

Suzy Curtains, Inc., and Lorraine Home Fashions of China and Amalgamated Clothing and Textile Workers Union, AFL-CIO-CLC. Cases 11-CA-13913, 11-CA-13980, 11-CA-14114, and 11-CA-14219

August 17, 1995

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS
AND TRUESDALE

On December 16, 1992, the National Labor Relations Board issued a Decision and Order in this proceeding¹ in which it found that the Respondent, Suzy Curtains, Inc., and Lorraine Home Fashions of China, a single employer, violated Section 8(a)(5), (3), and (1) of the National Labor Relations Act by: (1) insisting that its initial collective-bargaining agreement with the Union be coterminous with the Union's certification year; (2) unilaterally and without notice to or providing an opportunity to bargain with the Union, reorganizing its warehouse and promoting an employee to a supervisory position, thereby causing the bargaining unit to lose work; (3) unilaterally implementing new prebid procedures for bargaining unit positions; (4) refusing to provide the Union with requested information relating to health and safety matters affecting unit employees; (5) threatening employees with reprisals because of their support for the Union; (6) promising benefits to employees to encourage their withdrawal of union support; (7) issuing written warnings to employees because of their activities on behalf of the Union; (8) unilaterally granting wage increases, changing methods of computing pay, granting holidays, changing the procedures for selecting employees for assignments, and implementing new attendance policies; and (9) withdrawing recognition from and refusing to bargain with the Union.

On March 3, 1994, the United States Court of Appeals for the Fourth Circuit remanded the case to the Board for consideration of two threshold issues that the Respondent raised in opposition to the Board's petition for enforcement.² First, the court states that the Board must determine whether, as urged by the Respondent, a settlement agreement entered into on October 7, 1992, between the Union and Charlotte Curtains, Inc., the purchaser of and successor to Suzy Curtains, Inc., resolved the unfair labor practice charges involved in the instant case. While the settlement agreement is captioned with Board case reference numbers of a separate unfair labor practice proceeding,³ and does not cite the reference numbers covering the in-

stant proceeding,⁴ the court directs the Board to resolve whether there is merit to the Respondent's contention that the parties "clearly understood" that all cases regarding Charlotte would be settled through that agreement. Second, the court directs the Board to determine whether, in view of the Respondent's cessation of manufacturing operations at Charlotte Curtains, Inc., the remaining warehouse and distribution employees working at Lorraine Home Fashions, compose an appropriate unit as to which the Respondent's continuing bargaining obligation should apply.

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

The Board accepted the court's remand on May 2, 1994, and on May 12, 1994, invited the parties to submit statements of position with respect to the remanded issues. On June 20, 1994, the Respondent and the Charging Party filed statements of position. Thereafter, on September 28, 1994, the Board issued a Notice to Show Cause⁵ why it should not reaffirm its unfair labor practice findings and bring the extant unfair labor practices before the court of appeals for enforcement.

The Respondent, the Charging Party, and the General Counsel each filed timely statements of position in response to the Notice to Show Cause. The General Counsel additionally filed an amended statement of position and the Respondent filed a response.

I. THE POSITIONS OF THE PARTIES

The Respondent, both in its position on remand and in response to the Board's Notice to Show Cause, essentially reasserts the twin defenses it raised before the court of appeals. The Respondent states first that the parties' settlement agreement was intended to encompass all outstanding unfair labor practices involving Charlotte Curtains as successor to Suzy Curtains, including those litigated in the underlying proceeding. The Respondent asserts that it has satisfied its obligations arising out of all unfair labor practice allegations involving those entities by fulfilling the settlement's notice posting requirement, i.e., by mailing copies of the "Notice to Employees" to all former Suzy/Charlotte Curtains' unit employees. Further, the Respondent points out that because Lorraine Home Fashions was included on the settlement agreement's caption and was listed as an "Employer" on the "Notice to Employees" that the Respondent posted pursuant to the settlement agreement, that it too was a part of the settlement agreement. Second, the Respondent contends that the certified unit to which the bargaining order pertained—composed of production and maintenance

¹ 309 NLRB 1287.

² 19 F.3d 11 (mem.).

³ Cases 11-CA-14596 and 11-CA-14706, which were referred to by the court as *Suzy II*.

⁴ Cases 11-CA-13913, 11-CA-13980, 11-CA-14114, and 11-CA-14219.

⁵ The Notice to Show Cause incorrectly referred to Case 11-CA-14219 as Case 11-CA-14210. We correct this typographical error.

employees working out of the Suzy Curtains facility, as well as shipping and receiving employees working out of the Lorraine Home Fashions facility—has suffered dissolution and is no longer appropriate for bargaining. Thus, it contends, the bargaining order is moot and should be dismissed. The Respondent relies on the following factors in support of its position: (1) it has closed its manufacturing operations at Charlotte Curtains (Suzy's successor), rendering that entity defunct; (2) with the cessation of manufacturing, it no longer employs any production and maintenance employees; (3) its remaining work force consists of only 26 warehouse and distribution employees working out of the Lorraine Home Fashions facility; (4) only 3 of the 26 currently employed warehouse and distribution employees were working for the Respondent at the time the Union was certified; and (5) the Union has abandoned its representational interest in the unit.

The Charging Party asserts that the underlying unfair labor practices were not included within the scope of the settlement agreement, as evidenced by: (1) the language of the agreement, which expressly excludes Lorraine Home Fashions from its terms; and (2) letters written by the Respondent's counsel acknowledging that Lorraine's unfair labor practices were not encompassed by the settlement. In addition, the Charging Party asserts that the sale of a part of a business does not necessarily, and did not in this case, result in the fatal fragmentation or the dissolution of a bargaining unit. While intervening events and the passage of time may have had a corrosive effect on the originally certified unit, the employees who remain in Lorraine's employ still constitute an appropriate unit for bargaining, i.e., warehouse employees.

The General Counsel argues essentially the same points as the Charging Party. He states that Lorraine Home Fashions was not only expressly excluded from the terms of the settlement agreement, but also that the General Counsel reiterated and emphasized this exclusion in writing to the Respondent. Second, the General Counsel contends that the closing of the Charlotte Curtains' portion of the business did not result in the dissolution of the entire bargaining unit, but merely removed a part of it. The part of the unit that remains (shipping and receiving employees) is a clearly defined component of the original unit, engaged in the same type of work, under the same conditions, and under the same ownership and supervision as had been the case when the unit was certified. In such circumstances, the unit remains viable as does the outstanding bargaining order.

II. ANALYSIS

Having considered the record, the court's decision, and the parties' briefs, we conclude that there are outstanding, unremedied unfair labor practices that are

amenable to enforcement proceedings and that the Respondent's remaining unit employees, who perform shipping and receiving work out of the Lorraine Home Fashions facility, comprise an appropriate unit for bargaining.

III. THE EXTANT UNFAIR LABOR PRACTICES

In view of the various contentions by the parties, our review of the extent and application of the parties' settlement here requires an examination of both the format and text of the settlement agreement itself. The caption of this agreement, as the Respondent points out, includes the name Lorraine Home Fashions, as well as Suzy Curtains and its successor, Charlotte Curtains. The inclusion of Lorraine in the caption, however, does not by itself establish the scope of the agreement. Inasmuch as the Board had previously found that Lorraine Home Fashions and Suzy Curtains together comprised a single employer, the inclusion of Lorraine in the heading is the appropriate way of identifying the parties to the proceeding. The settlement agreement could encompass all or only some of the allegations which were the subject of the charges against the single employer Respondent.

Further, the case reference numbers set forth in the caption refer to an unfair labor practice proceeding (described by the court as *Suzy II*) entirely separate from the instant case, in which Suzy Curtains and Lorraine Home Fashions were named as the Respondent. The absence of reference numbers applicable to the instant case (*Suzy I*) strongly suggests that the unfair labor practices litigated in this case were not encompassed by its terms. Thus, the inclusion of the name of Lorraine Home Fashions in the caption of the agreement is not dispositive of the scope of the agreement as applied to the instant proceeding.

Turning to the text of the settlement itself, we note that it states, inter alia, that it covers only those allegations in Cases 11-CA-14596 and 11-CA-14706 (*Suzy II*) that pertain to Respondents Curtains and Charlotte and that it "does not cover allegations in said cases relating to Respondent Fashions." It also states that the settlement "does not cover paragraphs 20(a) and 28(a) through (g) as related to Respondent Fashions and as described in the Consolidated Complaint."⁶ These statements in the body of the agreement make clear that Respondent Lorraine Home Fashions is excluded from its terms.⁷

⁶The allegations encompassed by those paragraphs include the solicitation of grievances and the promise to remedy them and the refusal to bargain collectively with the Union through direct dealing, unilateral changes, failure to provide information, and other acts inconsistent with its bargaining obligation to the Union.

⁷Anomalously, this clear language appears to be undercut by the content of the settlement's accompanying "Notice to Employees" which refers to alleged unlawful conduct described within the paragraphs of the complaint identified as excluded from the settlement's

Reinforcing the exclusionary language in the text is the absence of any reference in the “Notice to Employees” posted by the Respondent pursuant to the settlement agreement to unfair labor practices that arose in the Lorraine facility. While the notice contains cease-and-desist language relating to conduct not encompassed within the allegations of *Suzy II*, and refers extensively to unfair labor practice findings within *Suzy I*, we note that each of these references relates to conduct that occurred in the Suzy Curtains facility, involving employees who performed production and maintenance work. In fact, the only unfair labor practice findings from the Board’s underlying decision which are omitted from the settlement’s notice are the Respondent’s unilateral reorganization of its warehouse department (which operated entirely within the Lorraine facility) and the removal of work from the unit as a result of the Respondent’s promoting a warehouse leadperson to a supervisory position. The failure of the notice to address those aspects of this proceeding which uniquely affected the Lorraine facility is consistent with the settlement text’s specific exclusion of Lorraine Home Fashions from its reach. We conclude that these distinct, identifiable unfair labor practices which arose within the Lorraine facility are not encompassed by the settlement and are, therefore, unsettled, unremedied, and amenable to further enforcement proceedings.

Moreover, we find that the record establishes that the Respondent understood that the unfair labor practices involving Lorraine were not settled by the disputed agreement. Appended to the Respondent’s statement of position as part of “Attachment D” is a letter dated June 22, 1993, from the Respondent’s counsel to the Board’s Regional compliance officer. In protesting the accuracy of including the name Lorraine Home Fashions in the caption of the notice, the letter asserts: “[T]he Region would not acknowledge that the notice was not correctly published with regard to matters alluding to Lorraine Home Fashions of China. As clearly stated on the settlement agreement, the matter was not to settle any matters relating to Lorraine Home Fashions of China.” Thus, it appears that the Respondent was fully aware that the settlement did not extend to unfair labor practice issues involving Lorraine and that it objected even to the notice’s reference to Lorraine.⁸

coverage. While we acknowledge that this internal inconsistency creates ambiguity regarding the scope and coverage of the settlement agreement as pertaining to the allegations of *Suzy II*, we find it unnecessary to resolve this issue as it is not before us in this proceeding.

⁸In any event, the Respondent’s current position statement does not argue that the unfair labor practices involving Lorraine have been remedied. It focuses instead on the resolution of all Suzy/Charlotte Curtains-related issues. The Respondent merely attempts to dismiss the seriousness of the Lorraine-based violation as “a very minor matter,” not requiring any monetary remedy, and

Accordingly, based on the foregoing evidence, we conclude that the settlement agreement does not encompass all aspects of this proceeding, that the parties understood the limitations of the settlement, and that further proceedings seeking enforcement of the Board’s original order as applied to Lorraine Home Fashions of China are appropriate.

IV. THE VITALITY OF THE BARGAINING UNIT

Turning to the issue of unit appropriateness, we find that while the certified unit has undergone certain changes since the issuance of our original Decision and Order, these changes have not rendered the existing unit inappropriate such that a bargaining order may not properly apply.

The unit in which the Union was certified was composed of over 150 employees, including both production and maintenance employees working out of the Suzy Curtains facility as well as shipping and receiving employees working at the Lorraine Home Fashions warehouse.⁹ The manufacturing processes performed at Suzy Curtains formed the larger part of the Respondent’s business and, according to the Respondent, accounted for approximately 130 of the unit employees, while Lorraine employed about 30. The Respondent described Suzy’s operation as the “manufacture [of] curtains in a cut and sew production process” and stated that Lorraine’s “warehouse and distribution facility was incidental but unrelated to the manufacturing process and involved the importation of curtains from China for distribution.” The Respondent offers the following description of its business after the cessation of its manufacturing operation:

[O]nly 40 total employees, including warehouse and distribution employees as well as supervisors and administrative employees, remained with Lorraine Home Fashions. Today, only 26 employees remain in shipping and receiving positions in the warehouse and distribution facility. Out of the 26, only 3 employees currently at Lorraine Home Fashions in the shipping and receiving portion were employed at the time of the 1989 election. Moreover, out of the [certified] unit . . . only shipping and receiving employees remain as part of the original bargaining unit. No production employees remain.

noting that the ordered remedial bargaining obligation “would be vitiated” as a result of the unit’s dissolution.

⁹The unit stipulated by the parties to be appropriate and subsequently certified by the Board is described as:

All production and maintenance employees, shipping and receiving employees, plant clericals, and assistant supervisors at the Employers’ 4337 Barringer Drive, Charlotte, North Carolina facility; excluding all office and clerical employees and guards and supervisors as defined in the Act.”

Relying on what it describes as virtually the identical facts in *Plymouth Shoe Co.*, 185 NLRB 732 (1970), the Respondent contends that when a unit has undergone such drastic diminution and change in composition, the Board should conclude that the original unit no longer exists and that Lorraine has no obligation to bargain. The Respondent further asserts that employee turnover and the Union's hiatus in representational activities vis-a-vis the Lorraine employees supports its contentions.

We find that the Respondent's reliance on *Plymouth Shoe* is misplaced and that its position lacks merit. *Plymouth Shoe* is a representation case addressing the circumstances under which a question concerning representation continues to exist following basic changes in the employer's operation. In that case, an election was held in the petitioned-for unit of manufacturing and shipping room employees. The Board thereafter set the election aside on the basis of the petitioner's objections. Before a second election could be ordered, however, the employer discontinued its manufacturing operations, but continued to import shoes for redistribution. The result was a fundamental change in the nature and scale of the operation, the elimination of most job classifications, and the diminution of the unit to less than 4 percent of its previous size. In light of the dramatic change in scope of the original bargaining unit, the Board determined that the original petition no longer provided the basis for a determination of representative because a new question concerning representation had arisen.

This case, by contrast, does not involve preelection proceedings to determine whether, in light of intervening operational changes an initial petition can support a second election. Rather, the unfair labor practice case before us addresses an employer's obligation to bargain with the certified bargaining representative of its unit employees to remedy unlawful conduct that was found to exist prior to the employer's implementation of operational changes that changed the unit's scope. We note that during the representation case involving the parties to this proceeding, the parties stipulated to the appropriateness of a single unit combining Suzy Curtain's production and maintenance employees with Lorraine Home Fashion's shipping and receiving employees. Both entities were physically located at the same address and comprised a single employer, and the Board found the wall-to-wall unit appropriate. Further, the Union was the certified collective-bargaining representative of the unit employees when the Respondent violated its bargaining obligations. Based on these distinctions, we find that *Plymouth Shoe* is inapposite.

In this case, the Respondent's sale of part of its business, after a Board determination that it has unlawfully disregarded its bargaining obligations with the

certified representative of its employees, does not vitiate its outstanding obligation to recognize and bargain with the Union as the representative of the remaining unit employees. Although it is no longer engaged in manufacturing, the Respondent continues to perform shipping and receiving work at the same location from which it had previously operated. By the Respondent's own description, Lorraine employs about the same number of unit employees now (26) as it did at the time of the election (approximately 30). Lorraine's employees currently perform the same type of work under the same conditions and supervision as they did when the manufacturing operation existed. The bargaining unit is still a wall-to-wall, plantwide unit, albeit composed exclusively of warehouse-type employees and therefore more homogenous than it had been at the time of the certification.¹⁰ We find that the changes brought about as a result of the Respondent's termination of its manufacturing business did not destroy the bargaining unit.¹¹

Finally, we are not persuaded by the Respondent's contentions that employee turnover and a hiatus in representational activity by the Union establish that the Union no longer enjoys majority support. Rather than abide by its bargaining obligations, the Respondent has been contesting the Board's Order through litigation. The Respondent's course of unlawful conduct, beginning shortly after the Union's certification, has deprived unit employees of meaningful representation and has undermined the Union's representational status. Circumstances which have resulted from the Respondent's own misconduct do not provide a basis for escaping remedial obligations. See *Franks Bros. Co. v. NLRB*, 321 U.S. 702, 705-706 (1944).

V. CONCLUSION

We have determined that there are outstanding unfair labor practices that were not covered by the parties' settlement agreement and that are therefore unremedied, and that the remaining warehouse and distribution employees working at Lorraine Home Fashions constitute an appropriate unit as to which the Respondent obligated to bargain in accordance with the terms of our previous Order.

¹⁰ Because the Employer is now engaged exclusively in a shipping and receiving/warehouse-type operation, it is not necessary to examine the traditional criteria concerning the appropriateness of a separate warehouse unit, i.e., geographic separation, functional integration, skills, supervision, etc. Instead, this plantwide, single facility unit which happens to be composed of warehouse employees is presumptively appropriate.

¹¹ See *Hydrolines, Inc.*, 305 NLRB 416, 422-423 (1991) (respondents were successor employers where they took over a significant portion of the predecessor's operation and continued to operate the acquired portion in a similar manner; the resulting unit was not an inappropriate "fragmentation" of the original unit but a separate appropriate unit).

ORDER

The National Labor Relations Board reaffirms the order set forth in the underlying proceeding that the

Respondent, now limited to Lorraine Home Fashions of China, Charlotte, North Carolina, its officers, agents, successors, and assigns, shall take the action set forth in the Order.