

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10**

GAYLORD CHEMICAL COMPANY, LLC §

and

**UNITED STEEL WORKERS
INTERNATIONAL UNION,
AND ITS LOCAL 887**

§ **CASE NO. 10-CA-38782**

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**EMPLOYER'S BRIEF IN SUPPORT OF ITS EXCEPTIONS
TO THE ADMINISTRATIVE LAW JUDGE'S DECISION**

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I. INTRODUCTION

Gaylord Chemical Company, LLC (hereinafter “Employer” or “Gaylord”) submits this Brief in Support of its Exceptions to the Administrative Law Judge’s Decision (“Decision”), which Administrative Law Judge Ira Sandron (“ALJ”) issued on August 18, 2011. In his Decision, the ALJ concluded Gaylord’s refusal to recognize and bargain with the Union was a violation of Section 8(a)(5) and (1) the National Labor Relations Act (“NLRA” or “Act”). (D. 8:45-46)¹ He also found the Employer unlawfully interrogated employees, created a position without first bargaining with the Union and refused to respond to the Union’s information requests. (D. 8:50-9:5).

Gaylord maintains the record does not support the ALJ’s decision. Gaylord does not have a duty to bargain with the Union, and, as such was not obligated to respond to the Union’s request for information or to bargain over a new position. Gaylord also denies it unlawfully interrogated employees.

Accordingly, the NLRB should overrule the ALJ’s Decision as described herein.

II. FACTUAL BACKGROUND AND ARGUMENTS IN SUPPORT OF EXCEPTIONS

Gaylord is a Louisiana Limited Liability Corporation and is engaged in the production of Dimethyl sulfoxide (“DMSO”) at its Tuscaloosa, Alabama manufacturing site. Gaylord’s corporate headquarters are located in Slidell, Louisiana. The parties do not contest salient facts in this dispute. The Administrative Law Judge merely had to determine whether under the record evidence Gaylord enjoyed the right at its new facility in Tuscaloosa to decline to recognize a party that did not previously represent its employees.

¹ “(D. __)” references the Report by page and line number, “(Tr. __)” references cites to the official hearing transcript page, “(J. Ex. __)” and (G.C. Ex __) refers to exhibits submitted during the hearing.

Prior to commencing operations in Tuscaloosa, Gaylord operated in Bogalusa, Louisiana where it manufactured DMSO and Dimethyl sulfide (“DMS”). Gaylord does not manufacture DMS at its Tuscaloosa plant. Gaylord’s new operations involves some of the same equipment it used in Bogalusa but it built the new plant from scratch and it contains new piping; an essential element of the manufacturing process.

For years, certain employees working in Bogalusa were represented for purposes of collective bargaining, first by the paperworkers and later by the steelworkers. In Bogalusa, the certified bargaining representative was set forth as “The United Steel Workers International and its Local No. 13-1089.” At no time have the employees informed Gaylord of any desire to be represented by United Steel Workers District 9.² In that regard, Gaylord has only received requests for bargaining or for information from District 9. (J. Ex. 4-7.)

A. General Counsel Failed to Carry its Burden of Proof That Respondent Violated Section 8(a)(1) and (5) of the National Labor Relations Act Because There is No Evidence of Unlawful Interrogation or Evidence Establishing a Continuing Bargaining Relationship With District 9

Mike Tourné, a longtime Union representative of the employees while they worked at the Bogalusa facility, testified succinctly that each contract Gaylord entered into with the Union was a “three-party agreement.” (Tr. at 170.) Tourné confirmed that Local 189 was present at the bargaining table for every negotiation, and was a necessary signatory to every contract. *Id.* and (Tr. at 144.) The ALJ completely ignored this evidence concluding that USW International, standing alone, is the certified bargaining representative. (D. 6:35). This conclusion is at odds with the evidence.

² Gaylord understands that employees signed authorization cards with District 9 after Gaylord relocated to Tuscaloosa. Gaylord learned of this from the Labor Board which confirmed majority status and from testimony at the hearing.

As noted above, all of the various contracts the General Counsel entered into evidence (J. Exs. 1, 2, 3 and 12) the certified bargaining representative was the different iterations of the international entity “and its Local 189.” This use of the conjunctive phrasing is significant because it identifies the specific Local which is the certified representative. According to Dan Flippo, this phraseology is not what the Union typically uses in its contracts. Mr. Flippo indicated it was used in “older contracts.” The more common way the Union identifies its certified bargaining representative is to phrase it to identify the international on behalf of its local. (Tr. at 88.) Further, there is no question that the Local is its own entity. “The local Union has its own attorney. They have their own officers, their own finances all of that...” (Tr. at 83.) Again, the ALJ made no mention of Flippo’s testimony confirming that this relationship was not like others the USW typically constructs.

Again while the ALJ adopted the Union and General Counsel’s positions that Gaylord had a legal obligation to recognize the Union in response to District 9’s requests for recognition and bargaining because Gaylord hired more than 50% of the employees, he ignored the Union’s own actions which belie that position. First, Tourné’s email to Flippo advising him of Gaylord’s move to Tuscaloosa concludes with Tourné’s statement that the employees desire Union representation. (G.C. Ex. 14.) Further, the Union sought new authorization cards from employees after the Tuscaloosa relocation. (Tr. at 65.) If, as the Union and the General Counsel contend and the ALJ found, Gaylord was obligated to recognize and bargain with the Union post-relocation, then why seek new authorization cards? Nothing precluded the Union then or now from filing a representation petition with the Labor Board in order to seek certification for a new local.

Instead, the ALJ permitted the Union to manufacture a new certified bargaining representative at a new facility with a workforce that currently has no collective bargaining agreement or relationship with District 9. (Tr. at 102.) In this regard, there is no dispute that Gaylord and Local 189 negotiated the effects of the Bogalusa shutdown which resulted in severance payments for all affected employees. (Tr. at 61 and G.C. Ex. 21.)

While the Union attempted to impute an anti-Union bias to Gaylord, it does not appear that a factor in the Decision. Nevertheless, the ALJ likewise did not address at all the evidence of no bias. This is important: 1) because it illustrates Gaylord is merely conforming with its belief the Union did not travel with it to Tuscaloosa; and 2) the alleged unlawful interrogations were not tinged with any anti-Union animus. Indeed, as employee Ronald Talley confirmed, Gaylord was under no obligation to hire any of the employees who had worked at the Bogalusa facility. (Tr. 61.) Yet, there is no dispute that Gaylord brought on board nearly all of the employees it had severed from Bogalusa. (J. Ex. 28.) Further, there is no dispute that Gaylord's reason for relocating had nothing to do with the Union. (Tr. at 58.)

Thus, it is with this backdrop that the legal issue be framed. That is, is an employer who relocates its facility approximately 238 miles³ obligated to recognize and bargain with a local that was not a signatory to the contract that existed prior to the closing. The ALJ did not cite to any Board or court opinion on facts like those here that supported the Decision. Gaylord submits there are no Board or Court decisions that contain the same salient facts that exist here: 1) the conjunctive definition of the certified bargaining representative as being both the international and the designated local (189); 2) the significant distance of the move; 3) the admitted absence of anti-Union bias behind Gaylord's decision to relocate; 3) the Union's internal requirement that

³This mileage is derived from point to point from Bogalusa to Tuscaloosa on Google maps.

employees continue to express a desire for Unionization; 4) the geographic definition in the collective bargaining agreement (Bogalusa); and 5) the solicitation of authorization cards post-relocation.

Gaylord believes that under this factual scenario it has no current bargaining obligation. And, while as noted above, there are no Board or Court decisions directly on point, there exists guidance confirming Gaylord's position. See e.g. International Union, United Automobile, Aerospace, and Agricultural Implement Workers v. NLRB, 394 F.2d 757, 761 (D.C. Cir.), *cert. denied*, 393 U.S. 831 (1968) ("where the International has been certified, an employer could hardly be held guilty of an unfair labor practice for failing to recognize a local union which was not certified"). Further, courts have found that "a substantial change in geographic location" coupled with an absence of unfair labor practice charges regarding the move are factors to be considered in determining whether an employer must recognize a union at the new facility. See NLRB v. Mass. Machine & Stamping, Inc., 99 LRRM (BNA) 2939 (1st Cir. 1978) ("There is no issue here of improper motive in seeking the move, nor of any unfair labor practice associated with the move itself. The move to a location forty miles away in a different state, under these circumstances, is a compelling reason for giving workers hired there the right to bargain for their own conditions of employment or choose their own bargaining representative.").

In addition, when, as is the case here, the unit description sets out that it is for employees working at "Bogalusa," the Union cannot transfer its representation rights to another location. See NLRB v. Waymouth Farms, Inc., 172 F.3d 598 (8th Cir. 1999).

What seems apparent is the Union and its Alabama local are not secure in their belief that a majority of the employees working in Tuscaloosa desire union representation. Otherwise, there is nothing that would prevent the Union from filing a petition and seeking an election to certify

itself and the new local as the employees' bargaining representative. Instead, the Union is using this process to force these employees to sign on with a new local with which it has no history. It is clear from the evidence that Gaylord had a contractual agreement with Local 189 for employees working at its Bogalusa facility. Because Local 189 is no longer seeking to represent the employees and they are no longer in Bogalusa, Gaylord has no current bargaining duty with District 9 or the USW International.

The evidence does not support a finding that Gaylord violated Section 8(a)(1) of the Act. The testimony is limited to several one-on-one meetings Marc Smith held with employees to discuss matters related to plant operations. Likewise, the testimony surrounding the "townhall" meeting did not reveal anything that would constitute an 8(a)(1) violation.

For purposes of these Exceptions, Gaylord does not dispute the factual underpinnings for the ALJ's findings with regard to the request to bargain and Gaylord's creation of the lead shipper position. But, since both of those findings are predicated upon a legal conclusion that the Act binds Gaylord to recognize and bargain with the Union, the findings fails if there was no such duty. As discussed above, because the Act did not require Gaylord to recognize and bargain with District 9, the Board cannot hold it to have violated the Act for not responding to the Union's request for information or for not bargaining with the Union about the lead shipper position.

III. CONCLUSION

Based upon the foregoing, the Employer requests the ALJ's Decision, including his Conclusions of Law, Remedy, and Order, regarding the foregoing matters be overruled.

Respectfully submitted this 17th day of October, 2011.

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