

Western Freight Association; Merchant Shippers, Incorporated; Stor-Dor Forwarding Company; Westland Forwarding Company; Dependable Consolidators, Inc. and Highway Drivers, Dockmen, Spotters, Ramp Men, Meats, Packing House and Allied Products, Drivers and Helpers, Office Workers and Miscellaneous Employees, Local 710, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.¹ Case 13-RC-10997

June 26, 1968

DECISION AND ORDER

BY CHAIRMAN McCULLOCH AND MEMBERS FANNING AND ZAGORIA

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before Julian D. Schreiber, Hearing Officer. Following the hearing and pursuant to Section 102.67 of the National Labor Relations Board Rules and Regulations and Statements of Procedure, Series 8, as amended, and by direction of the Regional Director for Region 13, this case was transferred to the National Labor Relations Board for decision. Briefs have been timely filed by the Employer, the Petitioner, and the Intervenor.²

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.

The Board has reviewed the Hearing Officer's rulings made at the hearing and finds that they are free from prejudicial error. They are hereby affirmed.

Upon the entire record in this case,³ including the briefs filed herein, the Board finds:

1. The parties stipulated, and we find, that the Employer⁴ is engaged in commerce within the meaning of the Act, and that it will effectuate the purposes of the Act to assert jurisdiction herein.
2. The Labor organizations involved claim to represent certain employees of the Employer.
3. No question affecting commerce exists con-

cerning the representation of employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

The companies named in the petition are wholly owned subsidiaries of U.S. Freight. Merchant Shippers, Incorporated, Stor-Dor Forwarding Company, Western Freight Association, and Westland Forwarding Company are freight forwarders. Dependable Consolidators, Inc., is a freight handler.⁵ These companies are all presently located at the same location, "new" house No. 7, 1601 S. Western Avenue, Chicago, Illinois. The companies have interlocking officers, and the employees of the different companies are intermingled in a single location at "new" house No. 7 under the same supervision. In many cases the different companies' employees do each other's work. Under these circumstances, we find that these companies are a single employer under the Act.⁶

Prior to 1942, Merchant Shippers, Incorporated,⁷ did its own freight handling with its own employees. The employees doing the freight handling were covered by a collective-bargaining agreement between Merchant and the Intervenor, which by its terms obligated Merchant to bargain with regard to any decision to subcontract its freight handling work. In 1942, Merchant decided to subcontract the freight handling aspect of its operation to the Chicago, Burlington, and Quincy Railroad Company (hereinafter referred to as Burlington or the Burlington). Merchant and the Intervenor bargained with regard to the subcontracting and reached an agreement, also signed by Burlington, that, in the event the work was returned to Merchant, such positions and incumbents that were transferred to Burlington would return to Merchant with seniority rights unimpaired and under terms of existing agreements with the Intervenor. Sixty-four employees followed their work and became employees of the Burlington. The transferred employees continued to be represented by the Intervenor, and were covered by various collective-bargaining agreements between Burlington and the Intervenor. The latest such contract became effective January 1, 1961, and, in accordance with its terms, has continued for an indefinite period.

Subsequently, Merchant, as well as Stor-Dor For-

¹ The name of the Petitioner appears as amended at the hearing

² Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers and Station Employees, AFL-CIO, was allowed to intervene on the basis of an existing collective-bargaining agreement with Dependable Consolidators, Inc.

³ The Petitioner's request for oral argument is hereby denied as the record, including the briefs, adequately presents the issues and positions of the parties.

⁴ While the stipulated jurisdictional facts relate only to Dependable Consolidators, Inc., all the companies in the caption, as found *infra*, constitute a single employer within the meaning of the Act.

⁵ A freight forwarder contracts to transport freight in less than carload lots. The forwarder combines these lots into a carload lot and is responsible for shipment. A freight handler does the physical work of receiving and loading freight. For economic reasons, a freight forwarder will usually employ a freight handling company which, unlike the forwarder, is not under the jurisdiction of the Interstate Commerce Commission.

⁶ *Disney Roofing & Material Co*, 145 NLRB 88. The several entities named in the petition will hereinafter be called the Employer.

⁷ Merchant Shippers, Incorporated, is hereinafter referred to as Merchant.

warding Company, Westland Forwarding Company, and Western Freight Association, became subsidiaries of U.S. Freight. These freight forwarders sent their freight to "old" house No. 7, where employees of Burlington did the freight handling. Although Burlington's houses Nos. 8 and 9 occasionally did some of the Employer's overflow freight handling, the bulk of such work was done at "old" house No. 7 where Merchant shared space with Burlington.

In 1965, Burlington proposed that the Employer perform the physical handling of its freight with its own personnel. A "new" house No. 7 was constructed by Burlington; and in January 1966, in anticipation of taking over the freight handling operation, the Employer incorporated Dependable Consolidators, Inc. (hereinafter referred to as Dependable). However, though numerous meetings were held, no agreement was consummated between the parties until May. The Employer wanted to be able to pick and choose among the freight handling employees of Burlington and wanted to hire such employees as new employees without any seniority. Burlington and the Intervenor, relying on the 1942 agreement signed by Merchant, Burlington, and the Intervenor, originally maintained that the Employer should take all the employees that it needed from Burlington with full seniority. An agreement was finally reached on May 16, however, whereby the Employer agreed to take only 64 employees from Burlington's roster No. 5,⁸ to recognize the Intervenor as the majority representative of employees engaged in handling freight at "new" house No. 7, and to treat those employees with 3 or more years of service with Burlington as having 3 qualifying years toward vacations. In turn, the Employer's obligation to accept 64 employees was contingent on the condition that the employees be qualified, and that the Employer would not be held to a job stabilization agreement between Burlington and the Intervenor.⁹

On June 24, pursuant to the agreement of May 16, Dependable and the Intervenor entered into a collective-bargaining agreement, covering substantial conditions of employment, effective June 24, 1966, and to continue in effect until June 24, 1969. However, Dependable did not begin operations at "new" house No. 7 until July 18. On this date 95 employees transferred from the Burlington to Dependable.

⁸ In 1952 the Intervenor and Burlington dovetailed the men working Burlington's houses 7, 8, and 9 into one seniority roster which became known as seniority district No. 5. Employees on this roster could bid for jobs in any of the three houses on the basis of their seniority on the roster. As of May 12, 1966, 533 persons were listed on this roster. In addition to roster No. 5, each of the houses maintained a separate seniority roster.

⁹ The job stabilization agreement guaranteed any employee hired on or

Since July 18, Dependable has employed a force of approximately 110 men at "new" house No. 7; approximately 200 employees had been employed at "old" house No. 7. At Burlington's houses Nos. 7, 8, and 9, from which all the transferred employees came, over 500 employees did freight handling work.¹⁰ houses Nos. 8 and 9, of course, continued to operate under Burlington.

All of the transferring individuals performed freight handling duties at Burlington and now perform handling duties on the same type of freight at Dependable. However, at "new" house No. 7 the operation is automated, while at "old" house No. 7, more physical labor was required. Thus, while men were used to push two-wheeled cars at "old" house No. 7, much of the work is now loaded on automatic chains. Physically, "new" house No. 7 is diagonally across the Burlington railroad tracks from "old" house No. 7. Murphy, the supervisor at "old" house No. 7, is the president of Dependable.

According to Joyce, Petitioner's president, Petitioner secured authorization cards from employees before May 20, while the employees were still employed by Burlington. Joyce testified further that he received a telephone call from John Bridge, a spokesman for U.S. Freight, who stated that he had heard that the Petitioner had been signing up people at Burlington's house No. 7 and that U.S. Freight was concerned that Petitioner might put up a picket line. Bridge purportedly told Joyce that if the Petitioner could show a majority there would be a cardcheck, that he would furnish the Petitioner with lists of employees transferring to Dependable so that the cards held by the Petitioner could be checked against such lists, and that the Petitioner would be free to sign up employees on the premises. Petitioner claims the conversation took place prior to May 10.

Joyce also testified to subsequent conversations and meetings in which he was assured that Petitioner would have no difficulty getting recognition and negotiating a contract. On July 5, letters were sent by the Petitioner to Merchant and Dependable requesting a meeting for the purpose of discussing conditions of employment and hiring practices, and stating that the Petitioner intended to file a petition for an election at the time the freight handling employees were actually hired. On July 25, Dependable replied, stating that the employees involved

before October 1, 1964, a position with the Burlington for life.

¹⁰ As noted previously, 533 persons were listed on the district No. 5 roster. However, this list does not cover all employees doing freight handling work at houses 7, 8, and 9. Daily paid workers, who are regularly employed, were not on the roster. Of the 95 employees initially transferring, 36 had been daily employees.

were presently represented by the Intervenor. The Petitioner filed the present petition on September 14.

The Intervenor and the Employer contend that the agreements of May 16 and June 24 constitute a bar to the present petition. The Petitioner argues that the two agreements are prehire contracts which, under *General Extrusion Company, Inc.*, 121 NLRB 1165, 1167, do not bar an election. Also, the Petitioner claims that it relied on the aforementioned responses by the Employer's representative to its assertion of majority status in refraining from filing a petition until September 14, 1966, and that therefore the contracts do not, under *Deluxe Metal Furniture Co.*, 121 NLRB 995, 998-999, constitute a bar to an election.

At the heart of Petitioner's position is the contention that no successor relationship exists in the present situation. Petitioner relies on the fact that the Employer's freight handling operations are conducted in a new building at a new location; the fact that the Employer has a freight handling complement of only 110, while the overall freight handling work force of Burlington's houses Nos. 7, 8, and 9 was over 500; and the fact that part of the freight handling operation has been automated. The acquisition of the physical assets of the predecessor by the successor is not a determinative factor.¹¹ But, where the majority of the employees hired by the employer are former employees of the predecessor, doing essentially the same work, a successor relationship obligating the successor to bargain with the representative of the predecessor's employees has been found even though the successor's employee complement is smaller than its predecessor's.¹²

We believe the Employer is a successor to the Burlington Railroad with regard to the freight handling operations in question. By the May 16th agreement, the Employer obligated itself to take 64 employees, a majority of the eventual complement of 110 employees, from Burlington's houses Nos. 7, 8, and 9. These houses were the only places where

the Employer's freight handling work was done by Burlington. Because of the labor situation, the Employer, in fact, got all its freight handling employees from Burlington. Murphy, the supervisor of "old" house No. 7, where the bulk of the Employer's freight handling work was done, is now the president of Dependable. At "old" house No. 7 only freight for the Employer was handled. Dependable, likewise, handles freight only for the Employer. All the transferring individuals performed freight handling duties at the Burlington and now perform similar duties on the same type of freight for the Employer. Though the freight now moves in a somewhat automated fashion, the unit employees still load and unload it manually, in the same way. Mere automation of some unit functions, when those functions are still performed by the same individuals, does not suffice to relieve what would otherwise be a successor-employer of its obligation to bargain with the incumbent Union. Under such circumstances, we find that the Employer was a successor to the Burlington.

Since we find a successor relationship in the instant case, we do not find the collective-bargaining agreement between the Employer and the Intervenor to have been of an objectionable "prehire" nature. A successor-employer is, by virtue of its successorship, under an immediate and continuing obligation to bargain with the statutory representative of the predecessor's employees, while an employer in a prehire contract situation is under an obligation *not* to bargain until after a representative complement of employees is hired and the union involved shows it represents a majority. In the successor situation, the employees already have selected a representative,¹³ while in an objectionable prehire case, the employees have not made a selection and would be deprived of their opportunity to do so if the prehire agreement were to be given a barring effect. We find the agreements, covering employees identified as having to come from Burlington but not yet formally on the payroll, were not prehire agreements within the meaning of *General Extru-*

¹¹ *Maintenance, Incorporated*, 148 NLRB 1299, *Consolidated American Services*, 148 NLRB 1521.

¹² See *Rohlik, Inc.*, 145 NLRB 1236, where the successor's work force, although only one-third the size of its predecessor's, was comprised almost entirely of employees who had been employed by the predecessor. See also *Johnson Ready Mix Co.*, 142 NLRB 437, where the successor's work force,

although much smaller than that of its predecessor, contained a majority of employees who had been members of the predecessor's work force

¹³ The record reveals that 70 of the 95 employees initially employed by Dependable had been members of the Intervenor while employed by Burlington

sion, *supra*, and that the collective-bargaining agreement of June 24 constitutes a bar to the present petition.¹⁴ Accordingly, we will dismiss the petition.

¹⁴ We do not consider Joyce's account of alleged representations by Bridge, the Employer's representative, as reliable. Although Joyce maintained that cards were obtained from the employees prior to May 20, there is considerable evidence to the contrary. Indeed, Petitioner's own representative, Kelley, stated that June 17 was the date authorization cards were passed out to employees at Burlington's house No. 7. The date that the conversation with Bridge took place is also subject to doubt. Though Joyce at one point testified his conversation with Bridge took place prior to May 10, on cross-examination Joyce testified that he talked to Bridge after he saw a notice of employment which had been posted in "old" house No

ORDER

It is hereby ordered that the petition filed herein be, and it hereby is, dismissed.

7. The notice was identified as having been prepared and passed out after July 18. Berman, Merchant's executive vice president, testified he did not contact Bridge before July 18. Further, although Joyce maintained that Petitioner was not aware of the Employer's contracts with the Intervenor, and, as a consequence, delayed filing its petition until September 14, 1966, Petitioner's letter of July 5 to Dependable, which was signed by Joyce, mentions a preferential hiring arrangement between the Employer, Burlington, and the Intervenor. Dependable's reply of July 25 also specifically stated that the employees sought by the Petitioner were represented by the Intervenor.