

Young and Hay Transportation Company and General Drivers and Helpers Union, Local No. 554, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 18-CA-3960

October 24, 1974

DECISION AND ORDER

BY CHAIRMAN MILLER AND MEMBERS JENKINS AND KENNEDY

On March 22, 1974, Administrative Law Judge George J. Bott issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions 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 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 brief, and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

The General Counsel alleges and the Administrative Law Judge finds that Respondent violated Section 8(a)(5) and (1) by refusing to bargain with the Union for a single unit which included employees at both its Council Bluffs and Schuyler locations. We find merit in Respondent's exceptions to these findings.

Respondent is a Minnesota corporation engaged in business as a regular route motor common carrier and maintains its principal office and place of business at Worthington, Minnesota, and terminals at Schuyler, Nebraska, and at Council Bluffs, Iowa. Since 1966 the Union had represented Respondent's employees at Council Bluffs. The Union filed a petition for election at Respondent's Schuyler location on June 28, 1972, and, pursuant to a Stipulation for Certification Upon Consent Election,¹ an election was held there on August 17, 1972.² The Board certified the Union as the exclusive representative of all

¹ The parties stipulated, and the Board found, that the following employees constituted a unit appropriate for the purpose of collective bargaining within the meaning of Sec. 9(b) of the Act:

All full-time and regular part-time employees of Young and Hay Transportation Company at its Schuyler, Nebraska, terminal including over-the-road drivers and steam cleaners but excluding office clerical employees, salesmen, professional employees, guards, and supervisors as defined in the Act.

² Of the 13 eligible voters, 10 cast ballots for, and 1 against, the Petitioner. Two ballots were challenged.

employees in the petitioned-for unit on January 26, 1973.

Respondent, although not a member of any employer associations, has nevertheless regularly executed the National Master Freight Agreement and Central States Area Local Cartage Supplemental Agreement since 1966. The agreement applicable to this proceeding covered the period April 1, 1970, through June 30, 1973, and provides in relevant part:

When a majority of the eligible employees performing work covered by an Agreement designated by the National Negotiating Committee to be Supplemental to the National Master Freight Agreement (to which their Employer is a prior signator), execute a card authorizing a signatory Local Union to represent them as their collective bargaining agent at the terminal location, then, such employees shall automatically be covered by this Agreement and the applicable Supplemental Agreements. In such cases the parties may by mutual agreement negotiate wages and conditions, subject to Conference Joint Area Committee approval.

The provisions of this Agreement shall apply to all accretions to the bargaining unit, including but not limited to, newly established or acquired terminals, and consolidations of terminals.³

After the certification at the Schuyler location, Respondent and the Union held discussions on March 30 and April 9, the Union taking the position that Council Bluffs and Schuyler constituted a single merged unit and that Schuyler was now covered by the National Agreement. Respondent took the position that Schuyler was a separate unit and that the National Agreement had no application to it. It offered to negotiate a separate agreement concerning Schuyler, but the Union refused.

The Administrative Law Judge viewed article 2, section 3, of the National Agreement as providing for the kind of "accretion" agreement which the Board will honor. Thus, he found that after a majority of employees at the Schuyler terminal chose the Union as their representative in a Board-conducted election, the Council Bluffs and Schuyler terminals became one unit and the National Agreement became applicable to Schuyler pursuant to its terms. He therefore found that, by refusing to bargain with the Union as the statutory representative of employees in a single unit consisting of employees at its Council Bluffs, Iowa, and Schuyler, Nebraska, terminals, Respondent violated Section 8(a)(5) and (1) of the Act.

The Board will give effect to an "after acquired" clause in a collective-bargaining agreement only if it

³ Art. 2, sec 3.

is unambiguous.⁴ In agreement with the Administrative Law Judge, we find that article 2, section 3, of the National Master Freight Agreement clearly requires that its terms be applied to the Schuyler location. Thus, the agreement provides for automatic coverage when a majority of employees performing work covered by the collective-bargaining agreement execute cards authorizing a signatory local union to represent them. In the instant case, however, the Union insisted, and the Administrative Law Judge found, that the contract additionally provided that Employer's later certified locations be merged into a single multilocation unit of the Employer's employees. In our opinion, the cited contract provisions do not sufficiently support a finding that the parties intended such a result.

The National Agreement was negotiated by a multiemployer association. The relevant reference in the National Agreement as regards the combination of units, article 3, section 4, speaks only in terms of multiemployer, multilocation units.⁵ This provision is also, by its terms, applicable to Respondent who is not a member of any multiemployer association but who has become a signatory to it. The General Counsel's and Charging Party's contention seems to be that, since Respondent agreed to a contract whose provisions call for automatic additions to the multiemployer unit, it was also agreeing to a kind of subunit comprised of all employees of an individual employer, including all "after acquired" facilities of such an employer. We do not agree. There was no provision in the contract describing any unit limited to Respondent's employees. In our view, whatever the effect of the provisions relating to the comprehensive multiemployer unit, they do not provide a basis for concluding that Respondent was agreeing to any subgrouping of various units of a single employer. Had such a subgrouping been intended, we believe the terms of the agreement would have specifically so provided. In light of these considerations, we believe the contract contains no support for the Union's position that the parties intended the contract to create a unit or subgrouping of the two facilities of this single Employer. Under these circumstances, we find the Union was demanding bargaining in a unit differing both from the certified unit and from any unit which is described in or contemplated by the multiemployer contract, and the Respondent had no duty to comply with such a request.

Since Respondent did not act unlawfully in refusing to bargain in the unit insisted upon by the Union, we are unable to conclude that Respondent's unilateral wage increase and offer of fully paid health insurance to Schuyler employees on August 16, 1973, constitute a violation of Section 8(a)(5) and (1). The

Union at all times rejected Respondent's offer to bargain with the Union for the Schuyler employees alone, insisting that it would bargain only on the aforescribed insupportable multilocation unit basis. Thus at the time of Respondent's granting of the wage increase and paid health insurance to the Schuyler employees it was clear that the Union was continuing to adhere to its position that it would bargain only in a unit authorized neither by our certification or by the National Agreement, a position which necessarily precluded any possibility of fruitful negotiations. In such a situation, the Union cannot be heard to protest Respondent's unilateral actions, inasmuch as it was the Union's own acts which foreclosed effective negotiations. Therefore, under the circumstances of this case, we are unwilling to find Respondent's action in violation of Section 8(a)(5) of the Act.

Additionally, since Respondent, at a timely point, had and expressed a valid basis for doubting the Union's continued majority in the Council Bluffs' bargaining unit, two of the four employees there having evidenced to Respondent their lack of support for the Union, we find no violation in Respondent's refusal to bargain at that location.

Accordingly, we shall dismiss all of the allegations of the complaint.

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 in its entirety.

⁴ See *Eltra Corporation, Prestolite Division*, 205 NLRB 1035 (1973).

⁵ This section reads:

The employees, unions, employers, and associations covered under this Master Agreement and the various Supplements thereto shall constitute one bargaining unit. . . . Accordingly, the Association and employers, parties to this Agreement, acknowledge that they constitute a single National multi-employer collective bargaining unit, composed of the associations named hereinafter and those employers authorizing such associations to represent them for the purpose of collective bargaining, solely to the extent of such authorization, and such other individual employers which have, or may, become parties to this Agreement.

DECISION

STATEMENT OF THE CASE

GEORGE J. BOTT, Administrative Law Judge: Upon a charge of unfair labor practices filed on August 22, 1973, by General Drivers and Helpers Union, Local 554, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union, against Young and Hay Transportation

Company, herein called the Respondent or Company, the General Counsel of the National Labor Relations Board issued a complaint on November 19, 1973, which he amended on November 26, 1973, alleging that Respondent had violated Section 8(a)(1) and (5) of the National Labor Relations Act, as amended, herein called the Act. Respondent filed an answer and a hearing was held before me in Council Bluffs, Iowa, on January 8, 1974, at which all parties were represented. Subsequent to the hearing, the parties filed briefs which have been considered.

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

FINDINGS OF FACT

I. JURISDICTION

Respondent is a Minnesota corporation engaged in business as a regular-route motor common carrier and maintains its principal office and place of business at Worthington, Minnesota, and terminals at Schuyler, Nebraska, and at Council Bluffs, Iowa. During the year prior to the hearing, which period is representative of all times material herein, Respondent derived revenues in excess of \$50,000 from the performance of transportation services as an essential link in the transportation of goods and commodities which were shipped to and from points outside the States of Iowa and Nebraska. During the same period of time Respondent purchased goods valued in excess of \$1,000 from sources located outside the States of Iowa and Nebraska for use in connection with Respondent's operations located within the States of Iowa and Nebraska.

Respondent admits and I find that it is engaged in commerce within the meaning of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Union is a labor organization within the meaning of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Respondent's Refusal to Bargain with the Union for a Single Unit of Employees at Respondent's Council Bluffs, Iowa, and Schuyler, Nebraska Terminals

I. The facts

Since sometime in 1966 the Union has represented employees at Respondent's Council Bluffs terminal under collective-bargaining contracts.¹ The most recent collective-bargaining contract was a multiemployer agreement covering the period April 1, 1970, through June 30, 1973.² Article 2 section 3 of that agreement provides:

¹ It was stipulated that four drivers constituted the entire complement of bargaining unit employees at the Council Bluffs terminal on August 17, 1973.

² Respondent is not a member of any employer association, but it has since 1966 regularly executed and applied the terms of the National Master Freight Agreement and Central States Area Local Cartage Supplemental Agreement.

This agreement shall not be applicable to those operations of the Employer where the employees are covered by a collective bargaining agreement with a Union not signatory to this Agreement, or to those employees who have not designated a signatory Union as their collective bargaining agent.

When a majority of the eligible employees performing work covered by an Agreement designated by the National Negotiating Committee to be Supplemental to the National Master Freight Agreement (to which their Employer is a prior signator), execute a card authorizing a signatory Local Union to represent them as their collective bargaining agent at the terminal location, then, such employees shall automatically be covered by this Agreement and the applicable Supplemental Agreements. In such cases the parties may by mutual agreement negotiate wages and conditions, subject to Conference Joint Area Committee approval.

The provisions of this Agreement shall apply to all accretions to the bargaining unit, including but not limited to, newly established or acquired terminals, and consolidations of terminals.

On January 26, 1973, after a secret ballot election conducted by the Board pursuant to a Stipulation for Certification Upon Consent Election the Board certified the Union as collective-bargaining representative for over-the-road drivers and steam cleaners at Respondent's Schuyler, Nebraska, terminal.³

After the certification the Union and the Company met on March 30 and April 9, 1973. At these meetings the Union took the position that the Council Bluffs and Schuyler terminals constituted a single unit and that the Schuyler operation was now covered by the national agreement. The Union was also willing to discuss specific economic relief with the Company. The Company took the position that Schuyler was a separate unit and that the national agreement had no application to it. It offered to negotiate a separate agreement covering Schuyler, but the Union refused.

In a letter to the Union dated April 15, 1973, Respondent notified it that it desired to terminate the contract covering Council Bluffs on June 30, 1973, and was prepared to negotiate a new agreement for that terminal.

On August 15, 1973, the Union requested Respondent to negotiate an agreement covering Council Bluffs and Schuyler on a multiunit basis. Respondent admits that it refused and continues to refuse to bargain with the Union for a unit consisting of employees at both terminals.

On August 17, 1973, Respondent notified the Union that it was withdrawing recognition from it as representative of employees at Council Bluffs, on the ground, as it advised the Union in its letter, that two of the four drivers em-

³ The certified unit was "all full-time and regular part-time employees of Young and Hay Transportation Co., at its Schuyler, Nebraska, terminal including over-the-road drivers and steam cleaners." with the usual exclusions. The Union, it appears, has historically not represented the sole steam cleaner employed at the Council Bluffs terminal.

ployed there had "adamantly stated" that they no longer wanted the Union to represent them.⁴

It is conceded that Respondent has continued to withhold recognition from the Union at Council Bluffs and that it unilaterally terminated employees health and welfare benefits at that terminal on August 17, 1973. It is also undisputed that, on or about August 15, 1973, Respondent unilaterally increased the wages of employees at Schuyler.

2. Analysis and conclusions

Respondent defends its refusal to bargain with the Union for the Schuyler and Council Bluffs terminals on a single unit basis principally on the ground that the Board has found that the employees at the Schuyler terminal constitute an appropriate unit, and that once a unit has been established, the law does not require a party to bargain on other than a unit basis. In support of its position, Respondent relies on *Shell Oil Company and its divisions Shell Chemical Company and Shell Development Company*,⁵ and *Douds v. International Longshoremen's Association, Independent, et al. [New York Shipping Assn.]*⁶

Shell Oil and International Longshoremen's Association are distinguishable, for in neither case was there an agreement, as here, purporting to bind the parties to bargain on an expanded unit basis if the employer added establishments to its existing operations. Indeed, in *Shell Oil* the Administrative Law Judge stated that it was "well settled" that the parties to a labor agreement may voluntarily agree to the enlargement or alteration of an existing unit, or to the merger of separate units, even if those units had been found by the Board to be appropriate,⁷ and in *International Longshoremen's Association*, the court observed that the Board's unit determinations could be subsequently changed "by agreement of the parties, if the process of alteration involves no disruption of the bargaining process or obstruction of commerce and if the Board does not disturb the agreement in a subsequent representation proceeding."⁸

There is nothing inherently wrong in combining Schuyler and Council Bluffs into a single unit, for the Company is in essentially the same kind of business at both locations and the job classifications are basically the same. Although the Board found that the employees at Schuyler constituted an appropriate unit, it did not find that another unit was not appropriate, and it is well known that in performing its function under Section 9(b) of the Act the Board has a large measure of discretion and may find a unit appropriate even though a different unit may have been more suitable. As one court stated, ". . . there are no absolute 'right' units."⁹ The parties could by agreement, therefore, bargain on a single unit basis for the two terminals even though the Board had certified one as appropriate. The fact that the alleged agreement to combine the units preceded the certi-

fication is immaterial for the Board recognizes the validity of such "accretion" clauses and gives effect to the contractual commitment of the parties if future employees are given a say in the selection of their bargaining representative.¹⁰

I find that article 2, section 3, of the National Master Freight Agreement is the kind of "accretion" agreement which the Board will honor and that, after a majority of employees at the Schuyler terminal chose the Union as their representative in a Board-conducted election, the Council Bluffs and Schuyler terminals became one unit and the National Agreement became applicable to Schuyler pursuant to its terms. Article 2, section 3, as set out in full earlier, provides that when a majority of employees not covered by the agreement execute cards authorizing the union to represent them as their bargaining representative, they shall automatically become covered by the agreement. While the section also provides that the provisions of the agreement shall apply to all "accretions" to the bargaining unit, and although I agree with Respondent that the Schuyler terminal is not technically an accretion to Council Bluffs since it has at least twice as many employees, nevertheless, I find that the merger of the two terminals into one unit is within the terms of the agreement and was within the contemplation of the parties in the circumstances of this case. Moreover, the Board has held that even though a new establishment may not be properly said to be technically an "accretion" to an existing unit, it may be held to be an accretion under appropriate circumstances if the parties have previously agreed that future establishments "would be deemed an accretion to an existing bargaining unit."¹¹

The latest teaching of the Board on the rights of the parties under contracts which purport to add after-acquired or other facilities to existing units covered by the agreement is found in *Houston Division of the Kroger Co.*¹² In that case a divided Board refused to apply existing contracts to newly acquired stores even though the contracts provided that the unions involved would be recognized as the bargaining representative for after-acquired stores¹³ and both unions presented the employer with an offer of proof of majority employee support in the form of authorization cards when they made their demands that they be recognized as representative of the employees in the new stores as part of the existing unit.

In holding that the employer did not violate Section 8(a)(5) of the Act by denying the unions' demands for recognition the Board noted that the contract contained no language on the question of majority support and how it would be demonstrated. In the absence of such language the Board was unwilling to "view an additional-store clause as tantamount to an advance agreement to honor a

⁴ I find on the basis of the testimony of Young, an official of Respondent, that employees Haven and Parbs told him in early August that they did not want to belong to the Union.

⁵ 194 NLRB 988, 995 (1972).

⁶ 241 F.2d 278 (C.A. 2, 1957).

⁷ 194 NLRB 988, 995.

⁸ 241 F.2d 278, 282.

⁹ *N.L.R.B. v. Overland Hauling, Inc.*, 461 F.2d 944, 946 (C.A. 5, 1972).

¹⁰ *Retail Clerks Union, Local 870 Retail Clerks International Association, AFL-CIO (White Front Stores, Inc.)*, 192 NLRB 240, 242 (1971); *GEM International, Inc.*, 202 NLRB 518 (1973); *Eltra Corporation, Prestolite Division*, 205 NLRB 1035 (1973).

¹¹ *White Front Stores, Inc.*, *supra*, at 242.

¹² 208 NLRB 928 (1974). See also *Smith's Management Corporation, d/b/a Mark-It Foods*, 208 NLRB 939 (1974).

¹³ The Board found that although there were obvious differences in language between the two contracts, they both purported to add after-acquired stores to the existing multistore units.

card majority." The Board was careful to point out, however, that it did not regard such clauses, properly applied, as contrary to the Act, and it made clear that such agreement "may control the ultimate unit in which bargaining should occur and the scope of future contract coverage," but it added that "in the absence of a specific agreement to determine majority status by an acceptable and legally permissible alternative method," free access to the Board's election processes could not be foreclosed.¹⁴

In the instant case not only does the contract provide for proof of majority in the form of authorization cards before previously unrepresented groups may be covered by the agreement, but the Union won a Board election and was certified as the representative of the new group. In such circumstances, none of the caveats of the majority in *Houston Division of Kroger Co.* apply, for the parties have done more than the Board requires by using its election machinery.

I find that by refusing to bargain with the Union as the statutory representative of employees in a single unit consisting of employees at its Council Bluffs, Iowa, and Schuyler, Nebraska, terminals, Respondent violated Section 8(a)(5) and (1) of the Act.¹⁵

Respondent also violated Section 8(a)(5) and (1) by unilaterally terminating health and welfare benefits covering bargaining unit employees at its Council Bluffs, Iowa, terminal on August 17, 1973.

Beginning on or about August 16, 1973, Respondent admittedly instituted unilateral wage increases and offered fully-paid health insurance coverage to bargaining unit employees at its Schuyler, Nebraska, terminal. By such conduct Respondent violated Section 8(a)(5) and (1) of the Act.

¹⁴ 208 NLRB 928, 930.

¹⁵ Since a two-terminal has been found, the legal effect of some employees at the Council Bluffs terminal having told Respondent that they no longer desired union representation is a moot question.

IV. THE REMEDY

Having found that Respondent engaged in unfair labor practices in violation of Section 8(a)(1) and (5) of the Act, it will be recommended that the Board issue the recommended Order set forth below requiring Respondent to cease and desist from said unfair labor practices and take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent illegally terminated health and welfare benefits for employees at its Council Bluffs terminal, I will recommend that Respondent make such employees whole for any losses they suffered by reason of such termination with interest thereon in the manner prescribed in *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

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

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of the Act.
2. The Union is a labor organization within the meaning of the Act.
3. By withdrawing recognition from the Union as the representative of unit employees at its Council Bluffs, Iowa, terminal and by refusing to bargain with the Union as the representative of employees in a single appropriate unit of employees at its Council Bluffs, Iowa, and Schuyler, Nebraska, terminals, Respondent violated Section 8(a)(5) and (1) of the Act.
4. By unilaterally and without prior notice to, or consultation with the Union, changing terms and conditions of employment of unit employees, Respondent violated Section 8(a)(5) and (1) of the Act.
5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

[Recommended Order omitted from publication.]