

**Ferri Supermarkets, Inc. d/b/a Murrysville Shop'N Save and United Food and Commercial Workers International Union, Local Union 23, AFL-CIO, CLC.** Case 6-CA-29333

March 30, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX  
AND HURTGEN

On June 19, 1998, Administrative Law Judge James L. Rose issued the attached decision. The Respondent filed exceptions and a supporting brief. The Acting General Counsel filed limited cross-exceptions, a supporting brief, and an answering brief to the Respondent's exceptions. The Respondent filed a brief in answer to the cross-exceptions and a reply brief to the Acting General Counsel's answering 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 briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this decision, and to adopt the recommended Order, as modified.<sup>1</sup>

We agree with the judge that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union, and by refusing to provide relevant bargaining information requested by the Union. We do not rely, however, on the judge's rationale that the Respondent is a successor employer pursuant to *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973), and thereby bound by a recognition agreement in an unfair labor practice settlement agreement entered into between the predecessor and the Union. The General Counsel concedes in cross-exceptions that the *Golden State* theory of violation was never asserted or argued in this case. Instead, the General Counsel argues that the Respondent is a successor under *NLRB v. Burns Security Services*, 406 U.S. 272 (1972), and that it has failed to prove either that the Union had in fact lost its majority status at the time of the refusal to recognize or that the refusal to recognize was grounded on a good-faith doubt based on objective considerations that the Union continued to command majority support.

The Respondent concedes that it is a *Burns* successor. It maintains, however, that on October 13, 1997, when it refused to recognize the Union, it had a good-faith doubt of the Union's majority status, based on information from its predecessor that a majority of employees had repudiated the Union, and based on statements by nine employees expressing dissatisfaction with the Union made in the presence of John Ferri, the son of the Re-

spondent's principal owner and president Edward Ferri. We find no merit in the Respondent's defense.<sup>2</sup>

The credited testimony establishes that Edward Ferri alone made the decision on behalf of the Respondent not to recognize the Union. He testified that he decided not to recognize the Union because the former owners told him that the employees no longer wanted to be represented by the Union, and they stated that "there was some process being done to change that." Ferri was unable to recall any other factors which caused him to doubt the Union's majority status. While the Respondent provided credible evidence that at least nine employees made statements indicating their dissatisfaction with the Union, the elder Ferri testified that he did not know about these statements until December 1997 or January 1998, months after the charges in this case were filed.<sup>3</sup> It is well settled that a respondent cannot rely on expressions of antiunion sentiments that come to its attention after its withdrawal of recognition, in order to justify such a prior withdrawal.<sup>4</sup> Moreover, there were approximately 74 employees in the unit and none of the statements attributed to the 9 employees by the Respondent indicated that they were part of an overall majority of unit employees who had rejected the Union.

In defense of its withdrawal of recognition, the Respondent also relied on a September 26, 1997 letter sent by the predecessor's counsel to the Respondent's counsel, which stated, inter alia, that: in August 1996, a majority of unit employees had presented a petition to the Respondent's predecessor stating that they no longer wanted to be represented by the Union; the Respondent's predecessor had, on the basis of that petition, notified the Union in October 1996 that it was withdrawing recognition; the Union thereafter filed unfair labor practice charges alleging that the withdrawal of recognition was unlawful; in April 1997, a decertification petition signed by a majority of the employees was filed with the Board, and a majority of the employees had thereafter revoked their dues-checkoff authorizations; in May 1997, the predecessor had entered into a settlement agreement whereby the predecessor agreed to bargain with the Union; the April decertification petition was dismissed by the Regional Office "because of the settlement agreement;" as provided in the settlement agreement, the predecessor held a number of negotiating sessions with the Union but in August 1997, based on the predecessor's belief that impasse had been reached, it had unilaterally implemented the terms of its last offer; the Union

<sup>2</sup> Consequently, we do not pass on the applicability of *St. Elizabeth Manor, Inc.*, 329 NLRB 341 (1999), to the facts of this case.

<sup>3</sup> We correct a misstatement of fact made by the judge. Contrary to the judge, Edward Ferri testified on cross-examination that he was not aware of "grumbling" by the employees in the presence of his son, John Ferri, until 1 or 2 months before the hearing in this matter, well after he decided not to recognize the Union.

<sup>4</sup> *Exxel-Atmos, Inc.*, 309 NLRB 1024, 1029 (1992), and cases cited therein.

<sup>1</sup> We shall modify the judge's recommended Order in accordance with our decision in *Excel Container, Inc.*, 325 NLRB 17 (1997).

thereafter had filed a new unfair labor practice charge alleging that no impasse had been reached and that the predecessor had not made certain payments to the health and pension funds as provided in the earlier settlement agreement; and the predecessor had thereafter decided to “revoke the implementation.”

Notably, Edward Ferri testified that he did not know about any of the events discussed in the letter. He therefore could not have relied on this information in deciding not to recognize the Union. Even had Ferri been aware of the events described in the letter, however, they did not provide objective considerations sufficient to create a reasonable good-faith doubt regarding the Union’s continuing majority status at the time the Respondent refused to recognize the Union. The August 1996 petition referred to in the letter was more than a year old when the Respondent refused to recognize the Union, and for that reason could not reasonably be relied on as an accurate reflection of the employees’ sentiments in October 1997.<sup>5</sup> Nor could the Respondent in good faith rely on knowledge of the April 1997 decertification petition, since the letter from the predecessor’s attorney recited that the petition had been dismissed by the Regional Director in light of his approval of an agreement settling unfair labor practice charges filed by the Union against the Respondent’s predecessor.<sup>6</sup> The alleged employer misconduct had taken place before the filing of that petition, and the employee revocations of dues-checkoff authorizations took place during the period for compliance with that settlement agreement. The timing of those events thus gave rise to the presumption that the employees’ disaffection from the Union arose from the alleged misconduct of the predecessor, in derogation of the bargaining relationship.<sup>7</sup> Under these circumstances, the Respondent could not reasonably rely on the August 1996 petition given to the predecessor, the April 1997 petition filed with the Board, or the ensuing checkoff revocations as objective considerations justifying a refusal to recognize the Union.

Based on the foregoing, we find that the Respondent has failed to prove a legitimate defense for failing to recognize and bargain with the Union, and for failing to provide relevant bargaining information requested by the Union. We therefore affirm the judge’s conclusion that the Respondent violated Section 8(a)(5).<sup>8</sup>

<sup>5</sup> *Rock-Tenn Co.*, 315 NLRB 670, 672 (1994) (7-month-old petition is stale).

<sup>6</sup> *Douglas-Randall, Inc.*, 320 NLRB 431 fn. 5 (1995) (decertification petition is to be dismissed in light of settlement of allegations of unfair labor practices occurring before or during time in which petition was signed). Accord: *Liberty Fabrics*, 327 NLRB 38 (1998).

<sup>7</sup> *Douglas-Randall*, 320 NLRB at 435.

<sup>8</sup> Member Hurtgen notes that the evidence fails to establish that the Respondent relied on the predecessor’s September 26, 1997 letter when declining the Union’s request for recognition, or indeed, on other specific evidence of loss of Union support under the predecessor. Rather, as found by the judge, the Respondent denied the Union’s request based

## ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Ferri Supermarkets, Inc. d/b/a Murrysville Shop’N Save, Murrysville, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Substitute the following for paragraph 2(b).

“(b) Within 14 days after service by the Region, post at its Murrysville, Pennsylvania facility copies of the attached notice marked ‘Appendix.’<sup>5</sup> Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent 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. 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 October 13, 1997.”

*Stephanie Brown, Esq.*, for the General Counsel.

*Domenic A. Bellisario, Esq.*, of Pittsburgh, Pennsylvania, for the Respondent.

*James R. Reehl, Esq.*, of Pittsburgh, Pennsylvania, for the Charging Party.

## DECISION

### STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge. This matter was tried before me at Pittsburgh, Pennsylvania, on February 19, 1998, on the General Counsel’s complaint which alleged that the Respondent refused to bargain with the Charging Party in violation of Section 8(a)(5) of the National Labor Relations Act (the Act).

The Respondent generally denied that it committed any violations of the Act and affirmatively contends that it had a good-faith belief that a majority of its employees did not wish to be represented by the Charging Party and in fact a majority did not.

on generalized “feelings” that the Union did not represent a majority of its employees and unspecified employee “grumblings.” On this basis, Member Hurtgen agrees that the Respondent violated Sec. 8(a)(5) by failing to recognize the Union and provide requested information. He does not adopt his colleagues’ further rationale, however, that even had the Respondent relied on this letter, or on other evidence of antiunion sentiment under the predecessor, Respondent would nonetheless be precluded from withdrawing recognition. Further, in Member Hurtgen’s view, the alleged unfair labor practice of the predecessor would not taint the sentiment, for those allegations were settled and never adjudicated. See the dissent in *Liberty Fabrics*, supra.

On the record as a whole,<sup>1</sup> including my observation of the witnesses, briefs, and arguments of counsel, I make the following

## FINDINGS OF FACT

### I. JURISDICTION

The Respondent is a Pennsylvania corporation engaged in the retail sale of food and grocery products, in connection with which it purchased goods directly from outside the Commonwealth of Pennsylvania valued in excess of \$5000 and is projected to derive annual revenues in excess of \$500,000. The Respondent admits, and I conclude, that it is an employer engaged in interstate commerce within the meaning of Section 2(2), (6), and (7) of the Act.

### II. THE LABOR ORGANIZATION INVOLVED

The Charging Party, United Food and Commercial Workers International Union, Local Union 23, AFL-CIO, CLC (the Union) is admitted to be, and I find is, a labor organization within the meaning of Section 2(5) of the Act.

### III. THE ALLEGED UNFAIR LABOR PRACTICES

#### A. The Facts

For many years the employees of the Respondent's predecessor, Bart's, Inc. d/b/a Murrysville Shop 'N Save, were represented by the Union. The Union and Bart's negotiated successive collective-bargaining agreements, the most recent of which expired on October 26, 1996.

Thereafter, Bart's withdrew recognition and the Union filed two unfair labor practice charges, generally alleging an unlawful withdraw of recognition and refusal to bargain. These charges were dismissed by the Regional Director but subsequently reinstated following appeal to the General Counsel. They were ultimately resolved by a settlement agreement executed by the parties and approved by the Regional Director on May 13, 1997.<sup>2</sup> Among other things, the agreement provides that Bart's would recognize and bargain with the Union and not withdraw such recognition "unless and until an election has been held by the National Labor Relations Board which establishes that the Union is no longer the exclusive collective-bargaining representative of our unit employees." A decertification petition filed on April 21 was dismissed by the Regional Director on June 13 under the authority of *Douglas-Randall, Inc.*, 320 NLRB 431 (1995). The Union and Bart's did bargain, but the record does not disclose whether, or to what extent, any progress was made toward a collective-bargaining agreement.

Sometime in the spring of 1997, Bart's and Respondent entered into negotiations which culminated in the Respondent's purchase of the store effective October 3. Bart's notified the Union on September 17, that a sales agreement had been executed and offered to bargain over the effects of the sale. The Union and Bart's did bargain over effects.

The Respondent is engaged in the same business as Bart's, at the same location, using the same trade name and apparently has substantially the same customers. Virtually all of the Respondent's bargaining unit employees were employees of Bart's. It is clear that the Respondent is a successor under

Board law, a fact which the Respondent does not dispute. However, the Union's two letters to the Respondent of September 23 and October 13, stating that it was the employees' bargaining representative and requesting certain information were ignored. The Respondent contends now, and in a position statement to counsel for the General Counsel, that the Union did not represent a majority of its employees or alternatively, that it had a good-faith doubt as to the Union's status as the employees' representative.

Some of the facts on which the Respondent claims to base its position occurred prior to the settlement agreement executed by Bart's. I ruled that such facts would be inadmissible. The Respondent also relies on facts occurring subsequent to the settlement agreement, particularly dues-checkoff revocations signed by nearly all bargaining unit employees, statements by employees during interviews for employment by agents of the Respondent, and a report that only one person attended an early October meeting of employees called by the Union.

However, Edward Ferri, the Respondent's principal owner and president, testified that he made the decision not to recognize the Union because he had the "feeling" that the employees did not want the Union to represent them. This was based on statements from his son John that "there was grumbling. That they (the employees) pretty much wanted to go it without the Union." He had no first-hand knowledge concerning the employees' desires: "I got scuttle-butt," from John and "it seems to me the manager had mentioned that there was grumbling." The decision not to recognize the union was made by Ferri at or before the time the Respondent bought the store.

#### B. Analysis and Concluding Findings

##### 1. Refusal to recognize the Union

"Under the board's well-settled successor employer doctrine approved by the Supreme Court in *NLRB v. Burns Security Services*, 406 U.S. 272 (1972), a successor employer, absent a reasonably based good-faith doubt of the incumbent union's majority, is obligated to recognize the continuing representative status of the bargaining agent of its predecessor's employees in an appropriate bargaining unit taken over from the predecessor." *Concord Services*, 310 NLRB 821 (1993). That is, as to its duty to bargain, a successor assumes the obligations of its predecessor. Similarly, the successor is liable to remedy any unfair labor practices committed by its predecessor. *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973).

Thus, the issue here is whether by October Bart's could have lawfully withdrawn recognition of the Union based on the facts outlined above. I conclude not.

First, the settlement agreement entered into on May 13 specifically provides that the employer would not withdraw recognition absent a valid Board-conducted election establishing that the Union no longer represents a majority of bargaining unit employees. Since the settlement agreement was integral to the remedy of Bart's unfair labor practices, under *Golden State* the Respondent was bound by it. Indeed, the Respondent does not argue that it is not so bound, or that it was unaware of the settlement agreement.<sup>3</sup> Although Bart's had complied with some of the agreement's provisions, the provisions concerning with-

<sup>1</sup> Counsel for the General Counsel's motion to correct transcript is granted. The motion is placed in record as GC Exh. 11.

<sup>2</sup> All dates hereafter are in 1997, unless otherwise indicated.

<sup>3</sup> The only statement about Board litigation in the sales agreement apparently refers to a case other than the one covered by the settlement agreement. Nevertheless, from position statements by counsel it is clear that the Respondent was aware of settlement agreement.

draw of recognition and engaging in good-faith bargaining remained executory.

Typically settlement of a lawsuit implies nothing about the merits. However, a Board settlement agreement is different. While approval of a settlement agreement by a Regional Director is something less than a formal decision following a hearing, it is more than simply acknowledging an allegation of wrongdoing. As the Fourth Circuit said in *Poole Foundry & Machine Co. v. NLRB*, 192 F.2d 740, 743 (4th Cir. 1951), cert. denied 342 U.S. 954 (1952), enfg. 95 NLRB 34 (1951): “a settlement agreement clearly manifests an administrative determination by the Board that some remedial action is necessary to safeguard the public interest intended to be protected by the National Labor Relations Act.”

Second, even without a provision prohibiting withdraw of recognition absent an election, the evidence that the Union lost its majority status is presumptively tainted by the unfair labor practices which were the subject of the settlement agreement. Such evidence, therefore, could not form the basis of a withdraw of recognition. *Lee Lumber & Bldg. Materials*, 322 NLRB 175 (1996).

And third, following a settlement wherein the employer is required to bargain, the parties must be afforded a reasonable time in which to negotiate and execute a contract.

*Poole Foundry & Machine Co.*, supra. Since settlement agreements manifest a determination by the Board that unfair labor practices have been committed which need to be remedied, an employer undertaking such an agreement cannot be allowed to escape the promise to bargain, lest settlement agreements have little practical effect.

Under *Golden State*, this principle is equally applicable where an employer's predecessor enters into a settlement agreement to bargain. For such an agreement to have any practical effect, the parties, including the successor, must have a reasonable time to bargain. It would clearly be detrimental to the policies of the Act to allow a successor employer to escape the promise to bargain made by its predecessor in settlement of a refusal-to-bargain charge.

The Board has opted for a “reasonable time” standard rather than setting some specific period in which the parties must bargain on grounds that once a bargaining relationship “has been restored after being broken, it must be given a reasonable time to work and a fair chance to succeed before an employer may question the union's representative status.” *Lee Lumber & Bldg. Materials*, supra at 193.

Here the Respondent's refusal to recognize the Union when it purchased the store in September was tantamount to withdraw of recognition, which, I conclude, was prior to the parties having had a reasonable time to negotiate. Although the Union and Bart's did undertake to bargain following execution of the settlement agreement, there is no evidence that any real bargaining took place. And it is questionable that these negotiations were given a fair chance to succeed since Bart's was simultaneously negotiating with the Respondent for the sale of the store. Further, from May until September, when the Union was notified by Bart's of the sale, was scarcely a “reasonable time” for purposes of collective bargaining.

I therefore conclude that the Respondent was not privileged to withhold recognition from the Union, notwithstanding that in circumstances free of unlawful conduct, the evidence it relied on to support its belief might be considered reasonable.

## 2. Refusal to furnish information

In his October 13 letter to the Respondent, the Union's secretary-treasurer & director of collective bargaining requested the names, addresses, current job classification, and rates of pay and benefits of all bargaining unit employees. Also requested were the names and relevant employment information of Bart's employees not hired as well as the names of non-Bart's employees who were. Along with the request for recognition, this request for information was ignored.

The requested information is clearly necessary in order for the Union to fulfill its duties as the employees' bargaining representative. Therefore, the Respondent will be ordered to furnish the requested information. E.g., *Rock-Tenn Co.*, 315 NLRB 670 (1994).

## 3. Changing the Board's withdrawal of recognition rule

The General Counsel seeks to overrule the doctrine that recognition can be withdrawn based on reasonable good-faith belief that the incumbent union has lost the support of a majority of employees, *Celanese Corp. of America*, 95 NLRB 664 (1951), recently approved by the Supreme Court in *Allentown Mack Sales & Service v. NLRB*, 118 S.Ct. 824 (1998). Since this case can be decided without reconsidering that rule, and it would be inappropriate to consider changing such a long-standing and entrenched policy without notice to the hundreds of parties who might reasonably be affected, I decline to rule on this issue.

## REMEDY

Having concluded that the Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist there from and take certain affirmative action designed to effectuate the policies of the Act, including recognizing the Union as the designated representative of the following appropriate unit of employees:

All full-time and regular part-time employees of Ferri Supermarkets, Inc. d/b/a Murrysville Shop 'N Save at its Murrysville, Pennsylvania, facility; excluding all office clerical employees and guards, professional employees and supervisors as defined in the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>4</sup>

## ORDER

The Respondent, Ferri Supermarkets, Inc. d/b/a Murrysville Shop 'N Save, Murrysville, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and bargain with United Food and Commercial Workers International Union, Local Union 23, AFL-CIO, CLC as the designated representative of its employees in the above-described appropriate bargaining unit.

(b) Refusing to furnish information to the Union which is necessary in order for the Union fulfill its duties as the employees' bargaining representative.

<sup>4</sup> If 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.

(c) 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, recognize and bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment, including furnishing to the Union requested relevant information and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time employees of Ferri Supermarkets, Inc. d/b/a Murrysville Shop 'N Save at its Murrysville, Pennsylvania, facility; excluding all office clerical employees and guards, professional employees and supervisors as defined in the Act.

(b) Within 14 days after service by Region 6, post at its Murrysville, Pennsylvania facility copies of the attached notice marked "Appendix."<sup>5</sup> Copies of the notice, on forms provided by the Regional Director for Region 6 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.

(c) Within 21 days after service by the Region, file with the Regional Director in a sworn certification of a responsible offi-

cial on a form provided by the Region attesting to the steps that 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.

WE WILL NOT refuse to recognize and bargain with United Food and Commercial Workers International Union, Local Union 23, AFL-CIO, CLC as the designated representative of our employees in the below-described bargaining unit.

WE WILL NOT refuse to furnish information to the Union which is necessary in order for the Union fulfill its duties as the employees' bargaining representative.

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

WE WILL, on request, recognize and 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 full-time and regular part-time employees of Ferri Supermarkets, Inc. d/b/a Murrysville Shop 'N Save at its Murrysville, Pennsylvania, facility; excluding all office clerical employees and guards, professional employees and supervisors as defined in the Act.

FERRI SUPERMARKETS, INC. D/B/A MURRYSVILLE SHOP 'N SAVE

<sup>5</sup> If 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."