

American Drinks Corporation, and Bart-Philips Enterprises, Inc and Bottlers Local 896, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America Case 21-CA-13456

June 16, 1976

DECISION AND ORDER

BY CHAIRMAN MURPHY AND MEMBERS JENKINS
AND WALTHER

On February 19, 1976, Administrative Law Judge David G Heilbrun issued the attached Decision in this proceeding Thereafter, General Counsel filed exceptions and a supporting brief, and Respondent filed cross-exceptions and a brief in opposition to General Counsel's exceptions and in support of its cross-exceptions

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, cross-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, as modified herein

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge as modified below and hereby orders that Respondent, American Drinks Corporation, and Bart-Philips Enterprises, Inc, Los Angeles, California, its officers, agents, successors, and assigns, shall take the action set forth in the Administrative Law Judge's recommended Order, as so modified

Substitute the following for paragraph 1

"1 Cease and desist from

(a) Promising employees economic or other benefits to induce foregoing support of the Union and threatening to refuse recalling employees from layoff because of their union sympathies, membership, or activities

¹ The Respondent has excepted to certain credibility findings made by the Administrative Law Judge It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect *Standard Dry Wall Products Inc* 91 NLRB 544 (1950) enf'd 188 F 2d 362 (CA 3 1951) We have carefully examined the record and find no basis for reversing his findings

"(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights protected under Section 7 of the Act"

DECISION

STATEMENT OF THE CASE

DAVID G HEILBRUN, Administrative Law Judge This case was heard at Los Angeles, California, on October 15 and 16¹ based on a charge and amended charge filed March 12 and September 29, respectively, and amended complaint issued October 2 alleging that American Drinks Corporation and Bart-Philips Enterprises, Inc, collectively called Respondent, violated Section 8(a)(1) and (3) of the Act by promising employees economic or other benefits to induce foregoing support of Bottlers Local 896, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, called the Union, by threatening to refuse recalling employees from layoff because of their union sympathies, membership, or activities and by discriminatorily laying off employees, then failing and refusing to recall them for employment

Upon the entire record² in this case, including my observation of the witnesses and upon consideration of briefs filed by General Counsel and Respondent, I make the following

FINDINGS OF FACT

I THE BUSINESS OF RESPONDENT AND THE LABOR ORGANIZATION INVOLVED

Respondent, comprising two corporations located in Los Angeles, California, engages in packaging canned soft drinks and annually sells goods valued in excess of \$50,000 to customers in California, each of which annually purchases and receives goods and products valued in excess of \$50,000 directly from suppliers located outside California or annually sells and ships goods and products valued in excess of \$50,000 directly to customers located outside California I find Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5)

II THE ALLEGED UNFAIR LABOR PRACTICES

Facts and Discussion

American Drinks operated a soft drink bottling facility until September 1974 On September 18, 1974, Philip Di Bartola, Jr, succeeded his father as corporate president of this firm and of Bart-Philips Until then the latter firm had engaged in market consulting and food brokerage Based

¹ All dates and named months hereafter are in 1975 unless indicated otherwise

² The transcript is corrected as requested by General Counsel in an unopposed motion

on pronounced financial and operational problems faced by American Drinks at the time, D₁ Bartola deactivated it and placed bottling operations under Bart-Philips.³ American Drinks had been party to a collective-bargaining agreement with the Union effective from April 3, 1972, through April 5, 1975, which Bart-Philips tacitly assumed for the duration of its term. This agreement provided exclusive hiring hall procedures with extensive detail relating to scope of available work, seniority entitlement, and mechanics of dispatching personnel. For several full months following De Bartola's assumption of control, gross sales were under half the comparable amount of a year earlier. He testified that during this period operational difficulties were faced in several identifiable regards.⁴ During these months D₁ Bartola experimented with "back ordered" production in an attempt to operate more efficiently, however, customers disliked the technique and frequent equipment breakdowns tended to defeat his purpose.

On December 13, 1974, D₁ Bartola laid off all bargaining unit employees save Roy McCoy.⁵ In the several weeks following no production was attempted, however, painting, steam cleaning, and various maintenance functions were performed. Roy Hamilton, laid-off union steward, testified that he went to the plant periodically during this period and complained to D₁ Bartola about the performance of bargaining unit work by nonmembers.⁶

On January 17 a meeting was held at D₁ Bartola's behest in union offices. D₁ Bartola, his father, Union Secretary-Treasurer Guy Lewis, and Business Agent Joe Close attended. D₁ Bartola sought some relief from strict contractual requirements concerning utilization of employees in anticipation of resuming limited production. An understanding evolved that for an initial fractional week a partial crew of about five employees would fill existing orders and following that production speed would be deliberately slowed to result in continuous 40-hour workweeks for the partial crew. The understanding was effectuated over the next 2-1/2 weeks, using a crew dispatched by the Union

These persons were of lesser seniority than others still on layoff from the previous month.⁷ D₁ Bartola assessed the results of this approach, concluding its continuation was unwarranted because of inadequate employee skills and the related fact of insufficient orders from customers. On February 7 he laid off the partial crew, although continuing McCoy in active employment. A week later Respondent acquired a used depalletizer and D₁ Bartola experimented with its ability to efficiently introduce bulk cans into the production sequence. On February 21 McCoy was laid off with advice from D₁ Bartola that business conditions simply did not permit his retention. During the week of McCoy's layoff two individuals were employed as "swampers" to perform truckloading and substitute for an injured truckdriver.

In the week preceding McCoy's layoff no production was achieved and in the week it occurred 1,029 cases were produced. During the 3 following weeks Respondent's output was 1,548, 4,225, and 3,666 cases, respectively. About March 15 the Union commenced picketing Respondent with laid-off employees participating.⁸ About 2 weeks after commencement of picketing Respondent began directly hiring new employees below union contract wage rates. For at least 5 months thereafter production was accomplished each week in the range of 1,750-10,240 cases.

Respecting paragraphs 9 and 10 of the amended complaint, McCoy testified that he conversed with D₁ Bartola about mid-February and again on February 20. In the first of these McCoy recalled being told Respondent would no longer have a union after April 1 but that D₁ Bartola would deny making the statement. In the second conversation D₁ Bartola expressed regret over the imminent layoff, stating he would like to have McCoy back working sometime as a nonunion member with insurance coverage under Respondent's program for "office help." D₁ Bartola fixes the earlier conversation as about late January, testifying that he "belly-ached with Roy about my plight" at the time by alluding to the Union's recent request for negotiations and expressing doubt that he could sign a contract when "come April 5th, we will or will not be here." D₁ Bartola recalled that on February 20 McCoy reacted to his notice of layoff by offering to informally help out on future occasions, causing D₁ Bartola to volunteer a remark that he had nothing "against [the guys] or the Union for that matter."

General Counsel primarily contends that events commencing with the December 1974 layoff, viewed in the context of several significant statements by D₁ Bartola, require an inference of discriminatory motivation directed against the Union's representative capacity for these employees. Chief among these events, and granting the "economic difficulties during the period in question," are persistent attempts to operate (or preparations to operate) without use of union employees, unilateral change in wages, terms, and conditions of employment embodied in the contract, spuri

³ Bart Philips formally rented production equipment from American Drinks met various debts and became employer of the bottling plant work force.

⁴ These were (1) insufficient funds to cover about \$150,000 in outstanding checks of American Drinks; (2) refusal of can suppliers to ship other than on prepayment basis; (3) handling complications arising from change in manner of cans supplied from boxed to bulk basis; (4) disrepair of plant machinery; and (5) reduced consumer purchasing of soft drinks. The aggregate effect of these factors included the consequence of Respondent becoming delinquent in pension plan contributions required by the union agreement.

⁵ The contract involved was of multiemployer application termed Soft Drink Bottlers Agreement. Covered employees performing production handling, syrup making, filler, seamer, operation, stacking, truckloading and other duties were simply termed bottlers. The full crew laid off at this time (exclusive of McCoy) numbered 11: Dean Sanborne and Mike Walters employed as plant superintendent and line superintendent respectively were retained.

⁶ A variety of persons were embraced by Hamilton's protest, including D₁ Bartola himself, the two superintendents, a Manpower type person, and Respondent's comptroller Luis de Vera, who was observed unloading products of a parent corporation. D₁ Bartola testified that he repeatedly spoke with Hamilton only to demand that advice of visitation be given and entry onto premises be strictly through the front reception area. Hamilton recalled that in mid-January D₁ Bartola's father prohibited him from further entry to the plant.

⁷ D₁ Bartola credibly testified that when no employees appeared to work on the Monday following his meeting with union officials, he contacted Lewis and learned that senior employees had declined the arrangement. Lewis' unconvincing denial of such a conversation is discredited.

⁸ In February D₁ Bartola received a written union request to open negotiations. His final reply by letter dated March 3 advised the firm was in no position to sign a contract and expressed doubt they could carry on.

ous claim that experienced union-represented employees were without competence to function in needed tasks during the problem-plagued January-February period, and unjustified employment of new individuals shortly following the start of picketing about March 15

Before any ultimate resolution of this issue it is necessary to isolate the elements of General Counsel's case, evaluate them, and conclude whether separately, or upon reaggregation, an 8(a)(3) violation has been shown. There is practically no basis to believe that a pretextual force was present in the material happenings subsequent to D₁ Bartola's assumption of control.⁹ It axiomatically follows that depressed sales and unreliable productive capacity will leave a business without normal need for its regular employees. Unquestionably Respondent performed maintenance work directly associated to the production process and sporadically achieved limited output during the period which allegations of this case address. This was done with a changing mix of persons that included D₁ Bartola himself, supervisors, retained union employee McCoy, temporary help, and (in February) utilization of two individuals as they resided at the premises.¹⁰ Hamilton's fragmentary observation of these activities merely merges into admitted fact, coupled with corroboration available from McCoy's constant presence. General Counsel places great weight on claimed breach of contract respecting Respondent's course of action. While conduct in violation of contractual obligations may well be indicative of unfair labor practices in an appropriate setting, such is not the case here. The comprehensive contract phraseology of this agreement was only suited to ordinary dynamics of contract administration between the parties and no legitimate basis exists to analyze whether the "look after machinery" language, as an exception accorded supervisors to exclusive performance of bargaining unit work by covered employee (sec 2), should neutralize the entitlement of all covered employees to "equal chances at any work performed on days that the shop is not bottling, whether such work is considered bottlers' work or not" (sec 13). Plainly D₁ Bartola did not deliberately shun the obligations of this contract as manifested by his meeting with Lewis, token retention of McCoy during the bleakest phase of efforts to remain in business, and his uncontradicted claim of reporting all layoffs to union offices as required. As to whether junior employees comprising the partial crew utilized in January were, individually or collectively, without necessary skills to properly operate, I accept D₁ Bartola's perception of the general situation at that time. The concededly competent syrup maker, John Fomin, was among those senior employees disdaining experimental recall and the fact that Michael Wright had experience on the filler seamer in a full crew

⁹ No explanation was advanced why a going business as American Drinks had been should have reached the chaotic state discovered by D₁ Bartola in September 1974. It is idle to speculate on the reasons since D₁ Bartola's description of affairs was uncontradictedly without exaggeration.

¹⁰ I am satisfied that as recalled by McCoy the swampers performed some line and loading work however the stipulated amount of production in February was so inconsequential that coupled with contemporary injury to regular truckdriver Lionel Dawson their primary duties both as to time spent and significance to the business cycle was in nonbargaining unit delivery functions.

setting does not mean that D₁ Bartola incorrectly viewed him as unsatisfactory under the later special circumstances. There is no evidence to support the allegation that McCoy's layoff was discriminatorily motivated and respecting the hiring of new employees following the advent of March picketing this is arguably a contract violation but not more.¹¹ A most significant fact of the mid-February to mid-March period is Respondent's installation of the de-palletizer device which had the paradoxical impact of improving long term prospects for a return to business normalcy while complicating immediate, short term ability to run the production line without inordinate interruption. Thus the composite facts of the case are insufficient to justify inferring discriminatory intent.

During the period involved D₁ Bartola made exasperated utterances on various occasions. I credit his versions, but modified by certain particular recollections of McCoy.¹² As to the earlier McCoy conversation,¹³ I believe D₁ Bartola's version is the true one. By this he conveyed only to McCoy the obvious conjecture that business was marginal and the realistic prospects for a new contract with the Union hinged on future developments. McCoy's more damaging version is not accurate either from suggestibility or misunderstanding. D₁ Bartola's words were essentially repeated in his subsequent letter to Lewis and this entire incident does not lend weight to General Counsel's assertion of discriminatory motive. Respecting the conversation on February 20, I credit testimony of McCoy that D₁ Bartola coupled an improper invitation to prepare for unrepresented employment with the prospect of individually tailored insurance benefits as part of the bargain. The nature of this statement, given surrounding circumstances and past events, was reasonably likely to impart a coercive influence on McCoy's interest in maintaining his union membership into the future.

Overall, the evidence establishes a promise of benefit and threat to improperly condition future employment as alleged.¹⁴ The allegation of discriminatory layoffs and non-recalls to employment has not been supported with sufficient probative evidence. Cf. *Action Advertising Co., Inc.*, 195 NLRB 629 (1972).

¹¹ Whether D₁ Bartola viewed picketing as tantamount to a strike for which persons participating could not be expected back unless they so requested or whether he prematurely ignored the hiring hall obligations of a labor contract yet effective for a short time are not points that sufficiently tend to show animus regardless of how resolved. Notably Hamilton viewed the picketing as a situation in which the Union would not send out any men.

¹² D₁ Bartola is generally credited with conscious consideration of his rather astonishing placing (until prompted otherwise during cross examination) of the meeting in union offices as mid-December 1974. Otherwise his recollection was detailed and generally convincing. I except from this certain aspects of his remarks to McCoy which I believe D₁ Bartola has deliberately concealed or downplayed. Hamilton was an evasive witness whose testimony is not worthy of belief.

¹³ McCoy testified to a third incident around early January when D₁ Bartola remarked that the Union wouldn't tell him how to run his business. This utterance was not alleged to be a litigable issue, is not intrinsically outside the purview of sec 8(c) and fails to adequately relate to or color any other remark or activity of D₁ Bartola.

¹⁴ Given some basis in the pleadings Respondent's employment of persons prior to April 5 would constitute a violative unilateral change in contract terms. The point was not litigated in a manner separate from its claimed relevance to the 8(a)(3) branch of the case therefore no further treatment is given it.

CONCLUSIONS OF LAW

1 Respondent, by promising employees economic or other benefits to induce foregoing support of the Union and by threatening to refuse recalling employees from lay-off because of their union sympathies, membership, or activities, has engaged in unfair labor practices affecting commerce within the meaning of Sections 8(a)(1) and 2(6) and (7) of the Act

2 Respondent has not violated the Act in any respect other than as specifically found

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended

ORDER ¹⁵

Respondent, American Drinks Corporation and Bart-Philips Enterprises, Inc., Los Angeles, California, their officers, agents, successors, and assigns, shall

1 Cease and desist from promising employees economic or other benefits to induce foregoing support of the Union and threatening to refuse recalling employees from layoff because of their union sympathies, membership, or activities

2 Take the following affirmative action necessary to effectuate the policies of the Act

(a) Post at its Los Angeles, California, plant copies of the attached notice marked "Appendix" ¹⁶ Copies of said

¹⁵ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

¹⁶ In the event the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board".

notice, on forms provided by the Regional Director for Region 21, after being duly signed by Respondent's authorized representative, shall be conspicuously posted by it immediately upon receipt and be maintained for 60 consecutive days thereafter, in all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that such notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that the amended complaint be dismissed in all other respects.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT promise employees economic or other benefits to induce their foregoing support of Bottlers Local 896, International Brotherhood of Teamsters Chauffeurs, Warehousemen & Helpers of America or any other labor organization.

WE WILL NOT threaten to refuse recalling employees from layoff because of their union sympathies, membership, or activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights protected under the National Labor Relations Act.

AMERICAN DRINKS CORPORATION, AND BART PHILIPS ENTERPRISES, INC.