ABC Trans-National Transport, Inc. *and* Truck Drivers, Chauffeurs and Helpers Local Union No. 100, an affiliate of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 9–CA–12796

January 11, 1980

DECISION AND ORDER

BY MEMBERS JENKINS, PENELLO, AND TRUESDALE

On September 17, 1979, Administrative Law Judge Julius Cohn issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the Charging Party filed a brief in response to Respondent's exceptions.[1]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order, as modified herein.[3]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, ABC Trans-National Transport, Inc., New York, New York, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Insert the following paragraphs 2(d) and (e), respectively, and reletter the subsequent paragraphs accordingly:

"(d) In the event that Respondent resumes operations at its Cincinnati, Ohio, terminal, offer to the former terminal employees, in the approriate unit, their former jobs or, if those jobs no longer exist, substantially equivalent positions.

"(e) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order."

2. Substitute the attached notice for that of the Administrative Law Judge.

[1] The Charging Party and the General Counsel filed motions to strike, requesting that the Board strike from the record the affidavit of Respondent's vice president, Marvin H. Barsky, dated October 12, 1979, along with the attached grievance of Odell Hinkle against Respondent, dated July 28, 1978, submitted by Respondent as Exh. A of Respondent's exceptions to the Administrative Law Judge's Decision, and all references to said affidavit contained therein. Thereafter, Respondent filed a "Motion To Reopen Record," which motion was opposed by both the General Counsel and the Charging Party.

Under the provisions of Sec. 102.45(b) of the Board's Rules and Regulations, Series 8, as amended, the post-hearing evidence proffered by Respondent is not a part of the record and cannot be considered in resolving this controversy. In addition, said affidavit is not in accord with Secs. 102.30 and 102.38 of the said Rules and Regulations. *Forsyth Hardwood Company,* 243 NLRB 1039, fn. 1 (1979). With regard to the motion to reopen the record, we find that Respondent has not complied with the provisions of Sec. 102.48(d)(1) of the Board's Rules and Regulations, *supra.* Respondent has failed to show that the proffered evidence was unavailable at the time of the hearing. *Reppel Steel and Supply Co., Inc.,* 239 NLRB 358 (1978). Accordingly, Respondent's "Motion To Reopen Record" is hereby denied, and the motions of the General Counsel and the Charging Party to strike from the record the aforementioned affidavit of Marvin H. Barsky, with attached grievance, is hereby granted. Resp. Exh. A is rejected, and the alleged facts contained therein will not be considered a part of the record.

[2] The Administrative Law Judge, in sec. III, B, par. 4, of his Decision cited *Royal Typewriter Company, a Division of Litton Business Systems, Inc.,* 209 NLRB 1006 (1974), noting that the Board has found violations in these circumstances even if the union has been given 8 days' advance notice. Member Penello dissented in pertinent part, in *Royal Typewriter, supra* at fn. 16, but finds the circumstances herein are sufficiently distinct to warrant a finding that Respondent violated Sec. 8(a)(5) and (1) of the Act by its failure to bargain with the Union over the decision to close the Cincinnati terminal. In *Royal Typewriter, supra,* respondent informed the union 8 days before the decision was made to close the plant that such action was being considered. During the six bargaining sessions in this 8-day period, the respondent repeatedly asked the union to submit any ideas it had for resolving the underlying problems. ABC Trans-National Transport, Inc., informed the Union of the decision to close only *after* that decision had been firmly made.

[3] In order to remedy the violation found herein we shall also order Respondent, if it reopens the Cincinnati terminal, to reinstate the employees in the appropriate unit to their former jobs or, if such positions no longer exist, to substantially equivalent positions. *First National Maintenance Corp.,* 242 NLRB 462 (1979).

APPENDIX

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

Following a hearing at which all parties had an opportunity to present evidence and cross-examine witnesses, the National Labor Relations Board has found that we violated the National Labor Relations Act, and has ordered us to post this notice. We intend to abide by the following:

The National Labor Relations Act gives all employees the right:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or mutual aid and protection

To refrain from the exercise of any or all such activities.

WE WILL NOT fail and refuse to bargain collectively in good faith with Truck Drivers, Chauffeurs and Helpers Local Union No. 100, an affiliate of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein the Union, as the exclusive representative of our employees in the appropriate unit set forth below concerning the decision to close our Cincinnati, Ohio, terminal. The appropriate unit is:

All truckdrivers and dock employees employed at our Cincinnati, Ohio, terminal, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

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

WE WILL, upon request, bargain in good faith with the Union as the exclusive bargaining representative of all employees in the appropriate unit set forth above with respect to the decision to close our Cincinnati, Ohio, terminal, including any disputes with respect to the effectuation of the remedy set forth herein, and, if an understanding is reached, embody it in a signed agreement.

WE WILL pay the terminated employees their normal wages plus interest for the period required by the Decision and Order of the National Labor Relations Board.

WE WILL make available to the Union the needed economic information and forthwith begin to bargain with the Union in the manner described above.

WE WILL, in the event that we resume operations at our Cincinnati, Ohio, terminal, offer each of the former employees in the appropriate unit their former jobs or. if those jobs no longer exist, substantially equivalent positions.

ABC TRANS-NATIONAL TRANSPORT, INC.

DECISION

STATEMENT OF THE CASE

JULIUS COHN, Administrative Law Judge: This case was heard at Cincinnati, Ohio, on February 5, 1979. Upon a charge filed and served on July 25, 1978, the Regional Director for Region 9 issued the complaint in this proceeding on August 14, 1978, alleging that ABC Trans-National Transport, Inc., herein called Respondent, violated Section 8(a)(1) and (5) of the National Labor Relations Act, as amended, by closing down its Cincinnati, Ohio, terminal without notice or consultation with Truckdrivers, Chauffeurs, and Helpers Local Union No. 100, an affiliate of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union. Respondent filed an answer denying the commission of unfair labor practices. The sole issue herein is whether Respondent unlawfully refused to bargain with the Union concerning its decision to close the Cincinnati terminal.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. All parties filed briefs which have been carefully considered.

On the entire record in the case and from my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE COMPANY

Respondent, a Delaware corporation, is engaged in the business of freight forwarding and the transportation of freight by motor carrier within and between the States. It has various terminals in the United States including a terminal at Cincinnati, Ohio. During the 12 months preceding the issuance of the complaint, Respondent received revenues in excess of $50,000 for the transportation of freight in interstate commerce and for the performance of services for customers located outside the State of Ohio. The complaint alleges, Respondent admits, and I find that Respondent is an employer within the meaning of Section 2(2) of the Act engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

The facts, which are in the main uncontroverted, are briefly these. Respondent operates some 35 terminals in the country including the Cincinnati terminal involved herein, which is engaged in freight forwarding. At this terminal, Respondent employed five truckdrivers, two dockmen, a bookkeeper, salesman, and dock foreman.[1] The operation in Cincinnati was directed by Frank Conte, the district terminal manager. Respondent and the Union are parties to the National Master Freight Agreement and the Central States Area Local Cartage Supplemental Agreement, which was effective from April 1, 1976, to March 31, 1979.

[1] The appropriate unit is as follows:

All truckdrivers and dock employees employed by Respondent at its terminal at Cincinnati, Ohio, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

According to Frank Conte, he received a telephone call on July 14, 1978, from A. R. Brown, a vice president of Respondent's parent corporation, ABC Freight Forwarding, who told Conte that a decision had been made to close the Cincinnati terminal. Conte testified that he was told by Brown to contact Local 100 and advise them that, as of July 21 close of business, the office terminal would be closed. He was also instructed to confirm this information by letter. Conte, in accordance with his orders, telephoned Robert Sturgill, a business agent of the Union, and notified him of the decision to close the terminal. He then wrote a letter dated July 14 which was received by the Union on July 17.

On July 17 Respondent's counsel wrote to the Union advising it of the Company's intention to shut down its operation and stating that it would negotiate the effects of the shut down on the employees if the Union so desired. Again, on July 19, Respondent's counsel wrote the Union to similar effect.

Conte's letter of July 14, when received by the Union, was transmitted to Odell Hinkle, a business agent who handled local drivers (Sturgill, whom Conte called and to whom he wrote, had not been involved with Respondent's terminal), and Hinkle thereupon called Respondent's counsel. The latter testified that he told Hinkle he would discuss any questions or any problem on which they wanted to meet him. Although counsel infers that this offer would include discussion or bargaining about the decision to close the terminal, I find, in the total context of this conversation together with the two letters of counsel dated July 17 and 19, referring only to negotiations of the effects of the shutdown, that the telephoned offer of counsel to discuss the aforementioned relates to effects and did not include the decision to close. This is confirmed by the letter of Respondent's counsel dated July 26 to the Union in which he stated: "My offer of July 19, 1978 still stands to meet and bargain concerning the effect of the closing on the employees."

The terminal closed on July 21 and the unit employees were discharged on that date. Just prior thereto ABC Freight Forwarding, Respondent's parent, had purchased the Cincinnati terminal of Acme Fast Freight, a competitor of Respondent. Upon the closing of Respondent's terminal, Conte became terminal manager at Acme Fast Freight. Respondent's former bookkeeper and salesman were also employed by Acme. In its operation, Acme does not employ truckdrivers but contracts out that function.[2]

B. *Analysis and Conclusions*

The sole issue herein is whether Respondent failed and refused to bargain about its decision to close its Cincinnati terminal as a result of which its employees were discharged. It is conceded that the shutdown was for economic reasons and further that Respondent offered to bargain concerning the effects of the closing upon its employees.

The applicable law on this issue has been well established since the Board's Decision in *Ozark Trailers, Inc., et al.*, 161 NLRB 561 (1966). In that case the employer closed one of its several plants without prior notice to, or consultation with, the employees'/authorized representative at the closed plant. In addition to finding that the respondent therein violated Section 8(a)(5) by closing the plant and failing to give the union an opportunity to bargain over the effect of such closing on the employees, the Board also found that the respondent there violated the Act by failing to bargain over the decision to close the plant permanently. The Board emphasized that it was dealing with a partial shutdown of the employer's business, since the closing involved only one of several of the company's plants. In the instant case, of course, we are dealing with the shutdown of one of approximately 35 of Respondent's terminals. Accordingly, the principles of *N.L.R.B.* v. *Darlington Manufacturing Co.*, 380 U.S. 263 (1965), are not applicable since that decision refers to an employer completely going out of business.

As to Respondent's duty to bargain over the decision to close the plant permanently, the Board in *Ozark* stated: "In short, we see no reason why employees should be denied the right to bargain about a decision directly affecting terms and conditions of employment which is of profound significance for them solely because that decision is also a significant one for management."

Of course in this case Respondent, by virtue of Conte's telephone call to the Union on July 14 and his followup letter of the same date, gave notice to the Union of its intention to close on July 21. In this connection, it is noted that the Board has found violations in these circumstances even though the union has been given 8 days advance notice. *Royal Typewriter Company, A Division of Litton Business Systems, Inc.*, 209 NLRB 1006 (1974). However, giving a few days' notice, as was done in the instant case, is not in and of itself sufficient. It is clear that the decision of Respondent had already firmly been made. Thus, Conte, the terminal manager, himself was not aware of the imminence of the shutdown until he received a telephone call from a corporate vice president on July 14. Moreover, as had been noted above, Respondent's counsel wrote three letters, two during the interval and one thereafter, in which he stated Respondent's willingness to bargain concerning the effects of the shutdown. It is clear from the actions of Respondent and counsel that it was not offering nor was it willing to bargain concerning a decision which had previously been made. Thus, the Union was confronted with a *fait accompli* and was not afforded the opportunity to bargain during the critical time when such bargaining perhaps could have been productive, that is, the period when the decision was being considered and about to be made. In light of the post-closing actions of Respondent's parent corporation, with regard to Acme Fast Freight, it is conceivable that the Union may have had some opportunity either to alter the course of Respondent or to make some other accommodation with it. This chance was negated by the almost precipitous shutdown and Respondent's indications that it was willing to bargain only concerning its effects on the discharged employees.

I find, therefore, on the basis of the above, that Respondent, by failing and refusing adequately to advise the Union of its intention to close its Cincinnati terminal and by unilaterally closing such terminal and discharging its em-

[2] There is no allegation or contention that Respondent violated Sec. 8(a)(3) of the Act by closing its terminal, nor is there any claim that Acme became a successor employer.

ployees, violated Section 8(a)(1) and (5) of the Act and thereby failed and refused to bargain in good faith.[3]

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with the operations of Respondent described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. REMEDY

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

Having found that Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to bargain in good faith with the Union over its decision to close its Cincinnati terminal, I recommend that Respondent be ordered to make whole the unit employees for losses suffered as a result of the violation. Thus, Respondent shall pay employees backpay, at the rate of their normal wages when last in Respondent's employ, from July 21, 1978, the date on which Respondent closed its Cincinnati terminal and terminated its drivers and dockmen there employed, until the occurrence of the earliest of the following conditions:

(1) The date Respondent bargains to agreement with the Union on those subjects pertaining to the decision to close its Cincinnati terminal.

(2) The failure of the Union to request bargaining within 5 days of issuance of this Order, or to commence negotiations within 5 days of Respondent's notice of its desire to bargain with the Union.

(3) The subsequent failure of the Union to bargain in good faith.

(4) A bona fide impasse in bargaining.

Employees are to be made whole for losses set forth above in the manner established by the Board in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest computed in the manner described in *Florida Steel Corporation*, 231 NLRB 651 (1977).[4]

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to bargain collectively in good faith with the Union concerning its decision to close its Cincinnati terminal.

4. The Union has been and continues to be the exclusive representative of all the employees in the following appropriate bargaining unit:

> All truckdrivers and dock employees employed by the Respondent at its terminal at Cincinnati, Ohio, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(5) and (7) of the Act.

Upon the foregoing findings of fact and conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[5]

The Respondent, ABC Trans-National Transport, Inc., New York, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Failing and refusing to bargain collectively in good faith with Truckdrivers, Chauffeurs and Helpers Local Union No. 100, an affiliate of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive representative of its employees in the appropriate unit set forth below concerning its decision to close its Cincinnati, Ohio, terminal. The appropriate unit is:

> All truckdrivers and dock employees employed by Respondent at its terminal at Cincinnati, Ohio, but excluding all of its clerical employees, professional employees, guards and supervisors as defined in the Act.

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

2. Take the following affirmative action designed to effectuate the purposes and policies of the Act:

(a) Upon request, bargain in good faith with the Union as the exclusive bargaining representative of all employees in the appropriate unit set forth above with resqect to the decision to close the Cincinnati, Ohio, terminal, including any disputes with respect to the effectuation of the Remedy set forth herein, and, if an understanding is reached, embody it in a signed agreement.

(b) Pay the terminated employees their normal wages in the manner and for the period set forth in the remedy section of this Decision.

(c) Make available to the Union the necessary economic information and begin forthwith to bargain with the Union as more fully described in the remedy section of this Decision.

(d) Mail to the Union and the discharged employees copies of the attached notice marked "Appendix."[6] Copies of said notice, on forms provided by the Regional Director for

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[3] *P. B. Mutrie Motor Transportation, Inc.*, 226 NLRB 1325 (1976); *First National Maintenance Corp.*, 242 NLRB 462 (1979).

[4] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[5] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[6] In the event that this Order is enforced by a Judgment of a United States

(Continued)

Region 9, after being duly signed by Respondent's authorized representative, shall be mailed by Respondent immediately upon receipt thereof.

(e) Notify the Regional Director for Region 9, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

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."