American Hospital Supply Corporation *and* Truck Drivers Local Union No. 807, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 22–CA–4763

June 25, 1973

DECISION AND ORDER

BY CHAIRMAN MILLER AND MEMBERS FANNING AND JENKINS

On January 23, 1973, Administrative Law Judge Eugene E. Dixon issued the attached Decision in this proceeding. Thereafter, the Charging Party filed exceptions and a supporting brief, and the Respondent filed an answering 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 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,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

[1] We correct to read, "May 14," instead of "August 14," the date on which the Regional Office requested a list of the employees in the bargaining unit.

DECISION

STATEMENT OF THE CASE

EUGENE E. DIXON, Administrative Law Judge: This proceeding, brought under Section 10(b) of the National Labor Relations Act as amended (61 Stat. 136), herein called the Act, was heard at Newark, New Jersey, between August 7 and September 7, 1972, pursuant to due notice. The complaint, issued on June 15, 1972, by the representative of the General Counsel for the National Labor Relations Board (herein called the General Counsel and the Board) and based upon charges filed on January 18, 1972, by Truck Drivers Local Union No. 807, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union, alleged that American Hospital Supply Corporation, Respondent herein, had engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act by failing and refusing to reinstate its discharged employee Raymond Cooper because he joined or assisted said Union or engaged in other concerted activities for the purpose of collective bargaining, or mutual aid or protection.

In its duly filed answer Respondent denied the commission of any unfair labor practices.

Upon the entire record [1] in the case and from my observation of the witnesses I make the following:

FINDINGS OF FACT

I RESPONDENT'S BUSINESS

At all times material Respondent has maintained its principal office and place of business in Evanston, Illinois, and various other facilities in the State of New Jersey including a plant at Edison, New Jersey, and at all times material has been continuously engaged at said offices, places of business, and plants in the manufacture, sale, and distribution of hospital products and supplies, and related products. In the course and conduct of Respondent's period, Respondent caused to be sold and distributed at said Edison plant products valued in excess of $50,000, of which products valued in excess of $50,000 were shipped from said Edison plant in interstate commerce directly to States of the United States other than the State of New Jersey. At all times material Respondent has been an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II THE LABOR ORGANIZATION INVOLVED

Truck Drivers Local Union No. 807, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, at all times material has been a labor organization with the meaning of Section 2(5) of the Act.

III THE UNFAIR LABOR PRACTICES

The issue in this case is a very narrow one. Did Respondent waive or condone Raymond Cooper's picket line misconduct (for which he had been legally discharged) and by failing and refusing to recall him in his proper seniority slot discriminate against him in violation of Section 8(a)(1) and (3) of the Act?

Respondent and Local 807 had been parties to collective-bargaining agreements for several years at Respondent's Edison, New Jersey facility—the latest agreement expiring on March 12, 1971. At the expiration of that contract negotiations for a new contract took place. By March 19 substantial agreement had been reached on everything except wages and health and welfare provisions when the Union called a strike and began picketing the Edison facility. The picketing was soon extended to other facilities operated by Respondent at Boston, Philadelphia, Washington, D.C., and Evanston, Illinois. Contrary to the General Counsel's

[1] The General Counsel's unopposed motion to correct the record is hereby granted

assertion in his brief that the "picketing was effective" the evidence is overwhelming that the Union by early May had lost the strike. The picketing had never been really effective at Respondent's outlying locations and within a week or two from the start of the strike the Edison facility itself was operating with replacements at essentially normal efficiency.

In this posture in early May the Union took the initiative in setting up a meeting with Respondent on May 5. At this meeting the Union voluntarily committed itself to withdrawing the pickets from the outlying locations and in order to resolve the matter got Respondent to agree to a negotiation meeting on May 13 at which the Union requested the assistance of a Federal mediator.

Just a few days before the May 13 meeting took place Respondent learned that employees had filed an RD decertification petition. Looking into the matter Respondent became convinced that the employee sentiment for representation by Local 807 had deteriorated to such an extent that the Union would lose the decertification election. With this in mind Fred Long, Respondent's director of labor relations whose headquarters are in the Illinois location, directed the Edison people to file an RM petition.

Notwithstanding the filing of the decertification petitions prior to May 13 Long and other company representatives met with the Union on May 13 at the Travel Lodge Motel in Edison as scheduled. Representing the Union among others was its president, Joe Managan (not previously involved in the matter prior to May 5). For the Company was Long (as chief spokesman) among others. Also present was the Federal mediator.

After joint introductions and brief initial statements of both sides, Long in a private discussion with the mediator informed him of the pending decertification petitions and took the position that any agreement reached would have to be contingent upon the outcome of the decertification election. Nonetheless Long, the consiliator, Joe Mangan, and Raymond Rebholz, the Union's secretary-treasurer, went to Long's room in the motel (leaving all the other union and company negotiators behind) where a contract was worked out.[2]

There is no question that everyone understood that the contract was to become effective only if the Union won the decertification election.[3] The question arises as to what Respondent's position was to be regarding reinstatement with respect to those employees who had been given picket line misconduct letters of discharge. About this matter Long testified that in the May 5 meeting when the question of the reinstatement of the discharged employees came up Long's position was that the Company would not take them back. When the Union suggested that it would withhold charges against members who had crossed the picket line during the strike as a tradeoff for recision of the discharges, Long's reply was, "No, our people feel strongly about that."

In the May 13 meeting, according to Long's further testimony, when the question of the strikers' status came up, Long stated that Respondent was required by Law to take back the strikers when openings occurred. When asked how many the Company could take back Long said he did not know and that he would have to get the information from the Edison people. Then Joe Mangan asked, "What about the discharged strikers?" Long said, "We are not going to take them back." Mangan then pleaded with Long to put himself in Mangan's position and asked, "Can't you as part of the deal rescind the discharges of the strikers?" Long finally said that he "Would make it part of the deal."[4]

According to Rebholz' testimony Long agreed that Respondent "Would drop all the charges and suspensions and take the men back in seniority order but they couldn't talk for the individuals who had made charges against some of these people, they had no control over and they couldn't get these people to back off and they wouldn't try to get them to backoff."[5] In his testimony about the May 13 meeting Joe Mangan maintained that Long agreed to drop all criminal charges and suspensions but was vague about what words were used in this respect.

On the basis of the foregoing evidence I find that any commitment by Respondent to take back the discharged employees was, like the contract, conditioned upon the Union winning the decertification election.[6] Since the Union lost the election (which was held on June 18 and lost by a vote of 66 to 34) the question of Cooper's rehiring would normally have been settled by that fact alone. But some other evidence is in the picture that has to be considered before the final disposition can be made.

The Additional Evidence

As per his statement to the Union at the May 13 meeting Long asked Thomas Funkhouser and Thomas Hackenberg, officials of the two divisions of Respondent at Edison, to ascertain how many strikers could be immediately rehired. Although the Respondent actually had no openings, on May 14 Funkhouser called Rebholz and informed him that the Company would nevertheless take back the three most senior men because of their long tenure with Respondent.

[2] As noted, at the time of the strike practically everything had been agreed upon except health and welfare, and wages. The latter was not a crucial matter but the former was one the Company felt strongly about on the grounds that it felt that it could supply the same employee benefits for about half the cost of the union-financed program. The issue was resolved by taking a portion of the wage increase and adding it to the welfare package.

[3] As put by Rebholz in his testimony, if the Union won the decertification election the Respondent would agree to the contract and if the Union was not certified, "Good-bye Charlie"

[4] About this matter Long further testified as follows:

> At that point again, for the 15th time, I went through the whole process of the conditional thing The reason I went through the whole process of the conditional thing was the discharge thing had been a pretty big issue with us throughout this strike. The only reason that I ever threw it in was at that particular point I felt it was going to be a landslide election assuming we had the election, obviously we were going to have. I wasn't concerned about there being a deal I was confident that the Union was not a majority representative of the people, and that would be borne out in the election. This really made old Joe Mangan happy.

[5] In this connection it should be noted that few if any of the criminal charges had been filed by the Company (notwithstanding that they had tried to do so but were informed that the charges would have to be filed by the individuals against whom the conduct took place) and that they were filed by the employees involved in the incidents.

[6] I can see no reason whatsoever why Respondent, having beaten the Union so clearly in the strike, would have made an unconditional commitment to rehire the discharged employees when the contract and the whole future relationship with the Union was conditioned upon the Union retaining its representative status

On May 16, a Sunday, the union membership voted to approve the contract offer being fully informed that its application was contingent upon the Union winning the decertification election. They were also told that all suspensions and discharges had been "dropped" and the criminal charges "dismissed" [7] without condition.

The following day the Union's attorney, Warren Mangan, appeared at the Edison facility early in the morning with a written unconditional reinstatement request on behalf of each named striker including the discharged Cooper and the others who had received suspension or discharge letters. The question of Respondent's sending layoff letters to the strikers so as to enable them to receive unemployment compensation was discussed. According to Funkhouser's testimony, during the discussion with Mangan, the latter asked if Respondent was going to take back the discharged employees and was told, "absolutely not." According to Funkhouser, Mangan "took a very hard stand" on the Company's position in this respect.

During the course of this conversation between Mangan and Funkhouser, Funkhouser asked Mangan to leave the office while Funkhouser called Long in Chicago. After talking to Long, Funkhouser called Mangan back and a three-way telephone conversation ensued between Funkhouser, Long, and Mangan. Long agreed that the layoff letters go out to the strikers but both Long and Funkhouser denied in their testimony that any discussion regarding the discharged strikers took place at this time. Mangan testified to the contrary on direct claiming that Long agreed that the layoff letters should go to all strikers "including those who received notices of suspension and discharge." On cross when asked by Long if it were not true that he "agreed to send a layoff letter to those people who were eligible for a layoff letter . . . and there was no discussion at any time with respect to the discharged employees?" Mangan answered, "When you said they would send layoff letters to those eligible for layoffs, included in that would be those who had received discharge letters so I am agreeing with what you said." I credit Long and Funkhouser here.

Pursuant to the agreement about the layoff letters Funkhouser and Hackenberg with Long's telephone approval drafted and signed a letter,[8] several copies of which were xeroxed, with the names of the employees left blank. The letters were then given to the personnel manager, Joe Deering, with instructions to send to those eligible.[9] Deering sent them to all the strikers including those who had been discharged for picket line misconduct.[10] On the evidence before me and the record as a whole I agree with Respondent's contention that Cooper and the other dischargees received the layoff letters through "administrative error"—whether that of Deering alone [11] or combined with some negligence on the part of Funkhouser and Hackenberg.

In the meantime, on August 14 the Regional Office requested of Respondent a list of the names of all the individuals employed in the bargaining unit prior to the strike together with the names of all replacements who were working as of May 8, 1971. This list was supplied on May 24, 1971. Thereafter a consent election agreement was entered into to be held on June 18. On June 1, Respondent's local counsel wrote Wegleitner (who had supplied the May 24 list) reminding him that the "Excelsior" list was due at the NLRB Office by June 4 and that "the payroll period for eligibility ended May 21, 1971, so any employee hired after that date should not appear on the 'Excelsior' list." According to Wegleitner he understood the "Excelsior" list to be the same as the May 24 list with the cutoff date changed from May 8 to May 21. On this basis the "Excelsior" list was made up (with a copy to Long in Chicago) with no thought on Wegleitner's part regarding those who had received discharge letters. His only thought had to do with those who had quit. Wegleitner could recall no instructions as to whether the discharged employees should be included or excluded from the list.

According to Long's testimony he "didn't really closely examine the 'Excelsior' list until the morning of the election." At that time, as soon as he saw the discharged employees on the list he contacted the company observers with instructions to challenge the dischargees.

On the day of the election, after the balloting was over, it appeared that the Company had nine challenges—seven dischargees and two not here relevant. The Union had eight, six of whom they claimed were not on the payroll and two who were part-time employees. As for the Company's challenges, according to Long's testimony, Warren Mangan stated that he thought a deal had been made at the Travel Lodge that Respondent was rescinding the discharges. Long disputed this. The discussion became heated and lasted for quite a while. Finally, out of frustration Long said, "Let's get this out of the way; let's get to the count, let's have a

[7] That the criminal charges were not dismissed in the legal sense is shown by the fact that they went to trial in the Edison Municipal Court on May 24 with the Company's local counsel appearing on behalf of the complaining employees in aid of the prosecution of the cases On the basis of the May 24 prosecutions the court in October of 1971 handed down decisions finding Raymond Cooper and one Cornelius Wyche, Jr (among others), guilty of picket line misconduct Wyche's sentence was $10 and costs suspended, Cooper's 30 days suspended and $10 costs

[8] The letter, signed by both Hackenberg and Funkhouser as heads of their respective divisions, read

> You are hereby notified that you are on layoff until further notice You are being put on a waiting list pursuant to your seniority with the Company At such time as we have an opening and your position on the seniority list comes available, we will give you the first opportunity to come back to work. We will advise you by telegram at that time

[9] Funkhouser testified that Deering was instructed to send the letters "to those employees qualified for reinstatement" and was specifically instructed not to send them to the dischargees In his affidavit Funkhouser stated that personnel had the responsibility to get the letters out and that he did not know how it got to Deering

[10] On the basis of his layoff letter Cooper applied for and received unemployment compensation Daniel Wegleitner, Respondent's mid-West operations manager, who was in charge of unemployment compensation and payroll matters at Edison at this time, was not aware of Cooper's unemployment compensation payments until sometime in 1972 when Long called him and asked him how it had happened. Wegleitner in his testimony explained his ignorance in this matter on the basis that he had in effect delegated to his payroll clerk the administration of the unemployment compensation program stating that right after the strike started there were an unusual number of unemployment compensation applications and he gave her blanket authority to turn down all strikers requests for unemployment compensation on the grounds that they were on strike Then after the strike was over and the layoff letters went out he gave her blanket authority to approve such application, none of which he reviewed "closely "

[11] Deering's competence in his job was attacked in Respondent's testimony and the fact that he was discharged early in August (before the error regarding the layoff letters was discovered) would seem to corroborate Respondent's claim here

decisive vote so we don't have to go through the Mickey Mouse of going through challenged ballots. . . . " Thereupon the Company withdrew the seven challenges with the Union withdrawing the major portion of its challenges.

Warren Mangan's version of the controversy regarding the challenged ballots was somewhat different than Long's. I think that it is immaterial to the ultimate conclusion in this matter who was correct here. Considering the basic premise found herein, i.e., that the rehiring of the dischargees (like the collective bargaining agreement) was conditioned upon the union winning the election, whatever Long's motivation was in withdrawing the challenges [12] I would hardly call it a waiver or condonation of the picket line misconduct.

There is one remaining matter to be disposed of. It was only after Cooper learned that Cornelius Wyche, below him in seniority, had been recalled that Cooper sought and was refused reinstatement giving rise to the 8(a)(3) charge herein. As will be recalled, Wyche also was convicted of picket line misconduct. But unlike Cooper, Wyche received only a letter of suspension and never was discharged. On this basis it can hardly be said that there was disparity of treatment between the two. Indeed, not only does the term suspension imply reinstatement but when Wyche was reinstated he was put on 6 months' probation for his picket line conduct.

The record here reveals some sloppy staff work and communication on the part of Respondent officials including Long himself. It also reveals, in my opinion, a basic misunderstanding between the Union and Respondent regarding the status of the discharged employees. Germane to this observation is Long's testimony that when he heard Joe Mangan testify, for the first time it dawned upon him that perhaps the union representatives did not understand Long when on May 13 he said "the discussions were conditional." On the whole record here, without any 8(a)(1) or antiunion attitude alleged or shown on the part of Respondent, I am unable to find the condonation claimed by the General Counsel. Accordingly, I recommend dismissal of the complaint.

[12] It must be remembered that Long was convinced the Union would lose the election which conviction seems quite justified considering that the 66 to 34 margin included the 7 challenged votes he gave up on