

Staten Island Home Improvement Corporation and Edward N. Olsen, an Individual d/b/a Terrace Lumber Company and Local 522, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case No. 29-CA-90 (formerly 2-CA-10349). September 10, 1965

DECISION AND ORDER

On June 1, 1965, Trial Examiner Sidney Sherman issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. He also found that the Respondent had not engaged in certain other labor practices alleged in the complaint and recommended dismissal as to them. Thereafter, the General Counsel filed exceptions to the Trial Examiner's Decision and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel [Chairman McCulloch and Members Fanning and Jenkins].

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision and hereby adopts the findings,¹ conclusions, and recommendations² of the Trial Examiner, with the following additions and modifications.

¹ The General Counsel excepts to the Trial Examiner's statement in footnote 9 of his Decision with regard to the authority allegedly possessed by Taylor. We find merit in this exception, and we do not adopt that portion of footnote 9.

² The General Counsel excepts to the inclusion of footnote 10 of the Trial Examiner's Decision, asserting that it inaccurately implies that the unit herein found appropriate had been reduced to a one-man unit (Walsh) at the time of the hearing, and thus suggests that Respondent's bargaining obligation under our order is necessarily contingent upon an addition to the unit when the Union requests bargaining. To the extent there may be such an implication in the footnote, we find merit in the General Counsel's exception. The record shows that at the time of the hearing Respondent also employed one Taylor, whose unit inclusion has not been passed upon because of an unresolved issue, not necessary to decision herein, as to his supervisory status. Moreover, there is nothing in the record to show, nor is it contended, that Respondent did not intend to replace Maroney who was in the bargaining unit at the time of the bargaining demand and refusal, but who had quit prior to the hearing. If as a result of changed circumstances in the unit occurring since the Respondent's initial refusal to bargain, a question may arise as to Respondent's continued obligation to honor our bargaining order, that matter may be considered at the compliance stage of this proceeding and need not be passed on now.

Additional Conclusions of Law ³

4. By discriminatorily locking out and withholding employment from employees William Taylor, James Maroney, and Charles Walsh, and refusing to grant the Union's request to put them back to work because of their union activity, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a) (3) of the Act.

5. By these same actions, the Respondent interfered with, restrained, and coerced employees in the exercise of rights guaranteed them in Section 7 of the Act, and has thereby engaged in and is engaging in unfair labor practices within the meaning of Section 8(a) (1) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the Recommended Order of the Trial Examiner, as modified herein, and orders that the Respondent, Staten Island Home Improvement Corporation and Edward N. Olsen, an individual, d/b/a Terrace Lumber Company, Staten Island, New York, his agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order, as so modified: ⁴

Paragraph 1(b) is hereby deleted, and the following paragraph substituted therefor:

"(b) Discouraging membership in Local 522, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or in any other labor organization, by locking out or withholding employment from its employees, or in any other manner discriminating in regard to their hire or tenure of employment, or any term or condition of employment."

The second paragraph of the notice, beginning "WE WILL NOT discourage" is hereby deleted, and the following paragraph substituted therefor:

WE WILL NOT discourage membership in Local 522, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or in any other labor organization, by locking out or withholding employment from our employees, or in any other manner discriminating in regard to their hire or tenure of employment, or any term or condition of employment.

³The Trial Examiner found that the Respondent violated Section 8(a) (3) and (1) of the Act by discriminatorily locking out and withholding employment from Taylor and Maroney, and further by rejecting the Union's request to put said employees back to work, including Walsh, who had joined Taylor and Maroney in picketing the Respondent's premises. However, he inadvertently omitted these findings in his conclusions of law.

⁴Paragraph 2(b) of the Trial Examiner's Recommended Order, which inadvertently directs that copies of the notice to be posted shall be furnished by the Regional Director for Region 13, is amended to read: "Regional Director for Region 29."

IT IS HEREBY FURTHER ORDERED that the complaint be, and it hereby is, dismissed insofar as it alleges violations not found herein.⁵

⁵The complaint alleges that the Respondent violated Section 8(a)(1) of the Act by various threats of reprisal for union activity attributed to Edward Olsen, owner of Terrace Lumber Company. The answer denies these allegations. Olsen, at the hearing, denied having made the statements attributed to him. The Trial Examiner failed to make findings regarding these allegations. No exception to this was filed by the General Counsel. We therefore dismiss said allegations.

The complaint also alleges that the Respondent unlawfully made unilateral changes in the wage rates of its employees. The Trial Examiner found that these allegations were not supported by a preponderance of the evidence, and recommended dismissal of that portion of the complaint. He inadvertently omitted such dismissal in his Recommended Order. This omission is corrected by the above Order.

TRIAL EXAMINER'S DECISION

The charge herein was served upon Respondent on or about October 30, 1964, the complaint issued on February 26, 1965, and the case was heard on April 26. The issues litigated related to an alleged refusal to bargain, threats of reprisal and discrimination for union activity, and unilateral changes in wage rates.

At the end of the first day of the hearing before Trial Examiner Sidney Sherman, and before the General Counsel had rested, Respondent¹ indicated that it had no desire to contest the matter further, and on the record waived its right to present evidence, to except to any decision I might render, or to contest any order the Board might enter herein. Respondent further conceded the jurisdiction of the Board herein. The General Counsel, however, reserved the right to except to any provision of the Recommended Order herein, and to move that the hearing be reopened to introduce further evidence. No such motion has as yet been received.

In view of the foregoing consent by Respondent to a final disposition of the case on the present record, I proceeded at the hearing to read into the record findings of fact, conclusions of law, and a Recommended Order, disposing of all the issues herein. The purpose of this Decision is merely to formalize and clarify the action so taken by me at the hearing.

Upon the entire record,² and my observation of the witnesses, I adopt the following findings and conclusions

I. RESPONDENT'S BUSINESS

Staten Island Home Improvement Corporation, a corporation under the laws of New York State, is engaged at its establishment in Staten Island, New York, in the construction and remodeling of homes. Its gross receipts during 1964 were substantially less than \$50,000. Olsen, doing business as Terrace Lumber Company, operates a lumber yard in Staten Island, and, during the past year, of its total gross sales of \$112,000, about one-half represented sales to building contractors.

The record shows, and I find, that the bulk of the stock in the corporation is owned by Olsen and his wife, that Olsen is president of the corporation, and that he constitutes virtually the only active manager of both the corporation and the lumber yard.

I find that the corporation and Olsen, in his capacity as proprietor of the lumber yard, constitute a single employer within the meaning of the Act.

The complaint alleges, Respondent concedes, and I find, that it annually receives supplies valued in excess of \$50,000, of which more than \$40,000 in value was received directly from out-of-State points,³ and more than \$10,000 in value was received from firms within the State of New York, each of which had received said supplies directly from out-of-State points.

¹In view of my finding, below, that both Respondents constituted a single employer, they are referred to herein throughout in the singular.

²The transcript of testimony is hereby ordered corrected by changing "by" on p. 169, line 20, to read "bargain with"

³On the basis of undisputed testimony at the hearing, I find that, during 1964, an out-of-State supplier, Wyerhaeuser Lumber Company, sold to Respondent, for its lumber yard, \$14,000 worth of lumber. I excluded any further evidence of out-of-State purchases as cumulative, particularly as Respondent did not dispute the complaint's allegation of \$40,000 annual direct inflow.

I find that Respondent is engaged in commerce under the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.⁴

II. THE LABOR ORGANIZATION INVOLVED

Local 522, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, hereinafter called the Union, is a labor organization within the meaning of the Act.

III. THE UNFAIR LABOR PRACTICES

The complaint alleges that Respondent (a) violated Section 8(a)(5) and (1) of the Act by refusing on and after October 29,⁵ to recognize the Union as the representative of Respondent's employees, and by unilaterally changing wage rates on or about November 2, (b) violated Section 8(a)(3) and (1) of the Act by discriminatorily discharging three employees on or about October 29, and (c) violated Section 8(a)(1) by various threats of reprisals for union activity and by other coercive conduct. The answer denied all these allegations.

A. *The 8(a)(5) issues*

1. The appropriate unit

All parties agree, and I find, that the following unit of Respondent's employees is appropriate for purposes of collective bargaining:

All yardmen and truckdrivers, excluding carpenters, office clerical employees, professional employees, guards, and supervisors as defined in the Act.⁶

2. Majority status

The record shows, and I find, that by October 27, a majority of the employees in the aforesaid unit had signed cards authorizing the Union to act as their bargaining agent, and that they thereby appropriately designated the Union as such representative.⁷

3. The refusal to bargain

On the basis of a composite of the mutually corroborative testimony of Union Agent Stiles, and the employee witnesses, I find, notwithstanding Olsen's denial, that on October 29, union agent, Darche, stated to Olsen that the Union represented Respondent's employees, requested that he recognize the Union,⁸ and that, after ascertaining that the employees in fact desired Union representation, Olsen's only response to the recognition request was to announce that he had no work for the employees that day. Nor has Respondent at any time thereafter offered to recognize the Union. Accordingly, I find that Respondent has since October 29, refused to recognize the Union, thereby violating Section 8(a)(5) and (1) of the Act.

4. The unilateral wage increase

The evidence fails to preponderate in favor of a finding that after October 29, Respondent unilaterally changed the wage rates of its employees. I accordingly recommended dismissal of this allegation of the complaint.

B. *The 8(a)(3) issue*

Notwithstanding Olsen's denial, I find on the basis of the mutually corroborative testimony of the General Counsel's witnesses that on October 29, before the Union's recognition request, Olsen in effect, indicated to Taylor, and Maroney, that he intended to use their services that day, but that, upon receiving such request, and ascertaining that Taylor and Maroney desired union representation, he abruptly announced that he had no work for them. I find further, on the basis of Taylor's testimony, that

⁴ *Siemons Mailing Service*, 122 NLRB 81, 85.

⁵ All events hereinafter related occurred in 1964, unless otherwise indicated.

⁶ As to Respondent's contention that on October 29 there was only one employee in the unit, see next footnote.

⁷ The General Counsel presented in evidence cards signed on October 26 and 27 by Taylor, Maroney, and Walsh. Even if it be assumed that Taylor was a supervisor (see footnote 9, below), I find that Maroney and Walsh (who in 1964 spent part of his working time in the lumberyard) belong in the unit.

⁸ I rely here particularly on the testimony of Maroney.

on November 2, Olsen rehired Taylor and Maroney, after Taylor assured him that they no longer desired the Union. I find that, by thus withholding employment for union activity, Respondent violated Section 8(a)(3) and (1) of the Act.⁹

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent set forth in section III, above, occurring in connection with the operations of the Respondent described in section I, above, have a close, intimate, and substantial relation 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. THE REMEDY

It having been found that the Respondent violated Section 8(a)(1), (3), and (5) of the Act, it will be recommended that the Respondent cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

It has been found that the Respondent refused to bargain in good faith with the Union, which represented a majority of the employees in an appropriate unit. Accordingly, I shall recommend that the Respondent be ordered to bargain, upon request, in good faith with the Union as the exclusive representative of the employees in the appropriate unit.¹⁰

It has been found that on October 29, and for several days thereafter, Respondent discriminatorily denied employment to Taylor, Maroney, and Walsh. All three were subsequently reinstated.¹¹ At the hearing, all three asserted that they did not desire any backpay and the Union, likewise, disclaimed any interest in a backpay award. Under these circumstances, and as the amount of any such award would apparently be merely nominal, in any event, I do not believe it would effectuate the policies of the Act, under the circumstances of this case, to make such an award.

In view of the Respondent's unfair labor practices, particularly the discriminatory conduct found above, there exists a threat of future violations, which warrants a broad cease-and-desist order.

CONCLUSIONS OF LAW

1. All Respondent's yardmen and truckdrivers, excluding carpenters, office clerical, professional 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.

2. At all times material the Union has been and still is the exclusive representative of all the employees in the aforesaid unit for the purposes of collective bargaining, within the meaning of Section 9(a) of the Act.

3. By refusing to bargain collectively in good faith with the aforesaid labor organization as the exclusive representative of its employees in an appropriate unit, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

RECOMMENDED ORDER

Upon the entire record in the case, and the foregoing findings of fact and conclusions of law, it is recommended that Respondent, Staten Island Home Improve-

⁹ Walsh arrived at Respondent's premises, in the morning of October 29, after Taylor and Maroney had already been "locked out," and had begun to picket in protest in front of such premises. Walsh joined the pickets and did not work that day, although Darche vainly requested Olsen to put all three to work. By rejecting this request, Respondent additionally violated Section 8(a)(3) and (1) of the Act.

There was evidence that Taylor had authority to, and did, effectively recommend the discharge of employees. However, as a finding that Taylor was a supervisor on October 29 would not affect the basic violation findings or the remedy herein, I do not pass on that issue.

¹⁰ There was evidence indicating that at the time of the hearing Walsh was the only current employee in the bargaining unit. Any duty to bargain imposed herein is contingent upon there being at least two employees in such unit at such time as the Union may request bargaining.

¹¹ As found above, Taylor and Maroney were recalled on November 2. Walsh testified that he did not return to Respondent's employ until April 1965. However, the General Counsel offered to place in evidence Walsh's pretrial affidavit, in which he indicated that he returned to work at the same time as the others. This offer was rejected, as its only apparent purpose was to impeach the General Counsel's own witness.

ment Corporation and Edward Olsen d/b/a Terrace Lumber Company, Staten Island, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain in good faith concerning rates of pay, wages, hours of employment, or other conditions of employment with Local 522 as the exclusive representative of all its production and maintenance employees, excluding office clericals, professional employees, guards, and supervisors as defined in the Act.

(b) Discouraging membership in Local 522, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or in any other labor organization, by discriminating against employees in regard to their hire or tenure of employment or any term or condition of employment.

(c) In any other manner, interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form, join, or assist the above-named Union, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such right is affected by the provisos in Section 8(a)(3) of the Act.

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

(a) Upon request, bargain collectively in good faith with Local 522, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive representative of all yardmen and truckdrivers of the Respondent, excluding carpenters, office clericals, professional employees, guards, and supervisors as defined in the Act, with respect to rates of pay, wages, hours of employment, or other conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its plant in Staten Island, New York, copies of the attached notice marked "Appendix."¹² Copies of said notice, to be furnished by the Regional Director for Region 13, shall, after being duly signed by the Respondent's representative, be posted by the Respondent immediately upon receipt thereof, and be maintained by it for a period of at least 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that such notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 29, in writing, within 20 days from the date of receipt of this Decision, what steps the Respondent has taken to comply herewith.¹³

¹² In the event that this Recommended Order is adopted by the Board, the words "a Decision and Order" shall be substituted for the words "the Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "a Decree of the United States Court of Appeals, Enforcing an Order" shall be substituted for the words "a Decision and Order".

¹³ In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify said Regional Director, in writing, within 10 days from the date of this Order, what steps the Respondent has taken to comply herewith."

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to the Recommended Order of a Trial Examiner 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 bargain in good faith, upon request, with Local 522, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive representative of all employees in the bargaining unit described below in respect to rates of pay, wages, hours of employment, or other conditions of employment, and, if an understanding is reached, embody it in a signed agreement. The bargaining unit is:

All our yardmen and truckdrivers, excluding carpenters, office clericals, professional employees, guards, and supervisors as defined in the Act.

WE WILL NOT discourage membership in Local 522, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or in any other labor organization, by discriminating against employees in regard to their hire or tenure of employment or any term or condition of employment.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form, join or assist Local 522, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization, to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection or to refrain from any or all such activities, except to the extent that such right may be affected by the provisos in Section 8(a)(3) of the Act.

All of our employees are free to become, remain, or refrain from becoming or remaining, members of Local 522, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization.

EDWARD N. OLSEN D/B/A TERRACE LUMBER COMPANY,
Employer.

Dated_____ By_____ (Representative) (Title)

STATEN ISLAND HOME IMPROVEMENT CORPORATION,
Employer.

Dated_____ By_____ (Representative) (Title)

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

If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 16 Court Street, Brooklyn, New York, Telephone No. 596-5386.

W. B. Johnston Grain Company and Johnston Seed Company and American Federation of Grain Millers, AFL-CIO. Case No. 16-CA-2149. September 10, 1965

DECISION AND ORDER

On July 21, 1965, Trial Examiner Rosanna A. Blake issued her Decision in the above-entitled proceeding, finding that the Respondent has engaged in and is engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision and a brief in support thereof.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel [Chairman McCulloch and Members Brown and Zagoria].

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the Respondent's exceptions and brief, and the