Garden Ridge Management, Inc. *and* General Drivers, Warehousemen and Helpers, Local Union 745 affiliated with the International Brotherhood of Teamsters. Cases 16–CA–22275 and 16–CA–22756

May 18, 2007

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On May 31, 2006, the National Labor Relations Board issued a Decision and Order[1] in this proceeding, finding that the Respondent violated Section 8(a)(5) and (1) by failing and refusing to meet at reasonable times with the Union. In that Decision and Order, the Board also dismissed allegations that the Respondent violated Section 8(a)(5) and (1) by engaging in surface bargaining and by withdrawing recognition from the Union. The General Counsel has moved for reconsideration of the dismissals.

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

We conclude that the General Counsel has raised no new matters as to the withdrawal of recognition. However, we acknowledge that the surface bargaining matter warrants additional consideration.

Contrary to the General Counsel's contention, we did not hold that the precertification comments of Vice Presidents Rutherford and Ferguson were irrelevant to the issue of surface bargaining. Rather, we concluded that they were insufficient to tip the balance in favor of deciding that the General Counsel had proven his allegation by a preponderance of the evidence. In this regard, we found and hereby reaffirm that the Ferguson statement did not show an intention to avoid agreement.

We acknowledged that Rutherford's statement was more troublesome. The General Counsel argues that we downplayed Rutherford's precertification statement as that of "someone divorced from the bargaining process." To the contrary, we gave Rutherford's statement appropriate weight under the circumstances. The Respondent's chief negotiator, Christopher Antone, testified that Ferguson directed the bargaining, and the judge found that Ferguson "called the shots." While the judge also found that Rutherford, as vice president of human resources, was in a good position to know about the Respondent's bargaining plans, this does not mean that Rutherford called the shots.

We also noted that the Rutherford statement (like the Ferguson statement) was made prior to the certification of the Union. We note that there are other cases where precertification statements were relied upon to show surface bargaining. However, those cases, discussed below, involved bargaining-table conduct which, together with the precertification statements, proved the allegation of surface bargaining. That kind of other conduct is not present here.

In *Gadsden Tool, Inc.*, 327 NLRB 164 (1998), enfd. mem. 233 F.3d 577 (11th Cir. 2000), the respondent's attorney expressed a prediction, during negotiations, that the union may as well shut the company down because it would never sign a contract, and it also later reneged on an oral agreement it had reached with the union. And, after reneging, the respondent significantly changed its bargaining proposals. Under the totality of these circumstances, the Board found that the General Counsel had satisfied his burden of proving that the respondent harbored an intent to avoid reaching agreement.

In *Overnite Transportation*, 296 NLRB 669, 671 (1989), enfd. 938 F.2d 815 (7th Cir. 1991), a host of management officials at every level from the company board chairman to a supervisor-dispatcher told employees, before certification that the Company would close its doors if employees unionized, that a vote for the union would mean job losses, that employees would not receive better wages with a union, and that it would never sign a collective-bargaining agreement with the union. Specifically, the same company vice president who became involved in negotiations after the union was certified, had warned employees that the company "was not Union," "would never be Union," "absolutely . . . would not sign a contract with any Union." These and other precertification statements were relevant evidence tending to show that the respondent's later bargaining was conducted with an intent to avoid agreement. During bargaining, the respondent "refused to agree to almost every major economic and noneconomic proposal set forth by the Union on the grounds that it did not plan or desire to depart from existing company policies." Under these circumstances, the Board found that the General Counsel satisfied his burden of proof.

In *Port Plastics, Inc.*, 279 NLRB 362 (1986), the respondent told employees, before certification, that it would not give "those bastards" (i.e., the union) anything during contract negotiations. During bargaining, the respondent proposed terms that "sought to ensure that the Union would have no voice in the establishment or maintenance of the employees' terms and conditions of em-

[1] *Garden Ridge Management, Inc.*, 347 NLRB No. 13 (2006).

ployment." For example, "Respondent's management-rights clause would retain for the Company absolute authority and control over establishing hours of work, altering or reducing job classifications, instituting technological changes, subcontracting out unit work, and abolishing all inefficient or unnecessary past practices on its own whim." Once again, the Board examined all the evidence and concluded that the respondent harbored an unlawful motive.

In sum, unlike in *Gadsden Tool*, *Overnite Transportation*, and *Port Plastics*, in which remarks reflecting with varying levels of gravity an intent not to reach an agreement were communicated by, among others, agents of the Respondent who were later major players at the bargaining table, the Respondent's precertification comments, though serious, were made by an official found not to have been "calling the shots" and were unaccompanied by postcertification conduct that clearly evidenced an unlawful intent.

More significantly, our dissenting colleague misrepresents our view when she suggests that we enunciate a rule of law whereby precertification statements cannot serve as evidence of bad faith unless they are followed by unlawful conduct at the bargaining table. Rather, we have considered the role in negotiations of the individual making the remarks, the content of the remarks themselves, *and* whether, as in the precedent cited above, they were accompanied by postcertification unlawful conduct—in short, the totality of the circumstances. See *Port Plastics, Inc.*, supra at fn. 2.

We recognize that the Respondent failed to meet at reasonable times. However, that failure does not establish the separate allegation of surface bargaining. Although the Respondent should have met more frequently, that does not itself establish an intention not to reach an agreement. After examining all of the circumstances, we affirm our earlier finding that that the General Counsel failed to prove that the Respondent attempted to avoid reaching agreement.

Conclusion

For the foregoing reasons, we reaffirm the Board's holding that the Respondent did not violate Section 8(a)(5) and (1) by engaging in surface bargaining and by withdrawing recognition from the Union.

ORDER

The Board's Order at 347 NLRB No. 13 (2006), is reaffirmed.

Dated, Washington, D.C. May 18, 2007

Robert J. Battista, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER LIEBMAN, dissenting.

The General Counsel's motion for reconsideration presents an opportunity for the majority to revisit its original decision and to reassert the importance of employer statements in finding unlawful surface bargaining. Unfortunately, the majority declines to do so.

I adhere to the position in my original dissent that the Respondent violated Section 8(a)(5) and (1) by engaging in surface bargaining and by withdrawing recognition from the Union. The cases cited by the General Counsel in his motion bolster my earlier contention that the majority gave insufficient weight to the precertification statements made by management officials, Ferguson and Rutherford. Together with the other surrounding circumstances, including the Respondent's failure to meet at reasonable times and its repeated introduction of proposals requiring protracted negotiations, these statements establish a surface-bargaining violation.

The majority explains its contrary conclusion as based on the "totality of the circumstances" here: "the role in negotiations of the individual making the remarks, the content of the remarks themselves, and whether . . . they were accompanied by postcertification unlawful conduct." But this explanation does not serve to distinguish this case from other cases where the Board has found surface-bargaining violations or otherwise to justify the failure to find a violation here.

The majority emphasizes that the remarks here were not made by an agent of the Respondent who was later a "major player" at the bargaining table. But in two of the three cases addressed by the majority, a major player at the bargaining table did *not* make the precertification antiunion statements relied on in finding surface bargaining.[1] In *Gadsden Tool*, 327 NLRB 164 (1998), enfd. mem. 233 F.3d 577 (11th Cir. 2000), the employer's president, who was not present during negotiations, made the precertification antiunion comments. In *Overnite Transportation*, 296 NLRB 669 (1989), enfd. 938 F.2d 815 (7th Cir. 1991), the employer's vice president made the antiunion comments. He attended negotiations, but there is no indication that he was a major player during

[1] While *Port Plastics*, 279 NLRB 362 (1986), involved remarks made by the employer's principal negotiator, the decision does not imply that only statements made by a major player at the bargaining table are probative of an intent to engage in surface bargaining. Nor does Board authority or common sense support such an artificial approach.

negotiations. Here, too, a vice president made the statements confirming the Respondent's surface-bargaining scheme—and not just any vice president, but the vice president of human resources, an officer who presumably would be familiar with the Respondent's approach to dealing with the Union.

The majority also concludes that the Respondent's postcertification unlawful conduct—the failure to meet with the Union at reasonable times—"does not itself establish an intention not to reach an agreement." Indeed, the majority seems to suggest that only remarks accompanied by "postcertification conduct that clearly evidenced an unlawful intent" are probative. But it is a mistake to give employer statements weight only when the employer's conduct already speaks for itself. This position represents a break from prior case law, where the Board has separately relied on employer statements made prior to certification as a strong indicator of unlawful bargaining behavior. See *Gadsden Tool, Inc.*, supra, 327 NLRB at 164 (observing that "evidence of statements made prior to the Union's certification . . . strongly indicates that the [employer] entered negotiations with no intention of reaching agreement").

Accordingly, I dissent.

Dated, Washington, D.C. May 18, 2007

Wilma B. Liebman, Member

NATIONAL LABOR RELATIONS BOARD