

International Union of Operating Engineers, Local Union No. 17 and Hertz Equipment Rental Corp. Case 3-CB-7607

August 27, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS
TRUESDALE AND WALSH

On July 17, 2000, Administrative Law Judge George Alemán issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel and the Charging Party filed answering briefs.

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,¹ findings,² and conclusions and to adopt the recommended Order as modified.³

Throughout the course of this proceeding the Respondent has asserted that the complaint should be dismissed

¹ On May 16, 2000, the Respondent filed with the judge a motion to correct the record to indicate that the Respondent's counsel had excepted to the judge's rulings at the hearing denying the Respondent's motion to dismiss the case and quashing subpoenas. The Respondent's motion asserts that the General Counsel and the Charging Party consented to the correction. The judge denied the Respondent's motion on the grounds that he was not persuaded from the context of the disputed passage that the Respondent's counsel was, in fact, objecting to the judge's rulings. The disputed transcript passage shows that the Respondent's counsel stated that "I respectfully accept both decisions from your Honor." The judge also observed that the Respondent's averment that the General Counsel and the Charging Party had consented to the correction was uncorroborated.

The Respondent has excepted to the judge's ruling on the motion to correct the record. Under all the circumstances, we find, contrary to the judge, that the Respondent's motion should be granted as the proposed correction is fully consistent with the transcript as a whole and no party has opposed the motion. In this regard, the General Counsel, in his answering brief, states that he was contacted by the Respondent's counsel following the hearing and verbally indicated that he did not oppose the motion to correct the transcript. The Charging Party's answering brief fails to address this issue.

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 We shall modify par. 2(a) of the judge's recommended Order to omit the requirement relating to notice mailing in the event that the Respondent goes out of business or closes the facility involved in this proceeding. See, e.g., *Laborers Local 1184 (Nicholson Rodio)*, 332 NLRB 1292 (2000). Consistent with the Board's standard remedial practice, we shall further require the Respondent to return to the Regional Director signed copies of the notice for posting by Hertz, if willing, at all places where notices to employees are customarily posted. We shall also correct the judge's recommended notice to conform to the language of his recommended Order.

and the case reassigned to another Region for a new investigation because the Respondent's counsel was not present when the Board agent assigned to investigate the charge took an affidavit from the Respondent's organizer and agent, Gerald Franz. The Respondent renews this contention in its exceptions. The Respondent's exceptions are without merit.

It is undisputed that, prior to any entry of appearance of counsel on behalf of the Respondent, the Board agent assigned to investigate this case contacted Franz and made an appointment to take his affidavit. Prior to the date of the appointment, the Respondent's counsel entered a notice of appearance, which requested that all contacts with the Respondent be initiated through counsel.⁴ Upon receiving this notice, the Board agent attempted to contact the Respondent's attorney and left a phone message advising him of the scheduled appointment to take Franz' affidavit.⁵ The Board agent also called Franz and asked if he wished to go forward with the affidavit in light of the entry of appearance. Franz voluntarily agreed. Franz's affidavit was not used at the hearing, and Franz was not called to testify by any party.

Section 10056.6 of the Board's Casehandling Manual⁶ provides, in pertinent part, that

Where the respondent is represented by counsel or other representative and cooperation is being extended to the Region in connection with its investigation of unfair labor practice charges, the charged party's counsel or representative is to be contacted and afforded an opportunity to be present during the interview of any supervisor or agent whose statements or actions would bind a respondent. This policy will normally apply in circumstances where: (a) the charged party or the latter's counsel or representative is cooperating in the Region's investigation; (b) counsel or representative makes the individual to be interviewed available with reasonable promptness so as not to delay the investigation; and (c) during the interview counsel or representative does not interfere with, hamper, or impede the Board agent's investigation. In cases involving individuals whose supervisory status is unknown, this policy would not be applicable.

This policy does not preclude the Board agent from receiving information from a supervisor or agent of the charged party where the individual

⁴ According to the Respondent's attorney, it is his practice never to provide an affidavit in cases where his client is the charged party.

⁵ The Respondent's attorney avers that he did not read the message left for him until after the affidavit had been taken.

⁶ The Casehandling Manual provides procedural and operational guidance to Agency employees in the administration of the Act, and is not binding authority on the Board or the General Counsel.

comes forward voluntarily, and where it is specifically indicated that the individual does not wish to have the charged party's counsel or representative present. In those cases in which the witness does not object to the presence of counsel, the appointment for an interview should be made and counsel advised of the date, time, and place of the interview.

As discussed above, the Board agent initiated contact with Franz at a time when no notice of appearance had been received. Following the entry of appearance, the Board agent promptly asked Franz if he wished to go forward with the affidavit. Franz voluntarily agreed to proceed with the interview. The Board agent also promptly contacted the Respondent's attorney to advise him of the appointment. The fact that the Respondent's attorney delayed in obtaining his telephone messages until after the affidavit had been secured does not, in these circumstances, establish that the Region acted improperly. For all of the foregoing reasons, in addition to those stated by the judge in his decision, we find that the investigation of this charge complied with the principles set forth above, and we deny the Respondent's motion to dismiss the complaint.⁷

Our colleague asserts that the Board agent engaged in misconduct by proceeding with the Franz affidavit in the circumstances of this case. According to the concurrence, the Board agent should have delayed further efforts to take the affidavit until he had made personal contact with the Respondent's counsel, once he had received notice of the entry of appearance. Our colleague also asserts that Franz did not come forward voluntarily to provide his affidavit. Instead "the Board agent solicited his participation at a time when the Board agent knew that Franz's employer was represented by counsel." We respectfully disagree.

As an initial matter, we stress that there is no evidence that the Board agent solicited Franz to go forward with the affidavit after the Respondent's counsel had entered a notice of appearance. To the contrary, it appears that the

⁷ We additionally affirm the judge's ruling quashing subpoenas served by the Respondent on the Regional Director and other Board agents in support of its contention that the complaint should be dismissed. The General Counsel has denied the Respondent's request for authorization to allow the subpoenaed individuals to testify and provide the requested documents. The Respondent has presented no evidence tending to contradict the facts set forth above, and has failed to identify any purpose to be served by these subpoenas other than a generalized desire to "complete the record." In these circumstances, we find that the subpoenas were properly quashed.

Chairman Hurtgen agrees with the quashing of the Respondent's subpoenas. However, he does not rely on the General Counsel's failure to consent. Instead, he relies upon the fact that the Respondent failed to set forth the specific purpose of the subpoenas.

Board agent advised Franz of the entry of appearance, and *asked* him if he wished to proceed with the previously scheduled appointment to take his affidavit. After being advised of the circumstances, Franz agreed to proceed with the previously scheduled appointment. Our colleague does not appear to contend that the Board agent's initial contact with Franz, before the Respondent's counsel had entered an appearance, in which the appointment to take Franz's affidavit was made, was improper. In our view, the concurrence fails to give the proper weight to the fact that the Board agent's initial contact with Franz was indisputably entirely proper.

More fundamentally, we do not agree with our colleague's suggestion that, regardless of Franz's willingness to be interviewed, the Board agent had a duty not to proceed until he had made personal contact with the Respondent's counsel, and afforded counsel the opportunity to be present. The facts show that the Board agent called the Respondent's attorney on December 17, 1999, at 11:43 a.m., to advise him of the appointment. The Respondent's attorney inexplicably did not retrieve the message until December 20, after the interview earlier that day. Thus, if the Respondent's attorney had not been tardy in returning the message, he could have been present at the interview.

In any event, Section 10056.6 of the Board's Casehandling Manual, which is quoted in full above, is clear that, while counsel is normally to be notified of interviews of supervisors or agents conducted in the course of investigating a charge, and given an opportunity to be present, the witness ultimately has the right to be interviewed, without the presence of counsel, if that is the witness's desire. Our colleague's proposed standard is inconsistent with the Board's Casehandling Manual, and we decline to fault the Board agent for failing to act in a manner consistent with the views set forth in the concurrence.

Our colleague also asserts that our finding that there was no misconduct in this case is somehow foreclosed by the Board's March 1, 2000 Order denying the Respondent's motion to dismiss the complaint and transfer the case to another Region. We do not agree. The Board's Order denied the Respondent's motion, "without prejudice to renewal of the motion before the Administrative Law Judge, who may also entertain any request that testimony or evidence from Gerald Franz be limited or excluded, or that the use of the affidavit of Gerald Franz be limited or excluded."

Contrary to our colleague, there is absolutely nothing in the Board's Order to suggest that the Board had "recognized that the Board agent's conduct might have been improper, but concluded that dismissal of the complaint was not the proper remedy." Nor does the Order indicate, as

our colleague suggests, that the Board had “suggested that a remedy might only be appropriate if the Respondent could show that it was somehow prejudiced at the hearing because of the actions of the Board agent.” Rather, the Board’s Order, by its express terms, referred the entire matter, including the motion to dismiss the complaint, to the judge assigned to the case, and reserved any ruling by the Board until the issuance of the judge’s final decision in this case, upon the filing of exceptions by any party. We decline to read into the Board’s prior Order in this case the interpretation placed upon it by our colleague. Because that Order effectively deferred any decision on the merits of the Respondent’s motion, we also do not agree that it places any limitation, as “law of the case,” on our disposition of the matter in this decision.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, International Union of Operating Engineers, Local Union No. 17, Tonawanda, New York, its officers, agents, and representatives, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

“(a) Within 14 days after service by the Region, post at its business offices and meeting halls copies of the attached notice marked “Appendix.”¹³ Copies of the notice, on forms provided by the Regional Director for Region 3, 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 and members 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.”

2. Add the following new paragraph 2(b) and reletter the subsequent paragraph.

“(b) Sign and return to the Regional Director sufficient copies of the notice for posting by Hertz Equipment Rental Corporation, if willing, at all places where notices to employees are customarily posted.”

3. Substitute the attached notice for that of the administrative law judge.

MEMBER WALSH, concurring.

I agree with the result reached by my colleagues in this case. Contrary to my colleagues, however, I conclude that the Board agent did not follow proper procedure in interviewing the Respondent’s agent without the pres-

ence of his counsel. In my view, once the Board agent had ascertained that the Respondent was represented by counsel, he should not have gone forward with the interview until he made personal contact with the Respondent’s counsel, so that he could be assured that the counsel knew that the interview was going to take place and would have an opportunity to be present. In the circumstances of this case, Franz’s agreement to go forward with the interview at the Board agent’s request cannot truly be considered the equivalent of an individual “coming forward voluntarily” and “specifically indicating” that he does not wish to have the Union’s counsel present. Franz did not ‘come forward voluntarily.’ In fact, the Board agent initially solicited his participation in the interview, and later contacted him to ascertain if he still wished to have the interview after his counsel had entered an appearance. In my view, this is a far cry from a witness ‘coming forward voluntarily’ to give a statement knowing that he is an agent of a party that is represented in the proceeding. Accordingly, as a matter of fundamental fairness, the Board agent should have waited at least until he was assured that the counsel knew about the interview before going forward.¹

The Respondent previously filed a motion to dismiss the complaint in this case directly with the Board. On March 1, 2000, a Board panel, which included Member Truesdale, denied the motion, “without prejudice to renewal of the motion before the Administrative Law Judge, who may also entertain any request that testimony or evidence from Gerald Franz be limited or excluded, or that the use of the affidavit of Gerald Franz be limited or excluded.” In my view, a fair reading of this Order reveals that the Board panel recognized that the Board agent’s conduct might have been improper, but concluded that dismissal of the complaint may not be the proper remedy. Instead, the panel suggested that a remedy might only be appropriate if the Respondent could show that it was somehow prejudiced at the hearing because of the actions of the Board agent. I consider that prior ruling to be the law of the case. My colleagues, however, ascribing no substantive meaning to the ruling at all, have decided to rule that the Board agent’s actions were proper. For the reasons stated below, it is my view (in agreement with the judge) that in fact no prejudice has been shown. Thus, it is completely unnecessary to

¹ My colleagues rely on the fact that the Board agent notified the Respondent’s counsel of the interview on December 17, 1999, and the Respondent’s counsel did not respond until December 20, after the interview had been conducted. A quick look at a 1999 calendar shows that December 17 was a Friday, and December 20 a Monday, which means that in fact the Board agent allowed the Respondent’s counsel less than one business day to respond before proceeding with the interview.

reach out and rule on whether the Board agent's conduct was proper or not. Because my colleagues have concluded that such a ruling is necessary, however, I feel compelled to set forth my contrary view.

However, I agree with the judge that the Respondent has not in fact shown that it was prejudiced by the conduct of the investigation. No party sought to introduce Franz' affidavit, and he was not called as a witness. In addition, the Respondent has neither contended nor shown that its decision not to call Franz as a witness was influenced by the manner in which his affidavit was taken. Accordingly, solely for these reasons and the reasons stated by the judge, I agree that his decision to deny the Respondent's motion was correct.

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS 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 restrain or coerce employees of Hertz or of any other employer by blocking their ingress to or egress from Hertz' Tonawanda, New York facility.

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

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL UNION NO. 17

Rafael Aybar, Esq., for the General Counsel.
Richard D. Furlong, Esq., for the Respondent.
Richard C. Heffern, Esq., for the Charging Party.

DECISION

GEORGE ALEMÁN, Administrative Law Judge. A hearing in the above matter was held on April 10, 2000, in Buffalo, New York, pursuant to an unfair labor practice charge filed by Hertz Equipment Rental Corp. (Hertz) on December 9, 1999, and issuance of a complaint by the Regional Director for Region 4 of the National Labor Relations Board (the Board) on January 21, 2000. The complaint alleges that International Un-

ion of Operating Engineers, Local Union No. 17 (Respondent or Local 17) violated Section 8(b)(1)(A) of the National Labor Relations Act (the Act) by impeding "the entrance to and exit from the employer's facility by employees and supervisors, in the presence of employees." In an answer to the complaint dated March 14, 2000, the Respondent denies engaging in unlawful conduct.¹

All parties at the hearing were afforded full opportunity to call and examine witnesses, to submit oral and written evidence, and to argue orally on the record. On the entire record before me, including my observation of the demeanor of the witnesses, and after considering briefs filed by the General Counsel, the Respondent,² and the Charging Party, I make the following³

¹ The complaint and answer are found in GC Exh. 1.

² The Respondent has filed a motion to correct the record, claiming that transcript p. 19, L. 14, which reads, "MR. FURLONG: I respectfully accept both decisions from your Honor," is incorrect in that its counsel, Mr. Furlong, was not agreeing with, but rather taking exception to, my rulings denying its motion to dismiss (discussed below) and granting the General Counsel's petition to revoke subpoenas duces tecum and ad testificandum issued by the Respondent to Regional Director Sandra Dunbar and other Board agents (see R Exhs. 1 and 2). It asks that the record be corrected to read, "MR. FURLONG: I respectfully except both decisions from your Honor . . ." and avers that the General Counsel and the Charging Party have consented to the correction. Regarding the latter assertion, I have received nothing either from the General Counsel or the Charging Party expressing their agreement with, or lack of opposition to, the Respondent's motion. Further, I perceive nothing in the context in which Furlong made his remark to suggest that the latter was, in fact objecting to my rulings. Indeed, I find it unlikely that Furlong, whose verbal expression at the hearing was clear and concise, would have verbalized an exception to my rulings in the manner described by him. Rather, I find it more likely that if Furlong had intended to object to the ruling, the preposition "to" or "from" would have followed his alleged use of the term "except", so that his response to my ruling would have read, "I respectfully except to (or from) both decisions from your Honor." (See, e.g., Furlong's response to my ruling at Tr. 124.) In sum, I am not persuaded that the record at p. 19, L. 14 is in error, as claimed by the Respondent and, accordingly, deny its motion to correct the record.

³ In its brief, the Respondent renews a motion, initially denied without prejudice by the Board on March 1, 2000, and again denied by me at the start of the hearing, to dismiss the complaint and to have the unfair labor practice charge transferred to and reinvestigated by different a regional office. In support of its motion, it argues that the Regional Director for Region 3 and her subordinates engaged in a breach of ethics by taking a sworn affidavit from Local 17 Agent Jerry Franz at a time when Local 17 was represented by legal counsel and without first having obtained the latter's consent or approval. I adhere to my ruling denying the motion. In so doing, I note that the Respondent has made no claim, either at the hearing or in its brief, that it was somehow prejudiced by the procurement of Franz' affidavit without the purported consent of its counsel. Nor do I find that it was prejudiced in any way in the presentation of its case by this alleged breach of ethics, for Franz was not called as a witness by either side, nor was his affidavit or its contents used any point throughout the hearing. Rather, the General Counsel called just two witnesses in support of his case, Hertz officials Timothy Welch and Melissa Kwoka, while the Respondent, for its part, called none. Thus, other the limited reference made by the Respondent, at the start of the hearing, to the Franz affidavit in support of its motion to dismiss, the affidavit was never mentioned or discussed during the hearing. Therefore, assuming, arguendo,

A. Findings of Fact

1. Jurisdiction

Hertz Equipment Rental Corp., a corporate entity with an office and place of business at 125 Milens Rd., Tonawanda, New York, is engaged in the nonretail rental of construction equipment. Annually, Hertz purchases and receives at its Tonawanda facility goods valued in excess of \$50,000 directly from points located outside the State of New York. The complaint alleges, the parties agree, and I find, that Hertz is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The parties further agree, and I find, that the Respondent, Local 17, is a labor organization within the meaning of Section 2(5) of the Act.

2. Factual background

The salient facts in this Case are not in dispute. On October 2, 1998, following a Board-conducted election, Local 17 was certified as the exclusive collective-bargaining representative of “all full-time and regular part-time tractor trailer drivers, mechanics ‘A’ (including the lead mechanic) and mechanics ‘B’ employed by [Hertz] at its 125 Milens Road, Tonawanda, New York location.”⁴ It appears that in or around September 1999,⁵ the parties were engaged in contract negotiations, and that beginning some time in early September, the Respondent also engaged in some picketing at the main entrance to the Hertz facility.⁶ By letter dated November 9, signed by business representative Thomas Freedenberg, Local 17 notified Hertz that it was engaged in a strike because of Hertz’ use of “persons other than bargaining unit members” to do their work (GC Exh. 5). The precise nature and extent of Local 17’s picketing was described by Hertz branch manager Welch, and Hertz branch administrator Kwoka who, as noted, were the only two witnesses called to testify.

Welch became branch manager at the Tonawanda facility in September. He testified that he first learned about the picketing at that facility in August, before his arrival, but witnessed the picketing first hand on his arrival at the facility the Wednesday after Labor Day, 1999. He recalls that on that date, he observed Freedenberg, Gerald Franz, and Mark Kirsch, all admitted agents of Local 17, on the picket line. (Tr. 23, 40.) According to Welch, Local 17 continued picketing the facility through early October, ceased at that point, and resumed again on a daily basis on November 8. He testified that when he arrived to

that the taking of the Franz affidavit somehow amounted to a breach of ethics, it is patently clear that the Respondent was in no way been prejudiced by the conduct. Accordingly, for this and other reasons stated at the hearing, I find no basis for reversing my ruling denying the Respondent’s motion to dismiss.

⁴ Excluded from the bargaining unit are all other employees employed at this location, including salespersons, office clerical employees, guards and supervisors as defined in the Act (GC Exh. 2). Local 17 was again certified by the Board on November 5, 1999, as exclusive collective-bargaining representative of the same employee unit following an election held pursuant to a decertification petition (GC Exh. 3).

⁵ All dates are in 1999, unless otherwise indicated.

⁶ The main entrance is located at the western end of the Hertz facility (see GC Exh. 4). Another entrance located at the southwestern corner of the facility was not in use (Tr. 36).

work on the morning of November 8, Local 17 pickets were walking in a circular motion at the entrance, effectively blocking vehicles from entering or leaving, and that after being prevented from entering the facility for about 5 minutes, the pickets, numbering between six to nine, eventually moved away from the entrance and allowed him to proceed. Welch recalls that one of the pickets that day was Freedenberg. After entering the facility, Welch was told by Kwoka that a driver from Hertz’ Albany facility had earlier been prevented from entering the Tonawanda facility and that the police had been called. The driver, according to Welch, was then contacted and asked to return to the Tonawanda facility, receiving assurances that the police would be called. The driver in fact returned and was permitted to enter.⁷

The picketing, according to Welch, typically began around 6–6:30 a.m. each day and lasted, on some days until 11 a.m., and on other days to around 2–2:30 in the afternoon, with the number of pickets dwindling as the day wore on from a high of around nine in the morning to two pickets by late morning or early afternoon (Tr. 45-46). Regarding the involvement of Local 17’s agents in the picketing, Welch recalls seeing Freedenberg, Franz, and Kirsch, the former two more than the latter, on the picket line at least once a week picketing for a set period of time, and that Hertz employees Leonard Zilowkowski, Paul Ziegelhofer, and Dan Shively also took part in the picketing before reporting for work each day around 6:30-6:55 a.m.

Welch testified that the ability of employees and drivers to gain access to the facility during the picketing varied from day to day and depended on the time of day entry was being attempted and on who happened to be on the picket line at that particular time. For example, he claims that on some days, drivers seeking to enter in the morning would have to wait some 10 minutes before being allowed through the main entrance, but that on other days the wait would be only about 5 minutes long. Welch admits that there were times when employees or drivers had no difficulty entering or leaving the Hertz facility, such as when the pickets stationed themselves to the side of the entrance without blocking it, or when they were inside a nearby trailer. However, he also recalled that there were times when picketers would allow a driver to enter without interference, only to subsequently prevent their departure from the facility, and that such departure at times lasted some 20 minutes. He testified that as a general rule, he summoned the police for assistance when the picketing delays lasted more than 5 minutes.

Welch recalls that on November 9, he called the police after pickets blocked an outside hauler from entering the facility. He claims that he called the police some 5 minutes after he first noticed the hauler trying to enter the facility, and believes the hauler had already been detained for an extended period of time before he first observed the incident. This same hauler, Welch further testified, was also detained for some 40-45 minutes when he tried to exit the facility, although he admits he did not personally observe the hauler being prevented from leaving. A

⁷ Welch admitted not being present the first time the driver sought entry, but testified he did observe the driver return to the facility and be allowed to enter with police intervention (Tr. 44).

similar blocking incident, Welch claims, also occurred on November 24. On that day, several vehicles, including one he was driving, tried to exit the facility but were prevented from doing so by Local 17 pickets. According to Welch, each vehicle that day was detained for about 5 minutes in what he described was a “wait your turn” procedure in which each vehicle lined up to leave would be held up for 5 minutes after the one in front of it had departed. Welch testified that after being detained for 10 minutes, he called the police. According to Welch, between November 8 and mid-December, he had to call the police at least once a day in response to the pickets refusal to allow ingress and egress to the facility.

Kwoka testified that she worked for Hertz from April 30, 1998, until leaving “for personal reasons” on February 4, 2000. (Tr. 105.) She recalls that the Local 17 picketing began sometime in August, stopped on October 4, and resumed on November 8. Like Welch, Kwoka testified to seeing Freedenberg, Kirsch, and Franz take part in the picketing, that the picketing was more intense during the early morning hours, with picketers numbering anywhere from six to nine, but that their numbers tapered off to about two or three by late morning. At times, the pickets, according to Kwoka, carried picket signs stating that Hertz was unfair to organized labor.⁸ Kwoka claims that when vehicles approached seeking entry, the pickets would circle in front of the vehicle for about 5 minutes to prevent its entry and would thereafter allow it to proceed. Like Welch, she too recalled that employees Zilokowski, Ziegelhofer, and Shively took part in the picketing early in the morning before working hours. Regarding the length of time that vehicles were detained, Kwoka said it varied “anywhere from 5 to 7 minutes, sometime longer.”

Kwoka testified that on November 8, she observed the Albany driver attempt to enter the facility and leave when he was denied entry by the pickets. The driver then called the Hertz facility from a local pay phone to explain the problem, and Kwoka, who took the call, advised him to stay put, that she was going to call the police. When the police arrived, the driver was permitted to enter the facility, load his vehicle, and leave without further incident. Kwoka recalls Freedenberg being on the picket line that day, and testified to having observed at least one Local 17 agent present on the picket line on a daily basis. She also recalled another blocking incident that occurred on December 2, when some three vehicles were lined up outside the entrance waiting to get in but were prevented from doing so by pickets who blocked the entrance for approximately 30-45 minutes. The police were eventually called by Welch.

Kwoka, like Welch, recalls picketing occurring on a daily basis, and that the police had to be called “probably two to four times a week” to restrain the pickets in their blocking activity, testifying that either she or Welch would make the call. She explained that she was particularly aware of the pickets’ conduct because it was “something that I was keeping an eye on for when the branch manager was not present, to make sure that everybody was able to come and go as they needed to perform their job” (Tr. 101). Kwoka also testified, without contradiction, to having been verbally accosted and threatened by a fe-

male picket as she was returning from lunch one day. Thus, she testified that after waiting behind a truck that was entering the facility, Kwoka immediately drove through as the truck entered, at which point the female picket began calling her “nasty” names. Kwoka avoided a confrontation and simply kept driving (Tr. 114).

3. Analysis

The complaint, as noted, alleges, and the General Counsel and Charging Party contend, that the Respondent’s conduct in blocking the ingress and egress of vehicles to and from the Hertz facility during its picketing was coercive and violated Section 8(b)(1)(A) of the Act. The Respondent denies the allegation,⁹ arguing that if some blocking did occur the conduct did not amount to restraint or coercion but rather constituted nothing more than a minor inconvenience lasting at most 5 minutes, a length of time which the Respondent contends was acquiesced in by Hertz (R. Br. at 2, 5).¹⁰ I find merit in the allegation.

Initially, the record evidence makes clear, and I so find, that at various times during the picketing that began November 8, Local 17 pickets intentionally blocked vehicles from entering or leaving the Hertz facility by positioning themselves between the vehicles and the entrance to the facility. Both Welch and Kwoka so testified without contradiction. From a demeanor standpoint, Welch and Kwoka came across as sincere witnesses who, I am convinced, testified honestly and truthfully.¹¹ I there-

⁹ However, the Respondent does not deny that its agents took part in the picketing. Nor, for that matter, does it deny overall responsibility for the picketing.

¹⁰ Welch testified that when he began working at the Hertz Tonawanda facility, he became aware of a “gentlemen’s agreement” between Local 17 and the local police, acquiesced in by Hertz, which allowed Local 17 pickets to deny vehicles access to and from the facility for 5 minutes, but that the police would be called if went beyond 5 minutes (Tr. 86-87). The Respondent contends on brief that under this agreement, pickets were allowed to delay each vehicle seeking to enter or exit the Hertz facility for 5 minutes. I find nothing in Welch’s testimony to support the Respondent’s contention. Rather, Welch testified only that the pickets were allowed to block the entrance for 5 minutes, and made no reference to a “five-minute per car” delay period.

¹¹ During its cross-examination of Kwoka, the Respondent sought to question her on whether she had ever been accused of stealing from Hertz. I sustained the General Counsel’s objection to this line of questioning. The Respondent on brief contends that it should have been allowed to inquire into Kwoka’s purported prior bad conduct arguing that such questions are permissible under Federal Rules of Evidence § 608(b) for purposes of attacking her credibility and establishing her lack of truthfulness. I disagree. Rule § 608(b) expressly prohibits the use of “extrinsic” evidence of a witness’ conduct (except for certain types of criminal convictions) to impeach the witness, but permits inquiry into such conduct if, in the discretion of the court, such conduct is probative of truthfulness or untruthfulness. See, *U.S. v. Morrison*, 98 F.3d 619, 628 (D.C. Cir. 1996); *Ponderosa Granite Co.*, 267 NLRB 212 (1983). Here, the mere fact that Kwoka may have been “accused” of stealing does not, in my view, establish a predisposition on her part for untruthfulness. *Saddle West Restaurant & Casino*, 269 NLRB 1027, 1036 (1984). Kwoka, in any event, implicitly denied having been terminated for misconduct when she testified that she left Hertz’ employ for “personal reasons.” The Respondent was therefore precluded by her denial from cross-examining her further on the subject. *Bronx Metal Polishing Co.*, 276 NLRB 299, 303 (1985).

⁸ Welch did not recall seeing picketers carrying signs.

fore credit their mutually corroborative claim of having personally observed on numerous occasions Local 17 pickets blocking the ingress and egress of vehicles to and from the Hertz facility, and their further assertion that the delays caused by the pickets' actions at times extended from 30 to 45 minutes. I reject in this regard the Respondent's contrary claim that whatever blocking may have occurred only lasted for no more than 5 minutes, for it has presented no evidence whatsoever to support its position or to contradict Welch's and Kwoka's account. Thus, even if I were to agree, which I do not, with the Respondent's contention, on brief (p. 5), that Hertz "acquiesced in the five (5) minute per car delay protocol," Welch's and Kwoka's credited testimony, that vehicles at times remained blocked for 30-45 minutes and that the police were often called to intervene, makes clear that Local 17 had not been complying with said "protocol." The Respondent, it should be noted, offered no evidence to refute Welch's and Kwoka's claim that the police were called on numerous occasions to clear the entrance of pickets so as to enable vehicles to proceed.

In sum, I find, in agreement with the General Counsel and the Charging Party, that during the picketing of the Hertz facility that began November 8, Local 17's pickets physically blocked vehicles driven by Hertz employees and clients from entering or leaving the Hertz facility for periods ranging from under 5 minutes to between 30-45 minutes, and that on numerous such occasions access to and from the facility occurred only after police were called to intervene. The Board has long held that the blocking of ingress to and egress from an employer's facility constitutes coercive conduct violative of Section 8(b)(1)(A) of the Act. *Tube Craft*, 287 NLRB 41, 493 (1987); *Longshoremen ILA Local 1291 (Trailer Marine)*, 266 NLRB 1204 (1983). The Respondent here, as noted, suggests that the brief blocking by pickets of vehicles trying to enter or leave the Hertz facility were simply "low level confrontations" amounting to nothing more than an "annoyance or inconvenience" that does not qualify as, or fit the description of, restraint and coercion under Section 8(b)(1)(A). I disagree for, as found above, the blocking of vehicles at times lasted between 30-45 minutes. The Board in any event has held that the blocking of vehicles, even for a short period of time and, as was the case here, until broken up by police to allow entrance or exit, is likewise coercive and violative of Section 8(b)(1)(A). See *Sheet Metal Workers Local 19 (Delcard Associates)*, 316 NLRB 426, 431 (1995), *Big Horn Coal*, 309 NLRB 255, 258 (1992), and *Carpenters (Reeves, Inc.)*, 281 NLRB 493, 498 (1986), citing to *Iron Workers Local 455 (Stokvis Multi-Ton)*, 243 NLRB 340 (1979). As pointed out by the Board in *Delcard* supra, a union cannot "arrogate to itself the right to determine when and under what conditions employees could pass through its picket lines." Accordingly, I find that, as alleged in the complaint, the Respondent's conduct here in blocking vehicles seeking to enter and leave the Hertz facility was indeed coercive and violated Section 8(b)(1)(A) of the Act.

CONCLUSIONS OF LAW

1. The Charging Party, Hertz Equipment Rental Corp., is an employer engaged in commerce with the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent, International Union of Operating Engineers, Local Union No. 17, is a labor organization within the meaning of Section 2(5) of the Act.

3. By blocking ingress and egress to the Hertz facility, the Respondent has engaged in an unfair labor practice affecting commerce within the meaning of Section 8(b)(1)(A) and Section 2(6) and (7) of the Act.

4. The above unfair labor practice has a close, intimate, and adverse effect on the free flow of commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, the Respondent shall be ordered to cease and desist from blocking vehicles seeking to enter or exit the Hertz facility in Tonawanda, New York, and to post an appropriate notice.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹²

ORDER

The Respondent, International Union of Operating Engineers, Local Union No. 17, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Blocking vehicles seeking to enter or leave the Hertz Equipment Rental Corp. facility in Tonawanda, New York.

(b) In any like or related manner 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 after service by the Region, post at its office in West Seneca, New York, copies of the attached notice marked "Appendix."¹³ Copies of the notice, on forms provided by the Regional Director for Region 3, 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 and members 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

¹² 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.

¹³ 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."

notice to all current employees and former employees employed by the Respondent at any time since November 8, 1999.