

American Bakeries Company and Local Union No. 51, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and Local No. 326, Bakery, Confectionery and Tobacco Workers International Union, AFL-CIO. Cases 7-CA-24655 and 7-CB-6522

31 July 1986

DECISION AND ORDER

BY MEMBERS JOHANSEN, BABSON, AND
STEPHENS

On 10 April 1986 Administrative Law Judge Bernard Ries issued the attached decision. The Respondent Union filed exceptions, and the Respondent Company filed exceptions and a supporting brief. The General Counsel filed an answering brief, and the Charging Party filed a telegraphic response.

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 and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that Respondent American Bakeries Company, Ypsilanti and Port Huron, Michigan, its officers, agents, successors, and assigns, and Respondent Local Union No. 51 International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, its officers, agents, and representatives, shall take the action set forth in the Order.

Carol McCloskey, Esq., for the General Counsel.

Stewart J. Katz, Esq. (Keller, Thoma, Schwarze, Schwarze, DuBay & Katz, P.C.), of Detroit, Michigan, for the Respondent Employer.

Gerry M. Miller, Esq. (Goldberg, Previant, Uelmen, Gratz, Miller & Brueggeman, s.c.), of Milwaukee, Wisconsin, for the Respondent Union.

Roger Webb, Esq., of Detroit, Michigan, for the Charging Party.

DECISION

BERNARD RIES, Administrative Law Judge. This case was tried in Detroit, Michigan, on 28 October 1985.¹ A

¹ The underlying charges were filed on 3 June 1985 and the complaint was issued on 12 July 1985

brief and a motion to correct the record were received from the General Counsel, and a brief was received from the Respondent Employer, about 2 December 1985.²

On the basis of the pleadings, the briefs, and my own study of the applicable law, I make the following findings of fact, conclusions of law, and recommendations.

I. THE PLEADINGS; THE PROCEDURE

Respondent is, the pleadings show, engaged in the bakery business, with its principal office in Detroit, Michigan, and four installations in other Michigan cities. The only two facilities involved in this proceeding are located at Port Huron and Ypsilanti.

The complaint, after setting 48 paragraphs containing the usual allegations pertaining to jurisdiction, labor organization status, and pertinent supervisors and agents, continues:

9. (a) On or about February 8, 1985, Respondent Employer and Respondent Union entered into a collective bargaining agreement recognizing Respondent Union as the exclusive collective bargaining representative of a unit covering all non-supervisory employees of Respondent Employer employed at its Ypsilanti, Michigan facility.

(b) On or about May 13, 1985, Respondent Employer and Respondent Union entered into an agreement to bring all non-supervisory employees of Respondent Employer employed at its Port Huron, Michigan, facility under the terms of the agreement described above in subparagraph 9(a) and recognizing Respondent Union as the exclusive bargaining representative of this group of employees.

(c) Article I, Section 2 of the agreement described above in subparagraph 9(a) established a union security clause requiring all employees covered by said agreement to attain and maintain membership in Respondent Union, and to pay dues and initiation fees thereto, as a condition of employment.

(d) At the time Respondent Employer and Respondent Union entered into the agreement above in subparagraph [sic] 9(a) covering Respondent Employer's Ypsilanti facility employees, Respondent Employer had not yet hired any of the employees who were to be covered by said agreement.

(e) At the time Respondent Employer and Respondent Union entered into the agreement de-

² On 3 December, the Respondent Union sent a telegram adopting the brief filed by Respondent Employer, and also stating that it had "no objection to the granting of the General Counsel's motion to correct certain (but not all) errors in the record." Respondent Union thus appears to be acquiescing in part, but not all, of the General Counsel's motion, leaving it to me, I suppose, to decide where the General Counsel has gone wrong. Respondent Employer has filed no opposition to the motion.

I also find nothing exceptionable in, and I grant, the motion. In addition, sua sponte, I order a change in the Tr. 9, L. 16-18, to read, in lieu of the current "I have never been presented with this particular one in almost 11 years of dubious work," to read, "I have never been presented with this particular one in almost 11 years of doing this work." I am quite sure that even in moments of greatest despondence, I have not uttered (on the record) a remark such as the one reported

scribed above in subparagraph 9(b) to bring Respondent Employer's Port Huron employees under the terms and conditions of the agreement described above in subparagraph 9(a), Respondent Employer had not yet hired any of the employees who were to constitute its Port Huron facility workforce.

(f) [Deleted on motion of the General Counsel at the hearing.]

(g) Subsequent to executing the agreements described above in subparagraphs 9(a) and (b), Respondent Employer hired non-supervisory employees at each of its Ypsilanti and Port Huron facilities and has employed them under the terms and conditions of said agreements, including Article [sic] I, Section 2, described above in subparagraph 9(c).

(h) Respondent Employer's actions as set forth above constitutes [sic] unlawful aid, assistance and support to Respondent Union.

The remaining eight complaint paragraphs contain the usual legal conclusions, asserting that by the conduct alleged, Respondent Employer violated Section 8(a)(1), (2), and (3) of the Act and Respondent Union violated Section 8(b)(1)(A) and (b)(2).

The Respondent Employer's answer to the complaint admitted every factual allegation in paragraphs 1-9 (except for subpar. 9(f), which was, as stated, deleted at the hearing, and subpar. 9(h), which asserts a legal conclusion) and denied the remaining paragraphs. Respondent Union's answer was identical, but contained, in addition, the following:

FIRST DEFENSE

The Company's newly established Ypsilanti and Port Huron facilities constitute in predominant part relocations of routes and territories previously served by drivers working out of the Company's Farmington and Warren depots who were subject to Local 51's Detroit area sales agreement with the Company, which expressly provides that it shall cover any relocation of bargaining unit operations.

SECOND DEFENSE

The Company's newly established Ypsilanti and Port Huron facilities constitute accretions to bargaining unit operations covered by Local 51's Detroit area sales agreement with the Company, which are subject to Local 51's bargaining rights and majority status in the sales agreement bargaining unit as a matter of law.

THIRD DEFENSE

Even if the Ypsilanti and Farmington [sic] employees are not relocations of or accretions to Local 51's historical bargaining unit, dues and fees disgorgement is a wholly inappropriate remedy in the circumstances.

At the hearing, counsel for the General Counsel moved for judgment on the pleadings "[i]nasmuch as all the operative paragraphs have been admitted." The Respondents opposed the motion, with counsel for Re-

spondent Union reminding me that the "Union's answer, at the very least, raises three defenses," and I denied the motion. The General Counsel then rested, as did the Charging Party. The Respondent Employer and the Respondent Union followed suit, and they also moved for dismissal of the complaint based on a "failure of proof by the counsel for the General Counsel."³ I stated that I would take the motions to dismiss under consideration. The Charging Party then "move[d] for in effect judgment on the pleadings" in view of the fact that Respondents had presented "no evidence whatsoever . . . respecting those affirmative defenses." The motion was noted.

II. CONCLUSIONS

In *Ladies Garment Workers v. NLRB*, 366 U.S. 731, 738 (1961), the Supreme Court took note that "[t]he law has long been settled that a grant of exclusive recognition to a minority union constitutes unlawful support in violation of [Section 8(a)(2)]." There are some situations in which the Board and the courts, in the interest of balancing both stability and employee choice, have permitted or required recognition of a union which is not clearly the freely chosen bargaining representative of a full majority of the unit employees.⁴ There can be no doubt, however, that, in the usual case, the extension of recognition by an employer to a union at a new facility at a time when no employees have been hired constitutes a violation of the statute. *Special Service Delivery*, 259 NLRB 993 (1980).⁵

Given the foregoing state of the law, it seems clear that when the General Counsel rested on the pleadings, she had proved a prima facie case of violation. Although the ultimate burden of persuasion of the elements of an unfair labor practice by a "preponderance of the testimony taken" (Sec. 10(b)) never shifts from the General Counsel, *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), satisfaction of this burden may be accomplished by establishing an un rebutted prima facie case. The Board, quoting from *Black's Law Dictionary*, 4th ed., West Publishing Co., 1951, p. 1353, has defined a "prima facie case" as:

Such as will suffice until contradicted and overcome by other evidence. A case which has proceeded upon sufficient proof to that stage where it will support [a] finding if evidence to [the] contrary is disregarded . . . a prima facie case, then, is one which is established by sufficient evidence, and can

³ In resting, the Respondent Union, having relied on the existence of the pleaded "Defenses" in its answer to oppose the General Counsel's motion for judgment on the pleadings, took care to point out that pleading such defenses does not mean that the "burden of proving those defenses, in our opinion, [is] the Union's or the Company's."

⁴ *Ray Brooks v. NLRB*, 348 U.S. 96 (1954); *Herman Bros.*, 264 NLRB 439, 440-441 (1982).

⁵ The Board has even held that bargaining prior to achievement of the union's majority status is violative despite the fact that the contract is not enforced or is conditioned upon the union's ability to demonstrate majority standing at some later time. *Majestic Weaving Co.*, 147 NLRB 859 (1964); *Wickes Corp.*, 197 NLRB 860 fn 2 (1972); *Margaret Anzalone, Inc.*, 242 NLRB 879, 887 (1979).

be overthrown only by rebutting evidence adduced on the other side.

Avon Convalescent Center, 209 NLRB 937, 938 (1974).⁶

The facts admitted by the answers filed by both Respondents are sufficient to make out a prima facie showing of violation under the applicable 8(a)(2) and (3) and 8(b)(1)(A) and (2) principles—the answers concede that the Respondents entered into a “collective bargaining agreement” in February 1985 recognizing Respondent Union as the “exclusive bargaining representative” of all nonsupervisory employees at Ypsilanti, at a time when the Respondent Employer had not hired any of the employees to be covered by the contract, and thereafter applied to newly hired employees the union-security clause contained in the agreement; and they further concede that, in similar circumstances, in May 1985, Respondents made the Ypsilanti contract applicable to its Port Huron facility, also not staffed by any employees at that time.⁷

It is perhaps possible in theory to present various defenses to the prima facie showing of violations made out by the conjunction of complaint allegations and admissions in the answers here. It might be, as Respondent Union’s “FIRST DEFENSE” asserts, that recognition was lawfully extended at Ypsilanti and Port Huron because those facilities constituted nothing more than “relocations” of portions of existing units.⁸ Similarly, the Ypsilanti and Port Huron facilities might possibly be found to be “accretions” to an existing unit, and therefore part of the unit work covered by an existing agreement.⁹

The authorities make it clear, however, that when the General Counsel has proved a prima facie case, evidence to support such defenses must be presented by the respondent; if not presented, the prima facie case stands un rebutted, and “an un rebutted prima facie case necessarily amounts to proof by a preponderance of the evidence.” *Hale v. Dept. of Transportation*, 772 F.2d 882 (FC Cir. 1985). Accord: *National Automobile & Casualty*, 199 NLRB 91, 92 (1972); *Siro Security Service*, 247 NLRB 1266, 1272 (1980). For the proposition that such kinds of defenses are affirmative in nature (as Respondent Union’s answer appears to concede), see *Safeway Stores*, 256 NLRB 918, 919 (1981) (the delicatessen employees do

⁶ Concerning what constitutes “sufficient evidence,” I note Professor Wigmore’s preferred test: “Are there facts in evidence which if unanswered would justify men of ordinary reason and fairness in affirming the question which the plaintiff is bound to maintain?” IX Wigmore, *Evidence* § 2494 (3d ed.).

⁷ On brief, Respondent Employer argues, “[The General Counsel] did not present any evidence in support of her allegations” (emphasis in original). In fact, according to Wigmore, admissions in the pleadings constitute more than simple evidence: “The pleadings in a cause are . . . not mere ordinary admissions . . . but judicial admissions . . . i.e., they are not a means of evidence, but a waiver of all controversy . . . and therefore a limitation of the issues” IV Wigmore, *Evidence* § 1064 (Chadborn rev 1972).

⁸ Ordinarily, however, such an agreement can be maintained only when at least a “substantial percentage” of employees have transferred to the new location to demonstrate that a “relocation” has occurred. Compare *Westwood Import Co.*, 251 NLRB 1213 (1980), enfd. 681 F.2d 664 (9th Cir 1982), and *Lanco*, 277 NLRB 851 fn. 2 (1985).

⁹ It would probably be unusual, however, for the parties in an “accretion” situation to execute a separate collective-bargaining agreement, as the pleadings recite with regard to Ypsilanti, to cover the accreted unit

not show a sufficient community of interest with the bakery employees “to justify” the accretion of the former into the bakery unit); *Harte & Co.*, 278 NLRB 947, 948 (1986) (the Board has developed standards to determine when there is a “sufficient continuity of operations to justify applying an existing contract to a new location”); see also *Avon Convalescent Center*, supra (prima facie case of refusal to recognize and meet not rebutted); *Preston Products Co.*, 158 NLRB 322, 345 (1966) (unrebutted prima facie showing of unlawful pay raises). Obviously, it cannot be that in a case such as the instant one, the General Counsel must exclude all possible circumstances which might make the conduct lawful, as Respondent Employer asserts on brief; “There are numerous factors which the General Counsel failed to provide to substantiate her legal conclusion (i.e., that Respondent Union did not represent an uncoerced majority of the effected [sic] employees; that the new facilities were not a relocation or accretion to Respondent Union’s existing bargaining unit; whether the new facilities were separate, appropriate units, etc.).”¹⁰ The thrust of Respondents’ contentions seems to be that there can be no such concept as a prima facie case in the present situation, and that notion, I think, is simply wrong.

Accordingly, I conclude that the General Counsel has demonstrated prima facie, by virtue of the pleadings, that the Respondents violated the provisions of the Act alleged in the complaint; that Respondents have failed to rebut the prima facie case; and that the General Counsel has therefore proved the complaint allegations by a preponderance of the evidence.

CONCLUSIONS OF LAW

1. Respondent American Bakeries Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent Local Union No. 51, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America is a labor organization within the meaning of Section 2(5) of the Act.

3. By, about 8 February and 13 May 1985, entering into and applying a collective-bargaining agreement containing a union-security clause covering employees at, respectively, Respondent Employer’s Ypsilanti and Port Huron facilities at times when Respondent had not hired any employees to work at those locations, and thereafter enforcing the union-security clause against employees subsequently hired, Respondent Employer violated Section 8(a)(1), (2), and (3) of the Act, and Respondent Union violated Section 8(b)(2) and (1)(A) of the Act.

¹⁰ I might also note here Respondent Employer’s argument that the conclusion that the admitted allegations are not sufficient to find that violations have occurred “cannot be greater demonstrated than by the fact that the ALJ specifically denied the Motion for Judgment On The Pleadings.” That conclusion need not—indeed, almost certainly cannot—follow where the respondent has admitted the facts alleged but denied the asserted conclusions of law and advanced affirmative defenses. In such a situation, even when the General Counsel has proved a prima facie case, the respondent must be given an opportunity to offer rebuttal evidence. Thus, my refusal to grant the motion for judgment on the pleadings in fact demonstrates nothing about the sufficiency of the General Counsel’s proof.

4. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

To remedy the unfair labor practices here found, I recommend that the Respondents be ordered to cease and desist from continuing their collective-bargaining relationships at Ypsilanti and Port Huron; that they be required to rescind the collective-bargaining agreement and any supplemental agreement made applicable to those locations; and that they jointly and severally make all new employees whole for initiation fees and dues paid by them after being employed at Ypsilanti and Port Huron, except for those who had voluntarily become members of Respondent Union prior to the execution of the agreements and voluntarily retained their membership after being employed. *SMI of Worcester, Inc.*, 271 NLRB 1508, 1510 (1984). Interest shall be paid as set out in *Florida Steel Corp.*, 231 NLRB 651 (1977).

Finally, I shall recommend that the Respondent be required to post appropriate notices to employees.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹¹

ORDER

A. Respondent American Bakeries Company, Detroit, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Recognizing and bargaining with Local Union No. 51, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America as the representative of its Ypsilanti and Port Huron, Michigan employees for purposes of collective bargaining unless and until the Union has been certified by the National Labor Relations Board as the exclusive bargaining representative of any of such employees.

(b) Giving effect to the 8 February 1985 collective-bargaining contract and any supplement executed by Respondents American and the Union, and any modification or current extension thereof.

(c) Recognizing and bargaining with the Union or any other labor organization at a time at which such labor organization does not represent an uncoerced majority of the employees in the unit as to which recognition is extended, and discriminating against employees and encouraging membership in such labor organization by agreeing to and enforcing a union-security clause requiring membership in such a labor organization.

(d) 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) Make whole the Ypsilanti and Port Huron employees for the initiation fees and dues involuntarily paid by them, jointly and severally with the Union, and with interest, in accordance with the remedy section of this decision.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personal records and reports, and all other records necessary to analyze the amounts of compensation due under the terms of this Order.

(c) Post at its Ypsilanti and Port Huron, Michigan location copies of the attached notice marked "Appendix A."¹² Copies of the notice, on forms provided by the Regional Director for Region 7, 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 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) Post at the same places and under the same conditions as in the preceding subparagraph signed copies of Respondent Union's notice to employees marked "Appendix B."

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

B. Respondent Local Union No. 51, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Accepting recognition from employers, and executing and giving effect to collective-bargaining agreements at times when Respondent Union does not represent an uncoerced majority of employees in the bargaining units covered.

(b) Agreeing to, maintaining, and enforcing a union-security clause requiring membership in the Union in the circumstances set out in subparagraph (a), above.

(c) Maintaining its claim to recognition as the collective-bargaining representative of Respondent American's Ypsilanti and Port Huron, Michigan employees until it has been certified by the National Labor Relations Board as the exclusive bargaining representative of any of such employees.

(d) Giving effect to the 8 February 1985 collective-bargaining contract and any supplement thereto executed by Respondents Union and American, and any modification or current extension thereof.

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

¹¹ 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.

¹² 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."

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

(a) Make whole the Ypsilanti and Port Huron, Michigan employees for the initiation fees and dues involuntarily paid by them in accordance with the remedy section of this decision.

(b) Post at its business offices and meeting halls copies of the attached notice marked "Appendix B."¹⁸ Copies of the notice, on forms provided by the Regional Director for Region 7, 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 members 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.

(c) Furnish the Regional Director for Region 7 signed copies of the notice, in the number designated by the Regional Director, for posting by American Bakeries Company, at places where it customarily posts notices to employees of its Ypsilanti and Port Huron, Michigan locations.

(d) Preserve and make available to the Board or its agents all records necessary to the implementation of this Order.

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

¹⁸ See fn. 12, supra.

APPENDIX A

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.

WE WILL NOT recognize and bargain with Local Union No. 51, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America as the collective-bargaining representative of our Ypsilanti and Port Huron, Michigan employees until the Union has been certified by the National Labor Relations Board as the representative of any such employees, and WE WILL NOT give effect to the contract executed on 8 February 1985, and any supplement thereto, purporting to cover such employees, or any modification or current extension thereof.

WE WILL NOT require employees to involuntarily pay initiation fees or dues to the Union; and WE WILL NOT

give effect to any assignment forms executed by our Ypsilanti and Port Huron employees involuntarily.

WE WILL NOT recognize or bargain with the Union or any other labor organization at a time at which such labor organization does not truly represent a majority of the employees, and WE WILL NOT at such times agree to require employees to pay fees and dues to a labor organization.

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

WE WILL, jointly and severally with the Union, make our Ypsilanti and Port Huron employees whole for the fees and dues involuntarily paid by them to the Union since 8 February 1985 and 13 May 1985, respectively, with interest and in accordance with the Decision of the Board.

AMERICAN BAKERIES COMPANY

APPENDIX B

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.

WE WILL NOT accept recognition from employers, and execute and give effect to collective-bargaining agreements, at a time when we do not represent an uncoerced majority of employees in the bargaining unit.

WE WILL NOT agree to, maintain, or enforce a union-security clause requiring membership in our organization in the circumstances set out above.

WE WILL NOT recognize or bargain as the collective-bargaining representative of the Ypsilanti or Port Huron, Michigan employees of American Bakeries Company, unless and until we have been certified as such by the National Labor Relations Board.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of the rights under Section 7 of the National Labor Relations Act.

WE WILL, jointly and severally with American Bakeries Company, make the Ypsilanti and Port Huron employees whole for initiation fees and dues involuntarily paid by them to us since 8 February and 13 May 1985, respectively, with interest.

LOCAL UNION NO. 51, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUF- FEURS, WAREHOUSEMEN AND HELPERS OF AMERICA