

**Show Industries, Inc. and B.M. Merger Sub. B Inc., d/b/a Show Industries, Inc. and General Warehousemen, Local 598, International Brotherhood of Teamsters, AFL-CIO.** Case 21-CA-29544

August 27, 1998

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX, LIEBMAN, HURTGEN, AND BRAME

Upon a charge and a first amended charge filed respectively on August 3, 1993, and October 4, 1993, by General Warehousemen, Local 598, International Brotherhood of Teamsters, AFL-CIO (the Union), the General Counsel of the National Labor Relations Board issued a complaint on October 15, 1993, against the Respondent, Show Industries, Inc. and B.M. Merger Sub. B Inc., d/b/a Show Industries, Inc. (Respondent or Show Industries),<sup>1</sup> alleging that it had engaged in certain unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act. Copies of the complaint and notice of hearing were served on the Respondent and the Charging Party. The Respondent filed a timely answer denying the commission of any unfair labor practices.

On September 23, 1994, Show Industries, the Union, and the General Counsel filed with the Board a Motion to Transfer Proceedings to the Board and a Stipulation of Facts. On November 22, 1994, the Deputy Executive Secretary, by direction of the Board, issued an order granting the motion, approving the Stipulation, and transferring the proceeding to the Board. Thereafter, the Respondent and the General Counsel filed briefs.

On April 3, 1995, the Acting Executive Secretary, by direction of the Board, issued an order reconsidering and rejecting the parties' Motion to Transfer Proceedings to the Board and Stipulation of Facts, subject to resubmission with clarification as to certain issues. On June 5, 1995, the parties filed with the Board a Resubmitted Motion to Transfer Proceedings to the Board and a Clarified Stipulation of Facts. The parties agree that the Clarified Stipulation and exhibits shall constitute the entire record in the case, and that no oral testimony is necessary or desired by any of the parties. The parties have further waived a hearing, the making of findings of fact and conclusions of law, and the issuance of a decision by an administrative law judge. On July 13, 1995, the Acting Executive Secretary, by direction of the Board, issued an order approving the Clarified Stipulation, and transferring the proceeding to the Board. The Respondent thereafter filed a supplemental brief.

On the entire record in the case, the Board makes the following

<sup>1</sup> The parties have stipulated that Show Industries and B.M. Merger are a single employer within the meaning of the Act.

FINDINGS OF FACT

I. JURISDICTION

The Respondent, Show Industries, a California corporation, has been engaged in the merchandising of music and videos and related products, and operated, until on or about September 3, 1993, a warehouse facility located in Los Angeles, California. At all material times, Respondent B.M. Merger, a California corporation, has been engaged in the distribution of music and videos and operates a facility in Dallas, Texas. The parties have stipulated that at all material times, Show Industries and B.M. Merger have been a single employer. The Respondent, in the course and conduct of its business operations, has annually derived gross revenues in excess of \$500,000, and annually sold and shipped goods and products valued in excess of \$50,000 from points located within the State of California directly to customers located outside the State of California. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. We further find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The single issue presented is whether the Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to recognize and bargain unconditionally with the Union regarding the effects on the bargaining unit of the closure of the Respondent's warehouse located in Los Angeles, California.

*A. Facts*

On November 30, 1989, a representation election was held in a unit of the Respondent's employees at its Los Angeles warehouse. On May 21, 1991, the Board issued a Supplemental Decision and Certification of Representative finding the Union to be the exclusive collective-bargaining representative of the unit of warehouse employees. The parties have stipulated that since about May 30, 1991, and at all times material up to and including August 3, 1993,—on which date the Respondent offered to engage in bargaining over the effects of the closure of the Los Angeles warehouse—the Respondent has refused to recognize the Union as the bargaining representative of the unit of warehouse employees.

1. The refusal to bargain from May 30, 1991, to August 3, 1993

On November 8, 1991, the Board found that the Respondent violated Section 8(a)(5) and (1) by refusing to recognize and bargain with the Union, and ordered the Respondent to do so. *Show Industries*, 305 NLRB No. 72 (1991) (not published in bound volumes). The Respondent petitioned the Court of Appeals for the Ninth Circuit for review of the Board's Order. The court by

unpublished memorandum enforced the Board's Order on November 17, 1993.

On December 19, 1991, the Respondent and the Union met for the sole purpose of discussing the Respondent's new wage schedule for unit employees. The Respondent stated to the Union that its participation in these discussions did not constitute recognition of the Union as the exclusive collective-bargaining representative of the unit. The judge, in the ensuing unfair labor practice proceeding, relying on *Specialized Living Center*, 286 NLRB 511 (1987), *enfd.* 879 F.2d 1442 (7th Cir. 1989), found that by this conduct the Respondent engaged in conditional bargaining and violated Section 8(a)(5) and (1) of the Act by refusing to bargain in good faith before implementing its wage schedule. *Show Industries*, 312 NLRB 447, 454 (1993). The Board adopted the judge's conclusion without reaching the merits. The Board found that the Respondent's exceptions did not meet the minimum requirements of Section 102.46(b) of the Board's Rules and Regulations. *Id.* at 447 fn. 3.

#### 2. The effects bargaining

On August 3, 1993, while review of the Board's final order in the certification-testing proceeding was pending before the Ninth Circuit, counsel for the Respondent informed the Union's counsel by letter that the Respondent's Los Angeles warehouse would permanently close on August 27, 1993.<sup>2</sup> In the letter, the Respondent's counsel offered to discuss with the Union the decision to close or its effects upon bargaining unit employees. Counsel for the Union thereafter requested bargaining over the decision to close and the effects of closure of the Los Angeles warehouse on the unit employees.

On August 12, 1993, and on August 25, 1993, representatives of the Respondent met with representatives of the Union for the purpose of bargaining over the closure and the effects of the closure of the Los Angeles warehouse. The parties have stipulated that the Respondent did not state at these meetings that it was refusing to recognize and/or bargain with the Union.

On September 1, 1993, the Respondent's counsel sent a letter to the Union's counsel regarding the payment of severance pay to the unit employees affected by the closure of the Los Angeles warehouse. On September 2, 1993, the Union's counsel sent a letter to the Respondent's counsel setting forth the Union's proposal regarding severance payments.

On September 3, 1993, the Respondent ceased its operations at the Los Angeles warehouse, closed that facility, and permanently laid off the unit employees. On September 22, 1993, the Respondent's counsel sent a letter to the Union's counsel regarding recalculation of severance pay for the unit employees of the Los Angeles

warehouse. The record establishes that checks for severance pay were distributed to unit employees.

### B. Contentions of the Parties

#### 1. The General Counsel

The General Counsel argues that the Respondent failed to bargain unconditionally with the Union over the effects of the closure of the Los Angeles warehouse. The General Counsel contends that at the time the Respondent offered to engage in effects bargaining with the Union, it did not extend recognition to the Union as bargaining representative of the unit employees. The General Counsel thus asserts that the Respondent never cured its previous unlawful refusal to recognize and bargain with the Union—which the parties have stipulated occurred from about May 30, 1991, up to and including August 3, 1993—at the time the Respondent offered on August 3 to engage in bargaining over the effects of the closure of the Los Angeles warehouse. The General Counsel argues that in these circumstances the Respondent engaged in piecemeal, conditional bargaining in violation of Section 8(a)(5) and (1) by offering to engage in effects bargaining without curing its previous unlawful refusal to recognize and bargain with the Union.

The General Counsel further asserts that the Respondent's longstanding refusal to bargain had effectively dissipated union strength and bargaining power, and that the effects bargaining that did take place thus failed to provide the Union with a meaningful opportunity to bargain over the effects of the closure of the Los Angeles warehouse. The General Counsel accordingly reasons that the appropriate remedy in this proceeding is to order the Respondent to bargain anew over the effects of the closure of the Los Angeles warehouse, and to provide monetary relief to employees as set forth in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968).

#### 2. The Respondent

The Respondent initially argues that it provided adequate notice to the Union of its decision to close the Los Angeles warehouse, citing the parties' stipulation that the Regional Director for Region 21 dismissed that part of the Union's unfair labor practice charge alleging that the Respondent failed to give adequate notice to the Union of its decision to close the Los Angeles warehouse. The Respondent further maintains that it satisfied its obligation to engage in effects bargaining with the Union. The Respondent thus submits that it expressly offered to engage in effects bargaining with the Union, and met twice with the Union in negotiating sessions on August 12 and 25, 1993. The Respondent emphasizes that the parties have stipulated that the Respondent did not state at these meetings that it was refusing to recognize and/or bargain with the Union, and additionally argues that the Union did not demand recognition at these meetings. The Respondent further contends that the effects bargaining

<sup>2</sup> The General Counsel does not allege that the decision to cease operations at the Los Angeles warehouse was unlawful.

continued through the parties' exchange of letters during the month of September 1993 regarding the amount of severance pay due to unit employees, with the Respondent's final letter of September 22 concluding by requesting notification if the Union desired further discussions.

The Respondent thus submits that the stipulated record establishes that meaningful effects bargaining occurred, and that the Respondent thereby satisfied its obligation to engage in bargaining over the effects of the closure of the Los Angeles warehouse. The Respondent further submits that by engaging in substantive effects bargaining without limitation, the Respondent did not in fact refuse to recognize the Union. The Respondent additionally argues that the General Counsel has not established that negotiations were in any manner substantively affected by, or that any prejudice to the employees resulted from, any technical recognition deficiency. The Respondent submits that any bargaining order or monetary remedy under *Transmarine Navigation* would be punitive, because meaningful bargaining occurred and unit employees received severance payments.

### C. Discussion

The Supreme Court has declared that an employer must conduct effects bargaining "in a meaningful manner and at a meaningful time [.]” *First National Maintenance Corp.*, 452 U.S. 666, 682 (1981); *Metropolitan Teletronics*, 279 NLRB 957, 958-959 (1986), *enfd.* mem. 819 F.2d 1130 (2d Cir. 1987). We find, upon careful review of the stipulated record evidence, that the Respondent satisfied its obligation to engage in bargaining over the effects of its closure of the Los Angeles warehouse.

The Respondent gave the Union timely notice of its intention to close the Los Angeles warehouse, and the General Counsel alleges no unlawful conduct in this regard. The Respondent, at the time of notification, expressly offered to "discuss the decision [to close] or its effects upon the bargaining unit employees." The parties thereafter met on two occasions in bargaining sessions on August 12, 1993, and on August 25, 1993, for the purpose of bargaining over the closure and the effects of the closure on the Los Angeles warehouse. The parties, by their correspondence in early September, continued to exchange their views concerning severance pay. The final correspondence contained in the record is the Respondent's letter to the Union dated September 22, 1993, in which it set forth its severance pay formula, and concluded by stating "the Company has no further proposal to advance. Please let me know if you would like to discuss the matter any further." There is no evidence that the Union sought further discussions. We find that the record evidence fails to establish that the Respondent refused to engage in effects bargaining.

Our dissenting colleagues do not assert any specific infirmity in the effects bargaining that took place, such as an insufficient number of bargaining proposals in good faith. Rather, they argue that the Respondent engaged in unlawful piecemeal bargaining as evidenced by its offer to bargain only about the effects of the warehouse closure and by its longstanding position that it had no legal obligation to bargain with the Union.

We disagree. As accurately framed by the General Counsel on brief (p. 2), the complaint alleges that the Respondent "fail[ed] and refus[ed] to bargain unconditionally with the Union over the effects of its decision" to close its warehouse. We have found, however, based on the parties' Clarified Stipulation, that the Respondent did bargain with respect to the effects of the closure. Further, contrary to the complaint allegation, there is no evidence that the bargaining that did take place was conditional on the outcome of the Respondent's pending challenge to the Union's certification.

We do not find, as the dissent does, that the Respondent's offer to engage in effects bargaining can be construed as a piecemeal offer. The Respondent was challenging the Union's certification. The procedural device for doing so is to refuse to bargain about all subjects, and to thereby "test" the certification in the circuit court. There is no suggestion here that the challenge to the certification was spurious or otherwise in bad faith.<sup>3</sup>

While that challenge was pending, Respondent decided to go out of business. Of course, the law is that an employer with a duty to bargain must bargain about the effects of such a closure. Accordingly, Respondent had three choices: (1) consistent with its challenge to the certification, it could refuse to bargain about effects, just as it was refusing to bargain about all other mandatory subjects; (2) it could give up its challenge to the certification and bargain about all mandatory subjects, including the "effects" of the closure; and (3) it could bargain about "effects" but continue to challenge the certification.

We conclude that Respondent did not violate the Act by making the third choice. The first choice would have meant that there would be no bargaining on effects until such time as the circuit court upholds the certification. We think it more prudent to have "effects" bargaining at a time when it is most meaningful. Thus, we would not fault an employer for not making this choice.

The second choice would require the employer to give up its challenge to the certification. Given the bona fides of the challenge, we would not require the Respondent to do so.

The third choice seems prudent. The parties can bargain about "effects" when it is most meaningful to do so. Phrased differently, there is bargaining about the one

<sup>3</sup> The fact that Respondent may have committed other unfair labor practices does not establish that its challenge was in bad faith.

matter that most critically affects them at that time, viz. the closure and its effects.

We recognize that other subjects are not being bargained simultaneously. However, given the closure, it may well be that such matters are moot or at least less critical. Further, if the circuit court had agreed with the Respondent's good-faith challenge, there would have been no obligation to bargain at all.

Accordingly, we would not condemn as unlawful the Respondent's choice.<sup>4</sup>

In sum, the General Counsel had the burden of establishing the elements of a Section 8(a)(5) violation, and based on the limited stipulated record presented we find that that burden has not been met. Accordingly, we shall dismiss the complaint in its entirety.

#### CONCLUSIONS OF LAW

1. Respondent Show Industries, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. General Warehousemen, Local 598, International Brotherhood of Teamsters, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has not violated the Act as alleged in the complaint.<sup>5</sup>

<sup>4</sup> We find distinguishable *Specialized Living Center*, supra, cited by the General Counsel. The Respondent in that case expressly stated that it would continue to maintain its challenge to the certification and, because of that, it would not recognize the Union. Indeed, it did not offer to bargain at all; it simply offered to "meet and confer." By contrast, in the instant case, the Respondent actually bargained with the Union about the closure and its effects. In addition, given the subject of the bargaining in this case (closure and effects), there was a special need for immediate bargaining.

The dissent argues that *Specialized* is inapposite, albeit for a different reason. They say that "*Specialized Living* is a case of conditional bargaining, and here the Respondent's offer to bargain was not conditional." Accepting arguendo their distinction, we do not see how an unconditional offer to bargain should be treated more harshly than a conditional offer. Thus, if anything, their distinction adds additional support for dismissal in the instant case. We recognize that the unconditional offer herein was confined to a single topic. However, as discussed above, we think that this bargaining was better than none at all.

Member Brame, in finding that *Specialized Living Center* is distinguishable from the present case, emphasizes that this case arises in the context of the closing of the Respondent's warehouse. The closing of the facility places unique time constraints on bargaining, and reduces the subjects of bargaining to the effects of the closing. In light of these limitations, Member Brame finds that the Respondent's offer to discuss the effects of the closing and its actual bargaining with the Union were sufficient to satisfy its duty to bargain. In Member Brame's view, finding a violation in these circumstances would severely penalize the Respondent for exercising its statutory right to test the certification of the Union, and would unreasonably discourage employers from engaging in timely bargaining over the effects of closing, to the substantial detriment of all parties. Further, in his view, bargaining between a union and an employer over issues relating to a plant closing is likely to be far more effective when it occurs before the closing, rather than after the closing pursuant to a Board remedial order.

We share the concerns of our concurring colleague about the wisdom of *Specialized Living*. However, given the fact that that case is distinguishable, we would not reach out to overrule it in this case.

#### ORDER

The complaint is dismissed.

CHAIRMAN GOULD, concurring.

I agree with my colleagues that the Respondent engaged in good-faith bargaining over the effects of its decision to close its warehouse and that the Section 8(a)(5) complaint should, therefore, be dismissed. I also agree with my colleagues that the Board's decision in *Specialized Living Center*, supra, is distinguishable from the instant case and does not support the General Counsel's argument that the Respondent violated the Act. I write separately, however, to state my view that *Specialized Living* should be overruled.

*Specialized Living* stands for the proposition that whenever an employer seeks judicial review of the Board's certification of a union and its 8(a)(5) refusal to bargain finding, the employer's subsequent willingness to bargain about a particular subject is considered a further violation of Section 8(a)(5) because of its refusal to recognize and bargain with the union on all mandatory subjects during the pendency of judicial review. Application of that rule effectively leaves an employer with only two all-or-nothing choices—to refuse to bargain with the union on any subject while seeking judicial review, or to forego its right to seek judicial review and bargain with the union on all mandatory subjects. The first fails to recognize and to accommodate the significant interests employees, unions and employers may have in attempting to resolve important issues without delay through bargaining; the second effectively forecloses an employer from exercising its right of access to the courts. Neither, in my view, is totally compatible with important statutory objectives.

Rather, I conclude that, whatever the outcome of a test of certification proceeding, an employer's bargaining conduct during the pendency of that proceeding should be considered in isolation. If an employer indicates a willingness to bargain during this period on any issue, its position presents an avenue for potential resolution of matters that are of concern to employees, the union and the employer, and for that reason its conduct should be encouraged. It may be that this will positively affect other aspects of the relationship. On this matter I am agnostic. Nonetheless, it is the policy of promoting resolution of issues which I encourage by this decision.

*Specialized Living* should be overruled.

MEMBERS FOX AND LIEBMAN, dissenting.

"It is well settled that the statutory purpose of requiring good-faith bargaining would be frustrated if parties were permitted, or indeed required, to engage in piecemeal bargaining." *E.I. Dupont & Co.*, 304 NLRB 792,

<sup>5</sup> In view of our finding that the Respondent did not violate the Act as alleged in the complaint, we need not address the General Counsel's request for remedial relief.

fn. 1 (1991). As the court explained in *NLRB v. Patent Trader*, 415 F.2d 190, 198 (2d Cir. 1969), modified on other grounds 426 F.2d 791 (2d Cir. 1970), when a party “remov[es] from the area of bargaining . . . [the] most fundamental terms and conditions of employment (wages, hours of work, overtime, severance pay, reporting pay, holidays, vacations, sick leave, welfare and pensions, etc.),” it has “reduced the flexibility of collective bargaining, [and] narrowed the range of possible compromises with the result of rigidly and unreasonably fragmenting the negotiations.”

The Respondent’s conduct here falls squarely into this category of bad-faith bargaining. By virtue of its certification, the Union was legally entitled to bargain with the Respondent over the whole host of mandatory subjects listed by the *Patent Trader* court. Instead, for over 2 years, the Respondent unlawfully refused to recognize and bargain with the Union, and indeed the Respondent committed additional unfair labor practices during this time period. *Show Industries*, 305 NLRB No. 72 (1991) (not published in Board volumes), enfd. No. 91-70765 (9th Cir. 1993) (unpublished memorandum); *Show Industries*, 312 NLRB 447 (1993) (the Respondent unlawfully refused to bargain in good faith and unlawfully terminated three employees in violation of Section 8(a)(1), (3), (4), and (5) of the Act). Suddenly, when the Respondent was about to close the Los Angeles warehouse permanently and lay off all unit employees, the Respondent offered to discuss that topic only. It never withdrew its longstanding position that it had no legal obligation to bargain with the Union. The General Counsel has by these facts established that by offering to discuss only the warehouse shutdown the Respondent engaged in unlawful piecemeal bargaining.<sup>1</sup> The Union expressly raised this infirmity in its September 2, 1993 letter to the Respondent: “Local 598 does not believe

<sup>1</sup> From May 21, 1991 (the date of the Union’s certification), to September 3, 1993 (the date the warehouse closed), bargaining was fragmented in two respects. First, there was only 1 month during that entire period (during the last month) when the Respondent met with the Union. Second, on August 3, 1993, when the Respondent finally signaled its willingness to meet with the Union, its agenda was limited to one matter. Even at that time, there were still other subjects suitable for negotiations, such as the wage rate employees would be paid and the fringe benefits they would receive during their last month of employment, but the Respondent’s August 3 communication did not encompass these mandatory subjects.

In our view, given the background of the Respondent’s longstanding refusal to recognize and bargain with the Union, its offer to bargain over the effects of the closing was not tantamount to an announcement that it was now willing to recognize and bargain with the Union over all mandatory subjects. As for the statement in the Respondent’s September 1 letter that it did “not intend to foreclose further bargaining in any respect,” we note that this letter was merely “sent” on that day, which was 2 days before the warehouse was to close, and there was no indication that it was sent by a means calculated to reach the Union before then. Moreover, in context, the suggestion of a willingness to bargain “in any respect,” was at best ambiguous, and could reasonably have been read as simply meaning further bargaining “in any respect” over the severance pay proposal that was on the table.

[the Respondent] has engaged in good faith bargaining concerning this matter, considering . . . the atmosphere of its long-standing general refusal to bargain[.]” We would therefore find that the Respondent failed to satisfy its bargaining obligation as alleged in the complaint.

Our colleagues misapprehend what we regard as the vice in the Respondent’s conduct. In sum, this is a case of piecemeal bargaining, not conditional bargaining. *Specialized Living Center*, 286 NLRB 511 (1987), enfd. 879 F.2d 1442 (7th Cir. 1989), discussed at length in the majority decision, is inapposite because *Specialized Living* is a case of conditional bargaining, and here the Respondent’s offer to bargain was not conditional. That is to say, the Respondent did not state to the Union in effect: “I am recognizing and bargaining with you on all terms and conditions of employment subject to the condition that I am continuing to test the certification. If a court ultimately agrees that the certification was improperly issued, than any contract we agree to will be nullified.”

Instead, this Respondent unconditionally refused to recognize and bargain with the Union in order to obtain court review of the certification pursuant to the statutory scheme. Cf. *Terrace Gardens Plaza, Inc. v. NLRB*, 91 F.3d 222 (D.C. Cir. 1996) (judicial review is available only if the employer refuses to bargain and is found, in a final Board order, to have violated Section 8(a)(5)).<sup>2</sup> Thereafter, the Respondent offered to bargain *only* over the closure of the Los Angeles warehouse and no other topic. Its motivation for doing so is immaterial. The critical fact is that by attempting to pick and choose the occasion for bargaining and otherwise limit its scope, the Respondent engaged in conduct that, under the well-established precedent cited above, was in violation of its obligation under Section 8(a)(5) to bargain in good faith.

<sup>2</sup> *Terrace Gardens*, like *Specialized Living*, involves conditional bargaining and therefore does not govern the instant case.

