

Western Cab Company and United Steelworkers of America, AFL-CIO. Case 28-CA-10658

November 12, 1991

ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT
AND RAUDABAUGH

On February 23, 1990, the Union filed a charge in Case 28-CA-10150 alleging violation of Section 8(a)(1) and (5) of the Act based on bad-faith bargaining by the Employer. On April 24, 1990, the Regional Director dismissed the charge. On May 17, 1990, the Union appealed the Regional Director's dismissal which was based, in part, on newly discovered evidence which accompanied the appeal. Based on this new evidence, the Regional Director reconsidered his decision to dismiss and, in August 1990, the Regional Director reaffirmed the dismissal of the bad-faith bargaining allegation but concluded that Respondent Employer had declared an unlawful impasse on March 15, 1990. On September 12, 1990, the Regional Director approved an informal settlement agreement between the Employer and the Union.

On November 21, 1990, the Respondent filed a representation petition (Case 28-RM-551) which was based on an employee-circulated petition to decertify the Union. The decertification petition was filed during the time the Respondent had posted a notice pursuant to the informal settlement agreement executed on September 12, 1990. In addition to providing that the Respondent would recognize and bargain with the Union, the informal settlement agreement also provided that the union certification year would be extended from September 12 to November 12, 1990.

Thereafter, the Employer withdrew recognition from the Union which resulted in the filing of the instant charge. In his complaint, the General Counsel contends that since a settlement agreement executed by the employer provided that the Employer would recognize and bargain with the Union, the withdrawal of recognition was not privileged because a reasonable period of time for bargaining had not elapsed before the Employer withdrew recognition.

A hearing in this matter was held before Administrative Law Judge Gerald A. Wacknov beginning on May 13 and closed on September 25, 1991. During the hearing, the Respondent sent two letters to General Counsel Jerry M. Hunter requesting the General Counsel's consent for Field Examiner Kevin Donnellan to give testimony in the above case. As set forth in the Respondent's letters, the Respondent contends that Field Examiner Donnellan was specifically informed by the Respondent's negotiator of the Respondent's willingness to resume bargaining on or about March 1990, that it seeks to establish, by questioning

Donnellan, that he communicated this information to a representative of the Charging Party, and that based on the "most unusual" circumstances of this case, the General Counsel should permit Donnellan to testify. Relying on Section 102.118 of the Board's Rules and Regulations, the General Counsel denied both requests for permission for Donnellan to testify. The administrative law judge granted the general counsel's motion to quash the Respondent's subpoena of Donnellan.¹

On September 26, 1991, the Respondent filed a request for special permission to appeal the judge's ruling, contending, inter alia, that the General Counsel's policy considerations for refusing to grant permission for Donnellan to testify are legally insufficient, that neither the General Counsel's policy nor Section 102.118 creates an evidentiary or procedural privilege,² that the evidence sought is clearly relevant, that the time period between the date of any communication Donnellan might have made to the Union and the date that negotiations actually resumed should be considered in determining whether a reasonable time for bargaining had elapsed, and that the administrative law judge's decision to quash "constitutes an abuse of discretion and is clearly erroneous."

On October 4, 1991, counsel for the General Counsel filed opposition to the Respondent's appeal. The General Counsel urges the Board to uphold the judge's ruling to quash, arguing that (1) the General Counsel did not abuse his discretion in denying permission for Donnellan to testify and (2) the General Counsel has repeatedly taken the position that the passage of time from the alleged unlawful impasse to the signing of the settlement agreement is, by itself, not relevant to determining whether the Respondent bargained for a reasonable period of time after executing the settlement. The General Counsel also argues that assuming arguendo that hiatus in bargaining is relevant, the Respondent's notification to a Board agent of its willingness to resume bargaining does not constitute notification to the Union of such intent.

The General Counsel disputes the Respondent's reliance on *NLRB v. Health Tec Div.*, supra, contending that *Health Tec* actually supports the General Counsel's decision where there existed no evidence that the Employer was prejudiced. The General Counsel also argues that the Employer could have procured testimony from witnesses other than the Board agent to support its claim that the Union was advised of the Employer's willingness to resume bargaining. Finally, the General Counsel argues that the Board has held that communications to third parties are ineffective and

¹ The basis for the judge's ruling granting the General Counsel's petition to revoke does not appear on the record.

² Respondent relies on *NLRB v. Health Tec Division/San Francisco*, 566 F.2d 1367 (9th Cir. 1978).

that the Board should, therefore, deny the Respondent's appeal.³

Having duly considered the matter, the Board has decided to grant the Respondent's appeal and, on appeal, the judge's ruling is affirmed but without regard to Section 102.118 of the Rules and Regulations. Assuming *arguendo* the administrative law judge relied on Section 102.118, the Board finds that the subpoena should have been revoked on grounds that the evidence sought is irrelevant. The Respondent makes no claim that it authorized or requested the Board agent to communicate to the Union its alleged "willingness to resume bargaining." Since the Respondent doesn't argue that it asked the Board agent to act as a "mediator" or as its agent, the Respondent had no legal basis to expect that he would.⁴ Further, the Respondent does not contend that it ever independently engaged in any conduct manifesting to the Union its asserted willingness to bargain prior to its entry into the settlement agreement nor does it contend that the Union had ever expressed the view that it was indifferent to any willingness of the Respondent to bargain. Rather, the Respondent contends only that it believes the agent would testify that, "in accordance with his normal practice, he conveyed [the] information to a representa-

tive of the Union," and that the length of the period between the Union's presettlement acquisition of this information and the postsettlement date on which negotiations actually resumed should be considered in assessing whether a reasonable time for bargaining elapsed between the date of the settlement agreement and the filing of the decertification petition.

We assume *arguendo* that if an employer, prior to an 8(a)(5) settlement, expresses to a union its willingness to bargain, the period of time between such expression and the settlement would be relevant to assessing the reasonable period for bargaining after the settlement. Notwithstanding that assumption, we find no reason for concluding that the testimony sought by the Respondent here is relevant. The Respondent does not seek to show that it told the Union of its willingness to bargain. Nor does the Respondent seek to show that it told the Board agent to deliver such a message on its behalf and that the Board agent agreed to do so. At most, a third party (the Board agent) told the Union that he had been told by the Respondent that the Respondent was willing to bargain. In these circumstances, there is an insufficient basis for requiring the Board agent to testify.⁵ Accordingly,

IT IS ORDERED that the Respondent's request for special permission to appeal is granted and, on appeal, the judge's ruling granting General Counsel's motion to quash the subpoena is affirmed.

³The General Counsel relies on *Seligman & Associate*, 273 NLRB 1216 (1984); *W. C. McQuaide, Inc.*, 237 NLRB 177 (1978); *Rafaire Refrigeration Corp.*, 207 NLRB 523 (1973); *Michael M. Schaefer*, 246 NLRB 181 (1979).

⁴As noted by the General Counsel, the alleged communication to the Board agent falls under the category of a third-party communication, the effectiveness of which is questionable under the cited precedent.

⁵Member Oviatt concurs in the result. He would rely solely on the policy underlying Sec. 102.118, which, as he understands it, is generally to prohibit the testimony sought here, particularly where, as here, the Respondent has not shown that other witnesses could not testify as to the events at issue.