

Cassis Management Corporation and Service Employees International Union, Local 32E, AFL-CIO. Case 2-CA-29311

August 29, 1997

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On September 30, 1996, Administrative Law Judge Raymond P. Green issued a decision in this case finding that the Respondent discharged the entire bargaining unit, including Charles W. Morrow, in violation of Section 8(a)(3) and (1) of the Act, that Donald Hoy was a supervisor within the meaning of Section 2(11) of the Act, that the authorization cards Hoy solicited were invalid, and that there was no basis for a bargaining order under the principles enunciated in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). On April 14, 1997, the National Labor Relations Board issued a decision adopting the judge's findings concerning the unlawful discharge of the bargaining unit employees, but the Board reversed the judge's findings concerning Hoy's supervisory status, the validity of the authorization cards, and the appropriateness of a bargaining order.¹ Thus, the Board found that Hoy was not a statutory supervisor, that he should be offered reinstatement and backpay along with the rest of the bargaining unit, that the authorization cards he solicited were valid, and that the cards demonstrated that a majority of the employees in the unit wished to be represented by the Union. The Board further found that, because of the Respondent's egregious unfair labor practices, a bargaining order was presumptively appropriate.

The Board, however, did not order the Respondent to bargain with the Union because of the need to resolve a conflict in the hearing testimony as to facts concerning the Respondent's allegation that union officials had engaged in picket line misconduct. The Respondent claims that the alleged misconduct precludes the issuance of a bargaining order under the doctrine set forth by the Board in *Laura Modes Co.*, 144 NLRB 1592 (1963). The Board remanded the matter to the judge for the purpose of making credibility resolutions concerning the conflicting testimony, and findings of fact and conclusions of law concerning the Respondent's defense based on *Laura Modes Co.*

On May 7, 1997, the judge issued his supplemental decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The Board has considered the supplemental decision and the record in light of the exceptions and briefs and

¹ 323 NLRB 456 (Chairman Gould and Member Fox; Member Higgins dissenting).

has decided to affirm the judge's rulings, findings,² and conclusions set forth in the supplemental decision, and to issue the Order set forth below,³ which supercedes the order previously entered in this proceeding.⁴

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

³ On May 12, 1997, the Respondent filed a motion for reconsideration and to reopen the record, and the General Counsel subsequently filed a reply. In its motion for reconsideration, the Respondent contends, among other things, that in reaching its conclusion that Hoy was not a statutory supervisor, the Board erroneously found on p. 2 of its decision that "Hoy and the other unit employees met with [Property Manager] Shea daily in the office at 8 a.m. and discussed the work that needed to be done." The Respondent asserts that the Board's finding is inconsistent with Shea's testimony that she did not report to work until 9 a.m.

Even assuming arguendo that Shea was not present for the 8 a.m. meetings, the Board would still reach the same result. The question whether Shea was present at the morning meetings is immaterial because the Board found that Hoy's role at those meetings was not indicative of supervisory status. Thus, the Board found that at the daily meetings Hoy merely informed "his coworkers if something had occurred during the night that they were required to deal with before they returned to their normal routine," that "no independent judgment was required to determine what problems constituted emergencies," and that "Hoy's announcements of emergency repairs cannot be considered evidence of supervisory authority." *Cassis*, supra.

In all other respects, the Respondent's motion for reconsideration is denied as raising nothing not previously considered and as lacking in merit.

In its motion to reopen the record, the Respondent asserts that Donald Hoy is deceased, and therefore a reinstatement order as to Hoy is not appropriate. The General Counsel acknowledges that Hoy is deceased, and therefore submits that there is no need to reopen the record on this matter. Accordingly, we shall modify the Order by deleting Hoy's name from the list of employees to be reinstated and by providing that his estate shall be made whole.

The Respondent also asserts that the record must be reopened to demonstrate changed circumstances affecting the reinstatement of the discriminatees. First, the Respondent contends that it should be permitted to offer evidence that certain of the discriminatees are not entitled to reinstatement, because they were unable to perform their work in a satisfactory manner. We find that this issue either was, or should have been, litigated by the Respondent during the underlying unfair labor practice hearing. In addition, we find that the Respondent has failed to demonstrate that the evidence it seeks to adduce on this matter is either newly discovered since the close of the hearing or was previously unavailable. See sec. 102.48(a)(1) of the Board's Rules. Second, the Respondent submits that it should be given the opportunity to introduce evidence that since the April 1996 discharges of the discriminatees, it changed the nature of its business operation by contracting out to another company the maintenance work that the discriminatees performed. The mere fact that the Respondent may have subcontracted out this work does not relieve the Respondent of its obligation to reinstate unlawfully discharged employees. See *Stalwart Assn.*, 310 NLRB 1046, 1055 (1993); *Central Air Corp.*, 216 NLRB 204, 214 (1975). Rather, the Respondent must prove that it would have subcontracted the work in question even if the discriminatees had not been terminated, and during the compliance stage of this proceeding the Respondent will have an opportunity to present evidence bearing on that issue. See *Ellis & Watts Products*, 143 NLRB 1269, 1271 (1963), enfd. 344 F.2d 67 (6th Cir. 1965). Accordingly, we deny the Respondent's motion to reopen the record.

In *Laura Modes*, the Board held that where a union evidences total disinterest in enforcing its rights through the peaceful legal process provided by the Act and instead resorts to violence, the Board will refuse to issue a bargaining order, even though the employer has violated the Act. Here, the judge found, based on his credibility findings, that no agent of the Union or prounion employee engaged in any picket line misconduct. Specifically, the judge discredited the testimony of the Respondent's witnesses and found that no threats were made by union officials or agents to kill or physically harm employees Reyes and Jusino, who had crossed the Union's picket line in order to perform work for the Respondent. As stated in footnote 2, supra, there is no basis for reversing the judge's credibility resolutions. Therefore, we find that there is nothing to preclude a bargaining order under the doctrine set forth in *Laura Modes*, supra.⁵

Accordingly, based on the judge's credibility findings in his supplemental decision and our own findings in our prior decision summarized above, we conclude that Respondent violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union on April 4, 1996, and we shall order the Respondent to bargain with the Union as the exclusive representative of the employees in the bargaining unit.

ORDER

The National Labor Relations Board orders that the Respondent, Cassis Management Corporation, Dobbs Ferry, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for supporting Service Employees International Union, Local 32E, AFL-CIO or any other union.

(b) Refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of its employees in the following appropriate unit:

⁴Member Higgins joins the majority in affirming the judge's finding that there is no credible evidence of any picket line misconduct, and in denying the Respondent's motion for reconsideration and to reopen the record. However, he continues to adhere to his earlier dissenting view of this case. Thus Member Higgins finds that Donald Hoy was a supervisor and that union authorization cards cannot be used to support a bargaining order. See *Cassis Management Corp.*, supra, Member Higgins dissenting.

⁵The Respondent excepts to the judge's failure to find that Union Official Formisano threatened to suspend employee Reyes' pension checks and that thereafter Reyes' pension payments were, in fact, suspended. We find no merit in this exception. Any such alleged threats are beyond the scope of the Board's remand, which was for the express purpose of consideration of alleged death threats directed at Reyes or other employees. In any event, the record indicates that any cessation of Reyes' pension payments that may have occurred were in accord with the terms of the Union's pension plan.

All full-time and regular part-time cleaning, painting, and maintenance workers employed by the Employer at its facility located at 200 Beacon Hill Road, Dobbs Ferry, New York, excluding all managers and supervisors as defined in the Act.

(c) In any other 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) Within 14 days from the date of this Order, offer Charles Allien, Louis Cioffi, Nicholas Michel, Joe Elias Moody Jr., and Charles W. Morrow, full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Charles Allien, Louis Cioffi, Nicholas Michel, Joe Elias Moody Jr., Charles W. Morrow, and the estate of Donald Hoy, whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the judge's decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges of Charles Allien, Louis Cioffi, Nicholas Michel, Joe Elias Moody Jr., and Charles W. Morrow, and within 3 days thereafter notify them in writing that this has been done and that the discharges will not be used against them in any way.

(d) On request, recognize and bargain with the Union as the exclusive collective-bargaining representative of its employees in the appropriate unit concerning wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(e) Preserve and, within 14 days of a 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.

(f) Within 14 days after service by the Region, post at its Dobbs Ferry, New York facility copies of the attached notice marked "Appendix."⁶ Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in

⁶If 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."

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. In the event that, during the pendency of these proceedings the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 11, 1996.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against any employee for supporting Service Employees International Union, Local 32E, AFL-CIO or any other union.

WE WILL NOT refuse to recognize and bargain with Service Employees International Union, Local 32E, AFL-CIO as the exclusive collective-bargaining representative of employees in the following appropriate unit:

All full-time and regular part-time cleaning painting, and maintenance workers employed at our facility at 200 Beacon Hill Road, Dobbs Ferry, New York, excluding all managers and supervisors as defined in the Act.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Charles Allien, Louis Cioffi,

Nicholas Michel, Joe Elias Moody Jr., and Charles W. Morrow, full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Charles Allien, Louis Cioffi, Nicholas Michel, Joe Elias Moody Jr., Charles W. Morrow, and the estate of Donald Hoy, whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, with interest.

WE WILL, on request, recognize and bargain with Service Employees International Union, Local 32E, AFL-CIO as the exclusive collective-bargaining representative of our employees in the appropriate unit concerning wages, hours, and other terms and conditions of employment and, if an understanding is reached, WE WILL embody the understanding in a signed agreement.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Charles Allien, Louis Cioffi, Nicholas Michel, Joe Elias Moody Jr., and Charles W. Morrow and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the discharges will not be used against them in any way.

CASSIS MANAGEMENT CORPORATION

Ian Penny, Esq. and Lauri Kaplan, Esq., for the General Counsel.

Robert Ziskin, Esq. and Stacey Ziskin, Esq., for the Respondent.

Mathew N. Persanis, Esq., for the Charging Party.

SUPPLEMENTAL DECISION

RAYMOND P. GREEN, Administrative Law Judge. On April 14, 1997, the National Labor Relations Board (the Board) issued its decision in this case wherein it found that the Employer had violated the Act in certain respects. As part of that decision, the Board remanded a portion of the case to me for further determination. In this regard, the Board noted that two employees, Carlos Reyes and Israel Jusino, were told by a union official at the picket line that he wanted to kill them. This was denied by the Union's witnesses and the Board remanded this question for a credibility finding.

I have reviewed again the relevant portions of the transcript and have considered the briefs previously filed by the parties. I have also considered the demeanor of the witnesses in making the following conclusions. (In conjunction with the transcript and my own notes taken at the hearing, I recall these witnesses, notwithstanding that their testimony was taken on July 31 and August 1, 1996.) As the previously filed briefs dealt with this contention, there is no need for further briefing on this issue. Therefore, based on the record as a whole, the briefs filed by the parties and my observation of the demeanor of the witnesses, I make the following findings.

Both of the witnesses presented by the Respondent were hired as replacements for the illegally discharged employees. One of them, Carlos Reyes, had previously worked for the employer and indicated that he had received lots of favors from George Cassis in the past. The testimony of George Cassis also indicated that there was some animosity between Hoy and Reyes.

Reyes testified that he was threatened every day with statements by the pickets and by union officials to the effect that they wanted to kill him. He pointed specifically to Anthony Formisano, a business representative, as being one of the people who made this threat. Reyes also testified that Formisano made a threat to kill him, when handing him a piece of paper which was a charge by the Union. (R. Exh. 13.) In the latter regard, Reyes testified that a policeman was present when he got this paper.

Jusino testified that that one or more of the people on the picket line said, "he was going to kill one of—he want to poke us." He went on to testify that the pickets called Reyes and old man and said that he was going to lose his check. According to Jusino, statements were made to himself and Reyes almost every day for about 2 weeks after the picketing started. When asked if he recognized Formisano in the courtroom, Jusino said that he did. However, when asked if Formisano made the threats, Jusino said that he did not. When asked who made the threats to kill or the comment about poking, Jusino said that it "was a colored guy who was saying every day that he wanted to kill one of you. He wanted to poke us."

Formisano and Union Business Agent Angel Figueroa testified that they supervised the picketing and were there almost every day. Both credibly denied making any threats to kill either Reyes or Jusino. Both credibly testified that no such threats were made in their presence by any of the other people on the picket line. With respect to the charge noted above, Formisano testified that when he tried to hand it to Reyes, the latter became very agitated and a policeman came over to explain to Reyes that all he (Formisano) wanted was to hand him the piece of paper.

The General Counsel called police officers Curt Giacobbe and Gregory Vince to testify in this matter. Both testified that as far as they observed, the picketing was peaceful and without any incidents of threats or violence.

Officer Giacobbe testified to the incident when Formisano gave the paper to Reyes and his testimony was that Formisano made no threats during that incident.

Officer Vince testified that he was dispatched to the picket line on three occasions, once when it was reported that the pickets were on the property and the other two times when it was reported that there was some blockage of entrances. In describing what he saw when he arrived, Officer Vince testified that he saw "a peaceful demonstration of numerous picketers standing on the street area." There was no indication in his testimony, or in any other testimony, that Reyes and Jusino had ever complained to the police about alleged threats of physical harm or alleged threats to kill them.

In conclusion, I do not credit the testimony of Reyes and Jusino about the alleged threats.