL's street drivers who work from a separate seniority list on a daily oncall basis.

On February 21, 1992, the Union struck PTL and maintained picket lines at PTL jobsites at Conrail yards at 47th

Street and 63d Street in Chicago. That same day PTL laid off its street drivers, including named alleged discriminatees Michael Matyas, Manuel P. Gonzales, John Devens, Mark P. Lewis, Carl B. Bates, Armand Hernandez, James T. Herring, Aaron King, Rafael Rivera, Howard M. Anderson, and Melvin M. Williamson. PTL apparently stopped operating during the strike and did not employ street drivers. The strike lasted until February 27, but the Union continued to maintain what was called an informational picket line at the above locations. PTL did not resume operations or recall street drivers until some time in June 1992.

During this hiatus, another firm, All States Delivery, whose employees were not represented by the Union, handled the freight and hauling operations previously performed by PTL. Apparently All States continued to operate even after PTL resumed its operations.¹

At least some of the above-named street drivers participated in the picketing, but, in late March, all of them accepted employment with All States. This required them to cross and work behind Respondent's picket line.

On the first day that Michael Matyas attempted to cross the picket line while driving for All States, he was approached by Bobby Holmes, Respondent's steward at PTL. Holmes came up to Matyas' truck and asked why Matyas was crossing the picket line. Matyas replied that he needed the money. Holmes then said, "You're going to lose all your benefits and they are going to blackball you from the Union."²

According to the stipulation of the parties, after PTL resumed operations the Respondent requested that PTL remove "the drivers" from the oncall seniority list. This occurred in early July, and PTL complied with the Respondent's request.

Indeed, there is uncontradicted testimony from one of the drivers, Mark Lewis, that PTL terminated them. Lewis was hired and worked briefly as a dispatcher for PTL after it resumed operations in June 1992. He observed, both by referring to the seniority list and to PTL's computer, that certain drivers had been removed from the seniority list and terminated. The only drivers who were terminated, according to Lewis, "were the drivers that worked for All States Delivery."³

¹ Perhaps because of the parties' stipulation the background evidence herein was not fully developed and I am making some inferences based on a sketchy record.

² The above is based on the credible testimony of Matyas who impressed me as a reliable and straightforward witness. He gave a detailed account of the conversation and was not cross-examined about it by counsel for Respondent. In contrast, Holmes' testimony about the conversation was confined to short answers to questions put to him by counsel for the General Counsel who called him as a Rule 611(c) witness. Holmes acknowledged asking Matyas why he was crossing the picket line, thus showing his concern, on behalf of the Union, with Matyas' conduct; but he denied he made the above-quoted statement attributed to him by Matyas. I reject Respondent's contention that I should credit Holmes because he did not make a similar statement to another driver on a different occasion when that driver also crossed the picket line.

³ Lewis identified the following drivers as having been removed from the seniority list: Matyas, Hernandez, Devens, himself, King, Bates, Gonzales, Herring, Rivera, Williamson, and Anderson. All were listed in the stipulation as having worked for All States from late March 1992. Lewis also named someone referred to in the tran-

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In a direct conversation with Lewis, the Employer's operations manager, Pat O'Malley, confirmed that the above-named drivers were terminated. According to Lewis, O'Malley said, "[t]here was a deal cut between [a Union representative and an Employer representative] . . . that because we crossed the picket line we were all terminated from [PTL]."

The next day Lewis spoke to Union Business Agent Gil Valerio about his conversation with O'Malley. He asked why the All States drivers had been terminated by PTL. Valerio said that when they "took a withdrawal card from the Union," as apparently some, but not all, did, they resigned from PTL, and when they "crossed the picket line" they resigned from the Union.

B. Discussion and Analysis

In view of my credibility determination, set forth above, and my finding, as set forth below, that Holmes was an agent of Respondent when he spoke to Matyas while the latter was crossing the picket line, I also find that Respondent, through Holmes, unlawfully threatened Matyas in violation of Section 8(b)(1)(A) of the Act. See *Hotel & Restaurant Employees Local 50 (Dick's Restaurant)*, 287 NLRB 1180, 1185 (1988), and *Teamsters Local 959 (Frontier Transportation)*, 248 NLRB 743, 744 (1980). Holmes was indeed an agent of Respondent at the time he threatened Matyas. He was the only union steward at PTL and he supervised the picketing and kept picketing schedules and lists for the picketing employees. He was permitted by business agents on the scene to talk to people crossing the picket line and no one disavowed his remarks. In these circumstances, Holmes had actual, or at the very least, apparent authority to act on Respondent's behalf when speaking to people who tried to cross the Union's picket line. See in addition to *Hotel Employees Local 50*, supra; *Teamsters Local 959*, supra at 745-746, *Carpenters Local 296 (Acrom Construction)*, 305 NLRB 822 fn. 1 (1991).

The uncontroverted evidence clearly supports the finding, which I also make, that the Union caused the termination of the on-call drivers named in the complaint, the stipulation and by Lewis at the hearing because they worked for All States and crossed the Union's picket line. O'Malley's statement to Lewis made clear that the Employer terminated the drivers because of the Union's displeasure at their having crossed the picket line. Valerio's statement to Lewis confirms O'Malley's explanation.⁴

script as "Rich [inaudible]." No formal motion or stipulation was submitted posthearing to clarify this reference and no such person appears in the stipulated list of drivers who worked for All States. There is no other evidence that this person participated in any protected concerted activities.

⁴Lewis' testimony about O'Malley's statement is arguably hearsay. But see *NLRB v. Stage Employees Local 76*, 303 F.2d 513, 519-520 (9th Cir. 1962) (motivation for termination by employer, even where it has not been charged, is important part of 8(b)(2) violation; after all it is the employer who does the terminating). However, here, it was not even objected to; the evidence is therefore admissible and may be of probative value to support findings of fact. See *Electronic Data Systems Corp.*, 305 NLRB 219 fn. 2 (1991), and cases there cited. Its reliability is enhanced by Valerio's statement to Lewis, as well as Holmes' threat to Matyas. It would thus have been admissible and probative, even in the face of an objection,

The above evidence, together with Respondent's earlier unlawful threat, shows that the Employer fired the drivers for refusing to engage in union activities—observing the Union's picket line—and that it did so because of the Union's intervention that it do so for the stated reason. In short, the Union caused or attempted to cause the Employer to discriminate against employees in violation of Section 8(a)(3) of the Act. Thus, Respondent's violation of Section 8(b)(2)—and, derivatively, of Section 8(b)(1)(A)—is clearly established. See *Radio Officers Union v. NLRB*, 347 U.S. 17 (1954); *Food & Commercial Workers District 227 (Kroger Co.)*, 247 NLRB 195, 196 (1980); *Teamsters Local 212 (Stuart Wilson)*, 200 NLRB 519, 522 (1972).

Respondent contends that these drivers were properly stricken from the seniority list—essentially terminated—because they voluntarily quit their employment with PTL or because they withdrew from the Union and stopped paying dues. There is, however, no evidence to support this contention. Respondent did not call any Union or Employer witnesses on the point, and its contention is based simply on a reference to a contractual clause providing for a break in seniority in cases of voluntary resignation and the fact that some of the drivers withdrew from the Union and stopped paying dues, despite the existence of a union-security clause in the applicable agreement. It is true that some of the drivers sought withdrawal, and actually withdrew, from the Union, and some, perhaps all, stopped paying dues. But this does not establish that they voluntarily resigned from their jobs with the Employer. Nor is there any evidence that the Union sought to enforce either the seniority or the union security provision of the contract. Thus, although the lawful enforcement of a union-security clause might provide a defense to a charged violation of Section 8(b)(2), in the absence of any evidence that this was the reason for Respondent's action in this case, the defense is constructed merely on speculation. In any event, nothing in the record controverts the evidence that the Union used its influence to cause the Employer to terminate the drivers because they crossed the Union's picket line. Respondent could, of course, use internal discipline, including fines of members, to enforce adherence to its picket line. See *Retail Clerks (Roswil, Inc.)*, 226 NLRB 80, 89 (1976). But it could not, for this purpose, cause, or even attempt to cause, job-related retribution against the disfavored members or employees. See *Radio Officers*, supra, 347 U.S. at 42.⁵

CONCLUSIONS OF LAW

1. By threatening that employee Michael Matyas might be blackballed and lose benefits for crossing Respondent's picket line, Respondent violated Section 8(b)(1)(A) of the Act.

2. By causing PTL to terminate employees Michael Matyas, Manuel P. Gonzales, John Devens, Mark P. Lewis,

because, under Board law, hearsay may be admitted and used if, as here, it is corroborated by "something more than the slightest amount of other evidence." *RJR Communications*, 248 NLRB 920, 921 (1980).

⁵Because I find that the General Counsel has established a prima facie—indeed, a conclusive—case of a violation through affirmative evidence, and the Respondent has not rebutted it, I need not reach the General Counsel's contention that the violation is established by virtue of the presumption set forth in *Operating Engineers Local 18 (William F. Murphy)*, 204 NLRB 681 (1973), and its progeny.

Carl B. Bates, Armand Hernandez, James T. Herring, Aaron King, Rafael Rivera, Howard M. Anderson, and Melvin M. Williamson because they crossed and worked behind Respondent's picket line, Respondent violated Section 8(b)(2) and (1)(A) of the Act.

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

THE REMEDY

Having found that Respondent engaged in certain unfair labor practices, I shall recommend that it be required to cease and desist therefrom, and to take certain affirmative action necessary to effectuate the policies of the Act.

I shall also recommend that Respondent be ordered to notify PTL that it has no objection to restoring the above-named employees to the oncall seniority list and that it make those employees whole for any loss of earnings or benefits they may have suffered by reason of the discrimination against them, in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed under *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁶

ORDER

The Respondent, Truck Drivers Local 705, an affiliate of International Brotherhood of Teamsters, AFL-CIO, its officers, agents, and representatives, shall

I. Cease and desist from

(a) Threatening that employees who cross its picket lines might be blackballed or lose benefits for doing so.

(b) Causing or attempting to cause PTL to terminate or remove from its seniority lists any employees who cross and

work behind Respondent's picket lines or who refrains from engaging in other union or protected concerted activity.

(c) In any like or related manner restraining or coercing employees in the exercise of their rights under Section 7 of the Act.

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

(a) Notify PTL that it has no objection to the employment of employees Michael Matyas, Manuel P. Gonzales, John Devens, Mark P. Lewis, Carl B. Bates, Armand Hernandez, James T. Herring, Aaron King, Rafael Rivera, Howard M. Anderson, and Melvin M. Williamson and to the restoration of their names to the oncall seniority list.

(b) Make the above-named employees whole for any loss of earnings or benefits they may have suffered as a result of the discrimination against them in the manner set forth in the remedy section of this decision.

(c) Post at its business office or offices copies of the attached notice marked "Appendix."⁷ Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Forward a sufficient number of signed copies of the notice to the Regional Director for posting by PTL at its place of business in places where notices to employees are customarily posted, should PTL agree to do so.

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

⁶If 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.

⁷If 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."