Van Dorn Plastic Machinery Co., Division of Van Dorn Company *and* District 54 of the International Association of Machinists & Aerospace Workers, AFL–CIO. Case 8–CA–19045

September 28, 1990

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On December 20, 1989, Administrative Law Judge Robert T. Wallace issued the attached decision. The Respondent filed exceptions and a supporting brief, the Charging Party filed cross-exceptions and a brief in support of its cross-exceptions and in answer to the Respondent's exceptions, and the Respondent filed an answering brief to the Charging Party's cross-exceptions.

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,[1] and conclusions and to adopt the recommended Order.

The judge found, and we agree, that the certification year commenced on June 4, 1985, when the parties' first bargaining session occurred, and that the Respondent therefore violated Section 8(a)(5) and (1) of the Act by prematurely withdrawing recognition from the Union on March 14, 1986. For the reasons set forth below, we reject the Respondent's argument that the certification year commenced on February 28, 1985, when the Respondent furnished the Union with previously requested information and expressed its willingness to bargain.

In order to ensure a reasonable time for bargaining ''without outside interference or pressure,'' the Board has held that ''absent unusual circumstances, an employer will be required to honor a certification for a period of 1 year.'' *Mar-Jac Poultry Co.*, 136 NLRB 785–786 (1962) (footnote omitted). As the Board there found, when an employer has refused to bargain with the elected bargaining representative during part or all of the year immediately following the certification, it has ''taken from the Union'' the opportunity to bargain during ''the period when Unions are generally at their greatest strength.'' In such cases, the Board will take measures to ensure a period of at least 1 year of good-faith bargaining during which the bargaining representative need not fend off claims that it has lost its majority support. Id. at 787.

In concluding that the Respondent unlawfully withdrew recognition during the certification year, the judge relied on *Dominguez Valley Hospital*, 287 NLRB 149 (1987), enfd. 907 F.2d 905 (9th Cir. 1990), citing *Groendyke Transport*, 205 NLRB 244 (1973),[2] and found that in circumstances in which an employer has refused to bargain while pursuing its right to judicial review, the certification year commences on the date of the parties' first bargaining session following final affirmance of the Board's order. The Respondent, however, argues that the certification year commences when an employer furnishes to the union previously requested information and expresses its willingness to bargain, citing *Colfor, Inc.*, 282 NLRB 1173 (1987), enfd. per curiam 838 F.2d 164 (6th Cir. 1988).

Although *Dominguez Valley Hospital*, *San Antonio Portland Cement*, and *Groendyke Transport* did not involve information requests prior to bargaining, we find that the rule in those cases—i.e., that the certification year commences on the date of the parties' first bargaining session—should apply to situations, like those in *Colfor* and here, in which an employer has furnished information to the union prior to the first bargaining session.[3]

If the certification year were to begin when an employer furnishes information, a union could, in effect, be penalized for requesting information prior to negotiations, because that could result in less time for negotiations than if the union had not requested the information. For example, if the employer furnishes the requested information, but the first bargaining session does not occur for several months thereafter, the amount of time for bargaining in the certification year would be less than if the union had not requested the information and the certification year began with the parties' first bargaining session.[4] Further, the Board in *Dominguez Valley Hospital*, supra at 150, stated that in view of the fact that the election on which the certification was based had been held nearly 3 years earlier, ''some time can reasonably be allowed before the certification year begins for the union to reestablish contacts with unit employees to facilitate bargaining on

[1] We correct the judge's inadvertent error, in the penultimate paragraph of his ''Analysis and Conclusions'' section, in stating that a letter from the Board was dated March 6, 1986, rather than 1985.

[2] *Dominguez Valley Hospital* also cited *San Antonio Portland Cement*, 277 NLRB 309, 311 (1985).

[3] We disavow the judge's statement that *Dominguez Valley Hospital* implicitly modified *Colfor*. Rather, *Dominguez Valley Hospital* cited *Colfor* on a ''see also'' basis.

[4] Of course, if there is a significant delay in the start of bargaining attributable to inexcusable procrastination or other manifestation of bad faith on the part of the union, then equating the start of the certification year with the first bargaining session would not be warranted. *Dominguez Valley Hospital*, supra. We find no such procrastination here.

Although the instant case does not afford an occasion to outline the possible indicia of procrastination and bad faith, it would be appropriate to consider whether a union has refused, without adequate explanation, requests by a ready and willing employer to commence bargaining negotiations. In this way, the rule announced today does not leave the commencement of the certification year within the unrestricted discretion of one of the parties.

Member Devaney finds it unnecessary here to pass on the possible indicia of procrastination and bad faith.

their behalf.'' As in *Dominguez Valley Hospital*, the certification here was based on an election held years earlier and the same consideration applies. Application of the *Colfor* rule, in contrast, would deprive a union of a reasonable time before the certification year begins to reestablish contacts with unit employees.[5]

Finally, regarding the argument that an employer's expression of willingness to bargain should serve as the starting date for the certification year, we note that *Dominguez Valley Hospital*, supra, explicitly rejected the contention that the certification year should commence on the date the parties first agree to bargain. Similarly, in *San Antonio Portland Cement* at 310–311, the certification year was held to commence on the date of the parties' first bargaining session, rather than on the date the employer agreed to bargain. We thus reject the notion that the certification year should commence when an employer expresses its willingness to bargain.

Accordingly, we overrule *Colfor* to the extent it held that the certification year following final affirmance of a Board order commences when the employer furnishes previously requested information to the union and expresses its willingness to bargain. Rather, we adhere to our usual rule, expressed in *Dominguez Valley Hospital* and the cases cited there, that, absent unwarranted delay by the union, the certification year after an employer's initial refusal to bargain commences on the date of the parties' first bargaining session. Thus, we find that the certification year commenced here on June 4, 1985, the date of the parties' first bargaining session.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Van Dorn Plastic Machinery Co., Division of Van Dorn Company, Strongsville, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[5] For example, under *Colfor*, the certification year in the instant case would commence on the date the Respondent furnished the Union with the names and addresses of employees.

Richard F. Mack, Esq., for the General Counsel.
Keith A. Ashmus and *Linda E. Tawil, Esqs. (Thompson, Hine and Flory)*, for the Respondent.
David Roloff, Esq. (Gaines and Stern Co., L.P.A.), of Cleveland, Ohio, for the Charging Union.

DECISION

STATEMENT OF THE CASE

ROBERT T. WALLACE, Administrative Law Judge. On charges filed by the Union on March 21, 1986, a complaint was issued on May 16, 1988; and the case was tried by me in Cleveland, Ohio, on November 29, 1988. The basic issue is whether Respondent Van Dorn violated Section 8(a)(5) of the National Labor Relations Act by refusing to bargain with the Union.

Based on the entire record, including my observation of the witnesses, and after due consideration of briefs filed by all parties, I make the following

FINDINGS OF FACT

It is admitted, and I find, that Van Dorn is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5).

The case has a long history. On April 22, 1977, an election was held at Van Dorn and the Union received a majority of the ballots cast. Van Dorn filed objections. These were rejected by the Board and it issued a certification on January 17, 1978. Van Dorn challenged it by refusing to bargain and the Union filed unfair labor practice charges, and a complaint issued on March 29, 1978.

In *Van Dorn Plastic Machinery Co.*, 265 NLRB 864 (1982), the Board found that Van Dorn had indeed violated the Act by its refusal and, among other things, by telling employees that it would never recognize the Union; and it ordered the company to bargain with the union.

Van Dorn appealed and, on June 19, 1984, the Board decision was affirmed in pertinent part 736 F.2d 343 (6th Cir. 1984). It then filed a petition for review which was denied by the Supreme Court (469 U.S. 1208) on February 19, 1985.

In response to a union request made on November 14, 1984, for collective-bargaining and for a list of names and addresses of unit members ''as quickly as possible,'' Van Dorn wrote that it would not bargain or furnish any data because of its then pending appeal to the Court.

Subsequent to the Court's decision, Van Dorn on February 28, 1985, announced its willingness to bargain with the Union and forwarded the data requested 3-1/2 months earlier.

On March 12, the Union asked for additional data including information on classifications, wage rates, and fringe benefits; and it urged early reply ''so that we may begin negotiations.''

Van Dorn replied on March 20 advising that its director of employee relations (David C. Bragg) had been out of town and that it would respond ''as soon as our examination is complete and the information can be compiled''; and it provided the data 9 days later, on Friday, March 29.

The Union did not respond until May 1, 1985, 33 days later. Meanwhile, on the Monday (April 1) following receipt of the Van Dorn data, it sent a letter to all employees in the unit inviting them to a meeting on April 14 for purposes of updating them on events since the 1977 election and choosing a negotiating committee. The meeting was held on schedule but employees who had to work that day were allowed until April 16 to submit nominations and contract proposals. On April 27, a bargaining committee was chosen.

On April 25, Van Dorn informed the Union that in accordance with practice in prior years it intended to give unit employees a raise effective shortly after May 13, ''unless you object.'' Thereafter, it received two communications from the Union. The first, dated May 1, was a letter stating that a bargaining committee had been elected and requesting negotiations ''at your earliest convenience.'' The second letter,

dated May 6, indicated that the Union had no objection to any wage increase in May.

Van Dorn responded to the Union's request for negotiations on May 8 and advised that due to prior commitments its negotiator (Bragg) would be unavailable until June 4. As a result the parties first met on that date, at which time the Union presented its written proposals.

Over the next 8 months the parties met approximately 30 times, with a last meeting occurring on February 4, 1986, when Van Dorn presented a ''final'' offer. The Union purported to accept that offer in a telegram dated March 4. Van Dorn questioned the validity of the acceptance and later, in a letter dated March 14, told the Union that

> Effective immediately, on the basis of objective evidence . . . [the Union] does not represent a majority of employees in the bargaining unit . . . . Van Dorn withdraws recognition . . . .

Analysis and Conclusions

We are not here concerned with whether a valid ratification took place or whether Van Dorn had a reasonable basis for concluding that the Union had lost support of a majority of employees in the unit. Rather, the sole issue presented by the complaint and at the hearing is whether Van Dorn's withdrawal of recognition occurred within the certification year, and was unlawful.

Under well-settled case law, a union's majority status is virtually unrebuttable for a period of 1 year following its certification by the Board as the exclusive collective-bargaining representative of employees in an appropriate unit. *Kimberly-Clark Corp*., 61 NLRB 90 (1945); *Brooks v. NLRB*, 348 U.S. 96 (1954). This is to ensure that a newly certified union has a reasonable time for bargaining during which it need not dissipate energy fending off employer or rival union claims that it has lost majority support. *Mar-Jac Poultry Co*., 136 NLRB 785 (1962).

And where, as here, an employer refuses to bargain while pursuing its right to judicial review, the certification year does not begin to run until the date of the first face-to-face bargaining session following final affirmance of the Board's order. *Dominguez Valley Hospital*, 287 NLRB 149 (1987), citing *Groendyke Transport*, 205 NLRB 244 (1973). Since the first bargaining session between Van Dorn and the Union occurred on June 4, 1985, Van Dorn's withdrawal of recognition on March 14, 1986, was well within the certification year.

Van Dorn contends, however, that the caveat in *Dominguez*[1] applies here and that equity requires a finding that the certification year began on February 28, 1985, the date it formally recognized the Union and supplied names and addresses of unit employees.

Face-to-face bargaining began 3-1/2 months after denial of certiorari; and I find no ''inexcusable procrastination or other manifestation of bad faith'' on the part of the Union during that period.

The election at which the Union received a majority of employee votes occurred in 1977; and during the nearly 8 years in which Van Dorn pursued its appeals the Union lacked opportunity for developing rapport with unit employees. In this circumstance, the Union was entitled to a reasonable time ''to reestablish contacts with the unit employees, to facilitate bargaining on their behalf,'' and the 3-1/2-month period utilized is not excessive even assuming, contrary to the evidence, that the Union was responsible for the entire time. *Dominguez*, supra. In this respect, I note that the Union indicated its readiness to bargain by letter dated May 1, 1985, and that in its response dated May 8 Van Dorn advised that its representative ''was unavailable until June 4'' due to prior commitments.

Van Dorn also offers three additional reasons why it believes *Dominguez* is inapplicable. First, it contends that the Board by letter dated March 6, 1986, (R. Exh. 4) implied that the certification year had already begun. I find no such implication. The letter was a routine one from a compliance officer following final judicial affirmance on February 19, 1985, of the Board's bargaining order; and the request therein for periodic reports of compliance ''until such time as one year has passed'' can hardly be construed as a determination of any particular commencement date. In addition, such a letter does not constitute formal action binding on the Board. *Stokely-Bordo*, 130 NLRB 869, 871 (1961).

Next, it cites *Colfor, Inc*., 282 NLRB 1173 (1987), for the proposition that the certification year runs from the time a respondent furnishes previously requested information. But that case was cited and implicitly modified in that respect by *Dominguez*. And thirdly, it claims that applying the rule of *Dominguez* retroactively is not warranted because of equitable considerations, e.g., that it bargained in good faith for a reasonable time and injustice to employees who allegedly voted to reject the Union sometime in early March 1986. As to the rule in question, however, *Dominguez* merely reaffirmed a finding in the much earlier (1973) decision in *Groendyke*, supra.

Conclusion of Law

For the reasons stated, I find that Van Dorn's withdrawal of recognition on March 14, 1986, occurred within the certification year and constituted a refusal to bargain collectively with the representative of its employees in violation of Section 8(a)(1) and (5) of the Act.

Remedy

Recognition was withdrawn slightly more than 2-1/2 months prior to the end of the certification year. In my judgment, however, extending the time for bargaining for that term would not be conducive to meaningful negotiations and would not provide an adequate remedy.

Having in mind that an extension remedy need not be the product of a simple arithmetic calculation,[2] I find reasonable and will require a 6 months' additional recognitional period from the date the parties again sit down for face-to-face bargaining.

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[1] In *Dominguez* at 150, the Board states:

> Of course, if there is a significant delay in the commencement of bargaining attributable to inexcusable procrastination or other manifestation of bad faith on the part of the bargaining representative, equating the commencement of the certification year with the first bargaining session would not be warranted.

[2] *Colfor*, supra; *Glomac Plastics*, 234 NLRB 1309 at fn. 4 (1978), remanded 592 F.2d 94 (2d Cir. 1979), enfd. per curiam 600 F.2d 3 (2d Cir. 1979).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, Van Dorn Plastic Machinery Co., Division of Van Dorn Company, Strongsville, Ohio, its agents, officers, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with the Union by withdrawing recognition at a time when it was not lawfully permitted to do so.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of 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 bargain collectively in good faith concerning wages, hours, and other terms and conditions of employment with District 54 of the International Association of Machinists & Aerospace Workers, AFL–CIO as the exclusive representative of its employees in the bargaining unit described below and, if an understanding is reached, embody such understanding in a signed written agreement. The bargaining unit is:

> all production and maintenance employees, including leadmen working at the Employer's facility located at 11792 Alameda Drive, Strongsville, Ohio, but excluding dispatchers, quality control technicians, final quality control employees, manufacturing methods technician, research and development employee(s), truckdrivers, and all foremen and supervisors of higher rank and all office clerical employees and guards, professional employees and supervisors as defined in the Act.

(b) Recognize the Union on resumption of face-to-face bargaining in good faith and for 6 months thereafter as if the initial year of certification had been extended for that period.

(c) Post at place of business in Strongsville, Ohio, copies of the attached notice marked ''Appendix.''[4] Copies of the notice, on forms provided by the Regional Director for Region 8, 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

After a trial at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, and has ordered us to post this notice and do what it says.

The National Labor Relations Act gives you 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 refuse to bargain in good faith with District 54 of the International Association of Machinists & Aerospace Workers, AFL–CIO by withdrawing recognition at a time when we were not lawfully permitted to do so.

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

WE WILL, on request, bargain collectively in good faith concerning wages, hours, and other terms and conditions of employment with the above-named Union as the exclusive collective-bargaining representative of our employees in the bargaining unit described below. WE WILL regard the Union as the exclusive bargaining agent as if the initial year of certification had been extended for an additional 6 months from the resumption of face-to-face bargaining pursuant to the Board's Order in this case. If an understanding is reached WE WILL embody it in a written, signed, agreement. The bargaining unit is:

> all production and maintenance employees, including leadmen working at the Employer's facility located at 11792 Alameda Drive, Strongsville, Ohio, but excluding dispatchers, quality control technicians, final quality control employees, manufacturing methods technician, research and development employee(s), truckdrivers, and all foremen and supervisors of higher rank and all office clerical employees and guards, professional employees and supervisors as defined in the Act.

VAN DORN PLASTIC MACHINERY CO., DIVISION OF VAN DORN COMPANY

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[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[4] If 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.''