

Hobelmann Port Services, Inc. and International Brotherhood of Teamsters, Local Union No. 557, AFL-CIO. Case 5-CA-24302

April 28, 1995

DECISION AND ORDER

BY MEMBERS STEPHENS, COHEN, AND TRUESDALE

On October 12, 1994, Administrative Law Judge James L. Rose issued the attached decision. The General Counsel filed an exception 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 exception and brief and has decided to affirm the judge's rulings, findings, and conclusions to the extent consistent with this decision.

In his decision, the judge found that the Respondent had violated Section 8(a)(5) and (1) of the Act by its refusal to bargain with the Charging Party Union, which was the employees' certified bargaining representative. There are no exceptions to this finding and we therefore adopt it. The General Counsel has accepted, however, to the judge's failure to consider another allegation in the complaint. Specifically, as described further below, the complaint also alleged that Respondent had violated Section 8(a)(5) and (1) by its failure to supply certain information to the Union. The judge's decision is entirely silent on this aspect of the complaint. For the following reasons, we find merit in the General Counsel's exception and find that the Respondent violated the Act as alleged.

The facts show that the Union was certified as the employees' exclusive bargaining representative on November 23, 1993.¹ On November 29, the Union wrote to the Respondent, seeking to initiate bargaining and to set a date for negotiations to begin. In that letter the Union set out the following:

All matters of disciplinary action since the initial certification shall be a matter of negotiation. Please submit a list of all action taken against the employees.

On December 4, the Respondent wrote to the employees and informed them that it had decided not to contest the Union's certification and that it would begin bargaining with the Union. On December 6, the Respondent's attorney wrote the Union requesting that he be contacted to begin negotiations. On March 4, the Union wrote to the Respondent's attorney and indicated that this was "a [s]econd [r]equest for us to start negotiations." On March 15, however, the Respond-

ent's attorney wrote to the Union stating that the Respondent "will not bargain" with the Union pending the final resolution of a complaint that had been issued by the Region against the Union. That complaint was resolved by a unilateral settlement agreement entered into on June 28.

Before the judge, the Respondent contended that the complaint allegations against the Union had not been fully remedied by the settlement agreement and that the actions alleged to be unlawful in that complaint warranted the revocation of the Union's certification and also privileged the Respondent's refusal to bargain. The judge rejected that claim, found that the Respondent's bargaining obligation remained intact, and found that its refusal to bargain violated the Act.

As noted, there are no exceptions to the judge's finding that the Respondent refused to bargain with the Union in violation of the Act. This was the allegation contained in paragraph 9 of the complaint. The complaint at paragraph 10 also alleged, however, that since on or about November 29, the Union by letter had requested that the Respondent furnish the Union with "a list of disciplinary action taken against employees since the Union's certification." The complaint further alleged that this information was necessary for, and relevant to, the Union's performance of its duties as the employees' collective-bargaining representative, and that, since November 29, the Respondent had failed and refused to furnish the Union with the requested information. This refusal to supply the information was also alleged to be a violation of Section 8(a)(5). In its answer, the Respondent admitted that the Union had requested the information but it denied the allegations that the information was necessary and relevant; that it had refused to supply this information; and that it had thereby violated Section 8(a)(5) of the Act. We reject the Respondent's contentions.

It is well settled that "[i]t is a violation of Section 8(a)(1) and (5) for an employer to fail or refuse to furnish to a union any information which is relevant and necessary for the Union to have in order to fulfill its duty as bargaining representative."² The Board has also indicated that "information about employees actually represented by a union is presumptively relevant and necessary and is required to be produced."³ The Union sought a list of all disciplinary action taken against employees that it represented and thus that information was presumptively relevant and necessary and the Union was entitled to it.⁴

² *Baldwin Shop 'N Save*, 314 NLRB 114, 118 (1994).

³ *T.U. Electric*, 306 NLRB 654, 656 (1992). See also *Ohio Power*, 216 NLRB 987, 991-992 (1975).

⁴ *North American Soccer League*, 245 NLRB 1301, 1306 (1979); *American Commercial Lines, Inc.*, 291 NLRB 1066, 1163-1164 (1988); *Ryder Distribution Resources*, 302 NLRB 76, 90-91 (1991).

¹ All subsequent dates are from November 23, 1993, to June 28, 1994.

We also find that the Respondent refused to supply that information. The Union requested the information in its letter of November 29 and there is no indication in the record that the Respondent ever supplied it. In neither its December 4 letter to the employees indicating that it would bargain nor its December 6 letter to the Union stating its willingness to bargain did the Respondent indicate it was supplying the information sought. Further, there was no contact between the parties after the December 6 letter until the Union's March 4 letter in which the Union again requested bargaining. There is no indication in that March 4 letter that the information had been supplied. The Respondent in turn in its March 15 letter indicated that it would not bargain with the Union because of the complaint that had been filed against the Union, as discussed above. It did not indicate in its March 15 letter that it had supplied or was then supplying the Union with the information sought. Thus, we find that the Respondent refused to supply the information.⁵

Accordingly, we find that the Respondent's refusal to supply the necessary and relevant information that the Union sought violated Section 8(a)(5) and (1) of the Act and we shall enter the following conclusions of law, amended remedy, and Order.

CONCLUSIONS OF LAW

1. Hobelmann Port Services, Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. International Brotherhood of Teamsters, Local Union No. 557, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.
3. The Union has been at all times material the exclusive representative for the purposes of collective bargaining of the following employees:
All full time and regular part time employees employed by the Respondent at its Atlantic Terminal and Chesapeake Terminal located in Baltimore, Maryland; but excluding all office clerical employees, guards and supervisors as defined in the Act.
4. Respondent by refusing to bargain with the Union as the certified representative of its employees in the above-described bargaining unit and by refusing to provide the Union, on request, information necessary for and relevant to collective bargaining violated Section 8(a)(5) and (1) of the Act.

⁵Counsel for the General Counsel in her brief to the judge and in her brief to the Board stated that the Respondent had refused to supply the information. In its brief to the judge, the Respondent did not claim that it had, in fact, supplied the information. Further, the Respondent has submitted no exceptions to the judge's decision and no reply brief to the Board arguing that it did supply the information or that, if it did not, its refusal to supply the information was in some way privileged.

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

AMENDED REMEDY

Having found that the Respondent violated the Act by refusing to provide information that was necessary for and relevant to collective bargaining, we shall order the Respondent to cease and desist and to take certain affirmative action, i.e., to furnish the Union with the information which it has unlawfully failed and refused to furnish.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Hobelmann Port Services, Inc., Baltimore, Maryland, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 1(b) and reletter the subsequent paragraph.

“(b) Refusing to provide the Union with a list of disciplinary actions taken against employees since the certification of the Union.”

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

“(b) Provide the Union with a list of disciplinary actions taken against employees since the certification of the Union.”

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

MEMBER STEPHENS, dissenting in part.

I would dismiss the allegation as to refusal to provide information because, in my view, the General Counsel, who has the burden of proof, failed to put in sufficient evidence of the Respondent's failure and refusal to supply the requested information.

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 refuse to bargain with International Brotherhood of Teamsters, Local Union No. 557, AFL-CIO as the certified representative of our employees for purposes of collective bargaining.

WE WILL NOT refuse to provide the Union with a list of disciplinary actions taken against employees since the certification of the Union.

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

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit.

WE WILL provide the Union with a list of disciplinary actions taken against employees since the certification of the Union.

HOBELMANN PORT SERVICES, INC.

Eileen Conway, Esq., for the General Counsel.

Edward J. Gutman, Esq., of Baltimore, Maryland, for the Respondent.

James F. Wallington, Esq., of Washington, D.C., for the Charging Party.

DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge. This matter¹ was tried before me on July 18, 1994,² at Baltimore, Maryland, upon the General Counsel's complaint which alleged that the Respondent has refused to recognize and bargain with the Charging Party in violation of Section 8(a)(5) of the National Labor Relations Act.

The Respondent admits having refused to bargain with the Charging Party; however, it contends that the Charging Party has engaged in such egregious conduct that its certification should be withdrawn and the Respondent be relieved of its duty to bargain.

Subsequent to the hearing all counsel submitted briefs. Upon the record as a whole, including my observations of the witnesses, briefs and arguments of counsel, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is engaged in processing automobiles for import and export at its facility in Baltimore, Maryland. In the course and conduct of this business, the Respondent annually receives materials and supplies directly from points outside the State of Maryland valued in excess of \$50,000. The Respondent admits, and I find, that it is an employer engaged in interstate commerce within the meaning of Sections 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION

The Charging Party, International Brotherhood of Teamsters, Local Union No. 557, AFL-CIO (the Union), is admitted to be, and I find is, a labor organization within the meaning of Section 2(5) of the Act.

¹ The motion of counsel for the General Counsel to sever this case from Cases 5-CA-23383, 5-CA-23386, 5-CA-23586, and 5-CA-23997, all of which have been resolved without litigation, is granted.

² All dates are in 1994, unless otherwise indicated.

III. THE ALLEGED UNFAIR LABOR PRACTICE

A. *The Facts*

Pursuant to a Stipulated Election Agreement, on April 30, 1993, a secret-ballot election was held among the Respondent employees in the following unit:

All full time and regular part time employees employed by the Respondent at its Atlantic Terminal and Chesapeake Terminal located in Baltimore, Maryland; but excluding all office clerical employees, guards and supervisors as defined in the Act.

A majority voted in favor of representation by the Union. The Respondent filed objections to conduct affecting the results of the election, which were ultimately overruled by the Board, and the Union was certified as the employees' bargaining representative on November 23, 1993.

On November 29, 1993, John D. Clemens, the Union's president, wrote the Respondent requesting that negotiations begin for a collective-bargaining agreement. The Respondent's president, William A. Kroh, wrote a letter to "All of Our Employees" stating that his lawyers had advised that the certification of the Union could ultimately be overruled by the United States court of appeals or the Supreme Court; however, he had decided not to appeal and he had decided to begin negotiations with the Union. On December 6, the Respondent's attorney wrote the Union requesting he be contacted to begin negotiations.

Clemens held a meeting of unit employees on January 15, during which he made comments the Respondent contends violated Section 8(b)(1)(A) of the Act; and on January 26, a charge was filed. A complaint issued against the Union on March 11, alleging, in material part, that Clemens threatened unit employees with "violent retaliation" should they cross a picket line established by the Union and threatened expulsion from the Union and discharge should they accuse a fellow employee of wrongdoing.

Thus on March 15, 1994, the Respondent's attorney wrote the Union stating, "Hobelman Port Services will not bargain with your Local Union pending a final resolution of the Complaint in Case No. 5-CB-7770 by the National Labor Relations Board." This matter was resolved by a unilateral informal settlement agreement entered into on June 28. The Respondent contends here that the allegations have not been fully remedied by the settlement agreement.

Witnesses for the Respondent testified about the meeting on January 15 during which Clemens made certain statements which could reasonably be construed as the threats alleged.

Since neither the General Counsel nor the Union offered any evidence in rebuttal, and since the Respondent's witnesses were generally credible, I conclude that Clemens made the statements attributed to him.

The essence of Clemens' statements is contained in the affidavit of Betty Blackburn:

7. One of the things Clemens talked about during the meeting was that we couldn't "rat" on another brother or sister. He said that doing so could result in having our Union card pulled and being put out of a job. He said we could not rat to the Company on another broth-

er or sister who stole or got into a fight. He said we could not sign any kind of statement against a brother or sister. He said if we did the Union would pull our card and, we would no longer work for Hobelmann. He also said they'd pull our card and we'd be out of a job if we got 3 months behind on dues.

8. At one point, "Bubba" Butler asked Clemens whether if there was a strike, the Company could hire temps. Clemens said they could but if they did, he'd get other Union brother and sisters in to man a picket line at the gate and "no one would get through," or something to that effect. Clemens said something like "trust me—no one will cross the strike line, no one will even try—what ever happens, happens." He then went on to tell a story about an incident at another employer where the Union was on strike and was picketing and a cop gave a parking ticket to one of the picketers. He said that the picketers turned the cop car over and the cop wound up tearing up the ticket. The clear implication of all this to me was that they'd beat up or vandalize anyone who would try to cross a picket line.

Without accepting Blackburn's interpretation of Clemens' statements at the meeting, or the believability of some of the assertions, I do conclude he said something along these lines. Blackburn's testimony and affidavit are corroborated by her testimony and other witnesses. There is no evidence that Clemens, or the Union, however, in fact engaged in any violent conduct toward employees, supervisors or management of the Respondent, or anyone else.

The Respondent also contends that certain preelection conduct of the Union as well as a May 1994 strike against a company closely associated with the Respondent together with the statements of Clemens render the Union unfit to represent its employees.

B. Analysis and Concluding Findings

The Respondent argues that Clemens' threats are sufficiently serious that the Union's certification should be withdrawn and that it is not required to bargain with the Union. This contention is based on *Laura Modes*, 144 NLRB 1592 (1963), and subsequent cases, particularly including *Union Nacional de Trabajadores (Carborundum Co. of Puerto Rico)*, 219 NLRB 862 (1975), where there were substantial threats of physical violence during negotiations by the union's chief spokesman, followed, at the plant, by physical assaults and bodily injury and subsequent threats of violence. There the Board said, "We would not expect or require an employer to sit down and bargain with a union guilty of such misconduct absent adequate assurances against continuation thereof."

The Board has held, however, that withholding a bargain order based on the union's misconduct is an "extraordinary sanction." *M.P.C. Plating, Inc.*, 295 NLRB 583, 584 (1989), citing *New Fairview Convalescent Home*, 206 NLRB 688 (1973), enf.d. 520 F.2d 1316 (2d Cir. 1975), cert. denied 423 U.S. 1053 (1976).

Thus the issue here is whether the statements of Clemens are such as to warrant withholding a bargaining order against the Respondent. I conclude they are not. At worst, Clemens statements were abstract and took only a few minutes during a meeting of more than 4 hours. While threats by a union's

chief executive officer are not to be condoned, at stake also is the right of employees to be represented for collective bargaining by a labor organization of their choosing. Thus, as the Board noted, denying employees their right in this regard is an extraordinary remedy, and is entered only when the union engages serious acts of violence.

I conclude that the statements attributed to Clemens do not rise to the level of seriousness such that it would effectuate the policies of the Act to withdraw the Union's certification and withhold a bargaining order. But even if they did, by entering into the settlement in Case 5-CB-7770, the Union gave "adequate assurance against continuation" of the misconduct. Accordingly, I reject the Respondent's defense and I will recommend that the Respondent be ordered to bargain with the Union as the duly certified collective-bargaining representative of the Respondent's employees in the above-described appropriate unit.

The alleged preelection conduct of the Union was considered by the Board and rejected as sufficiently serious to set aside the election, and it is well settled that issues involving conduct alleged to affect the results of an election will not be re litigated in a refusal to bargain case. *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Further, this conduct could not seriously be considered a basis for excusing the Respondent from its bargaining duty.

Finally, the Respondent has not stated how or why the Union's strike against another company (even one closely associated with it) after its announced refusal to bargain is somehow egregious conduct requiring the withdrawal of a certification, or is even relevant to the issues here.

IV. REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist from this activity and to take certain affirmative action designed to effectuate the policies of the Act. Since the Respondent's unlawful refusal to bargain stopped the collective-bargaining process before it started, it is appropriate to commence the certification year when the Respondent recognizes and begins to bargain with the Union in good faith. *Thill, Inc.*, 298 NLRB 669 (1990).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³

ORDER

The Respondent, Hobelmann Port Service, Inc., Baltimore, Maryland, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with International Brotherhood of Teamsters, Local Union No. 557, AFL-CIO as the certified representative of its employees in the following unit appropriate for collective bargaining within the meaning of Section 9(c) of the Act:

All full time and regular part time employees employed by the Respondent at its Atlantic Terminal and Ches-

³If 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.

peake Terminal located in Baltimore, Maryland; but excluding all office clerical employees, guards and supervisors as defined in the Act.

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

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

(a) On request, bargain with the Union as the exclusive representative of the employees in the above-described appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement, the certification year to begin when the Respondent recognizes the Union and begins to bargain in good faith with it.

(b) Post at its Baltimore, Maryland, facility copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 5 after being signed by the Respondents 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.

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

⁴If 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."