JD(NY)–53-05
Brooklyn, NY

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

KINGS MATERIAL HANDLING CORP.

and **CASE 29-CA-26991**

LOCAL 1205, INTERNATIONAL BROTHERHOOD OF TEAMSTERS

Ashok Bokde, Esq., Counsel for the General Counsel
Stanley Israel, Esq., Counsel for the Respondent

DECISION

Statement of the Case

Raymond P. Green, Administrative Law Judge. I heard this case on November 8, 2005. The charge was filed on June 14, 2005 and the Complaint, which issued on September 20, 2005, alleged that notwithstanding the continuing viability of a visitation clause that existed in a contact that expired on November 30, 2004, the Respondent has refused to allow union representatives to visit with employees at its premises.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following:

Findings of Fact

I. Jurisdiction

The Complaint alleges, the Answer admits and I find that the Employer is engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. I also find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

For many years, the Employer and the Union have had a collective bargaining relationship. The last executed contract ran from November 14, 2000 to November 30, 2004. As of the time of the events in this case, the parties, although engaged in negotiations, had not yet reached a new contract and were, in effect operating under the terms of the expired agreement. That agreement contained a visitation clause which read as follows:

> The Employer agrees that any duly authorized business representative of the Union shall at all times be permitted to have free access to any place of work under the jurisdiction of the Employer or any member therein for the purpose of inspection of membership cards of said employees or in regard to any matter connected to the terms of this agreement.

The evidence established that on May 19 and again on June 20, 2005, union representative Nelson Nunez, was asked and directed to leave the Company's premises when he arrived to talk to employees about the progress of the contract negotiations. The Employer concedes that this is correct, albeit offering credible evidence that the reason it did so, was because it learned that Nunez was discussing the possibility of holding a strike vote with employees. It was the Employer's position that discussion of a strike vote was inappropriate and not covered by the language of the visitation clause. Notwithstanding that I tend to believe the Employer's testimony that it kicked Nunez off the premises because he was talking to employees about having a possible strike vote, I do not think that this distinction makes any difference to the outcome of the case.

The evidence also established that on several occasions subsequent to June 20, 2005, union representatives have visited with employees on the premises without incident.

It is well established that even after the expiration of a collective bargaining agreement, the extant wages and terms and conditions of employment, including contractually agreed upon visitation rights, continue in effect and cannot be unilaterally changed until such time as the parties reach an impasse in bargaining, reach a new agreement modifying those terms, or until the Employer is legally discharged from its obligation to bargain with the Union. *Lihli Fashions,* 317 NLRB 163 (1995) enfd. in part, 80 F.3d 743, 151 L.R.R.M. (BNA) 2941, (2nd Cir, 1996); *West Lawrence Care Center Inc*., 308 NLRB 1011 (1992); *W.A. Krueger Co*., 299 NLRB 914, 915 (1990); *Roman Iron Works,* 292 NLRB 1292, 1293 (1989). This is not true however, as to the union security and dues checkoff provisions of an expired contract. *Robbins Door & Sash Co*., 260 NLRB 659 (1982); *Tampa Sheet Metal Co*., 288 NLRB 322, 326 n. 15 (1988). Nor is it true of a no-strike or an arbitration provision in an expired contract. *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 198 (1991); *Hilton-Davis Chem. Co., Div*., 185 NLRB 241 (1970).

It should be noted that in these types of cases, the unlawful refusal to bargain is *not* based on a breach of contract. The theory of the violation is that an employer may not, in the absence of notice and negotiations, unilaterally change *the existing terms and conditions* of its employees. As the existing terms and conditions happened to have been defined by a contract, (since expired), it is the change in the existing conditions and not any alleged contract breach that is the basis for the violation.

In the present case, one of the terms of the expired contract gave union representatives a broad right to visit employees at the Employer's premises. By its terms, union representatives were free to visit with employees at any time for purposes which included "any matter connected to the terms of this agreement." Despite the Respondent's assertion that discussion of a strike vote would not be included within the scope of the agreement, I do not agree. At the time of these visits, the parties were engaged in negotiations whereby they might or might not modify the terms and conditions that existed in the pre-existing contract. Nunez visited the shop to talk to employees about the state of the negotiations and such discussion clearly is "connected" to the expired agreement, the terms of which continued in effect. This connection exists because the terms of the pre-existing agreement might, as a result of bargaining, be altered, modified or changed. And since strikes, (or lockouts), are part and parcel of the process by which a contract, (and the concomitant terms and conditions of employment), might be altered or modified, discussion of a strike vote is inextricably related to the terms and conditions of the contract that existed in the past and the contract as it may be modified in the future.

The Respondent also contends that the facts in this case represent simply a case of a "mere" contract breach and do not rise to the level of a unilateral change, unlawful under Section 8(a)(5) of the Act. I do not agree.

Had the refusal to permit the Union's representative occurred during the life of the old agreement, the Respondent would have a legitimate argument that this was merely a breach of contract case that could and should be handled pursuant to the grievance/arbitration provisions of that contract. But in this case the contract had expired when these events occurred and the arbitration provisions of the contract did not survive its expiration. Because there was no contract in existence and because the arbitration provision of the expired contract was not in effect, this cannot be a breach of contract case. Rather it is a case involving a unilateral change which is cognizable under Section 8(a)(5) 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.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended: [1]

ORDER

The Respondent, Kings Material Handling Corp., its officers, agents, successor, and assigns, shall

1. Cease and Desist from

(a) Refusing to allow representatives of Local 1205, International Brotherhood of Teamsters, to visit with our employees consistent with the terms of the agreement in effect from November 14, 2000 to November 30, 2004.

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

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 those facilities in Brooklyn, New York where the bargaining unit employees are located, copies of the attached notice marked "Appendix." [2] Copies of the notice, on forms provided by the Regional Director for Region 29, 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

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[1] 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.

[2] If this Order is enforced by a Judgment of the 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."

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, or sold the business or the facilities involved herein, 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 Respondents at any time since May 19, 2005.

(b) 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.

Dated, Washington, D.C.

Raymond P. Green
Administrative Law Judge

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

WE WILL NOT refuse to allow representatives of Local 1205, International Brotherhood of Teamsters to visit with our employees consistent with the terms of the agreement in effect from November 14, 2000 to November 30, 2004.

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

Kings Material Handling Corp.
(Employer)

Dated _____ **By** _____
(Representative) **(Title)**

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

One MetroTech Center (North), Jay Street and Myrtle Avenue, 10th Floor
Brooklyn, New York 11201-4201
Hours: 9 a.m. to 5:30 p.m.
718-330-7713.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 718-330-2862.