Temple Security, Inc. *and* General Service Employees Union, Local No. 73, SEIU, AFL–CIO, CLC and Independent Courier Guard Union of America, Party in Interest. Cases 13–CA–33078 and 13–CA–33382

December 20, 2001

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND WALSH

On May 28, 1999, the National Labor Relations Board issued its Decision and Order in the above-captioned case. 328 NLRB 663.[1] The Board found that the Respondent, an employer of guards, did not violate Section 8(a)(5) and (1) of the Act by withdrawing recognition from and refusing to bargain with the Charging Party, a mixed guard union,[2] upon the December 31, 1994 expiration of the parties' collective-bargaining agreement. The Board further found that the Respondent did not violate Section 8(a)(3), (2), and (1) by thereafter recognizing the Party in Interest, executing a collective-bargaining agreement with the Party in Interest, and giving effect to a union-security clause and a dues-checkoff clause contained in that agreement.

The Board's findings flowed directly from its earlier decision in *Wells Fargo Armored Service Corp.*, 270 NLRB 787 (1984), enfd. 755 F.2d 5 (2d Cir. 1985), cert. denied 474 U.S. 901 (1985).[3] In *Wells Fargo*, the Board construed Section 9(b)(3)[4] as precluding the finding of an 8(a)(5) and (1) violation when an employer of guards withdraws recognition from a mixed guard union upon expiration of the parties' collective-bargaining agreement. The Board concluded that to find such a violation would give "[the mixed guard union] indirectly—by a bargaining order—what it could not obtain directly—by certification—i.e., it compels the [employer] to bargain with the [u]nion." 270 NLRB at 787.

The Charging Party petitioned for review in the United States Court of Appeals for the Seventh Circuit. On October 16, 2000, the court granted the petition and remanded the case to the Board for further consideration of the Charging Party's Section 8 claims. *Service Employees Local 73 v. NLRB*, 230 F.3d 909 (7th Cir. 2000). The court held that the Board erred in construing Section 9(b)(3)'s prohibition against certifying mixed guard unions as depriving such unions of the protections of Section 8.

The court determined at the outset that the Board's interpretation of Section 9(b)(3) was not entitled to *Chevron*[5] deference. The court emphasized that the *Chevron* doctrine has two parts: "the part that requires a court to defer when ambiguities exist, and the part that requires a court to enforce the plain terms of a statute against the agency when there is no ambiguity." 230 F.3d at 913. The court added that the "meaning—or ambiguity—of certain words or phrases may only become evident when placed in context." Id. (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000)). In the context of the Act, the court found no "need to look beyond the language of the Act to understand the scope of the limitation created by [S]ection 9(b)(3)." 230 F.3d at 914.[6]

Turning to that language, the court pointed out that Section 9(b)(3) requires the Board to refrain from doing only two things: (1) finding that a unit including guards and nonguards is appropriate; and (2) certifying mixed guard unions as representatives of guard units. The court emphasized that there is no express language in Section 9(b)(3), or the Act, requiring the Board also to withhold from mixed guard unions the protections of Section 8. To the contrary, the court pointed out, in drafting Section 9(b)(3) Congress preserved guards' status as statutory employees who are entitled to form unions and claim all the rights and protections of Sections 7 and 8.

The court found further support for its plain reading of Section 9(b)(3) in the fact that this Section prohibits the *certification* of mixed guard unions, but does not forbid an employer from voluntarily recognizing a mixed guard union as the representative of a guard unit. The court found this distinction significant because, inasmuch as

[1] The case was submitted to the Board on a stipulated factual record, which is fully described in sec. III of the Board's decision.

[2] A mixed guard union is one which represents guards but which also admits nonguards to membership, or is affiliated directly or indirectly with an organization that admits nonguards to membership.

[3] The Respondent relied exclusively on *Wells Fargo* to justify its withdrawal of recognition and, in turn, relied on that withdrawal to permit its recognition of and bargaining with the Party in Interest.

[4] Sec. 9(b) provides, in pertinent part:

> [T]he Board shall not . . . (3) decide that any unit is appropriate . . . if it includes, together with other employees, any individual employed as a guard . . . ; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

[5] *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

[6] As a result, the court found it unnecessary to even consider, much less defer to, the Board's balancing of the policy arguments for and against its interpretation of Sec. 9(b)(3). For similar reasons, the court found unpersuasive the Second Circuit's decision enforcing the Board's order in *Wells Fargo*. As the court pointed out, the Second Circuit decided the case before the Supreme Court had elaborated on the *Chevron* doctrine and, as a result, felt obliged to defer to the Board's interpretation of the Act.

the Act establishes voluntary recognition as a legitimate way for unions to secure representative status, it shows that Congress never intended to take mixed guard unions outside the protections of the Act altogether. Rather, it shows that Congress struck a balance.

That balance, the court explained, lies in the fact that, while the Act grants certified unions "special privileges," such as a 1-year irrebuttable presumption of majority support, voluntarily recognized unions still enjoy the "the basic protections." As the court put it, "[c]ertification gives an organization which achieves it additional rights[,] not all its rights." 230 F.3d at 915 (quoting *NLRB v. White Superior Division*, 404 F.2d 1100, 1103 fn. 5 (6th Cir. 1968)). Against this backdrop, the court found that Section 9(b)(3) plainly was intended only to preclude mixed guard unions from claiming those additional rights, not to strip them of the basic protections afforded all bargaining representatives.

As the court finally observed, those basic protections include the protections of Section 8, which enforces the rights of employees to join unions and to bargain collectively, whether their union was certified by the Board or voluntarily recognized by their employer. More specifically, the court emphasized, Section 8(a)(5) broadly prohibits an employer from refusing to bargain collectively "with the representatives of his employees," meaning, simply, "those unions designated or selected for the purposes of collective bargaining by the majority of the employees in [an appropriate] unit." 230 F.3d at 915 (citations omitted).

For all of these reasons, the court held that the Board misconstrued Section 9(b)(3)'s directive not to certify mixed guard unions as meaning that voluntarily recognized mixed guard unions fall outside Section 8's protections altogether. The court remanded the case to the Board for further consideration of the Charging Party's Section 8 claims.

On January 31, 2001, the Board advised the parties that it had accepted the court's remand and invited statements of position. Only the General Counsel and the Charging Party filed statements of position.

The Board has considered the court's remand, and has decided to accept the court's decision as the law of the case.[7] The court left to the Board's consideration on remand whether the Respondent was privileged to withdraw recognition from the Charging Party either because a good-faith bargaining impasse had been reached or because the Charging Party had lost majority support. Because neither the Respondent, nor the Party in Interest advanced arguments along these lines after remand, we see no need to address the court's questions in the context of this case. The stipulated record before the Board, moreover, does not establish either factual predicate for withdrawal of recognition that the court identified. Even if the record were otherwise, our decisions likely would not permit a withdrawal of recognition.[8]

We therefore find that the Respondent was not privileged to withdraw recognition from the Charging Party upon the December 31, 1994 expiration of the parties' labor agreement simply because the Charging Party was a mixed guard union. Accordingly, we find that the Respondent violated Section 8(a)(5) and (1) by withdrawing recognition from and refusing to bargain with the Charging Party on and after that date. Further, because the Respondent's withdrawal of recognition was unlawful, we find that the Respondent violated Section 8(a)(3), (2), and (1) by recognizing the Party in Interest, executing a collective-bargaining agreement with the Party in Interest, and giving effect to a union-security clause and a dues-checkoff clause contained in that agreement.

ORDER

The National Labor Relations Board orders that the Respondent, Temple Security, Inc., Chicago, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize General Services Employees Union, Local No. 73, SEIU, AFL–CIO, CLC as the exclusive collective-bargaining representative of its employees in the appropriate unit. The appropriate unit, as set forth in article I, section 1 of the last expired collective-bargaining agreement between Respondent Employer and Local 73, effective by its terms for the period October 1, 1992, through December 31, 1994, is:

> All full-time and regular part-time watchmen, guards, security guards/officers, sentries, gatemen, roving guards, clock pullers, roundmen, industrial security

[7] Member Liebman dissented from the Board's original decision in this case. 328 NLRB at 665. She adheres to the views expressed in her dissent. Member Walsh shares those views. For institutional reasons, however, neither Member Liebman nor Member Walsh would vote to overrule the Board's original decision, or the Board's decision in *Wells Fargo Armored Service Corp.*, 270 NLRB 787 (1984), in the absence of a third vote to do so.

[8] First, it is well established that an employer is not entitled to withdraw recognition from a union upon good-faith impasse. See, e.g., *International Medication Systems*, 253 NLRB 863 fn. 2 (1980), enfd. mem. 667 F.2d 1031 (9th Cir. 1981), cert. denied 457 U.S. 1118 (1982). Second, when an employer unlawfully refuses to recognize and bargain with a union, the union's subsequent loss of majority support is presumed to be tainted by the employer's unfair labor practices and generally will not support the employer's withdrawal of recognition from the union. See, e.g., *Lee Lumber*, 322 NLRB 175, 178 (1996), enfd. in relevant part and remanded 117 F.3d 1454 (D.C. Cir. 1997), decision on remand 334 NLRB 399 (2001).

guards/officers, building security guards/officers, special guards/officers, industrial guards/officers, institutional guards/officers, hospital security guards, airport security guards/officers, commercial guards, patrolmen, walking beatment, car beatmen, and tenant security; plus working sergeants, working lieutenants, working captains, working dispatchers and supervisory personnel who are permanently assigned to a customer's premises and who work a regular detail of six (6) hours or more per week but excluding security employees in commercial buildings (except where separately contracted by a tenant for work exclusively in the tenants's space) in that area of Chicago bounded by Roosevelt Road on the South, Lake Michigan on the East, Halsted Street on the West, and Division Street on the North, and further excluding security employees in apartment buildings over seven stories in height in Cook County.

(b) Refusing to bargain collectively with General Services Employees Union Local No. 73, SEIU, AFL–CIO, CLC.

(c) Recognizing Independent Courier Guard Union of America as the exclusive collective-bargaining representative of the employees in the appropriate unit, and from applying the terms and conditions of the collective-bargaining agreement negotiated with Independent Courier Guards covering that unit (although this should not be construed to require or permit the varying or abandoning of any provision which increased wages and benefits over those which previously existed), unless and until Independent Courier Guards is certified by the National Labor Relations Board as the exclusive collective-bargaining representative for the unit.

(d) Providing assistance to the Independent Courier Guard Union of America by granting recognition to and entering into a collective-bargaining agreement with the Independent Courier Guards as the exclusive collective-bargaining representative of the employees in the appropriate unit.

(e) Encouraging membership in the Independent Courier Guard Union of America by granting recognition to and entering into a collective-bargaining agreement with the Independent Courier Guards as the exclusive collective-bargaining representative of the employees in the appropriate unit and by giving effect to the union-security provision and dues-checkoff clause in the contract with the Independent Courier Guards.

(f) In any like or related manner interfering with, coercing, or restraining employees in the exercise of their rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize General Services Employees Union Local No. 73, SEIU, AFL–CIO, CLC as the exclusive collective-bargaining representative of its employees in the appropriate unit, and, on request, meet and bargain with Local No. 73 concerning wages, hours of employment, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Within 14 days after service by the Region, post at its office in Chicago, Illinois, copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Responden's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicious 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 facilities involved in these proceeding, the Respondent shall duplicate and mail to all current employees and former employees employed by the Respondent at those locations at any time since January 1, 1995.

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

IT IS FURTHER ORDERED that the Board's original decision, issued on May 28, 1999, is vacated.

APPENDIX

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

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

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

[9] 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."

To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to recognize the General Services Employees Union, Local No. 73, SEIU, AFL–CIO, CLC, as the exclusive collective-bargaining representative of the unit described below:

> All full-time and regular part-time watchmen, guards, security guards/officers, sentries, gatemen, roving guards, clock pullers, roundmen, industrial security guards/officers, building security guards/officers, special guards/officers, industrial guards/officers, institutional guards/officers, hospital security guards, airport security guards/officers, commercial guards, patrolmen, walking beatmen, car beatmen, and tenant security; plus working sergeants, working lieutenants, working captains, working dispatchers and supervisory personnel who are permanently assigned to a customer's premises and who work a regular detail of six (6) hours or more per week but excluding security employees in commercial buildings (except where separately contracted by a tenant for work exclusively in the tenant's space) in that area of Chicago bounded by Roosevelt Road on the South, Lake Michigan on the East, Halsted Street on the West, and Division Street on the North, and further excluding security employees in apartment buildings over seven stories in height in Cook County.

WE WILL NOT refuse to bargain collectively with the General Services Employees Union, Local No. 73, SEIU, AFL–CIO, CLC.

WE WILL NOT recognize the Independent Courier Guard Union of America as the exclusive collective-bargaining representative of the employees in the appropriate unit described above and WE WILL NOT apply the terms and conditions of the collective-bargaining agreement negotiated with the Independent Courier Guards covering that unit (although this should not be construed to require or permit the varying or abandoning of any provision which increased wages and benefits over those that previously existed) unless and until the Independent Courier Guards is certified by the National Labor Relations Board as the exclusive collective-bargaining representative of the employees in the appropriate unit.

WE WILL NOT provide assistance to the Independent Courier Guard Union of America by granting recognition to or entering into a collective-bargaining agreement with the Independent Courier Guards as the exclusive collective-bargaining representative of the employees in the appropriate unit.

WE WILL NOT encourage membership in the Independent Courier Guard Union of America by grant recognition to and entering into a collective-bargaining agreement with the Independent Courier Guards as the exclusive collective-bargaining representative of the employees in the appropriate unit or by giving effect to the union-security provision and dues-checkoff clause in the contract with the Independent Courier Guards.

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

WE WILL recognize General Services Employees Union Local No. 73, SEIU, AFL–CIO, CLC, as the exclusive collective-bargaining representative of the employees in the appropriate unit, and, WE WILL, on request, meet and bargain with Local No. 73 concerning wages, hours of employment, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

TEMPLE SECURITY, INC.