

Caress Bake Shop, Inc. d/b/a Barkus Bakery and Bakery, Confectionery and Tobacco Workers International Union, Local 12, AFL-CIO-CLC.
Case 6-CA-18814

5 December 1986

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS
JOHANSEN AND STEPHENS

On 16 July 1986 Administrative Law Judge Arline Pacht issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.¹

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,² and conclusions and to adopt the recommended Order.³

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Caress Bake Shop, Inc., Allison Park, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order, except that the attached

¹ In not granting a visitatorial clause as part of her recommended remedy, the judge gave some examples of when, in her opinion, such a remedial provision would be "undoubtedly appropriate." In the absence of exceptions, we do not reach or pass on her comments concerning the appropriateness of visitatorial clauses in those or other situations.

² In affirming the judge's conclusion that the Respondent violated Sec. 8(a)(1) of the Act on 23 January 1986 by attempting to eject the Union's organizers from the premises of the Highway Inn and by calling the police to assist in their removal, we do not rely on her finding that the union agents never set foot on the Respondent's property. Rather, we rely on the fact that the Respondent's representatives never distinguished between the premises of the Respondent and those of the Highway Inn, and that the union agents were told they had no right to be on the Highway Inn property. The Respondent clearly was attempting to prevent the union representatives from distributing literature anywhere in the parking lot, including the portion leased by the Highway Inn's proprietor.

Because we affirm the judge's finding of an 8(a)(1) violation based on the Respondent's attempt to eject the Union's agents from property other than its own, we do not reach the issue, discussed in fn. 8 of the judge's decision, of whether the Union would have been entitled to contact employees on the Highway Inn property if that property had been owned or controlled by the Respondent.

We correct the following inadvertent errors in the judge's decision: (1) The last sentence of part II,A should refer to ". . . the right hand corner of the bakery [not tavern] itself . . ."; (2) the second sentence in par. six of part II,B should read "By 1985, only 16 of the original 46 employees . . ."; (3) the penultimate sentence in that same paragraph should be deleted altogether. The testimony on which it apparently is based was the subject of an objection and motion to strike by the Respondent's counsel, and the objection was sustained. None of those errors affects our decision or that of the judge.

³ The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

notice is substituted for that of the administrative law judge.

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.

WE WILL NOT attempt to prevent or interfere with representatives of the Bakery, Confectionery and Tobacco Workers International Union, Local 12, AFL-CIO-CLC, or of any other union, distributing union literature to our employees on the property adjacent to our premises, now leased to the Highway Inn, nor will we summon the police to assist in removing them or threaten them with arrest.

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.

CARESS BAKE SHOP, INC. D/B/A
BARKUS BAKERY

Ronald J. Andrykovitch, Esq., for the General Counsel.
Nicholas A. Pasciullo, Esq., of Pittsburgh, Pennsylvania,
for the Respondent.

DECISION

STATEMENT OF THE CASE

ARLINE PACTH, Administrative Law Judge. Based upon a charge filed on 24 January 1986,¹ as amended on 4 March, a complaint issued on 7 March alleging that Caress Bake Shop, Inc. d/b/a Barkus Bakery (Respondent or Bakery) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by promulgating an unlawful no-distribution rule and by preventing union agents from distributing literature to Bakery employees. The Respondent filed a timely answer denying it had violated the Act.

A trial was held before me in Pittsburgh, Pennsylvania, on 8 May. On the entire record, including my observation of the demeanor of the witnesses, and consideration of briefs submitted by the parties,² I make the following

¹ All dates refer to 1986 unless otherwise noted.

² In her posttrial brief, the General Counsel moved to correct the transcript. Having received no opposition to the motion from Respondent, and having reviewed the transcript and finding that the proposed corrections are accurate, the General Counsel's motion is granted.

FINDINGS OF FACT

I. JURISDICTION

Caress Bake Shop, Inc., a Pennsylvania corporation with an office and place of business in Allison Park, Pennsylvania,³ manufactures, sells, and distributes candy and baked goods. During the year ending 31 December 1985, a representative period, Respondent in the course of its business operations sold and shipped goods valued in excess of \$50,000 from its Allison Park facility directly to points outside the State and derived gross revenues in excess of \$500,000. Accordingly, the complaint alleges, Respondent admits, and I find that Caress Bake Shop, Inc. is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

Bakery, Confectionery and Tobacco Workers International Union, Local 12 (Union or Local 12) is and has been at all times material a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Setting*

Respondent, previously owned by the Barkus family, is located in Allison Park, a community on the northern outskirts of Pittsburgh. In 1983 Carl Colteryahn purchased the Respondent and is the sole stockholder of the corporation. At the same time, but acting in an individual capacity, Colteryahn purchased the property and the plant in which the bakery is situated, as well as an adjacent parcel of land that houses another freestanding building. As an individual owner, Colteryahn leases the plant at Allison Park to Respondent and the adjoining building and surrounding property to another tenant, Veronica Herman, proprietor of a tavern known as the Highway Inn. Respondent's Allison Park facility includes a bakery, candy room, shipping and receiving area, and a retail shop. A diagram of the property, introduced into evidence as Joint Exhibit 1, shows that the Caress plant occupies its entire site (referred to as parcel one), leaving no parking space for the employees, all of whom commute to work by private automobile. However, ample parking space is available on the acreage leased to the adjacent Highway Inn. Consequently, to alleviate the transportation problems of the bakery employees, Colteryahn negotiated a lease with Herman that expressly provides that "the Lessor [Colteryahn] its agents, employees, business invitees, other lessees, and the agents, employees and business invitees of such other lessees shall have the right of free, continuous and uninterrupted use in common with Lessee [Herman] of the parking and passage areas of the demised premises for the purpose of traversing the area and parking thereon." (See G.C. Exh. 8.)

Joint Exhibit 1 further demonstrates that access to the Allison Park facility is limited. Both the Bakery and the Highway Inn face a four lane state highway and are bordered in the rear by a creek. No sidewalk or shoulders abut either side of the highway that has a 45-mile-per-

hour speed limit. Apart from the highway, no other public roads approach Respondent's facility. The record indicates that the nearest stop light and crossroad intersecting the highway are at least several hundred yards to the south of the Bakery. A cutout or depression in the curb allows employees to exit from the highway and enter the Highway Inn parking area. Although specific spaces are not assigned to Respondent's employees, most of them park on the side of the tavern closest to the Bakery and then enter a nearby employee entrance. Only one sign was posted on the right hand corner of the tavern itself indicating that the area below it was designated for customer parking.

B. *The Union's Organizational Efforts*

In December 1985, the Union began its third effort to organize the Bakery employees. The first campaign, which took place in 1981, culminated in an election that the Union lost. At that time, the Union received an *Excelsior* list containing the names and addresses of 46 employees then in the defined appropriate unit.⁴

In 1984 Local 12 again attempted a short-lived organizational drive, confining its efforts to one mailing to the employees identified on the 1981 *Excelsior* list. The Union abandoned its efforts without filing an election petition when employees failed to demonstrate sufficient interest.

Robert Meier, Local 12's vice president, testified that the following year, when several employees expressed a renewed interest in representation, the Union decided to contact the employees directly by leafletting at their place of employment. Thus, on 18 December 1985, Meier and Leon Swimmer, a local 12 executive board member, parked Meier's car on the Highway Inn lot at approximately 6 a.m. The union agents approached employees as they arrived at work over staggered starting times, distributed union materials, and engaged a number of them in brief conversation. At some undefined point during the morning, Edward Torr, Respondent's general manager, emerged from the Bakery and told the union representatives to leave as they were on private property. When Meier responded that he was on Highway Inn property, Torr claimed that Respondent owned that land too. Torr returned to the plant without further comment after Meier insisted that he had as much right to be there as any other member of the public. Meier and Swimmer remained outside the Highway Inn and continued distributing literature to the bakery employees without further interruption. They did not depart until 10 a.m.

Meier and Swimmer repeated their campaigning efforts on 23 December and 3 January. On each of these occasions, they parked on the Highway Inn lot and handed out literature to the bakery employees for several hours without interference. In fact, none of Respondent's agents were aware of their presence on these dates. This was not to be the case on their fourth and final venture to the Highway Inn parking area. In the early morning

³ The Respondent has retail outlets throughout the Pittsburgh area but only its Allison Park facility is involved in this proceeding.

⁴ Although the Union petitioned to represent only the production and maintenance employees in 1981, the Regional Director's Decision and Direction of Election expanded the appropriate unit to encompass office and sales personnel at the Allison Park facility.

hours of 23 January, Meier and Swimmer returned to the Highway Inn parking lot. When they attempted to hand material to Respondent's operations manager, John Kwasniewski, he asked Meier to leave the premises. Meier told Kwasniewski, as he had told Torr, that he, like other members of the public, had a right to remain. Kwasniewski then entered the Bakery. Approximately 15 minutes later, three police cars arrived at the scene and parked in front of Meier's car.⁵ After conferring with Kwasniewski, a police lieutenant asked Meier whether he had permission to be at that location and if he knew that he was trespassing. Meier again expressed his view that he had a right to be there and that he was not even on the Respondent's property. The police officer maintained that he had no right to park on the Highway Inn lot either and admonished Meier that he would arrest him for disorderly conduct if any bakery employee was offended by the union agents' presence or by the material they were distributing. Meier testified without controversy that the lieutenant then asked Kwasniewski whether any of the employees were offended and received a negative response. After this, the police simply left.

This confrontation with the police occurred while 5 to 10 bakery employees passed by on their way to work. Swimmer attempted to hand out literature and talk with them, but, as he testified, he perceived a marked reluctance on the employees' part to acknowledge him or to accept any of the materials, in contrast to their friendlier reception on former occasions. After the police left, Meier and Swimmer remained for another half hour but then they also departed and did not return to the Allison Park facility for fear of further hostile encounters.

In addition to their on-site contacts with employees, during the same time period, the Union also sent out two or three mailings to those employees for whom they had names and addresses. By 1985, only 15 of the original 46 employees on the *Excelsior* list remained in Respondent's employ. In addition to those 16, the Union obtained the names and addresses of 9 other current employees. Thus, because 80 employees were on Respondent's payroll by February 1986, the Union had the names and addresses of 31 percent of the work force.⁶ In addition to the several mailings, Meier also testified that he made approximately 12 telephone calls to employees. The Union made no other efforts to contact employees by alternative means. They did not place advertisements in either of the two major newspapers in the Pittsburgh area nor resort to any of the numerous metropolitan Television or radio stations because, as Meier stated, the cost of such communications would have been prohibitive.⁷ He further

maintained that the use of a sound truck would have been futile because the Bakery's plant windows were sealed in the winter. He knew of no billboard close to the plant nor any location on or near the highway that would permit handbilling in safety. The widespread dispersal of employees throughout 18 townships and 17 different zipcode areas of Pittsburgh led the union representatives to conclude that home visits would be difficult and time consuming, even if they had all the employees' names and addresses. Meier also attributed the failure to establish an in-plant organizing committee to the fact that the employees were fearful of demonstrating interest in the Union. Finally, he testified that he did not attempt to obtain the names and addresses of employees by tracing license plate numbers when he learned there would be a \$5 charge for each such inquiry.

III. DISCUSSION AND CONCLUDING FINDINGS

The issues to be resolved in this case are whether Respondent violated Section 8(a)(1) of the Act by promulgating and maintaining in a discriminatory manner, a no-distribution, no solicitation rule, attempting thereby to prevent union representatives from handbilling bakery employees in violation of their Section 7 right to organize.

In *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956), the Supreme Court formulated a balancing test to determine when an employer's right to exclude nonemployees from its property must yield to the employees' right to obtain a union's message first hand at the work site. The Court framed the accommodation in these terms:

[A]n employer may validly post his property against nonemployee distribution of union literature if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message and if the employer's notice or order does not discriminate against the union by allowing other distribution. [Id. at 112.]

If the evidence in this case established that Respondent owned or even controlled the parking area surrounding the Highway Inn, then the instant case would appropriately be resolved under the guidelines set forth in *Babcock & Wilcox*, supra. However, *Babcock & Wilcox* is inapposite here, for the evidence in this case clearly shows that the union agents were on the Highway Inn premises and never set foot on Respondent's property. Thus, the Respondent had no legal authority to attempt to eject them from land over which it had no control.

In its answer to the complaint and through half of the trial in this matter, Respondent claimed that it owned the Highway Inn property. In fact, Respondent knew that this was not true. During the trial, when the General Counsel received, under subpoena, the lease that Colter-yahn negotiated with the proprietor of the Highway Inn,

daily Pittsburgh journal. The cost of advertising on any one of the many radio or television stations in the Pittsburgh metropolitan area also was equally expensive.

⁵ In par. 5,b of its answer to the complaint, Respondent gratuitously represented that its supervisor, Jim McKee, telephoned the police in response to complaints from employees who were allegedly frightened by the union agents. Respondent neither presented evidence to support this allegation nor controverted Meier's testimony that Kwasniewski informed the police that no employees were offended by the Union's presence. Thus, I attach no weight to the allegation in par. 5,b of the answer.

⁶ At the time of the hearing the number of employees had grown to 86. No evidence was adduced that might prove that the Union knew which 16 employees of the original 46 remained in Respondent's employ by December 1985.

⁷ Meier testified that a one-time, single page advertisement in the major Pittsburgh paper would cost \$6400 and cost \$3900 in the other

the General Counsel learned that the Caress Bakery Corporation had no ownership interest in parcel two. Then, on further inquiry by the General Counsel, Colteryahn ultimately acknowledged that he purchased parcel two solely as an individual and leased it to Herman with a reservation expressly limited to parking privileges for the lessor (Colteryahn) and certain persons in a business relationship to him.

After the truth of Colteryahn's ownership and rental arrangements of parcel two was revealed, Respondent devised a claim that the lease created an easement in Respondent's behalf that gave it the right to eject the union organizers. On construing the lease (G.C. Exh. 8), I find no basis for Respondent's contention. The applicable language in the lease provides that Colteryahn's lessees, its agents, employees, and business invitees, have a limited interest extending solely to parking privileges on the Highway Inn property. Respondent is not even identified by name in the lease. Rather, as a lessee, the Bakery is perhaps a third party beneficiary of a narrow provision in a lease between two separate, independent parties. That lease vests no authority in Respondent to exercise dominion over strangers who may park on property leased to the Highway Inn.

Based on Colteryahn's account of a conversation with Ms. Herman, Respondent also attempts to argue that their true intent in negotiating the lease was to restrict parking for their own purposes and prohibit parking by outsiders. The lease contains no language that would support such an intent. If adequate parking space (on a lot over an acre in dimension) was an important matter of genuine concern, it is difficult to believe that express restrictions would not appear in the lease or in any other writing. Further, Respondent failed to call Herman to verify Colteryahn's testimony. Moreover, no evidence was adduced that she, as lease-holder of parcel two, ever questioned or complained about the presence of the union representatives, or posted notices prohibiting such visitors, or reserved the parking area for any exclusive purpose. Consequently, I conclude that at no time were the union agents on Respondent's premises or trespassers on Highway Inn property. Accordingly, Respondent had no legal right to prevent nonemployees from distributing union literature there. By attempting to eject Meier and Swimmer on 23 January and by calling the police to assist in their removal, Respondent interfered with its employees' organization rights in violation of Section 8(a)(1) of the Act. See *Gainesville Mfg. Co.*, 271 NLRB 1186, 1188 (1984).⁸

⁸ Assuming, arguendo, that Respondent had authority to exclude nonemployees from the parcel two parking area, I would find, nevertheless, that such right should yield to the Union's right to communicate with the bakery employees because they were relatively inaccessible through other means of communication. See *Babcock & Wilcox*, supra at 112. The undisputed evidence shows that the employees are widely dispersed in a densely populated metropolitan area. They do not walk nor take public transportation to work. Thus, it would be highly unlikely for a union organizer to encounter them on the street near the Bakery or in their communities. Moreover, even if the Union had a complete list of employees' names and addresses (rather than a bare 31 percent), locating and traveling to their residences for home visits would be arduous and very time consuming. Further, given the numerous media outlets in the area, advertising on radio, television, or in the press would be exceedingly expensive and minimally cost effective. As noted in *Hutzler Brothers Co.*, 241

However, I do not find that Respondent's conduct on 18 December 1985, rises to the level of an unfair labor practice. By all accounts, General Manager Torr's exchange with Meier was brief and ended with Torr simply retreating to the Bakery. No evidence was adduced that any employees were present during this exchange. Thereafter, the union representatives apparently felt unconstrained, for they continued their activities that same morning without interruption and returned on three subsequent occasions. Although I recognize that in order to violate the Act, a respondent's conduct merely must tend to be coercive. I cannot conclude the evidence shows such a tendency on 18 December. Although Torr may have overstepped the bounds of his jurisdiction, he did not intrude upon his employees' Section 7 rights. Thus, it would be inappropriate to recommend a cease-and-desist order with respect to Respondent's conduct as alleged in paragraph 10(a) of the complaint.

The General Counsel also contends that Respondent did not have an established rule prohibiting solicitation or distribution on its premises; rather, it hastily invented such a policy as an expedient after Local 12 agents appeared. In support of his theory, the General Counsel notes that Respondent's agents failed to allude to such a rule on either 18 December or 23 January. The General Counsel also points out that the rule was not in written form and was communicated orally to the employees, according to Torr, before he became general manager.

Concededly, Torr's testimony was generalized and vague, but this alone is insufficient to tip the scales in favor of the Union. The major defect in the General Counsel's case on this issue is that he relies almost entirely on speculation arising from the omission of reference to such a rule by Respondent's managers.⁹ But such omissions may be explained by perfectly legitimate reasons including sheer inadvertence. Similarly, Torr's admission that he had never before invoked the rule may indicate only that no need to do so arose during his tenure with Respondent. Standing alone, the fact that the rule was not often applied in the past does not prove that it was exercised in a discriminatory manner against the union officials. Surely, sounder evidence is required to carry the burden of proof on this issue. At a minimum, long-term employees could have been summoned to testi-

NLRB 914, 917 (1979), enf. denied 630 F.2d 1012 (4th Cir. 1980), campaigning costs may not be dispositive, but neither must they be discounted in assessing whether alternative modes of communication are reasonable. The record also suggests that campaigning by sound truck in the dead of winter on a road with a 45-mile-per-hour speed limit, or renting nonexistent billboards, would be equally futile. Putting cost aside, the Union could run a motor vehicle check to obtain employees' names and addresses, but to do so, the Union would have to enter the tavern parking area, the very act which Respondent claims is forbidden. Finally, the record indicates that no public area exists close to that Bakery where the Union could handbill in safety. Accordingly, were I to reach this issue, I would conclude that the Union had no reasonable means to communicate with the majority of Respondent's employees through other available channels so that access to the parking area used by Respondent's employees was necessary.

⁹ *Solo Cup Co.*, 172 NLRB 1110 (1968), cited by the General Counsel as support for drawing such an inference is inapposite for there the administrative law judge found that the company admitted it had agreed with other businesses to exclude union organizers from an entire industrial area. Id. at 1118.

fy about Respondent's past practice and policy in this regard. Because the evidence on this issue is inconclusive, I am unable to find that Respondent published and promulgated a discriminatory no-solicitation, no-distribution rule on 18 December and, therefore, will recommend that this allegation of the complaint be dismissed.

On the basis of the foregoing findings of fact, and on the entire record in this case, I make the following

CONCLUSIONS OF LAW

1. Respondent Caress Bake Shop, Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and the Union is a labor organization within the meaning of Section 2(5) of the Act.

2. By attempting to prevent union representatives from distributing literature to bakery employees in the parking area of the property adjacent to Respondent, leased by the Highway Inn, and by summoning the police to assist in their removal on 23 January 1986, Respondent interfered with its employees' right to organize, thereby violating Section 8(a)(1) of the Act.

3. The aforesaid unfair labor practice effects commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent violated Section 8(a)(1) of the Act, I will recommend that it be ordered to cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act. Specifically, Respondent will be ordered to post the notice attached to this Decision as Appendix A and to abide therewith.

The General Counsel urges that the recommended Remedy and Order include a visitorial clause on the grounds that such a clause is needed to assist the Board in verifying Respondent's compliance therewith.

In numerous circumstances, such as those outlined in the General Counsel's motion, a visitorial clause undoubtedly is appropriate.¹⁰ However, I am not persuaded that the Board requires the same stringent investigative power in this case simply to ascertain whether or not Respondent has posted the notice and is abiding by its dictates. Therefore, the General Counsel's request to include a visitorial clause in the proposed Order is denied.

¹⁰ E.g., in cases involving backpay or the discriminatory operation of hiring halls.

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

ORDER

The Respondent, Caress Bake Shop, Inc., d/b/a Barkus Bakery, Allison Park, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Attempting to prevent or interfere with representatives of Local 12 or any other union from distributing union literature to bakery employees on premises leased to Highway Inn (parcel two) or summoning police to assist in their removal and threatening them with arrest.

(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) Post at its Allison Park, Pennsylvania facility, copies of the attached notice marked "Appendix."¹² Copies of the notice, on forms provided by the Regional Director for Region 6, 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.

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

IT IS FURTHER RECOMMENDED that insofar as the complaint alleges other violations of the Act that have not been found to constitute unfair labor practices, these allegations are dismissed.

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."