Structure Tone, Inc. *and* International Union of Operating Engineers, Local 825. Case 22–CA–28139

August 27, 2008

DECISION AND ORDER

BY CHAIRMAN SCHAUMBER AND MEMBER LIEBMAN

On April 22, 2008, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified and set forth in full below.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Structure Tone, Inc., Newark, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with the Union, International Union of Operating Engineers, Local 825, by failing and refusing to provide the Union with the information requested in its letters dated November 6 and 28, 2007.

(b) 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) Promptly furnish the Union with the information it requested in its letters dated November 6 and 28, 2007.

(b) Within 14 days after service by the Region, post at its Newark, New Jersey office, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent 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 material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of this notice to all employees employed by the Respondent at any time since November 26, 2007.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official, on a form provided by the Region, attesting to the steps that 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 Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

[1] The judge noted that at the time of his decision, the Board had not issued a Decision and Determination of Dispute in a related 10(k) proceeding involving the Union's picketing at one of the Respondent's worksites. The Board has since found reasonable cause to believe that this picketing violated Sec. 8(b)(4)(D) of the Act and has awarded the disputed work on that project to an employee of the building owner. *Operating Engineers Local 825 (Structure Tone, Inc.)*, 352 NLRB No. 77 (2008). Accordingly, the Respondent's request that the Board refrain from deciding this information request case while the jurisdictional dispute is pending is moot.

The judge assumed, without finding, that the information requested by the Union, regarding the Respondent's active construction projects in the geographic area covered by the Union's collective-bargaining agreement, related to nonunit employees. That assumption underlay the judge's evaluation of the Union's demonstration of relevance. In the absence of exceptions, we make the same assumption.

[2] We shall substitute the Board's standard language for certain provisions of the judge's recommended Order and notice.

Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Schaumber and Member Liebman constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

[3] 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."

WE WILL NOT refuse to bargain collectively with the Union, International Union of Operating Engineers, Local 825, by failing and refusing to provide the Union with the information requested in its letters dated November 6 and 28, 2007.

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 promptly furnish the Union with the information it requested in its letters dated November 6 and 28, 2007.

STRUCTURE TONE, INC.

Benjamin Green, Esq., for the General Counsel.
Aaron Schlesinger, Esq. (Peckar & Abramson), for the Respondent.
Paul Montalbano, Esq. (Cohen, Leder, Montalbano & Grossman), for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard by me on March 25, 2008, in Newark, New Jersey. The complaint herein, which was based upon an unfair labor practice charge that was filed on November 27, 2007,[1] by International Union of Operating Engineers, Local 825 (the Union), alleges that since about November 26, Structure Tone, Inc. (the Respondent), has failed and refused to furnish the Union with information that it requested, which information is necessary for, and relevant to, the Union's performance as the collective-bargaining representative of certain of the Respondent's employees. It is alleged that the failure to furnish this requested information violates Section 8(a)(1) and (5) of the Act (the Act).

FINDINGS OF FACT

I. JURISDICTION

The Respondent admits, and I find, that it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION STATUS

Respondent admits, and I find, that the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE FACTS

The Union and the Respondent are parties to an 8(f) collective-bargaining agreement effective for the period July 1, 2005, through June 30, 2008. Stated briefly, the unit is the Respondent's employees engaged in the operation of power equipment within the Union's jurisdiction of the State of New Jersey, as well as Delaware, Ulster, Orange, Sullivan, and Rockland Counties in the State of New York. The agreement states that the parties "agree to make all assignments of work covered by this Collective Bargaining Agreement to the Employees covered hereunder" and it contains an exclusive hiring hall, which provides that whenever desiring to employ workmen, the employer will call upon the Union to provide these workmen, and the Union shall refer the workmen from an open employment list. The agreement does not contain an arbitration provision. The sole witness at the hearing herein was Paul Montalbano, counsel for the Union. He testified that the Respondent usually notifies the Union's business agent of a new project resulting in a pretrial conference to discuss the project and the number of employees that will be required to staff the project. On other occasions, the Respondent will simply call the Union's hiring hall to dispatch employees to the project. However, in September, the Union was informed by the Essex County Buildings Trade Council of a job being performed by the Respondent in Newark, New Jersey (the Halsey Street job). The Respondent had not informed the Union of this job, although the Union had previously provided the Respondent with employees for this jobsite. From about October 15 to 22, the Union picketed the Halsey Street job, resulting in a 10(k) hearing on November 5.[2] Montalbano testified that at this hearing he questioned Respondent's project manager about other work the Respondent was performing in either New Jersey or the five counties in New York State within the Union's jurisdiction, but found his answers "evasive." As a result, on the following day, Montalbano wrote to David Cahill, of the Respondent, inter alia:

> As the bargaining representative of the employees of Structure Tone who perform the work of operating power driven equipment on construction projects, Local 825 seeks to properly administer the collective bargaining agreement. Accordingly, it is requested that Structure Tone please provide a detailed itemized listing identifying each and every current active construction project of Structure Tone, which projects are located in the State of New Jersey and/or the counties of Delaware, Ulster, Sullivan, Rockland and Orange in New York State. Along with an identification of the project, an actual street address is necessary to enable the Business Agents to visit the site in order to make site inspections and to speak with bargaining unit employees.

The first response that he received was a letter dated November 26, from Aaron Schlesinger, counsel for the Respondent, stating, inter alia: "please be advised that Structure Tone is not currently involved in any active construction which is covered by its collective bargaining agreement with Local 825 in the State of New Jersey and/or the counties of Delaware, Ulster, Sullivan, Rockland and Orange in New York State." Montalbano then asked the Union's business agents to inquire whether the Respondent was performing any other jobs within the Union's jurisdiction. He was informed that the Respondent was performing a job in Jersey City, New Jersey, and, in fact, had made contributions to the Union's funds on behalf of one of its members for the payroll period November 14 through 26.

[1] Unless indicated otherwise, all dates referred to herein relate to the year 2007.

[2] Respondent, in his brief, characterizes this picketing as unlawful. This is his conclusion as the Board has not yet ruled on the Respondent's 8(b)(4)(D) unfair labor practice charge.

By letter dated November 28, Montalbano wrote to Schlesinger saying that he was in receipt of his November 26 letter denying that the Respondent is involved in any active construction in the area covered by the agreement between the Respondent and the Union, continuing,

> That, of course, states Structure Tone's opinion. As you know from prior discussions, as well as the Local 825 position as stated at the recent NLRB hearing, Local 825 believes that the Structure Tone project at the Newark Morgan Stanley facility is covered by the collective bargaining agreement.
>
> During the course of the hearing, Project Managers for Structure Tone indicated that there are active construction projects ongoing in New Jersey and perhaps elsewhere in the other five counties of New York that are within the Local 825 jurisdiction. It is Local 825's obligation to police the collective bargaining agreement, with such policing involving investigation as to whether or not Structure Tone is properly adhering to contract provisions at active construction projects. As long as there are active construction projects by Structure Tone in the Local 825 jurisdiction, Local 825 has a right to make a site visit to investigate contract compliance. Through independent investigation, we have learned that the representations set forth in your letter are not accurate. The purpose of this letter is to alert you to the inaccuracy, provide you with an opportunity for correction and further, to provide the other information which was originally requested and that is identification of the name and address location of each and every active project by Structure Tone in the Local 825 area.
>
> Failure to produce such information does constitute a violation of Structure Tone's obligation to bargain in good faith with Local 825. Please act accordingly.

Neither Schlesinger nor the Respondent replied to this request. As stated in the letter to Schlesinger, Montalbano testified to the reason for the request:

> The union has an obligation to . . . the membership to make sure employers who are signatory to a contract assign work that is under the collective bargaining agreement to the hiring hall members. That's how our members earn their living. So, we wanted to make a site investigation to determine whether or not Structure Tone was assigning work that comes within the jurisdiction of the union to members of Operating Engineers.

The Respondent, in its answer, denied that the requested information relates to the bargaining unit at issue and further alleges that the Union wants this information for the purpose of engaging in unlawful conduct, i.e., picketing at the sites requested.

IV. ANALYSIS

It is well settled that an employer's duty to bargain in good faith with the union representing its employees includes the obligation to supply the union with requested information that will enable the union to properly perform its duties as the bargaining representative of these employees. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967); *Crowley Marine Services v. NLRB*, 234 F.3d 1295, 1297 (D.C. Cir. 2000); *CEC, Inc.*, 337 NLRB 516, 518 (2002). This duty "undoubtedly extends to data requested in order properly to administer and police a collective bargaining agreement." *Oil, Chemical & Atomic Workers Local Union v. NLRB*, 711 F.2d 348, 358 ((D.C. Cir. 1983). Where, as here, the requested information concerns matters that are apparently outside the bargaining unit, such as those related to single employer or alter ego status, or when the request is to determine if work being performed belongs in the unit, the union bears the burden of establishing the relevance of the requested information. Although mere suspicion is not enough to satisfy this burden, potential or probable relevance is sufficient to give rise to an employer's obligation to provide the requested information, although the union is not obligated to disclose these facts to the employer at the time of the request. *Cannelton Industries,* 339 NLRB 996, 997 (2003). All that is required is for the General Counsel to demonstrate at the hearing that the union had at the relevant time a reasonable belief. *Knappton Marine Corp.*, 292 NLRB 236, 238–239 (1988). The union was not required to establish that the information that triggered its request was accurate or ultimately reliable, and the information supporting the request may be based upon hearsay. *Magnet Coal, Inc.*, 307 NLRB 444 fn. 3 (1992); *CEC, Inc.,* supra.

I find that, as set forth in Montalbano's testimony, as well as his letter of November 28, to Schlesinger, the Union has satisfied its burden and demonstrated the relevance of the requested information. The Union learned of the Halsey Street job and received notice that the Respondent had contributed to the Union's funds for the Jersey City job that the Union previously was unaware of. That was adequate to raise its suspicions that there might be other jobs as well. While the Union's suspicions may have been unwarranted, and, ultimately, the evidence may have established that the Respondent was not performing any unit work within the Union's jurisdiction, there was sufficient evidence to support the Union's request.

Although Schlesinger's November 26 letter to Montalbano states that the Respondent is not engaged in any other job within the Union's jurisdiction, the Union is not required to accept this warranty in lieu of the requested information. *Shoppers Food Warehouse*, 315 NLRB 258, 259 (1994). If it were obligated to accept such a warranty from the employer, there would be no need for the Section 8(a)(5) right to information.

Finally, the Respondent defends that the Union wants this information in order to engage in unlawful picketing at the requested sites. While the Union did picket the Halsey Street job in October, which picketing has not been found to be unlawful, this defense is conjecture in two respects: that the Union intends to engage in picketing these jobsites and that the picketing will be unlawful. In *Associated General Contractors of California*, 242 NLRB 891, 894 (1979), the Board stated: "It is well established that, where a union's request for information is for a proper and legitimate purpose, it cannot make any difference that there may also be other reasons for the request or that the data may be put to other uses." See also *Utica Observer-Dispatch v. NLRB*, 229 F.2d 575, 577 (2d Cir. 1956). In *NLRB v. CJC Holdings, Inc.*, 97 F.3d 114, 117 (5th Cir. 1996), the

court stated: "The possibility that a union may use relevant information for a purpose the employer finds objectionable is no justification for withholding it." In a similar situation in *Vanguard Fire & Supply Co.,* 345 NLRB 1016, 1040 (2005), the administrative law judge stated:

> If Respondent argues that it feared the Union would use the requested jobsite information to plan *lawful* picketing, its argument must fail. When a union engages in lawful primary picketing, it acts within the scope of its duties as the exclusive bargaining representative. Moreover, picketing is a long-established Section 7 right. An employer cannot justify withholding requested information by asserting that the union will use it to engage in protected activity.

I therefore find that the Union has sustained its burden of establishing that the information that it requested was relevant to it as the collective-bargaining representative of certain of the Respondent's employees, and that by refusing to furnish this information to the Union, the Respondent violated Section 8(a)(1) and (5) of the Act.

CONCLUSIONS OF LAW

1. The Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union has been a labor organization within the meaning of Section 2(5) of the Act.
3. By failing and refusing to furnish the Union with the information that it requested on November 6 and 28, 2007, which information was relevant to the Union as the bargaining representative of certain of the Respondent's employees, the Respondent violated Section 8(a)(1) and (5) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist therefrom and take certain affirmative action necessary to effectuate the policies of the Act. Specifically, I shall recommend that the Respondent furnish the Union with the information it requested in Montalbano's letters dated November 6 and 28, 2007.

[Recommended Order omitted from publication.]