

Jabin Industries, Inc., d/b/a Safe-Way Door and Teamsters Local Union No. 364, International Brotherhood of Teamsters. Cases 25-CA-23144, 25-CA-23182, and 25-CA-23199-2

February 13, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

On August 30, 1995, Administrative Law Judge Marion C. Ladwig issued the attached decision. The Respondent 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 brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

We agree, for the reasons stated by the judge, that the Respondent did not have a good-faith doubt of the Union's majority status when it withdrew recognition of the Union on April 8, 1994. We find it unnecessary to address whether the Respondent had a good-faith doubt of the Union's majority status at any earlier time.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Jabin Industries, Inc., d/b/a Safe-Way Door, Warsaw, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Walter Steele, Esq., for the General Counsel.

J. Michael O'Hara, Esq., of Fort Wayne, Indiana, for the Respondent.

DECISION

STATEMENT OF THE CASE

MARION C. LADWIG, Administrative Law Judge. These consolidated cases were tried in Warsaw, Indiana, on July 10-11, 1995. The charges were filed April 12 and May 2 and 9, 1994,¹ and the complaint was issued July 19.

On January 8 the bargaining unit employees voted 22 to 11 in a UD election against withdrawing the agency-shop provision in the collective-bargaining agreement. On February 14 employee James Kintzel showed Plant Superintendent William Shively a decertification petition bearing the signatures of 14 of the approximately 31 bargaining unit employees. A few days later he informed Shively that he had obtained 5 additional (totaling 19) signatures. Without expressing any doubt that the Union still represented a majority

of the employees, Shively proceeded to engage in seven bargaining sessions with the Union (from March 1 through April 7) for an agreement to succeed the expiring 3-year agreement.

On April 8, after receiving a notice that Kintzel's RD decertification petition had been filed, Shively stated at the eighth bargaining session that he did not believe the Union represented a majority of the employees. He withdrew recognition from the Union and refused to engage in any further negotiations until the decertification issue was resolved. By then, 6 of the 19 petition signers had either quit or retired and a 7th signer had joined the union negotiating committee. The remaining 12 current employees on the petition constituted less than 39 percent of the 31 employees in the bargaining unit. Employees later voted 17 to 1 in a union meeting to go on strike because of the Company's refusal to bargain.

The primary issues are whether the Company, the Respondent, unlawfully (a) withdrew union recognition on April 8 and (b) deducted the cost of drug screening from striking employees' wages, violating Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act).

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

FINDINGS OF FACT

I. JURISDICTION

The Company, a corporation, manufactures overhead garage doors at its facility in Warsaw, Indiana, where it annually ships goods valued over \$50,000 directly outside the State. 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 and that Teamsters Local 364 is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Refusal to Bargain*

1. Deauthorization vote and decertification petition

Following the Union's certification as the bargaining representative on December 11, 1990, the Company and the Union signed a 3-year collective-bargaining agreement (G.C. Exh. 2), effective from April 1, 1991, through April 1, 1994. The agreement provided (art. 1, secs. 2 and 3A) for an agency shop and the checkoff of dues.

On January 8, 1994, the employees voted 22 to 11 in Case 25-UD-216 against "withdrawing the authority of the bargaining representative to require, under its agreement with the Employer, that employees make certain lawful payments to the Union in order to retain their jobs" (Tr. 40; G.C. Exhs. 9, 10).

On January 24 the Union sent a contract opener letter, notifying the Company that it desired to negotiate changes in their agreement (Tr. 11; G.C. Exh. 3). Before the negotiations began on March 1 and despite the prounion vote by a large majority of the employees in the January 8 UD election, installer Jim Kintzel had several conversations with

¹ All dates are in 1994 unless otherwise indicated.

Plant Superintendent William Shively about a decertification petition.

Kintzel went to Shively about February 8 “to show him that I was getting ready to do something” to get rid of the Union and showed him two blank petitions. Shively suggested the simpler wording, which read: “We, the undersigned employees of Safe Way Door, Warsaw, IN, file this petition to decertify and remove Teamsters Union Local 364 from our facility.” (Tr. 124–125, 161, 196–200, 216; R. Exh. 4.)

Kintzel began circulating the petition and by February 14, he had obtained 14 employee signatures. On that date Kintzel showed the petition to Shively. Kintzel asked for Shively’s assistance in identifying 1 of the 14 names and said he had “five more people” who would sign the petition. (Tr. 109, 125–127, 162–163, 201–203.)

After getting 3 additional signatures on February 15 and 2 on February 18, Kintzel told Shively that he had a total of 19 signatures on the petition. At Kintzel’s request, Shively gave him the address of the Regional Office. Later, Kintzel asked Shively for the present “number of employees in unit” to place on the RD decertification petition (R. Exh. 3). As Kintzel recalled, Shively got the number 31 from the payroll records of union dues deductions. (Tr. 109, 127–128, 162, 166, 172–173, 203, 207–212, 216.)

Filing the RD decertification petition was delayed until after April 1, the expiration date on the collective-bargaining agreement (Tr. 129–131, 160, 164–165, 173–174, 203–208, 216–217, 225).

2. Negotiations for new agreement

When Kintzel informed Plant Superintendent Shively in February that 19 employees had signed the decertification petition, Shively undoubtedly knew that these employees constituted a clear majority of the approximately 31 employees then on the payroll. Yet, this antiunion effort occurred the month after a large majority (two-thirds) of the employees had voted in favor of the Union in the formal NLRB UD election.

Under these circumstances, Shively proceeded to bargain for a new agreement, without expressing any doubt that the Union had the support of a majority of the unit employees. He met in negotiations with the Union on March 1, 7, 16, 21, and 29 and on April 6 and 7. (Tr. 13, 15, 12–20, 23, 30, 32; G.C. Exhs. 4–8.) By April 7, as he testified (Tr. 149–152), “I thought” the Company and Union “were close to reaching an agreement,” except that in the last two bargaining sessions, the Union “took a very, very hard position on two items”—a union-shop provision and a provision for notice to the Union before discharging an employee—telling him that “They either got them, or they were going to strike.”

By the time of this April 7 bargaining session, the 19 employees opposing the Union on Kintzel’s February decertification petition had been reduced in number to 12. Six of the 19 had quit or retired. They were Rick Albert, Lewis Blankenship, Dick Felkner, Doug Howard, Tony Washington, and Jackie Watkins. A seventh signer, James Bradley, had joined the union negotiating committee, indicating his support of the Union. The remaining 12 employees constituted less than 39 percent of the 31 current employees in

the bargaining unit. (Tr. 32, 95, 137, 142, 166–167, 175–178, 185, 228–229; G.C. Exh. 13; R. Exh. 4.)

The signatures of all except two of the seven employees, Blankenship and Washington (who signed the petition on February 18), were on the decertification petition when Kintzel showed it to Shively on February 14. Shively was therefore aware at the time of the April 7 negotiations that the signatures of 19 employees who signed the petition in February, before the negotiations began, no longer indicated that a majority of the current employees were opposed to the Union. Excluding Blankenship and Washington (who Shively may not have known had signed the petition), only 14 of the 19 employees could be counted as current employees who may have still been opposed to the Union after the weeks of negotiations. Those 14 employees were clearly fewer than a majority of the 31 current employees in the bargaining unit.

3. Withdrawing recognition

On April 8 Shively received formal notice of the filing of Kintzel’s RD decertification petition (Tr. 135; R. Exhs. 2, 3). Despite his knowledge that he had no basis for believing that the Union did not represent a majority of the employees at that time, Shively nevertheless withdrew recognition of the Union and refused to engage in further negotiations. At the beginning of the eighth bargaining session that evening, in his words (Tr. 138–139, 169), Shively told Business Agent Douglas Merrill to “wait a minute” before taking out his papers, that

I received notice today, the same as you did, that there is a decert. petition on file at the Labor Board. With the objective evidence that we have and based on advice of counsel, we are going to terminate negotiations until this issue is settled.

. . . .

What I told him was that [the] majority of our employees had signed a decertification petition. And that means . . . the Union no longer represented the majority.

In response, as Merrill credibly testified (Tr. 37, 40):

A. I took the position that we definitely wanted to keep negotiating. We believe that we did represent the majority of the employees. And that *the majority of the employees were members of the Union* [emphasis added]. And that just a couple months prior, like in January, we had won a UD election there. We felt strongly that we represented a majority of the employees.

. . . .

A. I strongly recommended that we continue bargaining. And I thought that we did represent a majority of the people and that we wanted to continue bargaining.

Q. All right. And what was Mr. Shively’s response, if any?

A. He refused to do so. He would not schedule any more meetings.

Eighteen employees who attended a union meeting on April 26 voted 17 to 1 to strike because of the Company’s refusal to bargain. The strike, which began on May 2, was abandoned in mid-June, when the strikers returned to work. (Tr. 47–51, 85–86.)

4. Contentions of the parties

The General Counsel cites in his brief (Br. 8 fn. 1) the evidence that 6 of the 19 petition signers “were no longer employed” on April 8 and contends (Br. 6) that the Company neither has shown that the Union “did not in fact have majority support,” nor has presented evidence of “a sufficient objective basis for a reasonable doubt of the Union’s majority status at the time of the [Company’s] refusal to bargain.”

The Company admits in its brief (Br. 2) that around the middle of February, Plant Superintendent Shively “reviewed” Kintzel’s decertification petition bearing 14 employee signatures, but it ignores Shively’s admission at the trial that among these 14 employees, 4 of them were no longer employed on April 8 and 1 had been serving on the union negotiating committee. The Company also admits (at p. 3) that Shively made a head count on April 8 and determined that there were then 31 employees in the bargaining unit.

Thus, in effect, the Company is admitting Shively’s knowledge on April 8 that there were no longer 19 current employees opposing the Union. Excluding 5 employees from the 19 petition signers (but not Blankenship and Washington, who signed the petition on February 18, 4 days after Shively reviewed it, although they also had quit), only 14 of the 19 employees who signed the February petition could be counted as opposing the Union on April 8.

Nevertheless the Company contends in its brief (Br. 5) that based on Shively’s information that there were 19 employee signatures on the petition, his head count of 31 employees in the unit on April 8, and advice of counsel, he terminated negotiations because of a “good faith belief that the Union no longer represented a majority of its employees.”

Ignoring the Company’s 7 bargaining sessions with the Union after it learned in February that 19 employees had signed the decertification petition, the Company makes the obviously unfounded contention (Br. 5) that had it “continued to negotiate with Local 364 [on April 8], once it was aware [supposedly in February] that the Local did not represent a majority of the union employees, it would have committed an unfair labor practice.”

5. Concluding findings

As held in *Alexander Linn Hospital Assn.*, 288 NLRB 103, 107 (1988), a union

enjoys a rebuttable presumption of majority status upon the expiration of a collective-bargaining agreement. An employer who refuses to bargain with an incumbent union may rebut the presumption of majority status by establishing either (1) that at the time of the refusal to bargain the union in fact did not enjoy majority status, or (2) that the refusal was predicated on a good-faith and reasonably grounded doubt, supported by objective considerations, of the union’s majority status.

Clearly the Company has not established (1) that the Union “in fact did not enjoy majority status.” There is no evidence disputing Business Agent Merrill’s statement on April 8 that “the majority of the employees were members of the Union.”

It is also clear that the Company has not established (2) that its refusal to bargain on and after April 8 “was predicated on a good-faith doubt based on objective considerations of the Union’s majority status.” Besides the advice of counsel, the Company was relying solely on the fact that 19 employees signed the decertification petition in February, even though Shively knew on April 8 that 4 of the 19 employees were no longer employed and 1 of the 19 employees had been serving on the union negotiating committee.

Moreover, Shively’s conduct after he learned in February that there were 19 signatures on the petition demonstrates that he—apparently because of the prounion vote by a large majority of the employees in the formal NLRB UD election in January—did not then have a good-faith doubt of the Union’s majority status. Despite his knowledge of the 19 signatures, Shively engaged in seven bargaining sessions with the Union without expressing any doubt that the Union had the support of a majority of the unit employees.

As found, Shively first expressed a doubt about the Union’s majority status on April 8, after the Union on April 6 and 7 “took a very, very hard position on two items,” including a proposed union-shop provision, telling him that “They either got them, or they were going to strike.” His receipt of the decertification notice was obviously used as a pretext for withdrawing recognition of the Union and refusing to bargain.

I find that the Company has failed to establish a good-faith doubt of the Union’s majority status, even at the beginning of the negotiations when the 19 petition signers constituted a majority of the unit employees, and clearly not on April 8 after a substantial number of the 19 petition signers had quit or retired.

I therefore find that the Company unlawfully withdrew recognition of the Union on April 8, 1994, and since then has failed and refused to recognize and bargain with the Union in violation of Section 8(a)(5) and (1) of the Act and that the May 2, 1994 strike was an unfair labor practice strike.

B. Deduction from Strikers’ Wages

All new employees, considered probationary for the first 60 days of employment, were required to take a drug test. Before April 6 the Company deducted \$29 from their next paycheck for a negative drug test and reimbursed the \$29 if the employee remained employed 60 days. On April 6 the Company, for bookkeeping purposes, adopted a policy of not deducting the \$29 unless the employee failed to remain employed 60 days. It then deducted the \$29 from the employee’s last paycheck. (Tr. 91.)

Because of the great turnover, the total cost of the drug testing was substantial. The Company hired 170 employees in 1993 and 277 employees in 1994 (the year the strike occurred). (Tr. 122.)

On May 6 the Company deducted \$29 from the paychecks of four probationary strikers, Michelle Crum, Lori Lester, Estel Lewis, and Henry Prater. Prater testified that after he completed his 60 days of work following the strike, the Company reimbursed the \$29. (Tr. 91, 190.)

The General Counsel contends that deducting the cost of the negative drug tests from the four strikers’ paychecks (as it had done from all probationary employees’ paychecks before April 6) was discrimination against the employees as

strikers, in violation of Section 8(a)(1) and (3) of the Act. I disagree.

As the Company points out in its brief (Br. 4), it deducted the cost from the four strikers' last paycheck for work performed before the strike because it "had no assurance that these employees would return to work, and therefore [it] deducted the cost from the only paycheck it could be certain the employees would receive."

I find that this was a legitimate, nondiscriminatory reason for making the deduction. I therefore find that the Section 8(a)(1) and (3) allegation must be dismissed.

CONCLUSIONS OF LAW

1. By withdrawing recognition of the Union on April 8, 1994, and by failing and refusing since that date to recognize and bargain with the Union, the Company has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

2. The following is an appropriate bargaining unit:

All production and maintenance employees, including truck drivers, of Safe-Way Door at its Warsaw, Indiana facility, but excluding all office clerical employees, professional employees, guards, and supervisors as defined in the Act.

3. The Company did not unlawfully deduct the cost of drug screening from striking probationary employees' wages.

REMEDY

Having found that the Respondent has 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.

The Respondent having unlawfully withdrawn recognition of the Union on April 8, 1994, it must upon request bargain with the Union, rescind any unilateral changes in terms and conditions of employment since that date, and make the unit employees whole for any losses resulting from the unilateral changes, as prescribed in *Ogle Protective Service*, 183 NLRB 682 (1970), plus interest as computed in *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 recommended²

ORDER

The Respondent, Jabin Industries, Inc., d/b/a Safe-Way Door, Warsaw, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Teamsters Local Union No. 364 as the exclusive representative of the employees in the bargaining unit.

²If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) 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 following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All production and maintenance employees, including truck drivers, of Safe-Way Door at its Warsaw, Indiana facility, but excluding all office clerical employees, professional employees, guards, and supervisors as defined in the Act.

(b) On request of the Union, rescind any unilateral changes in terms and conditions of employment since April 8, 1994, and make the unit employees whole for any losses resulting from the unilateral changes, in the manner set forth in the remedy section of the decision.

(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 Warsaw, Indiana, copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 25, 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.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

³If 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.

WE WILL NOT refuse to bargain with Teamsters Local Union No. 364.

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:

All production and maintenance employees, including truck drivers, of Safe-Way Door at its Warsaw, Indiana facility, but excluding all office clerical employees, pro-

fessional employees, guards, and supervisors as defined in the Act.

WE WILL, on request of the Union, rescind any unilateral changes in terms and conditions of employment since April 8, 1994, and make you whole for any resulting losses, plus interest.

JABIN INDUSTRIES, INC., D/B/A SAFE-WAY
DOOR