Air Express International Corporation *and* Freight Drivers, Warehousemen and Helpers Local Union No. 390, an affiliate of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO. Case 12–CA–12758

June 30, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT

On December 15, 1987, the General Counsel of the National Labor Relations Board issued a complaint alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union's request to bargain following the Union's certification in Case 12–RC–6715. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed its answer admitting in part and denying in part the allegations in the complaint.

On January 25, 1988, the General Counsel filed a Motion for Summary Judgment. On January 27 the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed an opposition to the General Counsel's Motion for Summary Judgment and cross-motion for revocation of the certification.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

The Respondent denies its alleged refusal to bargain,[1] and also attacks the validity of the certification on the basis of its objections to the election in the representation proceeding. Specifically, the Respondent alleges that during the critical period between the filing of the petition and the election, rumors circulated among employees in the unit falsely attributing to Silver, the Respondent's operations manager, statements indicating animus toward persons of Cuban origin (who made up a majority of the unit employees). Thus, according to the credited testimony, Silver was alleged to have said, inter alia, that "these four f— Cubans won't do this to me"; "the f— Cubans were not going to put the Union in there," and even that he "[Silver] was going to terminate all the f— Cubans." The Respondent contends that those rumors, by inflaming ethnic animosities and making the employees believe that Silver would retaliate against them, destroyed the "laboratory conditions" necessary for a valid election.[2]

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding.

However, the Respondent, citing the Eleventh Circuit's recent decision in *M & M Supermarkets v. NLRB*,[3] contends that the Board in the representa-

[1] In its answer the Respondent denies that it has information sufficient to admit or deny the allegations of the complaint concerning the filing and service of the charge The answer further denies that the Union is the exclusive bargaining representative of employees in the unit, that the Union has requested bargaining, and that the Respondent has violated the Act by refusing to bargain.

Concerning the Respondent's qualified denial of the allegations of the complaint relating to the filing and service of the charge, we note that the exhibits accompanying the General Counsel's motion include (1) a copy of the Regional Director's letter to the Respondent, dated November 13, 1987, and marked, "CERTIFIED MAIL—RETURN RECEIPT REQUESTED," stating that the charge in this case has been filed and that a copy of the charge is enclosed; and (2) a copy of a letter from the Respondent's counsel to the Regional Office, dated December 11, 1987 (4 days prior to the issuance of the complaint), stating (inter alia) that "the instant charge is without merit." Although the exhibits contain no return receipt establishing that service of the charge was perfected, neither is there any indication that the charge was not delivered to the Respondent Moreover, the Respondent does not specifically deny having been served with the charge, it denies having information sufficient to admit or deny *either* the filing *or* the service of the charge (or the dates thereof) Although the Respondent may lack first-hand, personal knowledge of the filing of the charge, or of the date of filing, the matter of the service of the charge surely is within its knowledge, and therefore it is not unreasonable to suppose that, if the charge had not been served, the Respondent would have explicitly so stated in its answer or would have pursued this denial further in response to the Motion for Summary Judgment On the basis of all the foregoing, we conclude that there is no genuine issue of fact concerning the service of the charge

Concerning the Respondent's denial of having received a request to bargain and having refused to do so, we note that the exhibits appended to the motion include (1) a copy of a certified letter from the Union's counsel to the Respondent, dated October 27, 1987, demanding bargaining; (2) a copy of a letter from the Respondent's counsel to the Union's counsel, dated November 5, 1987, stating that the Respondent "declines" to recognize and bargain with the Union, and (3) counsel for the Respondent's December 11, 1987 letter to the Board Office (discussed above), stating that the Respondent "declines" to recognize and bargain with the Union The Respondent's answer also admits that the Respondent issued "a document dated November 5, 1987, to which the Board is referred for a true and accurate recitation of its contents " From all the above, we conclude there is no genuine issue of fact that the Union did, indeed, make a demand for bargaining that was refused by the Respondent

Although the Respondent denies that the Union has been the exclusive representative pursuant to Sec. 9(a) of the unit employees since August 20, 1987, it has admitted the appropriateness of the unit and the issuance and correction of the certification

In any event, in its opposition to the Motion for Summary Judgment, the Respondent does not rely on any of the above denials, but instead argues only that the election should be set aside because of certain allegedly inflammatory remarks of an ethnic nature made during the critical period before the election Accordingly, we find that the Respondent's denials raise no material issues of fact warranting a hearing.

[2] *General Shoe Corp*, 77 NLRB 124, 127 (1948)

[3] 818 F.2d 1567 (1987)

tion proceeding erred in failing to apply the standard for evaluating potentially inflammatory statements based on race, as set forth in *Sewell Mfg. Co.*[4] We disagree, because we are satisfied that the hearing officer, whose report was adopted by the Board in all relevant respects, did apply *Sewell* to the rumors at issue here. After summarizing the *Sewell* standard set forth in footnote 4, the hearing officer found that those rumors were based on a statement actually made by Silver;[5] that the Union did not make the statement part of its campaign; that there was no systematic attempt to inject the "racial" issue into the campaign; but that the employees probably had blown the statement out of proportion in the retelling of it. Thus, the hearing officer not only applied the *Sewell* standard,[6] but also properly found that, under that standard, the rumors imputing ethnic prejudice to Silver did not warrant setting aside the election.[7]

We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a Delaware corporation, engages in the business of air freight forwarding at its facility in Miami, Florida, where in the 12 months preceding the issuance of the complaint, it derived revenues in excess of $50,000 from the transportation of freight and commodities from the State of Florida directly to points outside the State. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Certification*

Following the election held May 8, 1986, the Union was certified August 20, 1987, as the collective-bargaining representative of the employees in the following appropriate unit:

> All drivers and warehousemen; excluding all supervisors, office clerical employees, managerial, confidential employees, and guards as defined in the Act.

On October 8, 1987, the Board issued an order correcting the certification by striking the unit just described and substituting the following appropriate unit:

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[4] 138 NLRB 66 (1962). In *Sewell* the Board announced that

> So long, therefore, as a party limits itself to *truthfully* setting forth another party's position on matters of racial interest and does not deliberately seek to overstress and exacerbate racial feelings by irrelevant, inflammatory appeals, we shall not set aside an election on this ground. However, the burden will be on the party making use of a racial message to establish that it was truthful and germane, and where there is doubt as to whether the total conduct of such party is within the described bounds, the doubt will be resolved against him.

Id. at 71–72 (emphasis in original).

[5] The Respondent contends that the hearing officer held that Silver did not make any anti-Cuban remarks. That contention misstates somewhat the hearing officer's actual findings, which were, in pertinent part.

> It is the finding of the undersigned that Silver did make a statement in effect stating what has been imparted [sic] to him. *I do not feel it was borne of malice* but merely an attempt by Silver to respond to a question as to who was involved in the organizing drive.[24]
>
> [24] The thrust of the Employer's argument at the hearing and in its brief was that it would be implausible and illogical for Silver to make an anti-Cuban, bigoted remark, and I agree. I find the *intent* was not anti-Cuban. In effect, Silver by responding in this manner conveyed to the person who asked the question, that he was aware of who was behind the organizing drive, as identified as Cuban and his displeasure with them for this activity.

(Emphasis added.) It is apparent that the hearing officer found that, irrespective of Silver's attitude toward Cubans, Silver was overheard to make a remark that was interpreted as anti-Cuban.

[6] The hearing officer did set forth the Board's standard for determining whether to invalidate an election because of "third party" conduct, i.e., whether the conduct created a general atmosphere of fear and reprisal, rendering a free choice of representative impossible. See, e.g., *Price Bros. Co.*, 211 NLRB 822, 823 (1974). However, the hearing officer made no finding concerning whether such an atmosphere of fear and reprisal had been created in this case. Instead, he turned to a discussion of *Sewell* and found the conduct in question here to have been unobjectionable under the *Sewell* analysis.

[7] We also reject the Respondent's contention that *M & M Supermarkets* requires that the election in this case be set aside. In *M & M Supermarkets*, a prounion employee deliberately injected the subject of religion into the campaign by making gratuitous remarks concerning the employer's religion; the court of appeals found those remarks to be so inflammatory as to invalidate the election. Here, by contrast, the employees merely repeated (with varying degrees of accuracy) the claim by Vasquez, an employee of another company, that he had overheard Silver say that he had no problems with Puerto Ricans, and that the only problems he had were with the "f— Cubans" who were trying to cause problems with the union matter in the warehouse. Thus, to the extent ethnic concerns were introduced into the campaign, they were introduced by Silver himself, not by the employees. See *Singer Co.*, 191 NLRB 179, 180 (1971) (declining to set aside election on the basis of inaccurate rumors that the employer's attorney was anti-Spanish, when the rumors arose out of a misunderstanding concerning the attorney's precipitous ejection of a Spanish-language interpreter from the polling area).

In *NLRB v. Bancroft Mfg. Co.*, 516 F.2d 436 (5th Cir. 1975), cert. denied 424 U.S. 914 (1976), a union organizer warned black employees on several occasions that "if the blacks did not stay together and the Union lost the election, all the blacks would be fired." 516 F.2d at 440. The court of appeals found those statements, *although untrue*, not to be racially inflammatory, or even to constitute attempts to incite racial passions, id. at 442–443, and therefore that they did not invalidate the election. Here, a fortiori, we found not only that no systematic attempt was made to inject ethnic issues into the campaign, but also that rumors about the Respondent's attitudes or intentions concerning Cubans actually originated in a statement by one of the Respondent's own high-ranking managers. The actions of the employees in circulating such rumors do not constitute the kind of gratuitous appeal to ethnic prejudice that *Sewell* brands as objectionable conduct. See *Beatrice Grocery Products*, 287 NLRB 302 (1987).

> All warehousemen employed by [Air Express] at its facility located at 2652-2658 N.W. 74th Avenue, Miami, Florida, excluding all other employees including drivers, office clerical employees, professional employees, guards and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. *Refusal to Bargain*

Since October 27, 1987, the Union has requested the Respondent to bargain, and since November 5, 1987, the Respondent has refused. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

By refusing on and after November 5, 1987, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).[8]

ORDER

The National Labor Relations Board orders that the Respondent, Air Express International Corporation, Miami, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Freight Drivers, Warehousemen and Helpers Local Union No. 390, an affiliate of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO as the exclusive bargaining representative of the employees in the bargaining unit.

(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) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All warehousemen employed by [Air Express] at its facility located at 2652–2658 N.W. 74th Avenue, Miami, Florida, excluding all other employees including drivers, office clerical employees, professional employees, guards and supervisors as defined in the Act.

(b) Post at its facility in Miami, Florida, copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 12, 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.

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

[8] The General Counsel requests that the remedy include a visitatorial clause authorizing the Board, for compliance purposes, to obtain discovery from the Respondent under the Federal Rules of Civil Procedure under the supervision of the United States court of appeals enforcing this Order. Under the circumstances of this case, we find it unnecessary to include such a clause, and we deny the General Counsel's request *Cherokee Marine Terminal*, 287 NLRB 1080 (1988).

[9] 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."

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 refuse to bargain with Freight Drivers, Warehousemen and Helpers Local Union No. 390, an affiliate of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America AFL–CIO as the exclusive representative of the employees in the bargaining unit.

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, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> All warehousemen employed by us at our facility located at 2652–2658 N.W. 74th Avenue, Miami, Florida, excluding all other employees including drivers, office clerical employees, professional employees, guards and supervisors as defined in the Act.

AIR EXPRESS INTERNATIONAL CORPORATION