

International Longshoreman's Association, Local 1575, AFL-CIO (Navieras, NPR, Inc.) and William De Jesus Ferrer. Case 24-CB-1892

November 30, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND LIEBMAN

On February 3, 1999, Administrative Law Judge Arthur J. Amchan 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 only to the extent consistent with this Decision and Order.

In September 1997 the Union and the Employer negotiated a new collective-bargaining agreement to succeed the parties' previous contract. The Union thereafter held a meeting of its membership to obtain ratification of the new contract. Dissatisfaction with a new contractual provision was expressed by approximately 80 percent of the attending membership standing up from their seats in protest. When that occurred, the union president announced that all those in favor of ratifying the new contract should stand up. He then announced that the contract had been ratified on the basis of those members who had, in fact, been standing in protest. The Union and the Employer subsequently executed the collective-bargaining agreement.

The judge found that the Union breached its duty of fair representation, and thereby violated Section 8(b)(1)(A) of the Act, by using the members' expression of disapproval as a basis for declaring that its members had ratified the new collective-bargaining agreement. We cannot agree with the judge's finding.

It is, of course, well established that an exclusive bargaining agent has the duty of fairly representing all unit employees. *Vaca v. Sipes*, 386 U.S. 171, 177 (1967). It is equally well settled, however, that the duty of fair representation is confined to matters of employment and its terms and conditions. As the Board stated in its leading duty-of-fair-representation decision, "Section 7 . . . gives employees the right to be free from unfair or irrelevant or invidious treatment by their exclusive bargaining agent in matters affecting their employment." *Miranda Fuel Co.*, 140 NLRB 181, 185 (1962), enf. denied 326 F.2d 172 (2d Cir. 1963). (Emphasis added.)

Procedures relating to the adoption, ratification, or acceptance of collective-bargaining agreements have long been recognized as not falling within the scope of Section 8(d)'s

"wages, hours, and other terms and conditions of employment," but as "matter[s] . . . exclusively within the internal domain of the Union." *Houchens Market of Elizabethtown, Inc. v. NLRB*, 375 F.2d 208, 212 (6th Cir. 1967). Accord, *Movers & Warehousemen's Assn. v. NLRB*, 550 F.2d 962, 965 (4th Cir. 1977). Employee ratification is thus a permissive subject of bargaining, and an employer may not insist that the collective-bargaining agreement be ratified as a condition of signing the agreement. See, e.g., *Seneca Environmental Products*, 243 NLRB 624, 632 (1979), enf. 646 F.2d 1170 (6th Cir. 1981).

A union is not obligated to obtain ratification of any collective-bargaining agreement that it negotiates on behalf of employees it represents. *North Country Motors*, 146 NLRB 671, 674 (1964). Rather, as the designated representative, the union is free to negotiate and make binding agreements, with or without the formal consent or ratification of the unit employees. Employee ratification is a prerequisite for contract acceptance only when both parties agree that it is a condition precedent to a binding contract. *Beatrice/Hunt-Wesson*, 302 NLRB 224 fn. 1 (1991); *Williamhouse-Regency of Delaware*, 297 NLRB 199 fn. 5 (1989), enf. 915 F.2d 631 (11th Cir. 1990). If a union does choose to seek employee ratification, it is for the union "to construe and apply its internal regulations relating to what would be sufficient to amount to ratification." *M & M Oldsmobile*, 156 NLRB 903, 905 (1966), enf. 377 F.2d 712 (2d Cir. 1967); *Childers Products Co.*, 276 NLRB 709, 711 (1985), review denied mem. 791 F.2d 915 (3d Cir. 1986).

Applying these settled principles to this proceeding, we must dismiss the complaint allegation that the Union's conduct of the ratification vote violated Section 8(b)(1)(A) of the Act. There is no contention here that the Union and the Employer agreed that employee ratification was a condition precedent to forming the collective-bargaining agreement. Therefore, a vote of the membership was not necessary to the formation of a collective-bargaining agreement between the Employer and the Union. Although the manner in which the Union conducted the ratification vote does not garner our sympathy, nonetheless as a matter of law that conduct, being purely an internal union affair, does not come within the duty of fair representation. Rather, the decision as to whether ratification occurred was within the Union's exclusive domain and control, and therefore the ratification process was purely advisory. See *NLRB v. Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, 349-350 (1958) ("ballot" clause relating to the procedure to be followed by employees before the union could call a strike or refuse a final offer "settles no term or condition of employment" and "merely calls for an advisory vote of the employees"). Accordingly, there was no violation of the

duty of fair representation in the Union's method of counting votes for and against ratification.¹

We shall therefore dismiss the complaint² in its entirety.³

ORDER

The complaint is dismissed.

Ismael Rodriguez-Izquierdo, Esq., for the General Counsel.
Nicolas Delgado, Esq., San Juan, Puerto Rico, for the Respondent.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in San Juan, Puerto Rico, on November 18, 1998. The charge was filed September 25, 1997,¹ and the complaint was issued May 29, 1998.

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

FINDINGS OF FACT

I. JURISDICTION

International Longshoreman's Association, Local 1575, admits, and I find, that it is a labor organization within the meaning of Section 2(5) of the Act. I further find, that at all times

¹ The judge's reliance on *Teamsters Local 310 v. NLRB*, 587 F.2d 1176 (D.C. Cir. 1978), reversing and remanding 226 NLRB 772 (1976), is misplaced. In that case, the court held that by denying members of one labor organization the same opportunity accorded other union employees to vote on contract ratification, a joint representative discriminated against employees "in matters affecting their employment" and violated its duty of fair representation. 587 F.2d at 1183-1184. There is, however, an important distinction between *Teamsters Local 310* and the instant case. In *Teamsters Local 310*, the court stressed that "[a]ll the evidence in the record," including the union constitutions, indicated that membership ratification was necessary before the joint representative could properly communicate its acceptance of the contract to the employer. *Id.* By contrast, in the instant case, there is nothing in the record contradicting the Union's position that membership ratification was not required by its constitution and bylaws.

² No exceptions were filed to the judge's dismissal of the other complaint allegations.

³ Alleged irregularity regarding internal union ratification may be appropriately resolved in another forum, however. A private right of action is available under the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. Sec. 401 et seq. (LMRDA). See *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 296 (1971) (purely internal union affairs are a subject that the NLRA leaves principally to other processes of law); *American Postal Workers' Union, Local 6885 v. American Postal Workers, AFL-CIO*, 665 F.2d 1096, 1101-1105 (D.C. Cir. 1981) (national union's refusal to submit collective-bargaining agreement to local union for ratification, while giving other union members the right to ratify their contracts, was inconsistent with the equal rights provision of the LMRDA); *Bauman v. Presser*, 117 LRRM 2393 (D.D.C. 1984) (court granted injunctive relief sought by union members to enjoin the counting of ballots in contract ratification because balloting procedures employed by union violated the LMRDA), appeal dismissed 119 LRRM 2247 (D.C. Cir. 1985), rehearing and suggestion for rehearing en banc denied (D.C. Cir. 1985).

¹ All dates are in 1997 unless otherwise indicated.

material to this case it has been the exclusive collective-bargaining representative of employees, including stevedores of Navieras, NPR, Inc., which provides marine transportation and related services between Puerto Rico and the continental United States. Navieras is an employer engaged in commerce within the meaning of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

For many years the Union has had collective-bargaining agreements with Navieras and Sea Land, Inc. regarding the employment of stevedores in Puerto Rico. Prior to 1962 both these companies unloaded their vessels at the southern port of Ponce, as well as at San Juan. In about 1962 the unloading of ships at Ponce ceased. In negotiating its collective-bargaining agreements since that time, the Union has historically sought to guarantee some work for its members from Ponce.

Stevedores are called to work in groups of 19 employees called gangs. Under the collective-bargaining agreement that was in effect between 1990 and 1994, there were four gangs comprised of union members from San Juan and one gang from Ponce (referred to in the record as the "fixed" Ponce gang). In negotiating a new collective-bargaining agreement with Navieras in 1997, the Union's board of directors proposed the creation of an additional gang from Ponce (the Ponce alternate gang).² Among the members of this new gang are the son and two grandsons of Celestino Perez, the highest ranking union official on the old Ponce gang. Under the terms of the new collective-bargaining agreement, this new Ponce gang is guaranteed 1 day of work each week. In alternating weeks this gang would work 1 day for Navieras and the next week 1 day for Sea Land. Under the terms of the prior collective-bargaining agreement, the work to be performed by the new or "alternate" Ponce gang would have been done by San Juan employees, including the charging party.

On September 25, 1997, the Union board of directors held an "assembly," or meeting, at which changes in the new collective-bargaining agreement were read to union members for the purpose of obtaining their ratification of the new contract. There were 500-600 of the Union's 1000-1200 members present. When the provision creating the additional Ponce gang and guaranteeing it a shift per week was read, William De Jesus Ferrer, a San Juan member, attempted to make a motion to submit this provision to a vote of the union's membership.

Nicholas Delgado, the union's attorney, told Ferrer to sit down and that his motion would be considered when the board had finished reading all the new provisions of the contract. When the reading of these changes concluded, the Union's board of directors refused to recognize Ferrer. Approximately 80 percent of those members in attendance, most of whom were from San Juan, stood up and started yelling to protest the board's failure to entertain Ferrer's motion.

While these members were still standing to protest, Union President Guillermo Ortiz asked that all those in favor of ratifying the collective-bargaining agreement stand up. He then announced that the contract had been ratified on the basis of those members standing in protest of the board's decision not to

² This provision appears in GC Exh. 3(b) at p. 4, par. 71.

entertain Ferrer's motion. Ortiz then left the meeting.³ On October 7 the Union and Navieras executed the collective-bargaining agreement presented at the September 25 assembly.

Analysis

The General Counsel alleges that the Union violated Section 8(b)(1)(A) in: (1) entering into the collective-bargaining agreement without allowing its members an opportunity to discuss and/or vote on the provision establishing the alternate Ponce gang and guaranteeing it work; (2) dishonestly treating the expression of opposition to this provision as an expression of support for ratification of the contract; and (3) fraudulently declaring that the collective-bargaining agreement was ratified on the basis of demonstrations of opposition to the creation of the new Ponce gang. I find that the Union did not violate the Act in preventing discussion and consideration of the Ponce alternate gang, but that it did violate the Act in treating demonstrations in opposition to the provision as support for ratification and declaring the collective-bargaining agreement ratified on that basis.

It is well settled that a union which enjoys the status of exclusive collective-bargaining representative has an obligation to represent employees fairly, in good faith, and without discrimination against any of them on the basis of arbitrary, irrelevant, or invidious distinctions. *Vaca v. Sipes*, 386 U.S. 171 (1967). However, so long as the Union exercises its discretion in good faith and with honesty of purpose, a collective-bargaining representative is allowed a wide range of reasonableness in the performance of its duties. *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953); *Air Line Pilots v. O'Neill*, 499 U.S. 65 (1991).

A union does not breach its duty of fair representation simply because it negotiates contract provisions beneficial to one group of represented employees at the expense of another group of represented employees. This principle is best exemplified by the recent Board decision in *Firemen & Oilers Local 320 (Philip Morris)* 323 NLRB 89 (1997). In the *Fireman & Oilers* case the Board held that the Union did not violate Section 8(b)(1)(A) when it negotiated a seniority provision that benefited six oilers who were production employees prior to becoming

³ To the extent that there is conflicting evidence regarding what transpired at the union assembly of September 25, I credit the testimony of William De Jesus Ferrer over that of Juan Velez, vice president of the Union, and R. Exh. 1, the minutes of the meeting. In this regard, I note that Respondent stipulated that three union members; Rafael Torres, Angel Lopez, and Jose Padilla, would give the exact same testimony regarding the assembly as De Jesus Ferrer. Thus, their testimony corroborates that of Ferrer. Angel Lopez was a member of the Union's board of directors on September 25. Jose Padilla was also a member of the board and formerly was the treasurer of the Union.

The General Counsel, on the other hand, stipulated to the admission of R. Exh. 1, the minutes of the September 25 meeting. These minutes are signed by Guillermo Ortiz, the president of the Union, and Carlos Ortiz, the secretary general of the Union. There is no evidence regarding the circumstances under which they were taken or whether they were ever approved. On balance, I find the testimony of De Jesus Ferrer, as corroborated, to be more credible than that of Velez and R. Exh. 1 as to whether the collective-bargaining agreement was ratified by the membership of the Union. I conclude that the collective-bargaining agreement was not ratified.

ing oilers, to the detriment of four other oilers, who had never been production employees.

On the other hand, if a union favors one group of represented employees for reasons that restrain or coerce employees in the exercise of their Section 7 rights, or reasons that are arbitrary or demonstrate bad faith, its negotiations may violate Section 8(b)(1)(A). One example is where the Union favors one group of represented employees because they have been members of the Union for a longer period of time, *Teamsters Local 42 (Daly, Inc.)*, 281 NLRB 974 (1986), enfd. 825 F. 2d 608 (1st Cir. 1987); *Teamsters Local 435 (Super Valu, Inc.)*, 317 NLRB 617, fn. 3 (1995). Another is one is when the Union favors one group because they were members of one local union rather than another, *Reading Anthracite Co.*, 326 NLRB 795 (1998).

The charging party intimates that the Union demonstrated bad faith in establishing the new Ponce gang on the basis of nepotism. However, the General Counsel did not allege, argue, or prove that nepotism was a motivating factor for the creation of this gang. Union Vice President Juan Velez testified that the board of directors was motivated simply by a desire to provide more work for the Ponce members, who according to Velez, have less employment opportunities than those in San Juan. I credit the testimony of Velez in this regard.

On the other hand, the General Counsel has established that the Union's board of directors used expressions of disapproval regarding the creation of the alternate Ponce gang to declare that its members had ratified the new collective-bargaining agreement in its entirety. Once the Union decided to seek ratification of the collective-bargaining agreement, it was required to do so in fair and honest manner, regardless of whether it was required to obtain such approval, *Teamsters Local 310 v. NLRB*, 587 F. 2d 1176 (D.C. Cir. 1978). Thus, in seizing on the demonstrated opposition to the alternate Ponce gang as a basis for ratification, the Union violated Section 8(b)(1)(A).

CONCLUSIONS OF LAW

1. By using expressions of disapproval to the new clause creating the alternate Ponce gang as a basis for declaring that its members ratified the new collective-bargaining agreement, the Union violated Section 8(b)(1)(A) of the Act.

2. The Union did not violate the Act in curtailing discussion of the merits of the contract provisions relating to the new alternate Ponce gang.

3. The Union did not violate the Act in not allowing its members to vote on the provisions relating to the new alternate Ponce gang separately from a vote on the entire collective-bargaining agreement.

REMEDY

Having found that the Union has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and take certain affirmative action designed to effectuate the policies of the Act.

The Union must in a fair and honest manner resubmit its collective-bargaining agreement to its members for ratification. The Union need not submit individual provisions of the agreement to its members for ratification, and need not allow debate on any of these provisions. The disposition of the General

Counsel's prayer that William De Jesus Ferrer and other similarly situated employees be made whole for any loss of earnings caused by the Union as a result of the unlawful ratification of the collective-bargaining agreement is deferred in order to determine whether the Union's members vote whether or not to ratify the collective-bargaining agreement. If the contract is

ratified then it may be apparent that these employees have suffered no loss as a result of the Union's conduct on September 25, 1997.

[Recommended Order omitted from publication.]