

Tampa Crown Distributors, Inc. and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Teamsters, Chauffeurs and Helpers Local Union No. 79. *Case No. 12-CA-160. October 31, 1958*

DECISION AND ORDER

On April 29, 1958, Trial Examiner Albert P. Wheatley issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices within the meaning of the Act, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. He also found that the Respondent had not engaged in certain other alleged unfair labor practices and recommended the dismissal of the complaint with respect to such allegations. Thereafter, the Respondent and the General Counsel filed exceptions to the Intermediate Report, together with supporting briefs.

Pursuant to the provisions of Section 3 (b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel [Chairman Leedom and Members Bean and Jenkins].

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and briefs, and the entire record in the case and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner with the exceptions, modifications and additions set forth below.

We agree with the Trial Examiner that the Respondent, on or about October 3, 1957, and thereafter, refused to bargain with the Union as the certified bargaining representative of the Respondent's employees in an appropriate unit in violation of Section 8 (a) (5) and (1) of the Act. The respondent does not deny that it refused to bargain. However, it seeks to justify its refusal on the ground that the Union was not properly certified. Specifically, it seeks to relitigate the issues which were before the Board in the earlier representation proceeding.¹ We hold, as did the Trial Examiner, that the Respondent may not relitigate such issues.² Moreover, even assuming that some of the evidence introduced in the present proceeding may be regarded as evidence previously unavailable to the Respondent or in the nature of newly discovered evidence, we agree with the Trial Examiner that, contrary to the Respondent's contention, such evidence does not estab-

¹ *Tampa Crown Distributors, Inc.*, 118 NLRB 1420.

² *Pittsburgh Plate Glass Company v. N. L. R. B.*, 313 U. S. 146, 161.

lish that the Union was responsible for the alleged threats or that the employees were thereby denied a free choice of bargaining representative.³

We disagree, however, with the Trial Examiner's finding that the Respondent did not violate Section 8 (a) (5) and (1) of the Act by granting certain wage increases on August 16, 1957, without prior notice to, and consultation with, the Union. As indicated in the Intermediate Report, the tally of ballots furnished after the election which was conducted by the Board on June 7, 1957, showed that the Union had received a majority of the votes cast. Certification of the Union was held up, pending a disposition of the Respondent's objections to the election, until September 19, 1957, when the Board overruled the Respondent's objections.

The Trial Examiner found that the wage increases were not unlawful because, at the time they were made, the Union had not yet been certified, the wage increases were the result of action contemplated by the Respondent before the advent of the Union, and there was no evidence that the Respondent was motivated by antiunion considerations. The testimony, however, given by the Respondent was merely to the effect that at certain irregular intervals, whenever it thought that an increase in the cost of living made a wage increase desirable, it granted an increase which usually varied from \$2 to \$5 per week. The Respondent claims that it contemplated granting such an increase to its employees before the Union filed its petition for certification but was deterred from putting the increase into effect on the advice of its attorney.

Whether or not a unilateral increase in the contemplated amount would, under the circumstances relied on by the Trial Examiner, be permissible without first bargaining with the Union is a question we need not decide. For, it is clear that the Respondent granted an increase of \$8 per week, which was actually in excess of the amount the Respondent originally contemplated giving the employees and included an additional amount allegedly to cover a further rise in the cost of living. The Respondent concedes that it was in the latter part of July 1957 that it decided to grant an amount larger than that originally intended. Since at that time the Union had already demonstrated its majority status among the Respondent's employees, the unilateral action taken by the Respondent was in clear disregard of its obligation to bargain with the Union as the exclusive bargaining

³ We note that the Intermediate Report fails to indicate the disposition of the one challenged ballot cast in the election which could have affected the outcome thereof. The record of proceedings in the earlier representation case indicates that the Board adopted the Regional Director's recommendation that the challenge to the ballot be sustained as no exception to such recommendation was filed. Furthermore, in addition to the 8 valid ballots cast in the election, as noted by the Trial Examiner, the record of proceedings shows that 1 void ballot was cast.

representative of its employees, and independently constituted a violation of Section 8 (a) (5) and (1) of the Act.⁴

THE REMEDY

Having found that the Respondent has engaged and is engaging in certain unfair labor practices, we shall order that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

We have found that the Respondent has committed unfair labor practices within the meaning of Section 8 (a) (5) and (1) of the Act by expressly refusing to bargain with the Union and also by changing and effecting new wage rates for some of its employees without giving notice to and consulting with the Union. We shall therefore order the Respondent, upon request, to bargain collectively with the Union as the exclusive representative of its employees in the appropriate unit concerning rates of pay, wages, hours and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. We shall also order the Respondent to cease and desist from changing or effecting new wage rates, or otherwise altering the working conditions of its employees, without giving notice to and consulting with the Union.

ORDER

Upon the entire record in this case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Tampa Crown Distributors, Inc., Tampa, Florida, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to recognize or bargain collectively with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Teamsters, Chauffeurs and Helpers Local Union No. 79, as the exclusive representative of all truckdrivers, warehousemen, and helpers employed by Respondent in Tampa, Florida, excluding all other employees and supervisors as defined by the National Labor Relations Act, as amended, with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

(b) Changing or effecting new wage rates or otherwise altering the working conditions of its employees in the above-described appropriate unit, without giving notice to, and bargaining with, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Teamsters, Chauffeurs and Helpers Local Union No. 79.

(c) In any like or related manner refusing to bargain collectively

⁴ Cf. *Superior Cable Corporation*, 116 NLRB 1674, 1679, enf. 246 F. 2d 539 (C. A. 4).

with the said labor organization as the exclusive representative of all the employees in the said appropriate unit.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain collectively with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Teamsters, Chauffeurs and Helpers Local Union No. 79, as the exclusive bargaining representative of all the employees in the above-described appropriate unit and embody in a signed agreement any understanding reached.

(b) Post at its place of business in Tampa, Florida, copies of the notice attached hereto marked "Appendix."⁵ Copies of said notice, to be furnished by the Regional Director for the Twelfth Region, shall, after being duly signed by an authorized representative or representatives of the Respondent, be posted by the Respondent immediately upon receipt thereof and maintained by it for a period of sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such notices are not altered, defaced, or covered by any other material.

(c) Notify the said Regional Director in writing, within ten (10) days from the date of this Order, what steps it has taken to comply herewith.

⁵In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "Pursuant to a Decision and Order" the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order."

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to a Decision and Order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL, upon request, bargain collectively with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Teamsters, Chauffeurs and Helpers Local Union No. 79, as the exclusive representative of all employees in the bargaining unit described below with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment and embody in a signed agreement any understanding reached. The bargaining unit is:

All truckdrivers, warehousemen, and helpers employed by Tampa Crown Distributors, Inc., in Tampa, Florida, excluding all other employees and supervisors, as defined in the Act.

WE WILL NOT change or effect new wage rates or otherwise alter the working conditions of our employees in the appropriate unit without giving notice to and bargaining with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Teamsters, Chauffeurs and Helpers Local Union No. 79.

WE WILL NOT, in any like or related manner, refuse to bargain collectively with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Teamsters, Chauffeurs and Helpers Local Union No. 79.

TAMPA CROWN DISTRIBUTORS, INC.,
Employer.

Dated _____ By _____
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

INTERMEDIATE REPORT AND RECOMMENDATIONS

ISSUES

Herein Tampa Crown Distributors, Inc. (Respondent) refused and continues to refuse to bargain collectively with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Teamsters, Chauffeurs and Helpers Local Union No. 79 previously certified by the Board after an election by secret ballot. The primary issue concerns the validity of the certification. There is also an issue of whether wage increases made effective between the date of the election and the date of the certification, without notice to, or consultation with, the Union violated the Act.

FACTS AND CONCLUSIONS

Pursuant to a Decision and Direction of Election¹ dated May 28, 1957, an election by secret ballot was conducted on June 7, 1957, under the direction and supervision of the Board's Regional Director for the Twelfth Region (Tampa, Florida), among employees in the unit found appropriate in the above-mentioned Decision. A tally of ballots reveals that out of 8 voters casting valid ballots, 4 voted for the Union, 3 voted against the Union, and 1 cast a challenged ballot.

On June 11, 1957, Respondent filed objections to conduct affecting the election. The Regional Director then, pursuant to the Board's regulations, after an investigation, made a written report on these objections, to which Respondent filed exceptions. In its exceptions, Respondent contended that certain preelection telephone calls made to employees by anonymous callers who threatened reprisals if employees did not vote for the Union warranted setting aside the election. The Board rejected this contention, stating:²

The Employer in its exceptions contends that the anonymous threats prevented a free election because of the small size of the unit and the closeness of the election, and because the only reasonable conclusion to be drawn by the threatened employees was that the calls were caused by the Union. . . .

We find no merit in the Employer's contentions. In the absence of evidence that threatening or coercive conduct is attributable to one of the participating parties, the Board will not set an election aside,³ unless the character of the

¹ *J. Spevak & Co., Inc.*, 110 NLRB 954; *White's Uvalde Mines*, 110 NLRB 278; *The Gruen Watch Company*, 108 NLRB 611; *Marman Bag Company, Inc.*, 108 NLRB 456; *J. J. Newberry Company*, 100 NLRB 84.

² Unpublished.

³ In its Supplemental Decision and Certification of Representatives, 118 NLRB 1420.

conduct is so aggravated as to create a general atmosphere of fear and reprisal rendering a free expression of choice of representatives impossible.⁴

The conduct of the anonymous caller cannot be attributed to the Petitioner merely because the employees who were called did not recognize the callers' voices, even assuming, as the Employer contends, that they were familiar with the voices of their fellow employees. Furthermore, the two anonymous and unpublicized calls⁵ in this case, while reprehensible, are clearly distinguishable from the conduct involved in those cases where the Board has set aside elections without attributing the objectionable conduct to any of the participating parties,⁶ and in our opinion was not such as to create a general atmosphere of fear and reprisal among the Employer's employees. Accordingly, we agree with the Regional Director that the objections should be overruled.⁷

⁴ *Poinsett Lumber and Manufacturing Company*, 116 NLRB 1732; *The Falmouth Company*, 114 NLRB 896; *Diamond State Poultry Co., Inc.*, 107 NLRB 3.

⁵ We note that the call to Sardinas, while threatening in tone, failed to identify the caller as either for or against the Petitioner and did not indicate how the caller wanted him to vote.

⁶ Compare cases cited in footnote 3, above.

⁷ *Gruen Watch Company*, *supra*; *Marman Bag Company, Inc*, *supra*; *J. J. Newberry Company*, *supra*.

Respondent's contentions herein are similar to its contentions in the representation proceeding. The Trial Examiner deems himself bound by the Board's rulings in the representation proceeding to the effect that preelection telephone calls made to employees by anonymous callers who threatened reprisals if employees did not vote for the Union do not warrant setting aside the election. Therefore, the Trial Examiner rejects this contention of Respondent assuming, *arguendo*, that the evidence received concerning the call to Sardinas was properly received as newly discovered evidence and that such evidence establishes that Sardinas was threatened with reprisal if he did not vote for the Union.

On the night before the election, certain employees in the voting unit met at the union hall and discussed the probable outcome of the election. At this time one of the union officials stated that if Sardinas voted against the Union, the Union would lose the election. Shortly thereafter 4 or 5 employees³ decided to go to Sardinas' home and talk to him. This group asked Sardinas to vote for the Union explaining that his vote would mean a victory for the Union. Sardinas replied he was reluctant to so vote because he had a cousin who was a foreman for Respondent and he (Sardinas) did not want to put himself "on the spot" with Respondent. It was then suggested that Sardinas vote a blank ballot and Sardinas agreed.

Respondent argues that the anonymous call to Sardinas plus the visit to his home constitute a fraud against the Board election affecting the results of the election to the extent that the election should be set aside. There are at least two flaws in Respondent's position. The Board has already rejected Respondent's contentions concerning the telephone call and as noted above the evidence is insufficient to establish that Morito was acting as a union agent when he, together with others, visited Sardinas' home. Without this evidence the record is insufficient to establish that the Union is responsible for the visit to Sardinas' home. Furthermore, assuming, *arguendo*, that the Union is responsible for this visit and what occurred there such conduct would not warrant setting aside the election. This was nothing more than an attempt to get an employee to vote for the Union and failing that, an attempt to get the employee not to vote against the Union and no threats or promises were made.

Between the date of the election (June 7, 1957) and the date of the certification (September 19, 1957) Respondent (on or about August 16, 1957) made effective wage increases. The Union was not given notice of, or consulted concerning, these wage increases. The issue here is whether these wage increases were in derogation of the Union's status as exclusive bargaining representative and therefore unfair labor practices within the meaning of Section 8 (a) (5) and (1) of the Act. (See *Medo Photo Supply Corporation v. N. L. R. B.*, 321 U. S. 678.)

³ Respondent contends that an ex-employee named Morito accompanied this group and that at this time Morito was a union agent and that therefore the Union is responsible for the conduct of these employees. The record reveals that Morito was an ardent supporter of the Union but does not establish that he was a union agent.

At the time these wage increases were announced (on or about August 20, 1957), Respondent's president (Miguel Diaz) read a prepared statement to the employees stating:

AUGUST 20, 1957.

To all warehouse employees:

I called you in here to give you a raise which raise I contemplated giving you sometime before the recent Union Activity started. Before I got the raise worked out the Union Activity began and my attorneys advised me that I should hold off on any wage increase at the moment since there might be a claim that I was giving it to fight the Union.

As you know the outcome of the election is tied-up because we do not feel that it was a fair vote. Since this will probably take a long time to be decided and as' the cost of living has gone up in the meantime I have decided to go ahead and make a wage increase.

I am going to give every man 20¢ per hour per week to be effective Aug. 16, 1957.

It has come to my attention from time to time recently that there is some friction among some of you fellows. I do not intend to put up with any friction in this Organization and it will have to be stopped at once. I want everyone to work together for the best interest of all.

Very truly yours,

TAMPA CROWN DISTRIBUTORS, INC.
(Signed) M. Diaz,
MIGUEL DIAZ, *President.*

The evidence adduced corroborates the statements read to the employees, namely that the wage increases were contemplated before the advent of the Union; that they were withheld on advice of counsel and that they were "cost of living" wage increases. Furthermore, there is no evidence of antiunion comment or action connected with the granting of these increases. In view of these circumstances the Trial Examiner finds that the evidence adduced is insufficient to warrant a finding that these wage increases violated the Act.⁴

ULTIMATE FINDINGS AND CONCLUSIONS

In view of the foregoing and upon the entire record in this matter, the Trial Examiner makes the following findings of fact and conclusions of law.

1. The evidence adduced in this proceeding satisfies the Board's requirements for the assertion of jurisdiction herein.⁵

2. The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Teamsters, Chauffeurs and Helpers Local Union No. 79 is a labor organization within the meaning of the Act.

3. The following employees of Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of the Act:

All truckdrivers, warehousemen, and helpers employed by Respondent in Tampa, Florida, excluding all other employees and supervisors as defined in the Act.

4. At all times since on or about September 19, 1957, the Union has been the exclusive representative of all employees in the aforementioned unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment.

5. On or about October 3, 1957, and at all times thereafter, Respondent refused and has continued to refuse to bargain collectively with the Union as the representative of the employees in the unit heretofore found appropriate.

⁴There are numerous cases holding that after certification a wage increase may not be made effective without prior consultation with the Union. But the Trial Examiner has found no case holding that a unilateral wage increase between the date of election and the date of the certification is in derogation of a union's status as exclusive bargaining representative and therefore violative of the Act. In the opinion of the Trial Examiner, prior to the certification a question concerning representation exists which is not true after the certification and this difference warrants the ruling made herein. Furthermore, assuming that the wage increases noted herein violate the Act such violation appears to be technical and one which for practical purpose will be resolved with a final resolution of the issue concerning the validity of the certification.

⁵Respondent distributes wines and liquors in the vicinity of Tampa, Florida, and annually it receives from points and places outside of Florida wines and liquors which, exclusive of taxes, are valued in excess of \$3,000,000.

6. By the aforesaid refusal to bargain Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (1) and (5) of the Act.

7. The evidence adduced does not warrant findings and conclusions that Respondent violated the Act by unilaterally granting its employees wage increases.

[Recommendations omitted from publication.]

Los Angeles-Seattle Motor Express, Incorporated and Lester H. Slater and California Trucking Associations, Inc., Party to the Contract

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 357 and Lester H. Slater and California Trucking Associations, Inc., Party to the Contract. *Cases Nos. 21-CA-2416 and 21-CB-783. October 31, 1958*

DECISION AND ORDER

On October 9, 1956, Trial Examiner William E. Spencer, issued his Intermediate Report in the above-entitled proceeding, a copy of which is attached; finding that the Respondents, Los Angeles-Seattle Motor Express, Incorporated, and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 357, herein called the Respondent Company and Respondent Union, respectively, had not engaged in any of the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. Thereafter, the General Counsel filed exceptions to the Intermediate Report, together with a supporting brief.

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and brief, and the entire record in the case and, for the reasons stated below, finds merit in the General Counsel's exceptions.

1. The Trial Examiner found that the Respondents did not violate the Act by giving effect to their 1955 contract. We do not agree.

During the period covered by the complaint, the Respondent Company and Respondent Union gave effect to a contract executed in May 1955, which provided, in pertinent part, as follows:

. . . The Employer shall first call the Union or the dispatching hall designated by the Union for . . . [casual] help. In the event the employer is notified that such help is not available, or in the event the employees called for do not appear for work at the time designated by the employer, the employer may hire from any other available source.