

**Airport Limousine Service, Inc., and Jay McNeill, Esq. as Receiver for Airport Limousine Service, Inc. and Local 462, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.** Case 22-CA-6589

August 31, 1977

### DECISION AND ORDER

BY MEMBERS JENKINS, MURPHY, AND  
WALTHER

Upon a charge duly filed by Local 462, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter referred to as the Union) on September 16, 1975, as amended on October 1, 1975, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 22, issued a complaint on October 6, 1975, against Airport Limousine Service, Inc., and Jay McNeill, Esq., as Receiver for Airport Limousine Service, Inc., hereinafter referred to jointly as Respondents, and individually as Respondent Airport and Respondent Receiver, respectively. Such complaint alleges that Respondents have engaged in, and are engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (5) of the National Labor Relations Act, as amended.

On August 2, 1976, all parties to the proceeding executed a stipulation of facts; waived a hearing before an Administrative Law Judge and the issuance of an Administrative Law Judge's Decision; and submitted the case to the National Labor Relations Board for findings of fact, conclusions of law, and an Order, based on a record consisting of the charges, the complaint and notice of hearing, the formal documents, and the stipulation of facts.

On October 21, 1976, the Board approved the parties' stipulation; ordered that the proceedings be transferred to the Board; and granted permission and set the time for the filing of briefs. Thereafter, the General Counsel and Respondent Receiver filed briefs.

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.

Upon the basis of the stipulation of facts, the briefs, and the entire record in this proceeding, the Board makes the following:

### FINDINGS OF FACT

#### I. JURISDICTION

Respondent Airport, a New Jersey corporation with its principal office and place of business at 677-683 Frelinghuysen Avenue, Newark, New Jersey, is engaged in the business of providing and performing transportation and related services. During the 12 months preceding the entering into of the stipulation, Respondent Airport's gross annual revenue, which is representative of its operations at all times material herein, exceeded \$500,000, of which at least \$2,000 was derived from the transportation of passengers and cargo directly to States other than the State of New Jersey.

The parties stipulated and we find that Respondent Airport is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that it will effectuate the purposes of the Act to assert jurisdiction herein.

#### II. THE LABOR ORGANIZATION INVOLVED

The parties stipulated and we find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

#### III. THE ALLEGED UNFAIR LABOR PRACTICES

##### A. *Facts*

At all times since 1968, and continuing to date, the Union has been the collective-bargaining representative of the following unit of Respondent Airport's employees at its Newark, New Jersey, terminals:

All drivers, mechanics, car washers and polishers . . . but excluding all managerial employees, dispatchers, office clerical employees, guards and supervisors as defined in the Act.

Respondent Airport's most recent contract with the Union covered the period September 9, 1974, to September 10, 1977.

Sometime during the last week of March 1975,<sup>1</sup> Joseph DeAngelis, Respondent Airport's president, and an admitted agent of Respondent Airport, met with James Tavaglione, the Union's secretary-treasurer. During this meeting, DeAngelis indicated that Respondent Airport was planning to institute a franchising system. Tavaglione asked to review a copy of the franchising agreement and DeAngelis agreed to send him a copy. Thereafter, a copy of the franchising agreement was given to the Union's shop steward.

<sup>1</sup> All dates are 1975 unless noted otherwise.

On April 1, Respondent Airport implemented the franchising agreement by bargaining directly and individually with unit employees Benjamin Adragna, Samuel Gaskin, and Oscar Taylor. In addition, on that same date, Respondent Airport subcontracted work then being performed by its drivers to Robert Bloom, an independent subcontractor.

In late April, Tavaglione telephoned DeAngelis and protested the franchising system. DeAngelis met with Tavaglione and the Union's shop stewards on May 2 to discuss the franchising system. DeAngelis indicated at that time that he had no objection to the franchise drivers continuing as members of the Union. Tavaglione indicated that he would consider the proposal and speak to his attorney. However, in late May, Tavaglione again protested the continuation of the franchising system whereupon it was immediately discontinued.

During the first week of June, Tavaglione again met with DeAngelis over the franchising issue. Tavaglione maintained that the system violated the collective-bargaining agreement; DeAngelis disagreed and indicated that he intended to resume it. Respondent Airport and the Union reaffirmed their respective positions in a telephone conversation in late June.

On July 7, Respondent Airport followed through on its intention to resume the franchising system and entered into franchise agreements with approximately 14 unit employees. On July 7, Respondent also subcontracted work then being performed by unit drivers to individual independent contractors with whom it also entered into franchise agreements. Since July 22, the Union has sought to arbitrate Respondent Airport's conduct in entering into the franchise agreements.

On August 30, Respondent Airport filed a petition in bankruptcy with the United States district court. On September 2, Jay Scott McNeill, Esq., was appointed receiver in bankruptcy. Following his appointment, Respondent Receiver made the following decisions: (1) on September 2, refused to guarantee Respondent Airport's employees the opportunity to work 10 hours at overtime premium rates each week as required by the collective-bargaining agreement; (2) on September 8, refused to arbitrate the issue of Respondent Airport's entering into the franchise agreements with its employees; (3) on September 10, refused to pay the employees a 20-cent-per-hour wage increase as required by the collective-bargaining agreement; and (4) on September 26, sought in the bankruptcy proceeding referred to above to disavow the entire collective-bargaining agreement.

The parties further stipulated that on August 30, the date the petition in bankruptcy was filed,

Respondent Airport was experiencing \$12,000 per month in operating losses. It had a gross income of approximately \$40,000 per week and a payroll of approximately \$17,000 per week. In September 1974, Respondent Airport had lost a contract with United Airlines for the transportation of airline crews, with a resultant gross loss of revenue of approximately \$600,000 per year.

### B. *Contention of the Parties*

The General Counsel contends that Respondents have violated Section 8(a)(5) of the Act by: (1) unilaterally instituting a franchising system on July 7; (2) unilaterally subcontracting unit work on July 7; (3) unilaterally refusing to guarantee employees the opportunity to work 10 hours of overtime at premium pay on September 2; (4) refusing to arbitrate a grievance concerning the franchising system on September 8; (5) refusing to grant employees a 20-cent-per-hour wage increase as required by the collective-bargaining agreement on September 10; and (6) seeking to disavow a collective-bargaining agreement in the bankruptcy court on September 26.

Respondent Receiver argues that his review of the financial condition existent at the time of the receivership indicated that Respondent Airport could not continue to operate under the existing collective-bargaining agreement and that all his actions were economically motivated.

### C. *Analysis and Conclusions*

1. Respondents herein do not deny that, prior to filing the petition in bankruptcy, Respondent Airport bargained directly and individually with unit employees on July 7 by instituting and entering into a franchising system and also on July 7 that Respondent Airport subcontracted out unit work. At the time of the establishment of the franchising system, and the subcontracting of unit work, there was in existence a collective-bargaining agreement between Respondent Airport and the Union which was not to expire until September 10, 1977. As Respondent Airport admittedly embarked on the franchise system and the subcontracting without the agreement and consent of the Union, Respondent Airport thereby violated Section 8(a)(5) of the Act since such a unilateral change constituted direct bargaining with unit employees in derogation of the Union's status as the employees' exclusive collective-bargaining representative. *Borden, Inc.*, 181 NLRB 109 (1970). Also, by entering into the individual franchise agreements with unit employees thereby modifying its existing collective-bargaining agreement with the Union without complying with the requirements of

Section 8(d), Respondent Airport further violated Section 8(a)(1) and (5) of the Act. *Carnation Company*, 172 NLRB 1882 (1968). Similarly, with respect to Respondent Airport's decision to subcontract out unit work, its failure to bargain over this matter with the Union beforehand also constitutes a violation of Section 8(a)(5) of the Act. *Fibreboard Paper Products Corp. v. N.L.R.B.*, 379 U.S. 203 (1964); *Pay 'N Save Corporation*, 210 NLRB 311 (1974).

2. With the appointment of Respondent Receiver on September 2, further actions in contravention of the contract and in violation of the Act occurred.<sup>2</sup> On September 2, Respondent Receiver refused to guarantee the employees the opportunity to work 10 hours at overtime premium rates each week as required by the still effective collective-bargaining agreement. Then, on September 10, Respondent Receiver refused to pay the employees the 20-cent-per-hour wage increase as also required under the contract. We note that Section 8(d) of the Act forbids a party to a contract to make midterm modifications of that contract without the consent of the other party. Clearly, the Union here did not give its consent to the actions of Respondent Receiver and, in such circumstances, Respondent Receiver violated the Act by refusing to guarantee overtime and by refusing to pay a wage increase as called for by the contract. *C & S Industries, Inc.*, 158 NLRB 454 (1966).

Respondent Receiver, however, argues that the above actions, which, in effect, modified the contract, were taken only to alleviate the dire financial position of Respondent Airport. We have noted such contentions before, and, however appealing they may be, we have concluded in the past that they are ultimately irrelevant to our considerations here. In *Oak Cliff-Golman Baking Company*,<sup>3</sup> the Board was faced with a situation where an employer had cut contract wages without the consent of the union but had done so for financial reasons. The employer argued that its motive—attempting thereby to save employee jobs—should prompt the Board to find no

<sup>2</sup> Respondent Receiver argues that he never assumed the contract between Respondent Airport and the Union and thus cannot be found in violation of the Act. We conclude otherwise. In his capacity as trustee, Respondent Receiver became guardian of Airport's assets, with full authority to continue the operation of the business and to exercise all powers necessary to the administration of that business. In *Marion Simcox, Trustee of Wagner Shipyard and Marina, Inc., and Stateside Service, Inc. d b a Stateside Shipyard and Marina, Inc.*, 178 NLRB 516, 518 (1969), the Board stated:

Section 2(1) of the Act defines the word "person," as used in the statute, to include "trustees, trustees in bankruptcy, or receivers," and Section 2(2) defines an "employer" as including "any person acting as an agent of an employer, directly or indirectly." [Emphasis supplied.] It seems clear from these provisions that Congress has not foreclosed the Board from exercising jurisdiction over trustees such as Simcox. See *N.L.R.B. v. W. C. Buchelder*, 120 F.2d 574 (C.A. 7). And, on the evidence in the

8(a)(5) violation in its actions. The Board assumed the employer's financial plight and its forthrightness but nevertheless concluded at 1064:

We have no doubt that Respondent's description of its motive and its object is a truthful one. But we have here a situation where these considerations are irrelevant. The unambiguous language of Section 8(d) of the Act explicitly: (1) forbade Respondent's midterm modification of the contract's wage provisions without the Union's consent; and (2) granted the Union the privilege it exercised to refuse to grant consent. Nowhere in the statutory terms is any authority granted to us to excuse the commission of the proscribed action because of a showing either that such action was compelled by economic need or that it may have served what may appear to us to be a desirable economic objective. To borrow the words of the Supreme Court, what must here be recognized is that "[t]he law is its own measure of right and wrong, of what it permits, or forbids, and the judgment of the courts [and of the Board] cannot be set up against it in the supposed accommodation of its policy with the good intention of the parties, and, it may be, of some good results." *Standard Sanitary Mfg. Co. v. U.S.*, 226 U.S. 2049.

The conclusions reached in *Oak Cliff-Golman* are equally applicable here and, accordingly, we reject Respondent Receiver's contentions based on economic necessity and find the September 2 and 10 actions, noted above, violated Section 8(a)(5) of the Act.

3. On September 8, Respondent Receiver refused to arbitrate the issue of Respondent Airport's entering into the franchise agreements with unit employees. The Union had sought such arbitration on July 22 pursuant to the contract. We note that the Board has held that a refusal to arbitrate is not, in itself, a refusal to bargain in violation of the Act.<sup>4</sup> However, in the instant case, Respondent Receiver has done more than just refuse to arbitrate a

present case, it seems similarly clear that when Simcox became trustee of the Wagner assets, he also became Wagner's legal successor for purposes of collective-bargaining, and by operation of law, was bound to honor any bargaining obligations owed by Wagner to the Union

In fact, Respondent Receiver was Respondent Airport's *alter ego*. See, e.g., *Cagle's, Inc.*, 218 NLRB 603, 604 (1975). As such, he was bound by the collective-bargaining agreement entered into by Respondent Airport. *The Bell Company, Inc., et al.*, 225 NLRB 474 (1976). Thus, we reject his contention to the contrary.

<sup>3</sup> 207 NLRB 1063 (1973).

<sup>4</sup> *Central Illinois Public Service Company*, 139 NLRB 1407, 1418 (1962); *United Telephone Company of the West and United Utilities, Incorporated*, 112 NLRB 779, 781 (1955); *Textron Puerto Rico (Tricot Division)*, 107 NLRB 583 (1953).

grievance. By his action of refusing to grant increases and benefits called for under the contract, as noted above, Respondent Receiver has demonstrated his desire to effectively repudiate the contract between the Union and Respondent Airport. This action of Respondent Receiver in refusing to arbitrate under the contract is part and parcel of that unlawful scheme and, accordingly, in this context, Respondent Receiver's refusal to arbitrate violated Section 8(a)(5) of the Act. Cf. *Chevron Oil Company*, 168 NLRB 574 (1967).<sup>5</sup>

4. On September 26, Respondent Receiver sought the disavowal of the collective-bargaining agreement between Respondent Airport and the Union in bankruptcy court. The General Counsel alleges this action as a violation of Section 8(a)(5) of the Act. However, while we have some reservations concerning the power of a bankruptcy court to permit a receiver lawfully to disavow a collective-bargaining agreement,<sup>6</sup> we do not find a violation of the Act simply in a receiver's procedurally valid attempt to have the court allow this.<sup>7</sup> Accordingly, we shall dismiss this allegation of the complaint.

#### IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The acts of Respondents set forth in section III, above, occurring in connection with their operations as 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 Respondents have engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that they cease and desist therefrom, and take certain affirmative action to effectuate the policies of the Act.

#### CONCLUSIONS OF LAW

1. Respondent Airport and Respondent Receiver are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local 462, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

<sup>5</sup> Member Murphy ordinarily would not find a refusal-to-bargain violation in a refusal-to-arbitrate situation. She joins her colleagues in finding such a violation here because of the unusual circumstances involved in this case, the Respondent Receiver's unlawful conduct overall, and the fact that court action by the Union to compel arbitration would be to little or no avail in light of the bankrupt status of Respondent Airport.

3. All drivers, mechanics, car washers, and polishers employed at Respondent Airport's Newark terminals, but excluding all managerial employees, dispatchers, office clerical employees, guards, and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since 1968, the above-named labor organization has been, and now is, the exclusive representative of all employees in the aforesaid appropriate unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent Airport in the aforesaid appropriate unit, by the following actions: unilaterally entering into franchise agreements with unit employees, unilaterally subcontracting out unit work, refusing to grant contractually called-for wage increases and overtime privileges, and refusing to arbitrate a grievance concerning the entering into of the franchise agreements, Respondents have engaged in and are engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

6. Respondent Receiver did not engage in unfair labor practices within the meaning of Section 8(a)(5) by seeking to disavow the collective-bargaining agreement in bankruptcy court.

7. The aforesaid unfair labor practices are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

#### ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondents, Airport Limousine Service, Inc., and Jay McNeill, Esq. as Receiver for Airport Limousine Service, Inc., Newark, New Jersey, their officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning wages, hours, and other terms and conditions of employment with Local 462, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive bargaining representative of its employees in the following appropriate unit:

<sup>6</sup> See *Shopmen's Local Union No. 445 v. Kevin Steel Products, Inc.*, 519 F.2d 698 (C.A. 2, 1975).

<sup>7</sup> Cf. *Clyde Taylor, d/b/a Clyde Taylor Company*, 127 NLRB 103, 109 (1960).

All drivers, mechanics, car washers and polishers employed at Airport's Newark terminals, but excluding all managerial employees, dispatchers, office clerical employees, guards and supervisors as defined in the Act.

(b) Continuing or giving effect to any franchise agreement with employees in the previously described appropriate unit.

(c) Dealing individually with any of its employees in the aforesaid unit in derogation of their bargaining representative.

(d) Refusing to bargain collectively with the above-named labor organization by unilaterally subcontracting work from the aforesaid bargaining unit.

(e) Refusing to bargain collectively with the above-named labor organization by declining to arbitrate the grievance concerning the issue of entering into franchise agreements with unit employees.

(f) Refusing to bargain collectively with the above-named labor organization by refusing to accord employees a benefit of 20-cent-per-hour as specified in the applicable bargaining agreement and refusing to guarantee employees 10 hours of overtime at premium rates.

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

2. Take the following affirmative action which the Board finds is necessary to effectuate the policies of the Act:

(a) Upon request, bargain collectively with the Union as the exclusive bargaining representative of Respondent Airport's employees in the appropriate unit with respect to wages, hours, and other terms and conditions of employment.

(b) Notify individually, and by the posting of the attached notice, all employees in the appropriate unit with whom Respondent has made franchise agreements that it will no longer offer, solicit, enter into, continue, or enforce such agreements or arrangements, but without prejudice to the assertion by the employees affected of any legal rights they may have acquired under such agreements or arrangements.

(c) Offer to all unit employees with whom Respondent has made franchise agreements immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make each of them whole for any loss of pay he may have suffered by reason of employment under franchise agreements, with interest, in accordance with our decisions in *F. W. Woolworth Company*, 90 NLRB 289 (1950); *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962); and *Florida Steel Corporation*.<sup>8</sup>

(d) Upon request, arbitrate the grievance concerning the issue of entering into franchise agreements with unit employees.

(e) Make the employees whole for any loss of earnings they may have suffered by reason of Respondent Receiver's unilateral action in refusing to pay employees a 20-cent-per-hour wage increase and refusing to guarantee employees 10 hours of overtime at premium rates as required by the collective-bargaining agreement, with interest computed in accord with our decisions in *Isis Plumbing & Heating Co.*, and *Florida Steel Corporation*, *supra*.

(f) 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.

(g) Post at their facility in Newark, New Jersey, copies of the attached notice marked "Appendix."<sup>9</sup> Copies of said notice, on forms provided by the Regional Director for Region 22, after being duly signed by Respondents' representatives, shall be posted by 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 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.

(h) Notify the said Regional Director for Region 22, within 20 days from the date of this Order, what steps Respondents have taken to comply herewith.

<sup>8</sup> In accordance with our decision in *Florida Steel Corporation*, 231 NLRB 651 (1977), we shall apply the current 7-percent rate for periods prior to August 25, 1977, in which the "adjusted prime interest rate" as used by the Internal Revenue Service in calculating interest on tax payments was at least 7 percent.

<sup>9</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."

## APPENDIX

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

WE WILL NOT refuse to bargain collectively concerning wages, hours, and other terms and conditions of employment with Local 462, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

WE WILL NOT enter into, continue, or enforce any franchise agreements with our employees.

WE WILL NOT deal individually with our employees concerning their terms and conditions of employment in derogation of their collective-bargaining representative.

WE WILL NOT unilaterally subcontract work from the bargaining unit the Union represents.

WE WILL NOT unilaterally refuse to pay employees a 20-cent-per-hour wage increase and guarantee them 10 hours of overtime at premium rates without prior notice to, and consultation with, the Union.

WE WILL NOT refuse to arbitrate the grievance concerning the issue of entering into franchise agreements with employees in the unit the Union represents.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights protected under Section 7 of the Act.

WE WILL, upon request, bargain with Local 462, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive representative of all the employees in the bargaining unit described below with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment. The bargaining unit is:

All drivers, mechanics, car washers and polishers employed at Airport's Newark

terminals, but excluding all managerial employees, dispatchers, office clerical employees, guards and supervisors as defined in the Act.

WE WILL, upon request, arbitrate the grievance concerning the issue of entering into franchise agreements with unit employees.

WE WILL pay employees for any loss of earnings due to our unilateral refusal to pay employees a 20-cent-per-hour wage increase and to guarantee them 10 hours of overtime at premium rates, with interest.

WE WILL offer to all employees with whom we have franchise agreements immediate and full reinstatement to their former jobs or, if those no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and WE WILL make each whole, with interest, for any loss of pay suffered by reason of the unfair labor practices found by the Board.

AIRPORT LIMOUSINE  
SERVICE, INC.

JAY MCNEILL, ESQ. AS  
RECEIVER FOR AIRPORT  
LIMOUSINE SERVICE, INC.