National Heat and Power Corp. *and* Local 553, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 29–CA–2069

February 26, 1973

DECISION AND ORDER

BY MEMBERS JENKINS, KENNEDY, AND PENELLO

On May 25, 1972, Administrative Law Judge[1] William J. Brown issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief, and both the General Counsel and the Charging Party filed cross-exceptions with supporting 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.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

The complaint alleges, in substance, that Respondent National Heat was a successor to National Fuel and that Respondent assumed National Fuel's collective-bargaining agreements and subsequently violated Section 8(a)(5) and (1) of the Act by refusing to calculate vacation allowances based on total length of service under both companies.

Briefly, the facts show that the Union in dealing with National Fuel and the Respondent has represented three units of employees: fuel oil drivers since 1955, mechanics since 1961, and dispatchers since 1968. The collective bargaining producing these agreements has generally been industrywide with the employers represented by the New York Oil Heat Association. Although National Fuel was never a member of the employer association, it appears at all material times to have agreed to be bound by the contracts derived from the Association-Union bargaining. On December 15, 1968, the industrywide contracts expired for the three separate units, and a citywide strike ensued until December 22, 1968, when the Union and the Association reached agreement on a new contract. Although National Fuel did not formally sign the new agreements reached between the Association and the Union, it agreed to be bound and did in fact observe all the terms and conditions of those agreements.

Sometime in December 1968 or January 1969 Respondent National Heat was incorporated, and it thereafter acquired the office building, garages, and most of the equipment formerly owned by National Fuel. In mid-February 1969, and without any hiatus, Respondent employed substantially all of National Fuel's employees and began distributing fuel to most of the former customers of National Fuel. In March 1969 National Fuel was entered into involuntary bankruptcy. The Respondent continued to observe all of the terms and conditions agreed to in the industrywide contracts of December 1968, and in May 1969, when those contracts became available in printed form, Respondent formally signed copies. The aforementioned contracts included a broad arbitration clause and a clause referring to the determination of accrued seniority under a successor.[2] In addition, the signed May agreements indicated that they were retroactively effective from December 16, 1968, and that they would expire on December 15, 1970.

In the fuel oil industry vacation pay for a calendar year is customarily paid the following spring. Thus, in April 1970, several of Respondent's employees made their application for vacation pay for the previous year. When the Respondent indicated that it would figure vacations solely on the employees' length of service with Respondent and would not credit service previously earned under National Fuel, the Union protested. The Respondent answered that since it was not a successor to National Fuel, it was not obligated to pay vacations based on seniority accrued under that company. The Union claimed that not only was Respondent a successor, but in addition it had voluntarily assumed the contracts that National Fuel had been enforcing, and those contracts obligated Respondent to pay vacations according to seniority accrued under both companies. The Respondent offered to arbitrate the issue; however, the Union declined and filed unfair labor practices involving Respondent's alleged unilateral actions.

1. The Administrative Law Judge found, and we agree, that Respondent is a successor to National Fuel. As pointed out earlier, substantially all the employees remained the same, the real estate and most of the equipment were the same, most of the customers remained the same, and there was an overlapping of corporate officers. In addition, the Administrative Law Judge credited testimony by Union Business Agent Bernard Pelegrino that Maurice Wolf, one of the overlapping corporate officers, stated that everything would remain in status quo

[1] The title of "Trial Examiner" was changed to "Administrative Law Judge" effective August 19, 1972.

[2] The three contracts contained the following clause

> Any successor, heir, or assign of the Employer concerned herein shall assume full responsibility for the accrued vacation time and the Employees concerned shall be granted their vacations accordingly.

and the men would get everything coming to them. We therefore conclude that the employing industry remained essentially the same despite the change in ownership.[3]

2. The Administrative Law Judge also found that the Respondent voluntarily assumed the contracts that National Fuel had been enforcing when it ceased to exist. We disagree, however, as the evidence relied on by the Administrative Law Judge, the affidavit of National Heat's chairman of the board, Howard Ross, is in our view insufficient to support such a finding. The only evidence of the above affidavit in the record is the reading of several sections of it by the General Counsel during the examination of Ross. The General Counsel asked:

> Q. Isn't it true also that when National Heat took over in March 1969, it assumed and continued to enforce the collective bargaining agreements between Local 553, IBT and National Fuel which covered the dispatchers, drivers and mechanics?
>
> A. That is not correct.

Although admitting that he did indeed make the statements read by the General Counsel, Ross denied their validity claiming that he had not comprehended the implications of the words of art included in the affidavit. We find the above evidence insufficient to support the Administrative Law Judge's finding of an explicit assumption of the predecessor's unsigned contracts.

3. At the hearing and in its brief to the Administrative Law Judge the Respondent argued that the Administrative Law Judge should withhold the Board's adjudicatory power and defer the dispute to arbitration under the *Collyer*[4] doctrine. The Administrative Law Judge found that *Collyer* was not controlling because that case involved special skills and expertise needed to administer the agreement, whereas the instant case involved the mere application of a mechanical formula respecting vacation allowance. Respondent excepted to this finding. We find, in agreement with Respondent, that this involves essentially a dispute over the terms and meanings of the contracts between the Union and Respondent. The parties signed contracts for each of the three units in May 1969, and those contracts contained identical provisions pertaining to the computation of vacation pay. The contracts also contained provisions which provided that any difference or dispute arising during the life of the agreement or regarding any other grievance between the parties which cannot be adjusted by the Union and the concerned employer were to be submitted to binding arbitration. Therefore when a dispute arose over the meaning of the vacation pay provision, the contract provided a remedy. Accordingly, for the reasons set forth in *Collyer,* we conclude that the policy of promoting industrial peace and stability through collective bargaining warrants our requiring the parties to honor the contractual grievance and arbitration obligation that they themselves have voluntarily established under binding commitment, and we shall issue an order to that effect.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the complaint herein be, and it hereby is, dismissed; provided, however, that:

Jurisdiction of this proceeding is hereby retained for the limited purpose of entertaining an appropriate and timely motion for further consideration upon a proper showing that either (a) the dispute has not, with reasonable promptness after the issuance of this Decision, either been resolved by amicable settlement in the grievance procedure or been submitted promptly to arbitration, or (b) the grievance or arbitration procedures have not been fair and regular or have reached a result which is repugnant to the Act.

MEMBER JENKINS, dissenting:

For the reasons expressed in the Administrative Law Judge's Decision and in my dissents in *Collyer* and its progeny, I would not defer this case to arbitration, but would determine this case on the merits.

[3] See, e.g., *Cruse Motors, Inc.*, 105 NLRB 242, 247.

[4] *Collyer Insulated Wire, a Gulf and Western Systems Company*, 192 NLRB No. 150.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

WILLIAM J. BROWN, Trial Examiner: This proceeding under Section 10(b) of the National Labor Relations Act, as amended, hereinafter sometimes referred to as the Act, came on to be heard at Brooklyn, New York, on March 6, 1972. The original charge of unfair labor practices was filed July 17, 1970, by the above-indicated Charging Party, hereinafter sometimes referred to as the Union; the complaint herein was issued May 26, 1971, by the General Counsel of the National Labor Relations Board, acting through the Board's Regional Director for Region 29. It alleged, in addition to jurisdictional matter, that the above-captioned Respondent, hereinafter sometimes referred to as the Company, engaged in unfair labor practices affecting commerce within the purview of Sections 8(a)(5) and (1) and 2(6) and (7) of the Act. The Company's duly filed answer admits the jurisdictional allegations of the complaint, but denies the commission of the unfair labor practices therein alleged.

At the hearing the parties appeared and participated, as

noted above, with full opportunity to present evidence and argument on the issues. Subsequent to the close of the hearing the General Counsel, the Respondent Company, and the Charging Party filed written briefs which have been fully considered. On the entire record herein and on the basis of my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT COMPANY

The pleadings and evidence establish that the Company, a corporation organized and existing under and by virtue of the laws of the State of New York, maintains its principal office and place of business at Maspeth in the Borough of Queens in the City and State of New York, where it is engaged in the retail sale and distribution of fuel oils and related products. During the calendar year immediately preceding issuance of the complaint herein, admittedly a representative period, the Company's gross operating revenues exceeded $500,000 and its direct interstate purchases of fuel oils and other goods exceeded $50,000. I find, as the Company concedes, that it is an employer engaged in commerce within the purview of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The pleadings and evidence establish and the Company concedes that the Union is a labor organization within the purview of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

The General Counsel alleges in this case, and the Company denies, that the Company was a successor to a corporation known as National Fuel Terminals, Inc., following that Company's involuntary bankruptcy in March 1969, assumed and signed the three bargaining agreements covering units of drivers, mechanics, and shippers respectively, but from and after April 15, 1970, unlawfully refused to pay vacation pay based on total seniority including that with the predecessor, hereinafter National Fuel, and the Company. The Company denies the commission of unfair labor practices and, alternatively, urges that the question presented is one which should be left for resolution under the grievance and arbitration clauses of the agreement between the parties.

Since 1955 the Union had a collective-bargaining relationship with National Fuel covering a unit of fuel oil drivers; bargaining with respect to National Fuel's mechanics dates from 1961 and agreements covering the unit of dispatchers date from 1968. The collective bargaining producing these agreements has generally been industrywide with employers represented by the New York Oil Heat Association. Although National Fuel was not a member of the employer association, it appears, at all material times, to have agreed to be bound by the Association-Union bargaining. In accord with this established policy of National Fuel's observing the associationwide contracts, that company regarded itself as bound by and observed the provisions of the three industrywide agreements in evidence as General Counsel's Exhibits 2A, B, and C. On the expiration of these agreements National Fuel agreed to be bound by such agreements as might result from the associationwide bargaining and when agreement between the Association and the Union was reached on December 22, 1968, National Fuel observed all terms and conditions of the agreement, although it never signed the Association agreement and was not a member of the Association.

Sometime in December 1968 or January 1969, National Heat was incorporated and thereafter engaged in the retail sale and distribution of fuel oil, having previously acquired the office building and garages formerly owned and used by National Fuel. National Heat also acquired most of National Fuel's trucks. An affidavit of Howard Ross, the Company's board chairman, establishes that the Company assumed and enforced the existing agreements covering the three established units of servicemen, drivers, and mechanics from and after March 1969.[1]

In April 1970 the Company advised employees that they would receive vacation pay based solely on the basis of their length of service with the Company and without credit for service previously earned with National Fuel. In response to union protests, the Company's bargaining representative, Hyaman Isaacs, stated that the Company was not a successor of National Fuel. It should be noted that the collective-bargaining agreement at all material times contained a provision to the effect that, with respect to the annual vacation allowance,

> Any successor, heir or assign of the Employer concerned herein shall assume full responsibility for the accrued vacation time and the Employees concerned shall be granted their vacations accordingly.

In the instant case the General Counsel alleges the commission of unfair labor practices within the scope of Section 8(a)(5) and (1) of the Act in National Heat's refusal, from and after April 15, 1970, to comply with the provisions of the agreement requiring the Company to pay vacation pay on the basis of total length of service with both National Fuel and National Heat.

It seems clear that the Company is a successor to National Fuel both in a legal and in a realistic sense. The Company was organized with an overlapping of corporate officers from National Fuel. In addition, as appears from the credited testimony of Union Business Agent Pelegrino, Maurice Wolf, an officer of both companies, informed the Union that the new incorporation amounted to no more than a change in name, that everything else would remain in status quo, and the men would get everything coming to them. Furthermore, National Heat took over National Fuel's real estate and trucks and continued to serve the same customers.

The evidence appears quite clearly to preponderate in favor of the conclusion that National Heat is a successor to the bargaining relationship formerly existing between the Union and National Fuel within the rule of *William J.*

[1] The express assumption of the agreement distinguishes the instant case from the factual pattern involved in *N.L.R.B.* v. *Burns International Security Services*, 406 U.S. 272.

Burns International Detective Agency, 182 NLRB 348. National Heat's refusal to abide by the terms and conditions of the agreement relating to the computation of vacation time constituted a refusal to recognize its errors and implied obligations as a successor to National Fuel's commitments respecting computation of vacation pay and amounted to a refusal to bargain within the rule of *William J. Burns, supra.*

There remains the question as to whether the Board should withhold its adjudicatory hand in view of the availability of the grievance and arbitration procedures of the existing agreement. In this regard the Company points to the Board's decision in *Collyer Insulated Wire,* 192 NLRB No. 150, as requiring defense to arbitration of the issue relating to computation of the vacation allowance. It clearly appears, however, from the Board's Decision in *Collyer* that the Board regarded the issues in that case as involving, *inter alia,* special skill and expertise in administration of the agreement rather than, as here, the issue of the obligation of a successor to recognize the Union and apply the mechanical formula respecting vacation allowances. I conclude that the case is not one where the Board should defer to arbitration.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Company set forth in section III, above, and there found to constitute unfair labor practices, occurring in connection with the business operations of the Company as set forth 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 thereof.

V. THE REMEDY

In view of the findings set forth above to the effect that the Company has engaged in unfair labor practices affecting commerce, it will be recommended that it be required to cease and desist therefrom and from like or related unfair labor practices and take such affirmative action as appears necessary and appropriate to effectuate the policies of the Act, including the payment of vacation allowances due from and after April 15, 1970, in amounts reflecting length of service with both National Heat and National Fuel, with annual interest on such supplemental vacation allowances at the rate of 6 percent per annum from April of each vacation year from 1970 to the date of payment.

On the basis of the foregoing findings of fact and upon the entire record in this case, I make the following:

CONCLUSIONS OF LAW

1. The Company is an employer engaged in commerce within the purview of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the purview of Section 2(5) of the Act.
3. By refusing from and after April 15, 1970, to make vacation allowance payments on the basis of total length of service with both National Fuel and National Heat, the Company has refused to bargain with the Union and has engaged in unfair labor practices defined within the scope of Section 8(a)(5) and (1) of the Act.
4. The aforesaid unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommended Order omitted from publication.]