

**A & M Trucking, Inc. and Local Union No. 3029,
United Mine Workers of America, AFL-CIO
and District 17, United Mine Workers of
America, AFL-CIO.** Cases 9-CA-29744, 9-CA-
29745-2, and 9-CA-30323

August 31, 1994

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING
AND COHEN

On January 6, 1994, Administrative Law Judge James L. Rose issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The judge found that the Respondent did not violate Section 8(a)(5) and (1) of the Act by refusing to furnish certain information requested by District 17 and by refusing to discuss grievances with Ronald Nibert, a designated representative of District 17 and Local 3029.¹ The judge concluded that the memorandum of understanding between the United Mine Workers of America and the Respondent extended only to union members and not all employees and did not entitle either the District or the Local to the rights normally attendant where a labor organization has been designated by a majority of employees in an appropriate unit and has been so recognized by their employer. The judge therefore found that the Respondent did not violate the Act when it refused to furnish the information or deal with Nibert and accordingly dismissed the complaint. For the reasons set forth below, we find, contrary to the judge, that the memorandum of understanding is not a members-only contract on its face or in its application, and that the Respondent violated Section 8(a)(5) and (1) by refusing to furnish District 17 with the requested information and by refusing to deal with Nibert.

On February 4, 1991, the Respondent and Mark Marsh, an International representative for the United Mine Workers of America, executed the memorandum of understanding to settle a strike by the Respondent's employees over the use of subcontractors to haul coal. Although characterized by the judge and the arbitrator

as "short and crude," the first page of the memorandum provides a wage rate, defines seniority and recognizes seniority rights, and specifies how employee problems will be handled. Item 4 of the memorandum provides that the Respondent "will recognize the settlement of disputes as defined in Article XXIII of the National Bituminous Coal Wage Agreement of 1988." The memorandum has a fixed duration and contains provisions relating to certain withholdings from wages, reopening the agreement, and management rights. The second page is a wage addendum. The third page, a seniority list of 35 employees, was drawn up and attached approximately 2 to 3 weeks after the execution of the document. The memorandum contains no express recognition clause or bargaining unit description and does not include such a clause through reference to any other collective-bargaining agreement or document.² The terms "employees" and "truckdrivers" are used interchangeably in the document and, in defining a new employee, the document refers to "any truckdriver."

Following the signing of the memorandum, Ronald Nibert was elected one of three committeemen to handle employee grievances. According to Nibert, the committeemen informed Tony Mayes, the Respondent's owner and president, of their election. Nibert and the other committeemen handled approximately seven grievances and safety complaints before the arbitration hearing. In each instance, they dealt with Mayes.

On May 9, 1991, Local 3029 filed a grievance concerning the Respondent's use of subcontractors to haul coal. Prior to the May 6, 1992,³ arbitration hearing on the grievance, by letter dated March 12, District 17 requested information from the Respondent concerning the use of subcontractors.⁴ The Respondent did not respond to the information request. At the end of Nibert's shift on May 7, Mayes told Nibert that he would no longer discuss union business with Nibert because Nibert had lied at the arbitration hearing the day before. Nibert replied that he was not a liar and that Mayes would have to deal with him regarding the Union because he was an elected committeeman.

By a decision dated June 5, the arbitrator found that the Respondent had violated the memorandum by subcontracting certain hauling of coal and provided an award based on the number of days that contractors were used. The arbitrator also ordered the parties to jointly examine the Respondent's records to determine the amount of the award. By letters dated June 26, July 3 and 6, District 17 repeated its request for the infor-

²The judge rejected the General Counsel's contention that the memorandum incorporated the bargaining unit description set forth in the 1988 National Bituminous Coal Wage Agreement, and no exceptions were filed to this finding.

³Unless otherwise indicated, all dates are in 1992.

⁴The information requested by the March 12 letter is divided into 8 documentary requests and 29 interrogatories.

¹The Charging Party, Local 3029, United Mine Workers of America, is a constituent part of Charging Party District 17, United Mine Workers of America, which in turn is a constituent part of the United Mine Workers of America.

mation sought in the March 12 letter and for information related to the arbitrator's award. The Respondent did not provide the requested information.

Near the end of June, Nibert approached Mayes about the transporting of some employees to the work-site in an open truck. Nibert was concerned about safety and whether the employees were being paid. Mayes told Nibert he would talk to one of the other committeemen, but not to Nibert.

By letter dated December 10, District 17, seeking further information regarding the Respondent's use of subcontractors, requested information regarding the Respondent's relationship with E & T Trucking, an alleged subcontractor. The Respondent did not respond to the request. By letter dated December 18, District 17 reiterated its request for the information concerning E & T and requested additional information concerning the Respondent's coal hauling contract with its prime contractor. Again, the Respondent failed to respond to the information request. By letter dated January 5, 1993, District 17 reminded the Respondent of the outstanding information requests and offered to clarify any of the requests. According to Robert Phalen, president of District 17, the Respondent has failed to respond to any of District 17's requests for information.

In concluding that the memorandum established recognition in a members-only unit, the judge relied on the memorandum's lack of a recognition clause and unit description, and on Nibert's testimony concerning the question of how many employees the Respondent had at the time the memorandum was executed. In this regard, Nibert testified that the Respondent had "45 to 60. At the time we—at the time that we went—were voted in Union, there was approximately 35." The judge concluded that this testimony was consistent with the seniority list attached to the memorandum that contained 39 names. The judge also cited the testimony of Robert Bess, a field representative for District 17, and Mayes as further support for this conclusion. Bess testified that District 17 represented the "classified employees" working for the Respondent. Bess further testified that he used the term "classified employees" to refer to "the Union employees or the employees who belong to the United Mine Workers and also work for" the Respondent. Mayes testified that the Respondent also employs mechanics, that the memorandum only covered the truckdrivers, and that the Respondent filed a monthly statement with District 17 of dues withheld for union employees. Contrary to the judge, we find that there is no evidence, either on the face of the document or in its application, that the memorandum covered only union members.

The memorandum, although brief, is a valid agreement with a fixed duration, reduced to writing, and executed by the parties. Further, the memorandum contains sufficient terms and conditions of employment to

stabilize the bargaining relationship between the parties. *Central Plumbing Co.*, 198 NLRB 925 fn. 1 (1972); see also *Appalachian Shale Products Co.*, 121 NLRB 1160 (1958). Although the document lacks an explicit recognition clause or unit description, the memorandum refers first to "truckdrivers"⁵ and subsequently to "employees." The memorandum further defines a "new employee" as "any truckdriver" paid by the Respondent. This language indicates that it applies only to the Respondent's truckdrivers,⁶ but nothing on its face suggests that it applies only to those truckdrivers who were union members. The judge appears to infer members-only application from Nibert's testimony as to the number of Respondent employees in February 1991. Contrary to the judge, we find that Nibert's statement is ambiguous and open to several interpretations rather than constituting evidence of a members-only recognition.⁷

We further find that neither the testimony of Bess nor Mayes suggests the existence of a members-only contract. Bess' testimony that District 17 represented the "classified employees" working for the Respondent is at best ambiguous. Concededly, Bess testified that he used the phrase "classified employees" to refer to "the Union employees or the employees who belong to the United Mine Workers" However, we do not believe that these remarks, standing alone, establish a "members only" contract. In this regard, we note that Bess was simply indicating his subjective understanding of the phrase. In addition, we note that the other evidence discussed herein is objective and that it supports the view that a "members only" relationship was not contemplated. Mayes' testimony merely indicates that the memorandum was intended to apply only to the Respondent's truckdrivers and, considered with the language of the memorandum, supports the conclusion that the Unions represented all the Respondent's truckdrivers.

Further, there is nothing in the record to suggest that the memorandum has been applied on a members-only basis. To the contrary, the record establishes that the Respondent has applied the memorandum to all of its truckdrivers, deducting dues from their paychecks, remitting those dues to District 17, dealing with the Unions' representatives over grievances, meeting with District 17 to discuss contract negotiations, and proceeding to arbitration over the grievance concerning subcontracting. Cf. *Ron Wiscombe Painting & Sandblasting Co.*, 194 NLRB 907 (1972). Further, nothing

⁵ In the first line of the memorandum, the parties scratched out the word "employees" and substituted "truckdrivers."

⁶ It is undisputed that the Respondent employs mechanics as well as truckdrivers.

⁷ As the judge noted, the testimony could be interpreted as meaning that the Respondent had 45 to 60 employees, 35 of whom were union members or as meaning that of the Respondent's work force of 45 to 60 employees, 35 were truckdrivers.

in District 17's or Local 3029's representational activities with either the Respondent or the truckdrivers in any way suggests that its representation was limited only to members. Under these circumstances, we find that the representation of the truckdrivers by District 17 and Local 3029 was not limited to those who had joined the United Mine Workers. Accordingly, we find that the Respondent had an enforceable contractual relationship with District 17 and Local 3029 and that the Respondent's failure to furnish the requested information⁸ to District 17 and to discuss grievances with the designated representative of District 17 and Local 3029 violated Section 8(a)(5) and (1) of the Act.⁹

CONCLUSIONS OF LAW

By failing to furnish District 17 with the information requested by letters dated March 12, December 10 and 18, 1992, and by refusing to discuss grievances with a representative designated by District 17 and Local 3029, the Respondent has violated Section 8(a)(5) and (1) of the Act.

REMEDY

Having found that the Respondent violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist and take certain affirmative action that will effectuate the policies of the Act. We shall order the Respondent to cease and desist from failing and refusing to furnish District 17 with information requested by letters to the Respondent dated March 12, December 10 and 18, 1992, and from failing and refusing to meet with Nibert for the purpose of processing grievances. We shall further order that the Respondent, on request, furnish District 17 with the information requested in the March 12, December 10 and 18, 1992 letters, not previously furnished.

ORDER

The National Labor Relations Board orders that the Respondent, A & M Trucking, Inc., Mt. Carbon, West Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

⁸The Respondent does not dispute that the requested information was necessary and relevant to District 17's and Local 3029's performance of its duties as the exclusive bargaining representative of the employees.

⁹Chairman Gould finds it unnecessary to pass on the judge's finding that the Respondent was not obligated under Sec. 8(a)(5) to furnish information to or deal with District 17 and Local 3029 pursuant to a members-only contract.

¹⁰If this 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."

(a) Failing and refusing to bargain collectively with the Local 3029, United Mine Workers of America, AFL-CIO, and District 17, United Mine Workers of America, AFL-CIO, as the exclusive bargaining representative of its truckdrivers, by refusing to furnish District 17 with the information requested by letters to the Respondent dated March 12, December 10 and 18, 1992, which is necessary and relevant to its performance of its function as the exclusive bargaining representative of the employees.

(b) Failing and refusing to meet for the purposes of processing employee grievances with Ronald Nibert, an individual designated as the agent of District 17 and Local 3029, for purposes of collective bargaining.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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

(a) On request, furnish to District 17 all the information requested by letters dated March 12, December 10 and 18, 1992, not previously furnished.

(b) On request, meet for the purpose of processing employee grievances with Ronald Nibert, an individual designated as the agent of District 17 and Local 3029, for the purposes of collective bargaining.

(c) Post at its facility in Mt. Carbon, West Virginia, copies of the attached notice marked "Appendix."¹⁰ Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

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

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT fail and refuse to bargain collectively with Local Union 3029, United Mine Workers of America, AFL-CIO and District 17, United Mine Workers of America, AFL-CIO, as the exclusive bargaining representative of our truckdrivers, by refusing to furnish District 17 with the information requested by letters dated March 12, December 10 and 18, 1992.

WE WILL NOT fail and refuse to meet for the purposes of processing employee grievances with Ronald Nibert, an individual designated as the agent of District 17 and Local 3029, for purposes of collective bargaining.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, furnish to District 17 all the information requested by letters dated March 12, December 10 and 18, 1992, not previously furnished, which is relevant and necessary to District 17's role as the exclusive bargaining representative of our truckdrivers.

WE WILL, on request, meet for the purposes of processing employee grievances with Ronald Nibert, an individual designated as the agent of District 17 and Local 3029, for the purposes of collective bargaining.

A & M TRUCKING, INC.

DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge. These cases were tried before me on August 25, 1993, at Charleston, West Virginia, upon the General Counsel's third consolidated complaint which alleged that the Respondent refused to furnish certain requested information and refused to discuss grievances with an individual duly designated as a representative of the Charging Party, both in violation of Section 8(a)(5) of the National Labor Relations Act.

The Respondent generally denied that it engaged in any unfair labor practices.

Following the close of the hearing, both counsel submitted briefs. Upon the record as a whole, including my observation of the witnesses, briefs, and arguments of counsel, I issue the following

I. JURISDICTION

The Respondent is a West Virginia corporation engaged in the business of transporting coal in the vicinity of Mt. Carbon, West Virginia. During the course of this business, the Respondent annually provides services valued in excess of \$50,000 to companies which annually sell and ship goods valued in excess of \$50,000 to points outside the State of West Virginia. The Respondent admits, and I find, that it is

an employer engaged in interstate commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATIONS INVOLVED

It is alleged that Local Union No. 3029 and District 17 are labor organizations within the meaning of Section 2(5) of the Act. The Respondent neither admitted nor denied this allegation, contending it was without sufficient knowledge to make an affirmative response; however, at the hearing it did stipulate that they meet the Board's definition of a labor organization. From the entire record it does appear, and I find, that Local 3029 is a constituent part of District 17, which in turn is a constituent part of the United Mine Workers of America, and that Local 3029, as well as District 17, represents employees of employers engaged in interstate commerce, including the Respondent, with regard to wages, hours, and other terms and conditions of employment.

Accordingly, I find that Local Union No. 3029 and District 17 are labor organizations within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background Facts

In a decision dated June 5, 1992, an arbitrator found that in early 1991 certain of the Respondent's employees went on strike, which was settled with the execution of a memorandum of understanding (MOU) on February 4, 1991. As the arbitrator noted, the MOU is "short and crude" and was meant to ensure that the hauling of coal would be done by the Respondent's employees.

The MOU provides a wage rate, seniority, how employee problems will be handled, and a provision that the Respondent "will recognize the settlement of disputes as defined in Article XXIII of the National Bituminous Coal Wage Agreement of 1988." There are also provisions relating to certain withholdings from wages, reopening the agreement, and management rights. The whole agreement is on one legal-size page, with a wage addendum on the second page.

A seniority list of employees, attached as the third page, was made up 2 or 3 weeks later, according to the testimony of Ronald Nibert, a truckdriver for the Respondent and one of the three union committeemen.

The MOU contains no recognition clause or bargaining unit description, nor does it include such by reference to any other collective-bargaining agreement or document.

Nibert testified the Union (in his testimony the United Mine Workers of America) has been representing the Respondent's employees since February 4, 1991. In answer to the question of how many employees the Respondent had at the time, he said: "45 to 60. At the time we—at the time that we went—were voted in Union, there was approximately 35."

Robert Bess, a field representative for District 17, testified that "I represent the classified employees who work for A&M Trucking." "I'm referring to the Union employees or the employees who belong to the United Mine Workers and also work for A&M Trucking." He further testified that he has represented those employees since February 1991 and he identified the MOU, although it was signed by another field representative.

Bess testified that after the arbitration decision noted above, he requested certain information from the Respondent relating to subcontracting. And he testified that he has not received the information. On subsequent occasions he also requested information which the Respondent has declined to give.

These requests for information, and the Respondent's refusal to comply, are alleged to be violative of Section 8(a)(5).

Nibert testified at the hearing preceding the arbitration decision. Tony Mayes, the Respondent's president, was of the opinion that Nibert lied at the hearing and told him so. Mayes further stated that because of this he would no longer discuss problems with Nibert as one of the Union's committeemen. This refusal by Mayes to deal with Nibert is alleged to be violative of Section 8(a)(5).

B. Analysis and Concluding Findings

In the third consolidated complaint herein it is alleged, and the Respondent denied, that the "employees of the Respondent set forth in the National Bituminous Coal Wage Agreement of 1988, herein called the Unit, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(a) of the Act."

It is also alleged, and denied, that the District 17 and Local 3029 have been the designated exclusive collective-bargaining representatives of the unit and since February 4, 1991, and the Respondent has recognized them as such by virtue of the National Bituminous Coal Wage Agreement of 1988.

That a union has been designated the representative of a majority of employees in a unit appropriate for collective bargaining is the threshold issue in a refusal-to-bargain case. On this issue, as all others, the General Counsel has the burden of proof by a preponderance of the credible evidence. That is, the burden is on the General Counsel to establish the appropriate bargaining unit and majority status of the union in that unit. E.g., *Charles F. Reichert*, 124 NLRB 28 (1959). There the Board held that the General Counsel did not meet his burden where the only evidence of majority status was a Pennsylvania State Board certification which was subsequently revoked for lack of jurisdiction.

It has long been settled that "the existence of a prior contract, lawful on its face, raises a dual presumption majority—a presumption that the union was the majority representative at the time the contract was executed, and a presumption that its majority continued at least through the life of the contract." *Bartenders Assn. of Pocatello*, 213 NLRB 651, 652 (1974), citing *Shamrock Dairy*, 119 NLRB 998 (1957), and 124 NLRB 494 (1959), enfd. 280 F.2d 665 (D.C. Cir. 1960), cert. denied 364 U.S. 892 (1960).

But in these and subsequent cases, the contract relied on to establish the presumption was a comprehensive collective-bargaining agreement containing a unit description and in each there was some kind of affirmative showing that the company had recognized the union as the exclusive representative of employees in that unit. In most of the cases following *Bartenders* and *Shamrock* the employer admitted recognition of the union in an appropriate unit, the issue litigated being the union's alleged subsequent loss of majority status. In these cases there was a factual basis to conclude

that at one time the union in fact represented a majority of employees in an appropriate unit.

The issue here is whether the facts support a conclusion that the Local or District were designated as the bargaining representative of a majority of the Respondent's employees in an appropriate unit. The General Counsel seems to argue that majority status and the appropriate unit may be inferred from the fact that the Respondent executed the MOU, which in turn was incorporated by reference the National Bituminous Coal Wage Agreement of 1988. I do not accept this argument.

On its face, the MOU only incorporates article XXIII, Settlement of Disputes. It does not adopt any other provision of the National contract, such as a bargaining unit description.

There is little evidence that either District 17 or Local 3029 was ever designated as the bargaining representative by a majority of the Respondent's truckdriver employees (assuming a unit of only truckdrivers would be appropriate). Nibert testified that at the time the MOU was executed, the Respondent had about 35 truckdrivers, which is consistent with the seniority list on which there are 39 names. There is nothing to suggest how many were members or had otherwise designated the Union.

Perhaps his testimony can be read to mean that in February 1991 the Respondent had 45 to 60 employees, 35 of whom were union members. But this is a stretch and, I conclude, is insufficient to sustain the General Counsel's burden. If in fact a majority of the Respondent's truckdriver employees had designated the Union in some manner surely more definitive evidence than this would be available. Indeed, stronger evidence was found insufficient by the Board in *Reichert*, supra, where Pennsylvania State Board certification was subsequently revoked for lack of jurisdiction. Though voided, the Pennsylvania certification showed that a majority of employees had designated the union.

Beyond that, the testimony of Bess and Mayes suggest that the parties intended only that union members would be covered under the MOU, and not all employees. Contracts which apply only to union members do not imply company recognition of the union as the representative of employees in an appropriate unit under Section 9(c) of the Act. *Cargo Packers*, 109 NLRB 1184 (1954). "It is well settled that a 'members only' contract does not afford the kind of representation nor establish the type of bargaining unit which the Act contemplates." *Ron Wiscombe Painting & Sandblasting Co.*, 194 NLRB 907, 908 (1972).

I conclude that at most the General Counsel established a members-only recognition by the Respondent. Such is certainly permissible and probably enforceable under Section 301 of the Act. However, it does not mean that the Local or District is entitled to the rights normally attendant where a labor organization has been designated by a majority of employees in an appropriate unit and has been so recognized by their employer.

I therefore conclude that the Respondent did not violate Section 8(a)(5) when it refused to furnish information or deal with Nibert. And, I shall recommend that the complaint be dismissed.

[Recommended Order for dismissal omitted from publication.]