

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE**

**1109 NOSTRAND AVENUE BAKERY INC.,
d/b/a ALLAN'S BAKERY**

and

Case No. 29-CA-30470

**LOCAL 53, BAKERY, CONFECTIONARY,
TOBACCO WORKERS & GRAIN MILLERS'
INTERNATIONAL UNION, AFL-CIO ¹**

*Tara O'Rourke, Esq., and Genaira
Tyce, Esq., Counsel for the General Counsel
Bruce J. Cooper, Esq., Counsel
for the Charging Party
Sharon Smith Fernandez and
Ronald Davis for the Respondent*

DECISION

Statement of the Case

Raymond P. Green, Administrative Law Judge. I heard this case in Brooklyn, New York on May 17, 2011. The charge in this case was filed on November 4, 2010 and the Complaint was issued on February 24, 2011. In substance, the Complaint alleges as follows:

1. That on March 15, 2005, Local 3, Bakery, Confectionery, Tobacco Workers and Grain Millers International Union, AFL-CIO, was certified by the Board as the bargaining representative of certain employees of the Respondent.

2. That the Respondent and Local 3 have been parties to a collective bargaining agreement that was effective for the period from March 1, 2007 to February 28, 2010.

3. That in April 2010, Local 3 merged with Bakery, Confectionery, Tobacco Workers and Grain Millers International Union, AFL-CIO, Local 50 and became Bakery, Confectionery, Tobacco Workers, and Grain Millers International Union, AFL-CIO, Local 53, herein called Local 53.

4. That on June 21, 2010, Local 53 and the Respondent reached a full and complete agreement to be effective from March 1, 2010 to February 28, 2013.

¹ Although the charge was originally filed in the name of Local 3, Bakery, Confectionery, Tobacco Workers & Grain Millers' International Union, AFL-CIO, that no longer exists as a separate entity. As alleged in the Complaint and not denied by the Respondent's Answer, Local 3 merged with Local 50 of this same international union to form Local 53. Accordingly, I have modified the caption of the case to reflect this change.

5. That since June 21, 2010, the Respondent has failed to honor the terms and conditions set forth in the new agreement by among other things, failing to pay employees the agreed upon wage rate and by failing to pay employees holiday pay for Martin Luther King Jr. Day.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the arguments filed, I make the following

Findings of Fact

I. Jurisdiction

The Complaint alleges that the Respondent, with a place of business at 1109 Nostrand Avenue, Brooklyn, New York is engaged in the production and retail sale of baked goods and other food items. It further alleges that during the past twelve month period, which is representative of its operations generally, the Respondent has derived gross annual revenues in excess of \$500,000 and that it purchased and received at its Brooklyn facility, goods and materials valued in excess of \$5,000 directly from suppliers located outside the State of New York. In response to the Complaint, the Company submitted a letter setting forth its position regarding the allegations of the Complaint. In this letter, the Respondent did not deny the jurisdiction allegations set forth at paragraphs 3 and 4 of the Complaint and they are therefore deemed to be admitted to be true. Accordingly, I conclude that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Complaint further alleges, the Respondent's Answer does not deny and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. The Alleged Unfair Labor Practices

The Company is a bakery specializing in Caribbean products. According to the testimony of Sharon Smith, her mother Gloria Smith is the owner. Sharon Smith testified that she and her sister are employees. At the time of the hearing, according to Sharon Smith, her mother was 71 years old, drew a salary and was intermittently involved with the running of the business.

On March 15, 2005, Local 3 was certified by the Board as the collective bargaining representative in the following unit of employees:

All full-time and regular part-time production employees, including oven workers, mixers, finishers, cleaners and packers, but excluding retail employees, head baker, clerical employees, managerial employees, guards and supervisors as defined in Section 2(11) of the Act.

At the time of this hearing, there were about nine part-time employees in the unit.

The Company and the Union executed a collective bargaining agreement that ran from March 1, 2007 to February 28, 2010. Sharon Smith signed this contract on behalf of the Respondent as the Company's Vice President and Narcisco Martas, who was the Union's President at that time, signed on behalf of the Union. During the negotiations for this contract, the Company was represented by Sharon Smith, Ronald Davis and an attorney. Except for one occasion when Gloria Smith was introduced to Martas at a bargaining session, she did not otherwise attend or participate in those negotiations.

Commencing on March 15, 2010, the parties met to negotiate a new agreement to replace the contract that expired on March 1, 2010. The evidence shows that there were three meetings where negotiations took place and one meeting that was scheduled but cancelled.

5 The Union's negotiating team consisted of union president Martas, Abelardo Aleman, a business agent, and Joseph Weinbel the Union's Secretary-Treasurer. In addition, the Union invited some employees to sit in on some of the negotiations. The Company was represented by Sharon Smith and Ronald Davis, who according to Smith was essentially a volunteer who provided this service for free. Gloria Smith did not appear during any of the meetings and the credible testimony of all the Union's witnesses was that at no time, did the Respondent's representatives state that her approval was necessary in order to finalize an agreement.² The credited evidence shows that except for specific demands brought up by both sides, the parties entered into negotiations with the understanding that the terms and conditions of the existing contract would be continued.

15 At the meeting that was held on March 15, 2010, the Union presented its initial demands. The Company agreed at this point that any new contract would have a three year term. In addition, the evidence shows that on this date or at the next meeting, the Union agreed to the Company's demand that it should not have to pay wages when employees could not come to work in a snow emergency. The Union's position was that any new contract should be retroactive to the expiration date of the old contract; i.e. March 1, 2010.

25 The next meeting took place on April 19, 2010. The evidence shows that at this meeting, the Company agreed that any new contract should contain a union check off provision. (The previous contract did not contain such a provision). The Union's witnesses testified that at this meeting, Davis agreed that any pay increases agreed to would be retroactive to March 1, 2010. In addition to the above, the evidence shows that the Union was demanding Martin Luther King Day as an extra holiday and that in response, Davis proposed switching an existing holiday, (Boxer's Day)³ to Martin Luther King Day. The Union did not, at this time, agree to the switch; instead demanding an additional day.

30 A meeting was scheduled for May 10 but it was called off by the Company. The reason is not relevant.

35 The final meeting took place on June 21, 2010. Sharon Smith and Ronald Davis were both present for the Company at this meeting. At the start of the meeting, the Union's representative, (Martas), modified his wage demand by decreasing it from a \$1.00 raise for each year to a \$.50 raise for each year. This was rejected by the Company. The Union then reduced its wage demand to \$.25, \$.35 and \$.45 for each year of a three year agreement. This too was rejected by the Company. The credible evidence shows that after a caucus, Davis in the presence of Smith, came back to the table and offered raises of \$.25 for the first year; \$.30 for the second year and \$.35 for the third year. The credited testimony also shows that after another caucus, the Union representatives came back and accepted the Company's offer. Finally, the credited evidence shows that the Union accepted the Company's proposal to shift Boxer's Day to Martin Luther King Day with no additions to the total number of existing holidays.

² In this regard, Sharon Smith testified for the Respondent and was its only witness. Her testimony was not corroborated despite the fact that Ronald Davis was at the hearing and acted as the Respondent's representative. He is an accountant and not an attorney.

50 ³ Boxer's Day, which is the day after Christmas, is a holiday in some countries that have been part of the British Empire.

The credited testimony of the Union’s witnesses shows that after they accepted the Company’s offer, the parties reviewed what had previously been agreed to, (snow days and dues check off), and agreed that all other terms and conditions contained in the expired contract would remain the same. According to the credited testimony of Martas, he agreed that the effective date of the contract should not be retroactive to March 1, 2010 but should commence as of June 21, 2010, commensurate with when the agreement was made. According to the corroborated testimony by the Union’s witnesses, the parties met upstairs in Davis’ office where they all shook hands and where Davis said they “had a deal.”

On July 23, 2010, the Union delivered to Davis’ office a draft of the contract that it had prepared.

At the end of July 2010, while the Union was having a convention in Las Vegas, Union representative Aleman received a phone call from Davis who said that he was not going to sign the contract because he had an issue with layoffs and retroactivity. Aleman told Davis that he would set up a meeting.

On August 11, 2010, Davis came to the Union’s office without Sharon Smith or any other company official. Martas testified that Davis sought to renegotiate the contract insofar as the effective date of the wage increase. Martas also testified that when Davis said that the Company was going to lay off two employees, Martas told him that the contract required the Company to retrain them for another department. Davis stated that he would not execute the contract and Martas said that he was not willing to change what had already been agreed to. As noted above, Davis did not testify.

Martas testified that on August 11, 2011, he also spoke to Sharon Smith on the phone and she pointed out that the proffered contract contained errors relating to snow days, the swapping of holidays and the probationary period. He acknowledged that there were some errors and told her that any errors would be corrected.

According to Martas, instead of forwarding a corrected copy of the contract, he decided to file an unfair labor practice charge because he then received a faxed letter from Sharon Smith dated August 11, raising additional issues and claiming that no agreement had been reached. Thus, instead of merely pointing out the errors in the proffered contract, Smith asserted that any new contract should contain no wage increases and that the number of holidays should be reduced from the existing four to three. I note that in this letter, Sharon Smith made no claim that any contract would have to be approved by her mother.

III. Analysis

The General Counsel presented four witnesses who essentially corroborated each other as what took place at the negotiations. On the other hand, the Respondent presented only the testimony of Sharon Smith. Smith’s version of these events was not corroborated by Ronald Davis who was at all of the meetings and who was present and available to testify. I therefore am going to credit the Union witnesses.

At the outset of the hearing, Mr. Davis claimed that the parties did not reach agreement because they had not reached an agreement on snow days, holidays and retroactivity. Yet it is clear from everyone’s testimony that the snow day issue was a company demand that the union acceded to at the outset. Moreover, the credited testimony was that the parties did agree to shift an existing holiday, Boxer’s Day to Martin Luther King Day and that the Union and the

Company agreed that any wage increases would begin on June 21, 2010, (the date of the agreement) instead of being retroactive to March 1, 2010.

5 The Respondent asserts that no agreement was reached because it was not approved by Gloria Smith. I do not agree. It is clear to me that the Respondent put forth only Sharon Smith and Ronald Davis as its representatives during the negotiations and that it did not represent that Gloria Smith's approval was required in order to reach an agreement. Sharon Smith had signed the previous contract and given all the circumstances, it is clear to me that she and Davis were authorized to bargain on behalf of the Company. At the very least, she and 10 Davis were held out to the Union as the Company's bargaining representatives and in the absence of any qualification as to their authority; they should be construed as having apparent authority. See *Hawaiian Paradise Park Corp. v. Friendly Broadcasting Co.*, 414 F.2d 750, 756 (9th Cir. 1969); *Metco Products v. NLRB*, 884 F.2d 156. In the latter case, the Court stated:

15 In the context of collective bargaining, the NLRB has adopted a clear and simple rule regarding the creation of apparent authority on the part of a labor negotiator. The NLRB has long held that "when an agent is appointed to negotiate a collective-bargaining agreement that agent is deemed to have apparent authority to bind his principal in the absence of clear notice to the 20 contrary. *University of Bridgeport*, 229 NLRB 1074. See also *Aptos Seascope Corporation* 194 NLRB 540 (1971), *Medical Towers Limited*, 289 NLRB No. 123 (1987) enfd. granted without opinion, *Medical Towers Ltd. v NLRB*, 862 F.2d 309 (3rd Cir. 1988). The laudable purpose of this rule is to lessen the opportunities for ambiguity and confusion by requiring a party who chooses to negotiate through an agent to disclose any limitations on the agent's authority. Here Metco does not dispute the fact that neither Saperstein nor any other 25 company official ever stated to the union the alleged limitations on Pearlman's authority. Metco's omission thus raises a rebuttable presumption in favor of the reasonableness of the Union's perception that Pearlman had full authority to enter into an agreement on Metco's behalf. 30

In my opinion, the credible evidence taken as a whole, shows that the Union and the Company reached a full agreement on June 21, 2010. At that meeting, after making reductions in its wage increase demands, the Union ultimately accepted the Respondent's offer. Also 35 instead of having the contract be retroactive to the expiration date of the previous contract, the Union essentially agreed that there would be no retroactivity at all, inasmuch as the parties agreed that the terms would go into effect on the date that the agreement was reached. (June 21, 2010).

40 The parties had previously agreed that the terms of the preceding contract would be continued unless explicitly modified. During the previous meetings, the parties had already agreed that there would be a shifting of one holiday; that the employer would have the right to not pay employees if the premises were closed due to snow; and that the employer would check off union dues. Therefore, with the final agreements that were made on June 21, relating to 45 wage increases and the effective date of their implementation, the parties concluded a full and complete collective bargaining agreement.

In my opinion, the General Counsel has established that the parties had reached a meeting of the minds. Accordingly, having reached a full agreement, the Respondent (and the 50 Union), is required to implement the terms of that agreement. Its subsequent refusal to do so, therefore constitutes a violation of Section 8(a)(1) & (5) of the Act. *Carpenters Local 405*, 328 NLRB 788, 794 (1999).

Remedy

5 Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

10 The General Counsel is not alleging that the Respondent has failed to execute the contract that was proffered by the Union. The reason is that the proffered agreement contained errors that did not accurately reflect the terms that had been agreed upon. And although the Union's representative expressed the willingness to correct the mistakes, he did not do so; instead filing this unfair labor practice charge. I note though, that the failure to send a corrected copy does not detract from the fact that an agreement was, in fact, reached. Martas' decision on this score is explained by the Employer's stated intention on June 21, to withdraw from the agreement that had already been made.

20 It is therefore recommended that the Respondent be ordered to comply with and implement the terms and conditions of the agreement that was consummated on June 21, 2010. This agreement consists of the terms set forth in the previous contract (March 1, 2007 to February 28, 2010), plus (a) a dues check off provision; (b) a provision permitting the employer to not pay employees when the facility is closed due to snow; (c) a switch in holidays from Boxer's Day to Martin Luther King Day; and (d) wage increases in the amount of \$.25 for the first year; \$.30 for the second year and \$.35 for the third year. Further, the effective date for implementation of the agreement is June 21, 2010.

25 To the extent that any employees have incurred a loss in wages as a consequence of the Employer's failure to implement the agreement, it recommended that the Respondent make those employees whole for any loss of earnings and other benefits suffered as a result of the discrimination against them. Backpay shall be computed in accordance with *F.W. Woolworth Co.*, 90 NLRB (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1187 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

30 On these findings of fact and conclusions of law and on the entire record, I issue the following recommended ⁴

ORDER

40 The Respondent, 1109 Nostrand Avenue Bakery Inc., d/b/a Allan's Bakery, its officers, agents, and representatives, shall

1. Cease and desist from

45 (a) Refusing to implement and abide by the agreement that was entered into with Local 53, Bakery, Confectionary, Tobacco Workers & Grain Millers' International Union, AFL-CIO on June 21, 2010.

50 ⁴ 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.

(b) In any like or related manner interfering with, restraining or coercing employees in the rights guaranteed to them by Section 7 of the Act.

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

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(a) Implement the agreement that was made with the Union on June 21, 2010 and abide by its terms for the duration of that agreement.

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(b) Make whole employees for any loss of earnings and other benefits suffered as a result of the Respondent failure to implement the agreement that was reached on June 21, 2010.

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(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

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(d) Within 14 days after service by the Region, post at its Brooklyn, New York facility, copies of the attached notice marked "Appendix"⁵ Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 21, 2010.

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(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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Dated, Washington, D.C., June 16, 2011.

Raymond P. Green
Administrative Law Judge

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⁵ 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.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to implement and abide by the terms of an agreement that we reached with Local 53, Bakery, Confectionary, Tobacco Workers & Grain Millers' International Union, AFL-CIO on June 21, 2010.

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

WE WILL implement the agreement that was made with the Union on June 21, 2010 and abide by its terms for the duration of that agreement.

WE WILL make whole employees for any loss of earnings and other benefits suffered as a result of our failure to implement the agreement that was reached on June 21, 2010.

**1109 Nostrand Avenue Bakery, Inc., d/b/a
Allan's Bakery**

(Employer)

Dated _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

Two MetroTech Center, Jay Street and Myrtle Avenue, Suite 5100
Brooklyn, New York 11201-3838
Hours: 9 a.m. to 5:30 p.m.
718-330-7713.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 718-330-2862.