Upstate Coca Cola, Inc. *and* **Bakery, Laundry, Beverage Drivers and Vending Machine Servicemen and Allied Workers of Albany and Vicinity Local 669, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America**

Bakery, Laundry, Beverage Drivers and Vending Machine Servicemen and Allied Workers of Albany and Vicinity Local 669, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America *and* **Richard Lindheimer.** Cases 3–CA–13133 and 3–CB–4858

31 March 1987

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS JOHANSEN AND CRACRAFT

On 21 October 1986 Administrative Law Judge Raymond P. Green issued the attached decision. The General Counsel filed exceptions and a supporting brief. The Respondent Union filed a letter opposing the General Counsel's 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, brief, and letter and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Robert A. Ellison, for the General Counsel.
Joseph H. McClure Jr., Esq., of Atlanta, Georgia, for Respondent.
Dominick Tocci, Esq., of Albany, New York, for the Union.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. This case was heard by me in Albany, New York, on 3, 4, and 9 June 1986. The initial charge in this proceeding was filed by Richard Lindheimer against the Union on 3 February 1986. The charge alleged that since 1 December 1985 the Union has unlawfully altered his seniority date and has improperly refused to process a grievance over this change. Lindheimer amended this charge on 10 March 1980 and the Regional Director issued a complaint against the Union on 11 March 1986.

On 6 March 1980 the Union, no doubt being advised that a complaint was going to be issued against it, filed an unfair labor practice charge against the Employer in Case 3–CA–13133. This charge alleges that the Employer discriminated against Lindheimer by changing his seniority date. At the same time, the Union averred that it nevertheless believed that the change in Lindheimer's seniority date was proper. In effect, the Union's intention in filing this charge was to assert (rather cleverly I must say), that if it is held to have violated the law because of the alleged change in Lindheimer's seniority, then the Employer should also be held liable because the Employer and the Union agreed to the change.

As a result of the charge in Case 3–CA–13133 the Regional Director issued, on 27 March 1986, an order consolidating cases, and an amended consolidated complaint against both the Union and the Employer. This amended consolidated complaint alleges:

(1) The Employer and the Union for many years have maintained a series of collective-bargaining agreements, the most recent of which runs from 1 November 1984 to 31 October 1987.

(2) In July 1985 the Employer and the Union made an oral agreement whereby Lindheimer (who had previously left the bargaining unit to work as a supervisor) would be allowed to return to a bargaining unit job with a 1961 seniority date, and/or with protection against any possible future layoffs.

(3) In reliance on the oral agreement, Lindheimer returned to the bargaining unit in August 1986 as a working foreman.

(4) In December 1985 the Union by its secretary-treasurer, Leo Lester, reneged on the oral agreement described in paragraph 2 by insisting that Lindheimer's seniority date be 26 August 1985 (i.e., when he returned to the bargaining unit).

(5) As a result, the Company on 11 December 1985 changed Lindheimer's seniority date to 26 August 1985.

(6) In January 1986 the Union caused the layoff of Lindheimer by insisting that his seniority date was August 1985 and by insisting that he should therefore be laid off before employees hired before August 1985.

(7) In February 1986 the Company acceded to the Union's demands and laid off Lindheimer.

(8) In December 1985 and February 1986 the Union refused to process Lindheimer's grievances relating to the change in his seniority date and his layoff in February 1986.

FINDINGS AND CONCLUSIONS

I. JURISDICTION

It is agreed and I find that the Employer is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

It also is agreed and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.[1]

II. OPERATIVE FACTS

Lindheimer initially began working at the Company about 1958 or 1959. He then left for a short time to work with his brother and returned in 1960. Thereafter, he continued to work continuously in jobs covered by the collective-bargaining agreement until July 1984 when he was asked to become the head of the maintenance department, a supervisory position. At the time, Lindheimer spoke to Bob Herman, another supervisor, who told him that if he did not like the new job, he could always return to the bargaining unit within 2 years. Nothing was said, however, about retaining or losing seniority on such a return. After his discussion with Herman, Lindheimer decided to accept the promotion and he began working as a supervisor. Simultaneously, he obtained a withdrawal card from the Union.

For one reason or another, Lindheimer found that he did not like his new job and about June 1985 he asked the Company's director of operations, Walter Munroe, if he could return to the bargaining unit. Munroe, who had himself just recently arrived at the Albany facility, replied that he would check with his superiors and get back to Lindheimer. When Munroe did check, his superiors told him to do what he thought best. The next week Munroe told Lindheimer that he could go back to a unit job, whereupon Lindheimer expressed some concern that if he went back into the bargaining unit, his seniority might begin again at zero. Munroe states that he then contacted Morse who worked in the personnel department (in Syracuse) because he did not know what Lindheimer's seniority should be if he returned to the bargaining unit.[2] Morse told him that she would get back to him, but apparently did not. Because Munroe was not certain about the interpretation of the contract in connection with Lindheimer's seniority question and because he was desirous of protecting Lindheimer from any possible seasonal layoff, Munroe arranged for a meeting with the Union in July 1985.

Before discussing the meeting of July, I note the following relevant provisions of the collective-bargaining agreement:

(1) Article XI—Seniority

> The principle of seniority shall prevail at all times except as otherwise specified herein. After working 30 days a new employee shall be placed on the appropriate seniority list as of his first day of employment. When it becomes necessary to reduce the working force, the last man hired shall be laid off first, and when the force is again increased, the men are to be returned to work in the reverse order in which they are laid off. Seniority shall be broken only by discharge, voluntary quit, or more than a two year layoff.

(2) At Article VII, the last paragraph states:

> The Company has discretion to select employees for the position of working foreman. A working foreman will be paid $.40 more per hour than the rate of his classification.

(3) Article XX Leave of Absence states:

> If the Company grants a leave of absence not to exceed six months, to any employee, the Company, on request of the employee, will furnish such employee in writing confirmation of such leave of absence. The employee assumes the responsibility of requesting such confirmation of leave in writing and filing same with the Union. The Union shall not be required to recognize such leave of absence unless the employee shall file such written confirmation thereof, with the Union within one week from the date the same is granted.
>
> Any employee absent without leave for any reason other than for sickness, or other legitimate or excusable reason, or any employee absent beyond the period of approved leave of absence, shall be considered as having left the employ of the Employer.
>
> The Company and the Union must jointly agree upon all leaves of absence prior to being granted. Prior to leaving, the employee must deposit with the Company monies to cover his pension contributions for the period of the leave of absence.[3]

In early July 1985 a meeting was held to discuss the return of Lindheimer to the bargaining unit. In addition to Lindheimer's presence, the Company was represented by Walter Munroe and Bob Herman and the Union was represented by Leo Lester and Irv Wood, its president.[4] It was at this meeting, according to the General Counsel, that the Union and the Company made an agreement whereby, (1) Lindheimer would go back into the bargaining unit as a working foreman, (2) he would have a seniority date of 1961 (i.e., his date of hire minus the 13 months that he was a supervisor), and (3) he would be protected from layoff in the event of possible future layoffs. In reviewing this record, and considering all the evidence in conjunction with the demeanor of the witnesses, I am convinced, contrary to the General Counsel, that no such agreement was made. Rather, what I think transpired is set forth below.

There is no doubt that the Company and the Union recognized that Lindheimer was an extremely valuable employee who, because of his ability to fix and maintain a wide variety of machinery, had almost a unique value to the Company. As such, the Company was anxious not only to accommodate the wishes of a long-term and loyal employee, but also was desirous of protecting him

[1] The contract in this case was jointly negotiated by several Teamsters Union locals with respect to several plants located in different cities The particular contract with Local 669 covers Coca-Cola employees in Albany and in Glen Falls, New York.

[2] According to Munroe, when he arrived at the Albany plant he received his training relative to the collective-bargaining agreement by being given the union contract and told to read it.

[3] There is also at art. XXI a grievance-arbitration clause.

[4] Leo Lester is the person in the Union with the highest authority

from the possibility of being laid off if future layoffs occurred. I also believe that the Union acknowledged Lindheimer's skills and was likewise desirous of accommodating him to the extent possible within the limits of the collective-bargaining agreement.

I conclude that at the July meeting the Company by Munroe expressed the desire to protect Lindheimer from layoffs because Munroe feared that the seniority clause might very well be interpreted as requiring Lindheimer to start at zero seniority on his return to the bargaining unit. I also conclude that Lester, although indicating his view that Lindheimer would lose his prior seniority, expressed the opinion that Lindheimer might be afforded some protection if the Company made him a working foreman. In this regard, I think that Lester had in mind the idea that if Lindheimer was designated as a working foreman, other employees who were hired before his return to the unit might not attempt to bump him in the event that regular employees were laid off.[5] The evidence shows that Lester said at this meeting that the Company could make Lindheimer a working foreman so as to afford him some protection, but that if other employees were laid off and if they filed grievances alleging that they had greater seniority than Lindheimer, Lester would have to take such grievances to the Union's executive board for consideration. In effect, therefore, I conclude that Lester merely suggested that a possible way to protect Lindheimer from layoff was for the Company to make him a working foreman. I do not believe that he agreed Lindheimer could have a 1960 or 1961 seniority date or that the Union would consent to guarantee Lindheimer absolute protection from layoff. Rather, I think that Lester essentially hoped that a layoff-seniority problem would simply not arise either because (a) no regular employees would be laid off in 1985–1986, or (b) if regular employees were laid off, they would not think to file grievances because of Lindheimer's working foreman's position and/or his unique skills. It is clear to me that Lester expressly reserved the right to process grievances in the event that future layoffs occurred and if other employees did assert they had greater contractual seniority than Lindheimer.

After Lindheimer returned to the bargaining unit in early August, the Company and the Union had a meeting in August to discuss the updating of the seniority list. When the Company proposed that Lindheimer should be assigned a seniority date of 1961, Lester objected and stated that Lindheimer's seniority date should be the date that he returned to the bargaining unit in August 1985.

Lindheimer's wife also works at the Albany plant. She is, as far as I can see, an intelligent and determined woman who is not afraid to assert her "rights." In 1984 she was fired when she became involved in a personality conflict with the plant manager. At that time, Lester processed a grievance on her behalf and succeeded in convincing the Company, without going to arbitration, that Lindheimer should be reinstated with backpay.

During the summer of 1985, Lindheimer's son had a summer job with the Company. After he was laid off in September, the Company needed a replacement and called the Union to send a man, which it did. When Mrs. Lindheimer discovered this, she called Lester and accused him of sending up a crony instead of having her son recalled for a week so that he would be eligible for unemployment benefits. Lester hung up on her, and after she called back and spoke to Wood, Lester went up to the Company, spoke to Robert Herman, and arranged for Mrs. Lindheimer's son to be recalled for a week.

On 18 November 1985 the Union held a nomination meeting for the purpose of selecting candidates for office. The incumbent officers, Leo Lester and Irv Wood were nominated for another term. Also nominated was Tony Jesmaine for secretary-treasurer. Right after the nominations, Lester and Wood held a party at a nearby restaurant where the local's members were invited. According to Mrs. Lindheimer, while at the party she told Lester that although she was supporting Irv Wood for reelection, she had not made up her mind between Lester and Jesmaine. She contends that Lester thereupon angrily told her to leave his party. This is denied by Lester.

Regarding the relationship between Mrs. Lindheimer and Lester, Munroe recalled one occasion, sometime in July 1985, when Lester referred to Mrs. Lindheimer as "that bitch." Munroe, who overheard this remark, could not relate the context that this remark was made. Also, Ken Richardson (the Company's production manager), recalled that on one occasion he overheard Lester remark that if it was not for his wife, Lindheimer would not have these problems.

At a meeting on 9 December 1985, the Company and the Union discussed a new proposed seniority list. When Lindheimer's name came up, Richardson agreed with the Union's position that having left the bargaining unit in 1984, Lindheimer had lost his seniority status under the terms of the contract. Further, he agreed that as neither shop stewards nor working foremen had contractual superseniority, Lindheimer's seniority began when he returned to the unit in August 1985. Thereafter on 11 December, a seniority list was posted and on 12 December Lindheimer presented a grievance to Leo Lester at the Union's office. This grievance read:

> Loss of 25 years seniority. I grieve that employer lists starting date as of 8/26/85 when starting time was in fact 6/29/60.

Present at the meeting on 12 December were Leo Lester, the Lindheimers, and their friend Pat Franklin who also was a shop steward. The Lindheimers argued that there had been an agreement back in August between the Company and the Union whereby Lindheimer retained most of his seniority. Pat Franklin took up Lindheimer's case and said that if there had been an agreement, then the Union should live up to it. Lester denied, however, that he had ever made such an agreement and said that the contract was controlling. He said that he neither could nor would alter the contract for Lindheimer's benefit or for the benefit of any other person.

[5] During the summer the Company hires college students who are laid off before regular employees are laid off In some years no regular employees are laid off at all, while in other years some are. In July 1985 there was no way for anyone to predict to what extent, if any, there would be layoffs of regular employees in the autumn or winter.

These positions by the respective parties were repeated over and over again with greater and greater heat.

On 12 December, Mrs. Lindheimer wrote a letter to Jesmaine expressing her support for his candidacy. For the most part she set forth the situation regarding Lindheimer's seniority status from the Lindheimer point of view. She also expressed the opinion that Lester was not to be trusted because he had reneged on the alleged agreement to allow Lindheimer to return to the bargaining unit while retaining most of his previous seniority. She gave permission for the letter to circulate as part of Jesmaine's election campaign. Despite its publication it did not harm Lester who won on 18 December.

In late December 1985 or early January 1986, a number of bargaining unit employees were temporarily laid off. Thereafter, in January some grievances were filed alleging that employees with greater seniority than Lindheimer had been laid off while he remained at work. These grievances were responded to by Herman, after consulting Munroe (Munroe was ill). The responses to the grievances of Conradt and Robbins were (1) the Union and the Company had agreed to give Lindheimer a seniority date of August 1961, and (2) they also agreed that Lindheimer would be classified as a working foreman. It should be noted that these letters of Herman were written despite the fact that he was aware that the Company's position as expressed by his superior, Richardson, in December 1985 was that Lindheimer's seniority date was August 1985 and that Lindheimer did not have any type of superseniority. As stated by Herman, he and Munroe drafted these replies because they disagreed with the Company's position. I also note that the response to Robbin's grievance was never sent to the Union because it was intercepted by Richardson who countermanded it.

A meeting was held between the Union and the Company on 28 January 1986. The spokesman for the Company was Richardson and the spokesman for the Union was Lester. The purpose of the meeting was to discuss the various pending seniority grievances. At this meeting Lindheimer was told by Richardson that the Company agreed with the Union's position. Lindheimer was also told that he was going to be laid off commencing on the first week of February.

On 30 January 1986 and 3 February 1986 Lindheimer filed three related grievances concerning his seniority status and his "layoff." These grievances were denied by the Company both orally and in writing.

I should note that in actuality Lindheimer was never really laid off because he used some of his accumulated vacation time for the period that he was scheduled for layoff. Also the Company, without objection from the Union, gave work to Lindheimer during his "layoff" period as a subcontractor because his skills were needed. Lindheimer returned to work on 1 March 1986 and has worked continuously since that date.

III. DISCUSSION

The General Counsel's theory in this case is based on a number of factual premises which, in my opinion, cannot be sustained. As I understand his theory, it is based on the hypothesis that (1) an agreement was made in July and/or August 1985 whereby the Company and the Union agreed to allow Lindheimer to return to a bargaining unit job with the retention of almost all the seniority that he had earned prior to his promotion to management and/or with a guarantee of job protection as a working foreman; (2) the Union reneged on this alleged agreement thereby ultimately causing Lindheimer's layoff in February 1986; and (3) the Union's reneging on the agreement was motivated by Lester's retaliation against Mrs. Lindheimer's support of his rival for union office.

As to motivation, the evidence may show a degree of hostility between Mrs. Lindheimer and Lester, two strong-willed individuals. But the facts show that whatever differences they may have had, Lester has assisted either her (when she was fired in 1984), or her son, when he was laid off in September 1985. The evidence simply cannot support the claim that Lester "reneged" on an alleged agreement in July 1985 concerning Lindheimer's seniority status because of his wife's intraunion activities, because it is clear that such a "reneging," if it occurred at all, occurred before his wife expressed her support for the rival candidate, Jesmaine.

Further, it is my opinion that Lester never entered into an agreement whereby Lindheimer would, on his return to the bargaining unit, retain his old seniority status minus the 13 months that he spent in management. Nor do I find that Lester agreed to any kind of arrangement guaranteeing Lindheimer job protection in the event that layoffs occurred in the future. Rather, I conclude that the credible evidence establishes that Lester, at the July 1985 meeting, merely suggested that if the Company, as was its contractual right, designated Lindheimer as a working foreman, this might give him some degree of protection because of his special skills. Thus, at most, it is my opinion that Lester made this suggestion because he hoped that layoffs of regular employees would not occur and that if they did, other employees might be dissuaded from filing grievances because of Lindheimer's "special skills." In this regard, it seems to me that Lester basically was hoping that the problem would simply not come up. Moreover, despite making the working foreman suggestion, Lester protected his flanks by explicitly reserving the right to take to his executive board any grievances which might arise in the event layoffs did occur and if employees did claim greater seniority than Lindheimer.

The evidence further establishes to my satisfaction that at the August 1985 meeting Lester specifically took the position that Lindheimer's seniority status began on the date that he returned to the bargaining unit. This position was ultimately agreed to by the Company's representative, Richardson, on 9 December 1985 when the Union and the Company were in the process of drawing up a new seniority list.

Having found that there never was any agreement as alleged by the General Counsel and having found an absence of unlawful motivation in connection with the Union's alleged "reneging," I must conclude that the allegations of the complaint have no merit. In my opinion the existing labor agreement is ambiguous concerning

what should happen to a person's seniority when he or she is promoted to management and thereafter returns to the bargaining unit. As such, it seems to me that the Union's interpretation of the contract (to the effect that such a person starts over again with zero seniority) is not unreasonable. It is, at the very least, a contractual interpretation which it could legitimately argue before an arbitrator.

As the question of Lindheimer's seniority status is to my mind one which solely concerns the interpretation of the existing contract, it properly was decided during the grievance meetings established by the contract's grievance procedure. As I am convinced that neither the Union nor the Company engaged in any acts motivated by the Lindheimers' protected concerted activity and as I am equally convinced that the Union's actions were not arbitrarily, capriciously or invidiously motivated, it is concluded that the allegations of the amended consolidated complaint should be dismissed.

CONCLUSIONS OF LAW

1. Upstate Coca Cola, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Bakery, Laundry, Beverage Drivers and Vending Machine Servicemen and Allied Workers of Albany and Vicinity, Local No. 669, affiliated with the 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. Neither the Union nor the Company has violated the Act in any manner as alleged in the amended consolidated complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

It is recommended that the complaint be dismissed in its entirety.

---

[6] 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.