Allied Trades Council *and* New York Joint Board, UNITE!, AFL–CIO and Duane Reade, Inc. 2–CB–18248 and 2–CB–18569

September 14, 2004

DECISION AND ORDER

BY MEMBERS LIEBMAN, SCHAUMBER, AND WALSH

The General Counsel of the National Labor Relations Board issued an amended consolidated complaint on February 26, 2002, against the Respondent, Allied Trades Council, alleging that it has violated Section 8(b)(1)(A), (2), and (3) of the Act by seeking, through arbitration, to apply the terms of its collective-bargaining agreement, including a union-security provision, to employees of Duane Reade without demonstrating that it has the support of a majority of those employees, thereby attempting to force Duane Reade to recognize it in a unit other than that established by the Regional Director in Case 2–RC–22403 (not included in bound volumes). The Respondent filed an answer admitting in part and denying in part the allegations in the amended complaint, and asserting affirmative defenses.[1]

On April 9, 2002, the General Counsel filed a Motion for Summary Judgment, with exhibits attached, and a memorandum in support of the Motion for Summary Judgment. The General Counsel contends that (1) matters denied by the Respondent are proved by reference to the exhibits attached to the Motion and/or otherwise previously determined, (2) the Respondent enumerates but provides no legal support for its affirmative defenses, none of which raise any material issues of law or fact, and therefore, (3) the pleadings raise no genuine issues of fact requiring an evidentiary hearing. On April 17, 2002, the Board issued an Order transferring proceeding to the Board and Notice to Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. The Respondent filed a memorandum in opposition to the General Counsel's Motion for Summary Judgment.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

We find that there is no material issue of fact that would require a hearing. We agree with the General Counsel that matters denied by the Respondent are proved by reference to the exhibits attached to the Motion and/or otherwise previously determined, and none of the Respondent's enumerated affirmative defenses raises any material issues of law or fact. Further, for the reasons set forth below, we find that the Respondent has violated the Act as alleged. Accordingly, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Employer, a corporation with an office and place of business in New York, New York, has been engaged in the operation of retail drug stores. During the 12 months preceding issuance of the complaint, the Employer, in conducting its business operations, derived gross revenues in excess of $500,000 and purchased and received at its New York, New York facility goods valued in excess of $5000 directly from points outside the State of New York. We find that the Employer is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Respondent admits, and we find, that it is a labor organization within the meaning of Section 2(5) of the Act. We also find that UNITE is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The issue is whether the Respondent has violated Section 8(b)(1)(A), (2), and (3) of the Act by seeking, through arbitration, to apply the terms of its collective-bargaining agreement, including a union-security provision, to certain employees of Duane Reade without demonstrating that it has the support of a majority of those employees, thereby attempting to force Duane Reade to recognize it in a unit other than that established by the Regional Director in Case 2–RC–22403.

A. Facts

Duane Reade has recognized the Respondent as the collective-bargaining representative of its employees since 1960. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which was effective from September 1, 1998, through August 31, 2001. The bargaining unit covered by this agreement consists of all employees in Duane Reade's employ, excluding part-time employees, assistant managers hired after September 1, 1998, executives, office employees, supervisors, warehouse employees, drivers and guards. This agreement also includes a union-security provision requiring employees covered by the agreement to become and remain members of the Respondent.

[1] The Respondent denied several of the allegations, denied knowledge or information sufficient to form a belief as to the truth of many of the allegations, averred that many of the allegations do not require a responsive pleading because they concern interpretation of referenced documents and referred to the contents of the documents for their meaning, and listed 10 affirmative defenses.

Prior to February 1, 2000, Duane Reade and the Respondent had a practice of accreting the employees in newly opened Duane Reade stores into the Respondent's contractual bargaining unit (with the exception of about 20 stores acquired in 1998). Since February 1, 2000, Duane Reade has added approximately 60 stores (those in dispute in this case) during a large expansion. The employees in those stores were not accreted to the Respondent's contractual bargaining unit, but are instead covered by a collective-bargaining agreement between Duane Reade and UNITE. UNITE's unfair labor practice charge alleges that the Respondent has continuously demanded recognition with respect to the stores in dispute since August 1, 2000. On December 7, 2000, the Respondent initiated arbitration proceedings pursuant to its collective-bargaining agreement, which contains a provision for final and binding arbitration of disputes, by requesting the American Arbitration Association to determine the following dispute:

> Has the Employer violated the collective bargaining agreement by failing to include within the contractually defined bargaining unit all employees (other than contractually excluded employees) employed by the Employer in stores opened on or after February 1, 2000, and by failing to provide such employees with the terms and conditions of employment contained in the collective bargaining agreement?

The Respondent has continued to maintain this request for arbitration.

On February 14, 2002, UNITE filed a first amended charge in Case 2–CB–18248, alleging that the Respondent violated Section 8(b)(1)(A), (2) and (3) of the Act by demanding recognition in the stores in dispute and initiating and pursuing arbitration, when it did not have majority support in those stores. Duane Reade filed a similar first amended charge on February 15, 2002, in Case 2–CB–18569, alleging that the Respondent violated Section 8(b)(1)(A), (2) and (3).

Earlier, on June 4, 2001, UNITE filed a petition for an election in Case 2–RC–22403.[2] Beginning on April 30, 2001, and continuing on five subsequent dates concluding on June 12, 2001, a hearing was held regarding the petitions that were consolidated with Case 2–RC–22403. The Respondent participated as an intervenor and filed a post-hearing brief in support of an appropriate unit. UNITE had petitioned for a unit encompassing Duane Reade's 142 stores known as the Allied Trades Unit (a unit that had been historically represented by the Respondent), and the Respondent argued that the unit should include an additional seven stores where UNITE and Duane Reade had an existing collective-bargaining agreement. The Respondent did not argue that *all* of the aforementioned 60 stores that opened on or after February 1, 2000 should be included in the unit. On the contrary, the Respondent's brief specifically stated that 37 remaining Duane Reade stores were not at issue in the representation proceeding because those employees were "putatively covered by an agreement between the Employer and UNITE."[3]

On August 3, 2001, the Regional Director for Region 2 issued a Decision and Direction of Election in Case 2–RC–22403, directing an election in the unit of 142 stores petitioned for by UNITE. She found that this unit is appropriate based on its existence as a historical unit. The Regional Director also noted that the Respondent did not argue for the inclusion of other stores represented by UNITE that are covered by existing collective-bargaining agreements in effect until 2004. The Decision and Direction of Election specifically stated that under Section 102.67 of the Board's Rules and Regulations, a request for review of the Decision may be filed with the Board; however, the Respondent did not file a request for review. The Respondent subsequently won this election.

On November 7, 2001, a hearing was held before an arbitrator pursuant to the Respondent's December 7, 2000 request for arbitration. (The parties had initially met with the arbitrator on July 16, 2001, but they agreed to adjourn the arbitration until the Regional Director issued the Decision and Direction of Election in Case 2–RC–22403.) On January 25, 2002, the arbitrator granted a stay of the arbitration pending the Board's resolution of the present case.

On February 26, 2002, the Regional Director issued the amended consolidated complaint and notice of hearing in this case, and on March 8, 2002, the Respondent filed an answer to the amended consolidated complaint. The General Counsel's Motion for Summary Judgment, the Board's Notice to Show Cause, and the Respondent's memorandum in opposition followed shortly thereafter.

[2] On June 7, 2001, this case was consolidated with other petitions UNITE had filed in April 2001 (Cases 2–RC–22361 through 2–RC-22373 and 2–RC–22376 through 2–RC–22386).

[3] The number of stores involved is somewhat unclear. Based on the General Counsel's documents, it appears that the 37 stores the Respondent referred to in its brief are included in the approximately 60 stores it later referred to at the arbitration hearing. It also appears that all or most of these 60 stores are covered by a collective-bargaining agreement between Duane Reade and UNITE. These stores are separate from the 142 stores known as the Allied Trades Unit, which are represented by the Respondent. The additional 7 stores the Respondent argued (in the representation proceeding) should be included in the Allied Trades Unit are presumably also included in the group of 60 stores represented by UNITE.

A hearing that had been scheduled for May 8, 2002, was postponed indefinitely.

B. Contentions of the Parties

The General Counsel contends that the pursuit of an arbitration award that would conflict with a Board determination constitutes litigation with an unlawful objective. Thus, the General Counsel alleges the Respondent's pursuit of its accretion theory at arbitration is an unfair labor practice, citing, inter alia, *Teamsters Local 776 (Rite Aid Corp.)*, 305 NLRB 832, 835 (1991), enfd. 973 F.2d 230 (3d Cir. 1992), cert. denied, 507 U.S. 959 (1993); *Sheet Metal Workers Local 104 (Lux Metals)*, 322 NLRB 877, 879 (1997). In this regard, the General Counsel asserts that while the Supreme Court has held that an arbitrator may have concurrent jurisdiction to hear undecided representation issues, a contrary Board finding on such issues takes precedence over an arbitrator's decision. *Carey v. Westinghouse*, 375 U.S. 261, 272 (1964).

The General Counsel asserts that the Respondent, by continuing to pursue its arbitration request, is insisting on the application of its collective-bargaining agreement, including the union-security clause, to nonunit employees, thereby violating Section 8(b)(1)(A) and (3). Furthermore, the General Counsel argues that the Respondent is violating Section 8(b)(2) by seeking an arbitral award that would cause Duane Reade to apply the collective-bargaining agreement to nonunit employees in violation of Section 8(a)(3).

The General Counsel notes that Section 102.67(f) of the Board's Rules and Regulations precludes the Respondent from relitigating an issue that could have been raised in the representation proceeding. Thus, the General Counsel argues that by failing to raise the accretion issue in the representation proceeding and failing to request review of the Regional Director's determination of an appropriate unit in that proceeding, the Respondent waived its right to further dispute the scope of the bargaining unit in the absence of any special circumstances or newly discovered, previously unavailable evidence. Finally, the General Counsel requests that the Board order the Respondent to reimburse the Employer for costs and expenses incurred in the investigation, preparation, and conduct of the arbitration proceedings.

The only complaint allegation that the Respondent fully admits is its status as a labor organization. However, the Respondent does not discuss its factual denials in its memorandum in opposition to the General Counsel's Motion for Summary Judgment. Nor does the Respondent provide any support for its 10 affirmative defenses listed in its amended answer. Rather, the Respondent's arguments address the merits of the complaint allegations, asserting that its actions did not violate the Act, and the imposition of fees is not an appropriate remedy in this case. The Respondent also devotes a substantial portion of its memorandum to discussing the merits of its accretion argument.

The Respondent argues that under *Carey*, supra, a union is not prevented from submitting disputes involving accretion or other representation issues to arbitration. The Respondent further argues that the Board will honor an arbitrator's accretion determination if it is made in accordance with Board standards, citing *Boire v. International Brotherhood of Teamsters*, 479 F.2d 778, 794 (5th Cir. 1973), rehearing denied mem. 480 F.2d 924 (5th Cir. 1973); *Champlin Petroleum Co.*, 201 NLRB 83, 90 (1973). Distinguishing *Rite Aid* and *Lux Metals*, supra, from this case, the Respondent argues that it filed its request for arbitration before the Board proceedings began, and the Board has not directly decided the issue of accretion in this case. Finally, the Respondent argues that it should not be responsible for Duane Reade's expenses and legal fees because the blatant bad faith demonstrated by the union in *Rite Aid*, supra, is absent here, where it asserts its accretion claim does not directly conflict with a Board decision.

C. Discussion

In her Decision and Direction of Election, the Regional Director concluded that the Allied Trades Unit of 142 Duane Reade stores petitioned for by UNITE constituted an appropriate unit. As noted above, the Respondent participated in the representation proceeding but specifically declined to argue for the inclusion of the stores at issue or to request review of the Regional Director's decision. Because no request for review was filed, the Decision and Direction of Election constitutes a final decision under Section 102.67(b) of the Board's Rules and Regulations. We agree that the Respondent is precluded from relitigating the scope of the bargaining unit by raising for the first time the issue of accretion, an issue that could have been raised in the representation proceeding.

By continuing to seek, through arbitration, an accretion to its bargaining unit that is in direct conflict with the Regional Director's unit determination in her Decision and Direction of Election, the Respondent has, in effect, sought to apply the terms of its collective-bargaining agreement to employees whom the Board has already determined to be outside of its bargaining unit. In so doing, the Respondent has insisted on and continues to insist on bargaining for a change in the scope of the existing bargaining unit and, therefore, has engaged in and is engaging in unfair labor practices within the meaning of Section 8(b)(3) of the Act. *Rite Aid*, supra, 305 NLRB at 834. Further, by insisting on application of its entire

contract, including the union-security provisions, to the employees at issue, the Respondent has restrained and coerced employees in violation of Section 8(b)(1)(A) of the Act. *Id.* By that same conduct, it has attempted to cause the Employer to discriminate against the employees at issue in violation of Section 8(a)(3) of the Act and, therefore, has engaged in and is engaging in unfair labor practices within the meaning of Section 8(b)(2) of the Act. Id.[4]

The fact that the Respondent's conduct occurred within the context of the arbitration process does not insulate it from unfair labor practice scrutiny in the circumstances of this case. The Respondent's arbitration request seeking application of the collective-bargaining agreement to nonunit employees was incompatible with the determination of the scope of the bargaining unit in the August 3, 2001 Decision and Direction of Election. *Lux Metals*, supra, 322 NLRB at 879. Because continuing to maintain the arbitration request after the date of the Decision and Direction of Election violates Section 8(b)(1)(A), (2), and (3) under established NLRA principles, it can be condemned as an unfair labor practice under these subsections from and after August 3, 2001. *Rite Aid*, supra, 305 NLRB at 835 (citing *Teamsters Local 952 (Pepsi-Cola Bottling)*, 305 NLRB 268 (1991)).

CONCLUSIONS OF LAW

1. The Respondent, Allied Trades Council, is a labor organization within the meaning of Section 2(5) of the Act.

2. New York Joint Board, UNITE!, is a labor organization within the meaning of Section 2(5) of the Act.

3. Duane Reade, Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

4. By continuing to seek, through arbitration, an accretion to its bargaining unit that is incompatible with the unit determination in the Regional Director's Decision and Direction of Election in Case 2–RC–22403, thus seeking to apply its collective-bargaining agreement to employees whom the Board has already determined to be outside the bargaining unit, the Respondent has insisted on and continues to insist on bargaining for a change in the scope of the existing bargaining unit and therefore has engaged in and is engaging in an unfair labor practice within the meaning of Section 8(b)(3) of the Act.

5. By insisting on application of its entire contract, including the union-security provision, to employees whom the Board has already determined to be outside the bargaining unit, the Respondent has restrained and coerced employees in violation of Section 8(b)(1)(A) of the Act and has attempted to cause the Employer to discriminate against its employees and has thereby engaged in and is engaging in an unfair labor practice in violation of Section 8(b)(2) and (1)(A) of the Act.

THE REMEDY

Having found that the Respondent has engaged in unfair labor practices within the meaning of Section 8(b)(1)(A), (2), and (3) of the Act, we shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. We shall order the Respondent to withdraw its December 7, 2000 request for arbitration. In addition, we shall order the Respondent to reimburse the Employer for all reasonable expenses and legal fees, with interest,[5] incurred on and after the date of the Decision and Direction of Election, August 3, 2001, in defending against the Respondent's arbitration request. *Lux Metals*, supra, 322 NLRB at 879. Those expenses were incurred solely because the Respondent continued to maintain its request for arbitration after the Regional Director issued her Decision and Direction of Election in Case 2–RC–22403, an action that we have found violated the National Labor Relations Act. In order to vindicate our interest in enforcing the Act, we have the statutory authority pursuant to Section 10(c) to authorize such relief.

Contrary to our concurring colleague, we do not limit the remedy to the seven stores that the Respondent specifically sought to have added to the 142-store unit in the representation proceeding. While it is true that the Regional Director's Decision and Direction of Election expressly excluded only these seven stores from the unit, the broader issue of whether the scope of the unit included all of the newly acquired stores could have been resolved in the representation proceeding. However, the Respondent chose to argue for the inclusion only of the seven stores, rather than all of the stores. As discussed above, the Regional Director's Decision and Direction of Election established the scope of the unit, which is inconsistent with the scope of the unit sought by the Respondent in its arbitration request. Section 102.67(f) of the Board's Rules and Regulations precludes the Respondent from relitigating this issue.

Moreover, our colleague cites *Lux Metals*, supra, in support of his limitation of the remedy. However, *Lux*

[4] As in *Rite Aid*, supra, maintaining the request for arbitration despite a contrary Board decision falls within the "illegal objective" exception in fn. 5 of *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983). Further, we agree with the D.C. Circuit court's conclusion that the Supreme Court's decision in *BE&K Construction v. NLRB*, 536 U.S. 516 (2002), "did not affect the footnote 5 exemption in *Bill Johnson's*." *Can-Am Plumbing v. NLRB*, 321 F.3d 145, 151 (D.C. Cir. 2003).

[5] Interest shall be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Metals is distinguishable. The Board in that case made clear that its consideration of unfair labor practices was limited to employees Ansic and Bussey because the complaint allegations referred only to these two employees. Here, in contrast, the complaint is not limited to the seven stores described above.

ORDER

The National Labor Relations Board orders that the Respondent, Allied Trades Council, New York, New York, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Maintaining its request for arbitration seeking to apply its collective-bargaining agreement to employees whom the Board has already determined to be outside the bargaining unit.

(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 of the date of this Order, notify the American Arbitration Association that it is withdrawing its December 7, 2000 request for arbitration.

(b) In the manner set forth in the remedy section of this decision, reimburse the Employer for all reasonable expenses and legal fees incurred on and after August 3, 2001, in defending against the Respondent's arbitration request.

(c) Within 14 days after service by the Region, post at its offices and meeting halls copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 2, 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 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.

(d) Forward signed copies of the notice to the Regional Director for Region 2 for posting by Duane Reade, if willing, at its facilities in New York, New York, where notices to employees are customarily posted.

(e) 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.

[6] 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."

MEMBER WALSH, concurring.

I agree with my colleagues that the Respondent's continued pursuit of accretion through arbitration was unlawful under the circumstances. I find, however, that it was unlawful only as to seven of the approximately 60 stores involved in the arbitration proceedings, because the Respondent's arbitration action conflicted with the Regional Director's August 3, 2001 Decision and Direction of Election only as to those seven stores. Thus, I would require the Respondent to reimburse the Employer only for reasonable expenses and legal fees that it expended in defending against the Respondent's arbitration request to the extent that it sought to accrete the employees of those seven stores.

Facts

In the Respondent's December 7, 2000 request for arbitration, it effectively sought a determination that the employees in the Employer's new stores that were opened since February 1, 2000, were accretions to the established 142-store unit covered by the Respondent's September 1, 1998—August 31, 2001 collective-bargaining agreement with the Employer (known as the Allied Trades Unit). Between February 1, 2000, and August 2001, the Employer opened about 60 such new stores. Thus, the Respondent's ongoing arbitration efforts were aimed at accreting the employees at these approximately 60 stores to the 142-store Allied Trades Unit.

In the Regional Director's August 3, 2001 Decision and Direction of Election in Case 2–RC–22403, she found appropriate and directed an election in a unit of all full-time and regular part-time employees (with certain expressed exclusions) employed in the established 142-store Allied Trades Unit. The Regional Director expressly excluded from the appropriate unit, however, the employees at seven other Employer stores[1] that the Respondent specifically sought to have added to the 142-store unit. These seven stores were part of the approximately 60 stores newly opened since February 1, 2000, that were the subject of the arbitration proceedings. The August 3, 2001 Decision and Direction of Election did not affect any of the other newly opened stores that were the subject of the arbitration proceedings.

Discussion

The Respondent's continuing pursuit of arbitral accretion of the *other* stores was not unlawful under the circumstances of this case, because such pursuit was not

[1] Stores 192, 240, 241, 242, 247, 252, and 264.

contrary to the express exclusion of just the seven specified stores from the appropriate unit determination in the Decision and Direction of Election.[2]

Inasmuch as the Respondent's unlawful conduct in this case involved only seven of the approximately 60 stores involved in the arbitration proceeding, the Respondent should be ordered to withdraw its request for arbitration only as to the 7 stores in question and to reimburse the Employer only for its reasonable expenses and legal fees attributable to defending against the arbitration of the accretion issue involving only those seven stores.[3]

[2] Cf. *Lux Metals*, 322 NLRB 877 (1997) (Union's referral of contractual grievance to arbitration unlawful, where it sought to apply contract to employees who were previously determined by Board to be not represented by the Union in the unit); *Rite Aid*, 305 NLRB 832 (1991), enfd. 973 F.2d 230 (3d Cir. 1992), cert. denied 507 U.S. 959 (1993) (301 suit unlawfully sought judicial enforcement of arbitration award in direct conflict with the Board's unit clarification determination).

[3] See, e.g., *Lux Metals*, supra (Respondent ordered to withdraw grievance only as to employees Ansic and Bussey and to reimburse employer for expenses and fees in defending against that part of grievance pertaining to Ansic and Bussey).

The determination of how much of the Employer's total expenses and fees in defending against the arbitration request to accrete the employees of the approximately 60 stores involved in the arbitration is attributable to its defense against the arbitration request to accrete the employees of the seven stores in question may be left to the compliance stage of this proceeding. If it is not possible discretely to trace reasonable arbitration expenses and fees to some or any of these seven stores individually, a reasonable general approach might be to require the Respondent to reimburse the Employer for 7/60ths (11.7 percent) of the Employer's total reasonable arbitration expenses and fees incurred in defending against the arbitration request in question.

APPENDIX

NOTICE TO 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 Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain on your behalf with your employer

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT continue to maintain our request for arbitration seeking to apply our collective-bargaining agreement to employees whom the Board has already determined to be outside the bargaining unit.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights set forth above.

WE WILL withdraw our December 7, 2000 request for arbitration.

WE WILL reimburse the Employer for all reasonable expenses and legal fees, plus interest, incurred on and after August 3, 2001, in defending against our arbitration request.

ALLIED TRADES COUNCIL