

**United Steelworkers of America, AFL-CIO; United Steelworkers of America, Local No. 196, AFL-CIO; United Steelworkers of America, Local No. 6850, AFL-CIO; United Steelworkers of America, Local No. 7508, AFL-CIO; International Union of Operating Engineers, Local No. 428, AFL-CIO; Construction, Production and Maintenance Laborers', Local No. 383, AFL-CIO; and Construction, Production and Maintenance Laborers', Local No. 479, AFL-CIO (Duval Corporation and Duval Sierita Corporation) and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 310. Case 28-CB-900**

August 7, 1979

## SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS JENKINS, MURPHY, AND TRUESDALE

On November 4, 1976, the National Labor Relations Board issued its Decision and Order in this proceeding<sup>1</sup> in which it reversed the Administrative Law Judge's findings that various Respondent Unions had violated Section 8(b)(1)(A) and (2) of the National Labor Relations Act, as amended. Thereafter, the Charging Party petitioned the United States Circuit Court of Appeals for the District of Columbia for review of the Board's Order. On August 1, 1978, a panel majority of the court ruled that the Board's Order was not supported by substantial evidence and the court remanded the case to the Board for further proceedings consistent with the court's opinion.<sup>2</sup>

On November 29, 1978, the Board accepted the court's remand and notified the parties that they could then file statements of position with regard to the issues raised by the remand. Subsequently, the Charging Party and Respondent filed statements of position.

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 reviewed the entire case in light of the court's decision and the statements of position on remand and we now enter the following findings.

In the Board's original Decision, we reversed the Administrative Law Judge's conclusion that Respon-

dents had violated Section 8(b)(1)(A) of the Act by accepting a collective-bargaining agreement before the Charging Party had had an opportunity to ratify it. We also reversed her finding that Respondents had further violated Section 8(b)(1)(A) of the Act by negotiating a strike-settlement agreement which by its terms made the Charging Party's members subject to disciplinary action for conduct which they could not know at the time they engaged therein was in violation of the executed collective-bargaining agreement. Lastly, we reversed the Administrative Law Judge's finding that Respondents had violated Section 8(b)(2) when three of Charging Party's members were disciplined for violating the terms of the collective-bargaining agreement. We therefore dismissed the complaint in its entirety.

In its decision, the court reversed our first 8(b)(1)(A) dismissal regarding the contract-ratification procedure. The court held that Respondents "did in fact deny the Teamsters the opportunity to ratify the collective-bargaining contract, and that in so doing those unions discriminated against the Teamsters 'in matters affecting their employment' [in violation of Section 8(b)(1)(A)]."<sup>3</sup> We have accepted that finding as the law of the case. With respect to our dismissal of the 8(b)(1)(A) allegation involving the strike-settlement agreement, the court found that conclusion was "unsupported by substantial evidence."<sup>4</sup> The court instructed the Board upon remand to reconsider our conclusion on this issue. Upon reconsideration in light of the court's opinion, which as noted above we deem to be the law of the case, we now find a violation of Section 8(b)(1)(A) in Respondent's actions involving the strike-settlement agreement.

1. As pertinent here, the record reveals that the Charging Party and Respondents are jointly certified and bargain jointly with the Employer. Notwithstanding this joint certification, there had been dissension between Respondents and Charging Party for years preceding the 1974 negotiations at issue. The 1974 negotiations began in August to replace the contract which was to expire on September 30, 1974.<sup>5</sup> It is important that, at the outset of negotiations, the Employer told Respondents and the Charging Party of its understanding that negotiations would continue on a joint basis and that, once the spokesman for the unions informed the Employer that a contract had been reached, then a new agreement existed. The unions agreed to this. The spokesman for the unions was James Smith, a Steelworkers member.

Joint negotiations continued through October 1, but then recessed so that the Charging Party's mem-

<sup>1</sup> 226 NLRB 772.

<sup>2</sup> 587 F.2d 1176. The Administrative Law Judge had also dismissed complaint allegations against United Steelworkers of America, Local No. 196, AFL-CIO, and Production and Maintenance Laborers' Local No. 383, AFL-CIO. See 226 NLRB at 785. These dismissals were also upheld by the Board and not disturbed by the court of appeals' decision. Accordingly, the designation "Respondents" in this Decision does not refer to these two unions.

<sup>3</sup> *Id.* at 1184.

<sup>4</sup> *Id.* at 1185.

<sup>5</sup> All dates are 1974 unless noted otherwise.

bership could vote that night on extending the old contract. Its membership voted instead to reject the contract's extension and to strike. Charging Party so apprised Respondents and set up picket lines. Later the same evening, however, negotiations with the other Unions, including the Charging Party, recommenced, and the Employer increased its wage offer. On October 2, Respondents held ratification meetings to consider the new proposal and it was accepted. Smith, the spokesman for the joint negotiating committee, told the Charging Party's representative there was a contract and that, accordingly, its strike was illegal. He also told the Employer there was a contract. It is clear that under the terms of the parties' bargaining arrangement, described above, a contract had, in fact, come into existence.

On October 3, the Charging Party's representatives were told repeatedly that the strike was illegal, as a contract was then in effect. They replied that their membership had not voted on the contract yet but would do so that evening. That night the Charging Party's membership ratified the contract and took down the picket lines.

Negotiations toward a strike-settlement agreement had begun on the afternoon of October 3. The Charging Party's representative neither participated in these negotiations nor executed the strike-settlement agreement. In fact, they were not even made aware of the meeting at which agreement on the strike settlement was reached. The agreement provided, *inter alia*, that any employee who had continued to picket after 9:30 p.m., on October 2, in violation of the new contract's no-strike clause, would be subject to discharge or discipline. The record reveals that, when the agreement was reached, Smith and the other bargaining officials of the joint representative were aware that the Charging Party's members had continued to picket after the agreed-upon deadline. Indeed, the Administrative Law Judge, discrediting Smith's testimony to the contrary, found that the provision on discipline was proposed not by the Employer's representatives but by Smith.

Based on the above, and in light of the court's opinion, we now find that by proposing and entering into the strike-settlement agreement which subjected the Charging Party's members to discharge or discipline for action undertaken at a time when they could not be expected to know that a new contract containing a no-strike clause had been concluded, Respondents violated Section 8(b)(1)(A) of the Act. Respondents, as joint representatives of the unit involved herein, owed a duty of fair representation to all their constituency, including those employees who were members of the Charging Party. In accordance with the obligation imposed by this duty Respondents were required not to engage knowingly in any activity

that could jeopardize the employment status of any unit member. It is apparent that by the above conduct Respondents breached their duty by, "deliberately and unfairly subject[ing] Teamsters employees to an unreasonable risk of discharge for unknowing conduct."<sup>6</sup>

2. With respect to the 8(b)(2) allegation, the record shows that on October 4 the Employer discharged two employees represented by the Charging Party and disciplined a third for picketing on October 2 and 3 in violation of the no-strike clause. The Administrative Law Judge found that Respondents' 8(b)(1)(A) violation with respect to the strike settlement agreement had directly contributed to the workers' discipline and thereby that Respondents had violated Section 8(b)(2) of the Act. As noted, the Board in its original Decision dismissed this complaint allegation. Although the court expressed no view on the merits of the 8(b)(2) allegation, it did state that if the Board concluded that Respondents had violated Section 8(b)(1)(A) of the Act regarding the strike-settlement agreement on remand—

the Board should consider whether that breach *per se* constitutes a violation of §8(b)(2) or whether more evidence of an attempt to cause discharge is necessary. If the Board finds a violation of §8(b)(2), it should consider whether that violation was causally related to the disciplining of the three Teamsters employees, giving appropriate weight to the ALJ's findings of union and employer hostility towards them. In this connection the Board should also consider the relevance of the General Counsel's determination that Duval, in firing the workers, did not discriminate against them in regard to tenure of employment in violation of §8(a)(3).<sup>7</sup>

With the court's instruction in mind, we conclude that Respondents violated Section 8(b)(2) of the Act in this proceeding. The reasons for our so concluding are largely those reasons relied on to find the 8(b)(1)(A) violation with respect to the strike-settlement agreement noted above. As the Administrative Law Judge found:

The failure to notify the Teamsters of the scheduled strike settlement negotiations, coupled with the proposals made and accepted by Smith which operated to the detriment of Teamsters employees, particularly in the circumstances of Respondents' animus toward Charging Party, indicates something far beyond mere negligence. Actually, Respondents' conduct had the effect of

<sup>6</sup> 587 F.2d at 1185.

<sup>7</sup> *Id.* at 1185.

inviting company reprisals against the picketing employees.<sup>8</sup>

Indeed, as the Administrative Law Judge further observed:

[B]ut for this breach of the . . . duty of fair representation, Broome, Garrett, and Ortiz [the employees who were disciplined] would not have been in the posture of engaging in activity in violation of the no-strike clause which subjected them to the penalties of the strike settlement agreement.<sup>9</sup>

Accordingly, we find that Respondents violated Section 8(b)(2) of the Act in this proceeding and we also find that the violation "was causally related to the disciplining"<sup>10</sup> which the employees received. While the court also remarked that there was "considerable evidence of employer hostility [emphasis supplied]"<sup>11</sup> to the disciplined employees we conclude that the 8(b)(2) violation is made out because Respondent's conduct clearly had the intended "effect of inviting company reprisals against the picketing employees."<sup>12</sup> If, as it did, the Employer took up that invitation, an 8(b)(2) violation is established.

Lastly, our conclusion that Respondents violated Section 8(b)(2) of the Act, is in no way diminished by the General Counsel's failure to allege an 8(a)(3) violation against the Employer in the discipline. Under Section 3(d) of the Act, the issuance of a complaint is exclusively the province of the General Counsel. In this case, he decided not to issue a complaint against the Employer. We conclude that this does not prevent us from finding an 8(b)(2) violation in the proceeding brought before us for consideration.

### ORDER<sup>13</sup>

Pursuant to the provisions of 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 herein and hereby orders that the Respondent, United Steelworkers of America, AFL-CIO; United Steelworkers of America, Local No. 6850, AFL-CIO; United Steelworkers of America Local No. 7508, AFL-CIO; International Union of Operating Engineers, Local No. 428, AFL-CIO; and

Construction, Production and Maintenance Laborers, Local No. 479, AFL-CIO; Pima and Mojave Counties, Arizona, their officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Attempting to cause or causing Duval Corporation and Duval Sierrita Corporation to discriminate against employees because they are members, or supporters, of Teamsters Local No. 310 in violation of Section 8(a)(3) of the Act.

(b) Restraining or coercing unit employees in the exercise of their rights guaranteed by Section 7 of the Act by failing to represent them in a fair and impartial manner.

(c) In any other manner restraining or coercing 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) Jointly and severally make Ignacio Ortiz whole for any loss of earnings he may have suffered as a result of his suspension on October 18, 1974, in the manner set forth in the section of the Administrative Law Judge's Decision entitled "The Remedy."

(b) Jointly and severally make James Broome and Vertis R. Garrett whole individually for any loss of earnings they may have suffered as a result of their discharge on October 4, 1974, with interest in the manner set forth in the section of the Administrative Law Judge's Decision entitled "The Remedy."

(c) Notify Duval Corporation and Duval Sierrita Corporation, in writing, with a copy to James Broome and Vertis R. Garrett, that it has no objection to the hiring or employment of James Broome and Vertis R. Garrett, and recommend that they be unconditionally reinstated to their former jobs, or, if they no longer exist, to a substantially equivalent position, without loss of benefits or seniority.

(d) Post at its business office, meeting halls, or other places where it customarily posts notices copies of the attached notice marked "Appendix."<sup>14</sup> Copies of said notice, on forms provided by the Regional Director for Region 28, shall, after being duly signed by authorized representatives of Respondents, be posted by said Respondents immediately upon receipt thereof and be maintained by them for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees and members are customarily posted. Reasonable steps shall be taken by Respondents to insure that said notices are not altered, defaced, or covered by any other material.

<sup>8</sup> 226 NLRB at 786.

<sup>9</sup> *Id.* at 787.

<sup>10</sup> 587 F.2d at 1185.

<sup>11</sup> *Id.* at 1180.

<sup>12</sup> 226 NLRB at 786 (emphasis supplied).

<sup>13</sup> We have set out the Administrative Law Judge's recommended Order and notice in full. In addition, we have provided in the Order and notice a paragraph indicating that Respondents have no objection to the reinstatement of James Broome and Vertis R. Garrett.

<sup>14</sup> In the event that 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."

(e) Sign and mail to the Regional Director for Region 28 sufficient copies of said notice on forms provided by him, for posting at the premises of Duval Corporation and Duval Sierrita Corporation, if said employers are willing.

(f) Notify the Regional Director for Region 28, in writing, within 20 days from the date of this Order, what steps Respondents have taken to comply herewith.

#### APPENDIX

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

After a hearing at which all sides had a chance to give evidence, the National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post this notice and we intend to carry out the Order of the Board and abide by the following:

The Act gives all employees these rights:

- To engage in self-organization
- To form, join, or help unions
- To bargain collectively through representatives of their choosing
- To act together for collective bargaining or other mutual aid or protection
- To refrain from any or all of these things.

WE WILL NOT do anything that restrains or coerces employees with respect to these rights. More specifically:

WE WILL NOT fail or refuse during collective bargaining, or otherwise, to represent unit em-

ployees in a fair and impartial manner who are members, or supporters, of Teamsters Local 310.

WE WILL NOT attempt to cause, or cause, Duval Corporation or Duval Sierrita Corporation to discharge or otherwise discipline or discriminate against employees who are members, or supporters, of Teamsters Local 310 in violation of Section 8(a)(3) of the Act.

WE WILL NOT in any other manner restrain or coerce employees in the exercise of their rights guaranteed by Section 7 of the Act.

WE WILL jointly and severally make whole James Broome, Vertis R. Garrett, and Ignacio Ortiz, with interest, for any loss of pay they suffered as a result of our failing to represent unit employees in a fair and impartial manner.

WE WILL notify Duval Corporation and Duval Sierrita Corporation, in writing, with a copy to James Broome and Vertis R. Garrett, that we have no objection to the hiring or employment of James Broome and Vertis R. Garrett and will recommend their unconditional reinstatement to their former jobs or, if they no longer exist, to substantially equivalent positions without loss of benefits or seniority.

UNITED STEELWORKERS OF AMERICA, AFL-CIO

UNITED STEELWORKERS OF AMERICA, LOCAL No. 6850, AFL CIO

UNITED STEELWORKERS OF AMERICA, LOCAL No. 7508, AFL CIO

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL No. 428, AFL-CIO

CONSTRUCTION, PRODUCTION AND MAINTENANCE LABORERS, LOCAL No. 429, AFL CIO