

Goya Foods, Inc. and Juan R. Silva. Case 22-CA-7763

September 29, 1978

DECISION AND ORDER

Upon a charge filed by Juan R. Silva, hereinafter Charging Party, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 22, issued a complaint and notice of hearing on August 5, 1977. Copies of the charge and the complaint and notice of hearing were duly served on Respondent. The complaint alleges that Respondent violated Section 8(a)(1) of the National Labor Relations Act, as amended, by failing and refusing to reinstate or place on a preferential hiring list certain striking employees who had made unconditional offers to return to work. Respondent filed a timely answer admitting certain factual allegations, but denying the commission of any unfair labor practice.

On February 6, 1978, the Charging Party, Respondent, and the General Counsel entered into a stipulation in which they agreed that certain formal papers filed in the proceeding and the stipulation, together with the exhibits attached thereto, constitute the entire record in this case. The parties waived a hearing before an Administrative Law Judge, the making of findings of fact and conclusions of law by an Administrative Law Judge, and the issuance of an Administrative Law Judge's Decision. They submitted this proceeding directly to the Board for findings of fact, conclusions of law, and the entry of an appropriate order by the Board, reserving to themselves the right to file simultaneous briefs on the date set for their receipt.

On March 22, 1978, the Board approved the stipulation, transferred this proceeding to itself, and set a date for the filing of briefs. Thereafter, the General Counsel and Respondent filed briefs.

The Board has considered the entire record herein, as stipulated by the parties, including the briefs, and makes the following:¹

FINDINGS OF FACT AND CONCLUSIONS

I. THE BUSINESS OF THE EMPLOYER

Respondent is a Delaware corporation with a facility in Secaucus, N.J., where it is engaged in the warehousing, sale, and distribution of packaged and canned foods and related projects. During the preceding 12 months, which period is representative of all times material herein, Respondent has sold and dis-

tributed or caused to be sold and distributed from its plant products valued in excess of \$50,000 which were shipped in interstate commerce to States of the United States other than the State of New Jersey. The parties stipulated and we find that Respondent is now, and at all material times has been, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and we further find that it will effectuate the purposes of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATIONS INVOLVED

The parties stipulated, and we find, that Local 481, Production, Industrial, Technical, Miscellaneous and Amalgamated Workers Union (hereinafter Local 481), and Local 56, Amalgamated Food and Allied Workers Union (hereinafter Local 56), are labor organizations within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. The Stipulated Facts

Since June 1974, Local 481 has been the duly certified representative of Respondent's employees. The last collective-bargaining agreement expired May 31, 1977.² On March 18, Local 481 notified Goya of its desire to modify the contract and requested negotiations.

On March 24, a petition was filed in Case 22-RC-7099 by Local 56, Respondent, Local 481, and Local 56 executed a Stipulation for Certification Upon Consent Election and an election was scheduled for May 27.

On May 18, certain employees struck to protest the discharge of two employees who were terminated for fighting, in violations of company rules and regulations. On May 23, Respondent discharged 12 leaders of the strike on the grounds that the strike was in derogation of the no-strike clause in the contract. The contract provides for compulsory and binding arbitration over "all complaints, disputes, controversies and grievances of any kind." It further provides, "There shall be no strike, slowdown or work stoppage during the life of this agreement . . ." and "any employee who violates this clause shall be subject to discipline up to and including discharge." Grievances were filed concerning the aforementioned discharges.

On May 19 and 24, unfair labor practice charges were filed by Local 481 alleging that the discharges violated Section 8(a)(1), (3) and (5) of the Act. The charges were dismissed by the Regional Director, and

¹ As the record and briefs adequately present the position of the parties, Respondent's request for oral argument is hereby denied.

² All dates hereinafter are in 1977 unless otherwise specified.

all appeals to the Board were denied. The scheduled election was postponed.

On May 23, Respondent obtained a temporary restraining order enjoining the strike. The employees returned to work on May 25.

On May 31, the contract expired, and on June 1, a majority³ of Respondent's approximately 112 employees struck for the stated object of obtaining reinstatement of the previously discharged employees. Subsequent to June 1, but prior to June 9, the striking employees added as objects of the strike a demand for a new contract containing improved wages, hours, and terms and conditions of employment and also a demand that Respondent recognize Local 56 as their exclusive bargaining agent.

On June 7 and 8, 43 striker replacements were hired. On June 9, the remaining vacancies were filled by reinstating certain striking employees. On June 9, 10, and 13, 22 named striking employees sought reinstatement to their former positions.

Respondent refused and continues to refuse to reemploy, reinstate, or place these employees on a preferential hiring list.

The election in Case 22-RC-7099 was held July 8. A Decision and Certification not included in the bound volumes of Board Decisions issued April 26, 1978, certifying Local 56 as the exclusive representative.

B. *The Contentions of the Parties*

The General Counsel contends that the strike was protected at all times on and after June 1 and that Respondent has violated Section 8(a)(1) of the Act by refusing to reinstate the striking employees or place them on a preferential hiring list.

He contends that the strike commencing June 1 to protest the lawful and nondiscriminatory discharge of coworkers was protected because it was after the May 31 expiration of the contract containing the no-strike clause.

Respondent argues the Board should find that a no-strike clause is coterminous with the duty to arbitrate and may extend beyond the term of the agreement. It contends that the Supreme Court's decisions in *Gateway Coal*⁴ and *Nolde Brothers, Inc.*,⁵ support a holding that a strike conducted after the expiration of a collective-bargaining agreement is not protected activity under the National Labor Relations Act when the underlying dispute giving rise to the strike (1)

arose during the term of or was created by the expired collective-bargaining agreement and (2) is subject to compulsory and binding arbitration.

The General Counsel argues that while the Supreme Court has held that an arbitration clause is usually the *quid pro quo* for a no-strike clause,⁶ it has also stated that the two are analytically different and must ultimately depend on the intent of the contracting parties.⁷ He concedes that while it is arguable that in *Nolde*⁸ the duty not to strike over arbitrable issues extends beyond the term of the collective-bargaining agreement, it does not do so in this case, because the no-strike clause herein is much narrower than that in *Nolde*. The clause in *Nolde* provided that there would be no strike pending negotiations or during arbitration. In the instant case the clause provides for "no strike, slowdown, or work stoppage during the life of the agreement."

The General Counsel also contends that even if the strike was not protected on June 1, it became so prior to June 9 (the date some of the strikers offered to return to work), because the striking employees added as objects of the strike a demand for a new contract and recognition of Local 56. He argues that strike activity for such objects is protected under the doctrine first enunciated by the Board in *The Hoover Company*.⁹ Finally, the General Counsel argues that even if the recognition object is found to be unprotected, striking for this objective does not simultaneously "taint" striking for the stated object of improving wages and working conditions and therefore render the entire strike unprotected.

With respect to the additional objects of the strikers, Respondent contends that they further rendered the strike unprotected because they had the effect of requiring it to violate Section 8(a)(1) and (2) of the Act under the doctrine announced by the Board in *Midwest Piping and Supply Co., Inc.*¹⁰

C. *Discussion and Conclusions*

We agree with Respondent that the no-strike clause herein has coterminous application with Respondent's duty to arbitrate under the expired agreement.

In *Nolde* the Supreme Court adopted the rule that the contractual duty to arbitrate disputes arising out of or during the term of a collective-bargaining agreement extends beyond the date of expiration of that agreement, unless negated expressly or by clear impli-

³ The parties stipulated that the strikers constituted a majority of unit employees.

⁴ *Gateway Coal Co. v. United Mine Workers of America*, 414 U.S. 368 (1974).

⁵ *Nolde Brothers, Inc. v. Local No. 358, Bakery & Confectionery Workers Union, AFL-CIO*, 430 U.S. 243 (1977).

⁶ *Boys Market, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970); *Textile Workers Union of America v. Lincoln Mills of Alabama*, 353 U.S. 448 (1957).

⁷ *Gateway Coal Co.*, *supra*.

⁸ *Nolde Brothers*, *supra*.

⁹ 90 NLRB 1614 (1950), enforcement denied 191 F.2d 380 (C.A. 6, 1951).

¹⁰ 63 NLRB 1060 (1945).

caution. The Court reasoned that the dispute therein was "over an obligation arguably created by the expired agreement" and found that "the fact that the Union asserted its claim to severance pay shortly after, rather than before contract termination did not control the arbitrability of that claim." The Court recognized that the arbitration duty is a creature of the collective-bargaining agreement and that a party cannot be compelled to arbitrate any matter in the absence of a contractual obligation to do so, but it nevertheless found that the duty extends postcontract. It reasoned that such conclusion was derived from the parties' intent in agreeing to arbitrate differences arising under the contract and from the reasons for the national labor policy favoring arbitration over judicial resolutions of disputes, including the parties' confidence in the arbitration process, the arbitrator's presumed special competence in matters concerning bargaining agreements, and the parties' interest in obtaining a prompt and inexpensive resolution of their disputes. The Court stated:

The parties must be deemed to have been conscious of this policy when they agree to resolve their contractual differences through arbitration, consequently, the parties' failure to exclude from arbitrability contract disputes arising after termination, far from manifesting an intent to have arbitration obligations cease with the agreement, affords a basis for concluding that they intended to arbitrate all grievances arising out of the contractual relationship. In short, where the dispute is over a provision of the expired agreement, the presumptions favoring arbitrability must be negated expressly or by clear implication.¹¹

In *Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of America, v. Lucas Flour Co.*,¹² the Supreme Court first endorsed the rule announced by the Board in *W. L. Mead, Inc.*,¹³ that a contractual commitment to submit disagreements to arbitration gives rise to an implied, rather than contractual, obligation not to strike over such disputes. In *Gateway Coal, supra*, the Court, while holding that the duty to arbitrate a certain matter gives rise to an implied no-strike obligation which would support injunctive relief, noted that ultimately the matter depended upon the intention of the contracting parties. The Court stated:

Thus, an arbitration agreement is usually linked with a concurrent no-strike obligation, but

two issues remain analytically distinct. Ultimately, each depends on the intent of the contracting parties. It would be unusual, but certainly permissible, for the parties to agree to a broad mandatory arbitration provision yet expressly negate any implied no-strike obligation. Such a contract would reinstate the situation commonly existing before our decision in *Boys Markets*. Absent an explicit expression of such an intention, however, the agreement to arbitrate and the duty not to strike should be construed as having coterminous application.¹⁴

In sum, the Court in *Nolde* found that the duty to arbitrate extended beyond the contract term if over a matter covered by or created by the contract and in *Lucas Flour* and *Gateway Coal* found that, absent express negation, the contractual duty to arbitrate over a particular issue implied a duty not to strike over the same issue.

In the instant case, the parties do not dispute the fact that the only permissible means of settling the dispute over Respondent's discharge of 14 employees in May was arbitration over the resulting grievances that were filed, even though the contract had expired. Respondent and Local 481 did in fact take the matter to arbitration. In addition, we find that the no-strike clause in the contract herein has coterminous application with that duty to arbitrate. In our view, the words "during the life of this agreement" contained in the no-strike clause do not constitute express negation that the duty not to strike should continue with the duty to arbitrate. The agreement "lives" on in the duty to arbitrate; so should the duty not to strike live on to the extent of the duty to arbitrate over issues created by or arising out of the expired agreement.

We believe that our conclusion is consistent with the strong national policy favoring arbitration of labor disputes. Furthermore, it would indeed be anomalous if an employer who would be contractually bound to arbitrate a certain dispute after contract expiration could still be subjected to economic pressure that would be protected.

Thus, we find that Respondent's employees were bound by their agreement not to strike. It follows that the strike commencing June 1 was unprotected and Respondent has no duty to reinstate the striking employees or place them on a preferential hiring list.

We further find that, since the object of reinstatement of the discharged employees remained part of the strikers' demands, the strike was unprotected at all times and had the effect of tainting the entire strike even though the additional demands might be lawful. Therefore, we find it unnecessary to reach the question of whether or not the additional demands

¹¹ *Nolde, supra*, 430 U.S. 243, at 255.

¹² 369 U.S. 95 (1962). This case was an action for damages for breach of contract. The employees struck, in the absence of a no-strike clause, over a discharge subject to arbitration under the contract.

¹³ 113 NLRB 1040 (1955). The Board found no violation of Sec. 8(a)(1) and (3) where the Employer discharged strikers who struck over an issue subject to arbitration: the contract did not contain a no-strike clause.

¹⁴ 414 U.S. 368, 382.

for recognition of Local 42 and for a new contract were protected objects of the strike. Accordingly, we shall order that the allegations of the complaint be dismissed.

CONCLUSIONS OF LAW

1. Respondent Goya Foods, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local 481, Production, Industrial, Technical, Miscellaneous and Amalgamated Workers Union, and Local 56, Amalgamated Food and Allied Workers Union, are labor organizations within the meaning of Section 2(5) of the Act.

3. Respondent has not committed unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act by refusing to reinstate the striking employees or place them on a preferential hiring list.

Upon the foregoing findings of fact and conclusions of law and the entire record and pursuant to Section 10(c) of the Act, we hereby issue the following:

ORDER

It is ordered that the complaint be, and it hereby is, dismissed in its entirety.

CHAIRMAN FANNING, concurring:

I agree with the result reached by my colleagues, but for different reasons. Before setting forth my reasons, I will indicate why I cannot agree with the rationale used by my colleagues. In my view, the no-strike promise ended with the contract—that is what the no-strike provision specifically states. Unlike my colleagues, I do not believe *Nolde* is applicable here; *Nolde* presents a different issue in a different context; it does not deal with the waiver of Section 7 or statutory rights. Where Section 7 or statutory rights have been involved, the Board has insisted that waivers will not be readily inferred, and there must be a clear and unmistakable showing that waiver occurred.¹⁵ Here, however, my colleagues would find not only that the arbitration provision extended beyond the duration of the contract but that the no-strike clause, although encompassing specific language to the contrary, also extended beyond the life of the contract. To me, using an at-best-dubious double inference hardly satisfies the Board's prerequisite that there be a

¹⁵ *Gary-Hobart Water Corporation*, 210 NLRB 742 (1974), enf. 511 F.2d 284 (C.A. 7, 1975); *The Timken Roller Bearing Company v. N.L.R.B.*, 325 F.2d 746 (C.A. 6, 1963), cert. denied 376 U.S. 971 (1964); *Rockwell-Standard Corp., Transmission and Axle Division, Forge Division*, 166 NLRB 124 (1969), enf. 410 F.2d 953 (C.A. 6, 1969); *Beacon Piece Dyeing and Finishing Co., Inc.*, 121 NLRB 953 (1958); *The Fafnir Bearing Company*, 146 NLRB 1582 (1964).

clear and unmistakable waiver of statutory rights.¹⁶ I would find that when the employees again went out on strike the day after the contract expired to protest the discharge of their fellow employees they were engaged in protected activity.¹⁷

However, my view of this case and the protected nature of the strike changes when the object of the strike changed to include demands for a new contract containing improved wages, hours, and conditions of employment and that Respondent recognize Local 56.

In *Hoover Company*,¹⁸ and more recently in *St. Regis Paper Company*,¹⁹ the Board held that concerted recognitional activity in the face of an outstanding rival claim for recognition is not *per se* unprotected. Fundamental to both the *Hoover* and *St. Regis* holdings, however, is the proposition that employer acquiescence to such a demand would not necessarily amount to a violation of Section 8(a)(2) and, for that reason, such activity should not lose its otherwise protected status. The rule of *Hoover* and *St. Regis* is grounded, in my view, upon equitable considerations, most notably the possibility that those making the demand might be completely unaware of the outstanding rival claim for recognition. That was in fact the case in *St. Regis*, and while the union in *Hoover* may have been aware of the rival claim, its activity at least preceded the rival's, and the rival claim was never acknowledged by it as valid. Here, Local 56 not only was aware of Local 481's outstanding recognitional interest but also went so far as to execute with it a stipulation for certification upon consent. Under such circumstances, Goya's potential for violating Section 8(a)(2) by acceding to Local 56's demand is more than mere possibility. That Local 481 "might have withdrawn from the ballot," as the General Counsel proffers, is sufficiently remote, in my view, given the election agreement, as to warrant a different result than was reached in *Hoover* and *St. Regis*. Our whole experience under the directly related *Midwest*

¹⁶ As the Supreme Court said in *Mastro Plastics Corp. and French American Reeds Mfg. Co. v. N.L.R.B.*, 350 U.S. 270 (1956), in a slightly different context:

To adopt petitioners' all-inclusive interpretation of the clause is a different matter. That interpretation would eliminate for the whole year, the employees' right to strike Whatever may be said of the legality of such a waiver when explicitly stated, there is no adequate basis for implying its existence without a more compelling expression of it than appears in . . . this contract. [Emphasis supplied.]

¹⁷ To the extent my colleagues' holding implies that striking to obtain the reinstatement of discharged employees (whether discharged lawfully or not) is not protected activity I would also take exception. It is, of course, hornbook law that employees are protected when they strike to protest discharges, absent an applicable no-strike clause. As I understand my colleagues' position, the employees on strike here were not protected because the no-strike clause, in their view, remained in effect after its expiration date with regard to the discharged employees.

¹⁸ 90 NLRB 1614 (1950), enforcement denied 191 F.2d 380 (C.A. 6, 1951).

¹⁹ 232 NLRB 1156 (1978).

*Piping*²⁰ doctrine suggests caution in the development of *per se* applications. Just as I read *Hoover* and *St. Regis* to hold that not all concerted recognitional ac-

tivity in the face of an outstanding rival claim for representation is *per se* unprotected, I do not infer from that that all such activity is *per se* protected. On the facts of this case, I would find an unlawful object as to the resumed picketing. On the basis I would dismiss.

²⁰ 63 NLRB 1060 (1945).