

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

TRUSTONE FINANCIAL FEDERAL CREDIT
UNION,

Respondent,

and

OFFICE AND PROFESSIONAL EMPLOYEES
UNION, LOCAL 12, AFL-CIO,

Charging Party

Cases 18-CA-158210
18-CA-163034
18-CA-165634

GENERAL COUNSEL'S POST-HEARING BRIEF

I. Introduction

Counsel for the General Counsel submits this Post-Hearing brief in support of the complaint allegations in the above cases. Respondent, Trustone Financial Federal Credit Union, unlawfully withdrew recognition from Office and Professional Employees Union, Local 12, AFL-CIO (the Union), as the employees' representatives prior to relocating two of its facilities, and then refused to recognize the Union as the employees' representatives at the relocated facilities even though a substantial percentage of those employees were former unit members. In conjunction with its unlawful withdrawal of recognition, Respondent engaged in direct dealing with employees over their terms and conditions of employment, unlawfully declared that the

relocated facilities would be non-Union, and refused to transfer to one of the relocated facilities employees who did not want to give up their right to Union representation.

Finally, Respondent interfered with a steward's representational duties in abrogation of the collective bargaining agreement. Based on the evidence adduced at the hearing on January 11 and 12, 2016, Respondent violated Section 8(a)(1), (3), and (5) of the Act.

II. The Parties and their Bargaining History

The Unit at issue in this dispute is set forth in the current collective bargaining agreement between Respondent and the Union, effective by its terms from October 1, 2014 to September 30, 2016:

Full Time and Part Time office and clerical Employees; excluding Field Representatives, Managerial Employees, Temporary Employees, Student Work Program Employees, Professional Employees, Watchmen, Guard, Confidential Employees and Supervisors as defined in the Act per Case No. 18-RC-12178.

GC. Exh. 22.¹

The Unit description contains no geographic limitation. Respondent and the Union have had a series of collective bargaining agreements covering the terms of employment of the Unit since approximately 1980. Tr. 15-16. During this approximately 26 year history, Respondent has opened new facilities and relocated existing facilities without contesting the fact that office and clerical employees, irrespective of location, are "in" the Unit and are represented by the Union. Tr. 93-96; 226-27. Thus, "office and clerical employees" working at Respondent's Headquarters in Plymouth, Minnesota,

¹ References to the transcript are indicated by "Tr." followed by page number, and exhibits are noted as either "GC. Exh." (General Counsel) or "Resp. Exh." (Respondent).

and branch facilities throughout the Minneapolis – St. Paul metropolitan area have historically been included the Unit. Tr. 17-18. Employees were included in the Unit when Respondent opened the Apple Valley facility (at issue in this matter) around 1991 and a new facility in South Minneapolis in 2010, and relocated its facilities in Roseville in 1998 and Maple Grove in 2009. Tr. 93-96. Historically, the distinction between opening “new” facilities or “relocating” facilities has not affected whether employees remained “in” the Unit – in both cases they have.

In 2011, Respondent and the Union bargained about whether employees at a new facility in St. Paul, the Highland facility, would be in the Unit. The Union and Respondent, in a Neutrality Agreement, agreed to exclude those employees from the Unit. Tr. 96-97, 206-208, 232; GC. Exh. 4. Respondent contends that the parties similarly bargained over whether employees at yet another new Respondent facility in Northeast Minneapolis, which opened around 2012, would be out of the Unit, and, according to Respondent, both parties mutually agreed that those employees would also be excluded from the Unit. Tr. 209-211, 232. This agreement is embodied in an unsigned neutrality agreement. Resp. Exh. 3. Respondent has presented another unsigned agreement, as well as testimony, to support its position that there was mutual agreement that future “new” facilities would be outside of the Unit. Tr. 217, 237; Resp. Exh. 5. The Union representative who negotiated those agreements is no longer employed by the Union. Tr. 40, 204-05. The unsigned agreement, by its terms, expired on October 1, 2014; Respondent maintains that it is still in effect but cites no evidence in support of this contention. Tr. 219-20, 225; Resp. Exh. 5. Nevertheless, this unsigned agreement, as well as prior drafts of these neutrality agreements, explicitly

recognize that the Golden Valley and Apple Valley facilities (at issue in this matter) are in the Unit. Resp. Exhs. 3, 4, 5.

III. The Relocations and the Current Dispute

In late summer and early fall 2015, Respondent relocated two of its facilities, one located at Olson Memorial Highway in Golden Valley (hereafter the Olson Memorial Highway facility), and one in Apple Valley (the Apple Valley facility), and unilaterally, without express agreement from the Union, excluded those employees from the Unit. Tr. 232-33. These facts are undisputed, as are the remaining facts of this matter.

By letters dated July 24 and September 15, 2015, Respondent announced the closing of its two facilities and withdrew recognition from the Union as the employees' bargaining representative at those two facilities, and bypassed the Union and dealt directly with the affected employees, in writing and in person, concerning the terms and conditions of employment at the new facilities. Tr. 21, 33, 173-74, 220-22; GC. Exhs. 5, 19, 12. Respondent advised employees of the closure of the facilities before providing the Union with such notice. Tr. 59-60, 272-73, 276-77; GC. Exhs. 8, 13. Respondent gave to employees the option of working at the new facilities, without remaining in the Union, or transferring to other facilities where the Union represented employees in order to remain in the bargaining Unit. Tr. 22, 33-34, 75-76; GC. Exhs. 13, 6, 15. In meetings with employees, Respondent advised them that the new facilities would be non-Union (or out of the Unit), that employees would receive wage increases and there would be differences in the health benefit plan. Tr. 69-70, 72, 133, 136-37, 155-56, 277; GC. Exh. 7.

a. Relocation of the Olson Memorial Highway Facility

Despite Respondent's claim that it closed an old facility and opened a "new" facility, in effect, all Respondent did was "relocate" the facility. Respondent closed its Olson Memorial Highway facility on August 29, 2015, and opened its "new" Boone Avenue facility (the Boone Avenue facility) on August 31, 2015. GC. Exh. 20.² The managers who worked at the Olson Memorial Highway facility now work at the Boone Avenue facility and have the same titles. Tr. 68, 172. There were ten employees at the Olson Memorial Highway facility, and there are ten employees at the Boone Avenue facility. Tr. 172. Employees were not provided any new training or job descriptions before transferring to the "new" facility, and are not performing any new duties. Tr. 75, 79, 173. If Respondent is offering different services at the "new" facility, the change is not noticeable to one of its customers. Tr. 78. Respondent, in fact, advised its customers that it was "relocating," a sentiment shared by Respondent's Chief Financial Officer. Tr. 150-52, 178; GC. Exh. 18. In connection with this move, the opportunity to transfer was initially offered only to employees at the Olson Memorial Highway facility, not to employees at other facilities. Tr. 175.

As stated above, ten employees worked in the Unit at the Olson Memorial Highway facility. Tr. 172. Five of those transferred to the Boone Avenue facility and now work in non-Union positions; four elected to remain within the Unit and transferred to facilities where the Union represented employees.³ GC. Exh. 10. The result is that 50% of employees at the Boone Avenue facility are former Unit employees. Had

² According to Google Maps, the distance between the old and new facility, from 6500 Olson Memorial Highway, Golden Valley, to 605 Boone Avenue North, Golden Valley, is approximately 1.8 miles.

³ One employee resigned his employment for reasons that have nothing to do with Respondent's actions.

Respondent not conditioned employment at the Boone Avenue facility on employees relinquishing their Union representation, presumably 90% of employees at the Boone Avenue facility would be in the Unit.

b. Relocation of the Apple Valley Facility

Again, despite Respondent's assertions that it closed an old facility and opened a "new" facility, it simply relocated one of its facilities. Respondent closed the Apple Valley facility on October 24, 2015, and opened the "new" Burnsville facility (the Burnsville facility) on October 26, 2015. Tr. 128.⁴ The managers who worked at the Apple Valley facility now work at the Burnsville facility; employees generally do the same work despite being told that they might have some additional responsibilities. Tr. 128-130. Employees received no additional job training related to the move. Tr. 175. Respondent wanted to control the message that the facility was not relocating, but rather, that it was closing an old facility and opening a new facility, "Please recite it to members in that exact way, AV is closing, BV is opening. Do not use the word move as we want to keep them separate." Tr. 142-43; GC. Exh. 23. But the changes between the Apple Valley and Burnsville facilities are mostly cosmetic. For example, a teller testified that she now stands at a pod, rather than sitting in a teller line. Tr. 153. Respondent offers commercial lending services at the Burnsville facility, something it did not offer at the Apple Valley facility, but there is no evidence that there has been any other change in products or services. Tr. 167. As with the relocation of the Olson Memorial Highway facility, the opportunity to work at the new facility, in this case the

⁴ According to Google Maps, the distance between the old facility at 14690 Galaxie Avenue, Apple Valley, and the new facility at 14300 Nicollet Court, Burnsville, is about 4.2 miles.

Burnsville facility, was only offered to those employed at the old facility, the Apple Valley facility. Tr. 176.

From the Apple Valley facility, all five employees elected to transfer to the non-Union positions at the Burnsville facility; of the employees now employed “non-Union” at Burnsville, five of the six used to be in the Unit – the sixth employee used to work for Respondent but not in a Unit position. Tr. 137-38, 175, GC. Exh. 14. Thus, despite Respondent’s unlawful declarations, all five employees transferred.

As part of the process of moving, employees had concerns regarding their new work conditions; one employee was told not to discuss scheduling concerns with other managers as the Burnsville facility was preparing to open. Tr. 139-41. The same employee was told not discuss the closing of the facility with the customers or discuss the Union’s picketers stationed outside the Burnsville facility. TR. 143-49; GC. Exh. 24. Each of these admonitions constitutes unlawful threats under the Act, discussed below.

c. Respondent's Justification for Withdrawing Recognition from the Union

Respondent defends its action primarily on two grounds, but, interestingly, does not challenge the principle that office and clerical employees should be included in the Unit. Respondent first claims that the Union and Employer had a series of neutrality agreements that specifically excludes Union representation of employees at “new” locations, and that the locations it opened were “new” rather than relocations, even though these neutrality agreements specifically stated that the Apple Valley and Golden Valley facilities are “in” the Unit. Tr. 57, GC. Exh. 4. Respondent’s second argument is that the Union has somehow “waived” the right to represent employees at its new

facilities because the Union has not sought to represent employees at new facilities in the Milwaukee, Wisconsin metropolitan area.⁵

d. Respondent's Interference with the Union Steward's Duties

Article 23.01 of the parties' collective bargaining agreement permits an employee to have a Union Steward or Representative present when discipline is issued. GC. Exh. 22. On July 31, 2015,⁶ the Union's Steward accompanied an employee to a meeting at Respondent's Apple Valley facility. Tr. 110. The employee was to receive a Notice of Discipline. Tr. 110, Resp. Exh. 6. After the employee was issued the discipline, Respondent's manager asked whether she had any questions. Tr. 113, 253. The Union Steward attempted to ask questions on the employee's behalf, but was prevented from doing so. Tr. 113. In fact, Respondent made it quite clear that it was the employee who could ask the questions, not the Steward. Tr. 113-115. Respondent's manager who testified did not dispute the Steward's testimony: "I interrupted Ms. Williams at that point, before she could continue the line of questioning..." Tr. 255. It is no wonder that the meeting then devolved into an argument over whether the Union Steward could ask questions on behalf of the employee. Tr. 256, 257-58. Respondent's manager then told the employee that *she* (the employee) could approach Respondent to discuss the discipline, and ended the meeting because of the Steward's line of questioning. Tr. 280-81.

⁵ From 2012 to as recently as January 2016, Respondent acquired or merged with five other credit union facilities in the Milwaukee metropolitan area. Some of those credit unions' employees were represented by other unions, among them the Communications Workers of America and the Service Employees International Union. Tr. 227-30. Had the Union sought recognition, it would have likely violated the Act.

⁶ The witness testified that the meeting occurred on 2014. TR. 110. Respondent's exhibit and its manager's testimony show that the meeting occurred instead on 2015. Tr. 22, Resp. Exh. 6.

At a few prior meetings Respondent's manager had asserted her interpretation of the parties' respective roles during these types of meetings. Tr. 117, 251-252. An interpretation that is absent from the relevant contractual provision. GC. Exh. 22. There appear to be no documents that limit the roles of the parties during disciplinary meetings. Tr. 278-79.

IV. Respondent's Violations of the Act

a. Withdrawal of Recognition

Section 8(a)(5) of the Act proscribes an employer from unilaterally changing employees' terms of conditions of employment without first bargaining with the Union. Changing the scope of a Unit description is a permissible subject of bargaining, but even so, an employer cannot make changes without first obtaining the union's consent. *Dixie Electric Membership Corp.*, 358 NLRB No. 120 (2012) (Noel Canning), affirmed 361 NLRB No. 107 (2014). Respondent changed the scope of the Unit by removing two of its facilities from the Unit without first obtaining the Union's consent.

The same facts lead to a violation under a different theory. Respondent assigned Unit work to non-unit employees, a decision that is a mandatory subject of bargaining and something Respondent could not do without first bargaining with the Union. *Dahl Fish Co.*, 279 NLRB 1084 (1986).

Irrespective of the theory applied, Respondent relocated its facilities, withdrew recognition from the Union and refused to recognize the Union at the relocated facilities even though a substantial percentage of Unit employees work at those relocated facilities. It is well established that a Union retains its representational status after a

facility is relocated, and that an existing collective bargaining agreement remains in effect, if the operations at the new facility are substantially the same as those at the old facility and transferees from the old facility constitute a “substantial percentage” (defined as 40 percent or more) of the new facility’s employee complement. *King Soopers, Inc.*, 332 NLRB 32, 37 (2000), enfd. 254 F.3d 738 (8th Cir. 2001); *Rock Bottom Stores*, 312 NLRB 400, 402 (1993), enfd. 51 F.3d 366 (2nd Cir. 1995); *Westwood Import Co, Inc.*, 251 NLRB 1213 (1980), enfd. 681 F.2d 664 (9th Cir. 1982). As the Board has emphasized, “this rule constitutes an appropriate balance between the transferees’ interest in retaining the fruits of their collective-bargaining activity and the newly hired employees’ interest in choosing whether to have union representation.” *King Soopers*, 332 NLRB at 37, citing *Rock Bottom Stores*, 312 NLRB at 402.

Here, the operations at the Burnsville and Boone Avenue facilities are substantially the same as those at the Apple Valley and Memorial Highway facilities, if not identical, and more than 80% of the employees at the Burnsville facility came from the Apple Valley facility, while 50% of the employees at the Boone Avenue facility came from the Olson Memorial Highway facility. Of course, 90% of the Boone Avenue employees would have been from the Olson Memorial Highway facility but for Respondent’s unlawful conduct. Even disregarding this, however, there is far more than the requisite “substantial percentage” at both locations, and Respondent was required to continue to recognize the Union and apply the parties’ collective bargaining agreement.

This case is factually similar to *King Soopers*. In that case, an employer refused to recognize and bargain with the unions representing its employees after it closed a

store and opened a new store the next day. The Board concluded that the employer was obligated to continue to recognize Local 26 as the employees' representative, and to honor the extant collective bargaining agreement.

The 8th Circuit enforced the Board's decision, 254 F.3d 738 (8th Cir. 2001), and directly addressed many of the issues in the instant case:

[F]or the life of a collective-bargaining agreement the status of the union as exclusive bargaining representative may not ordinarily be questioned...This longstanding rule prohibits employers from petitioning the Board for decertification of a union and from repudiating the contract or withdrawing recognition from and refusing to bargain with a union during the term of the collective bargaining agreement absent proof of unusual circumstances. A workplace relocation, the scenario at issue here, is not considered the type of unusual circumstance which prevents the application of this rule...to conclude otherwise would permit any employer to push the Union...out the door whenever an employer might opt to modernize its facility.

254 F.3d at 742 (citations omitted).

The Court affirmed the Board's conclusion that King Soopers violated Section 8(a)(5) of the Act by withdrawing recognition from the union because the old and new facilities were in the same geographical area, the employees worked under the same managers and performed the exact same job as at the old facilities, and employees from the old facilities made up more than 40% of the employees at the new facilities. Likewise, in the instant case, Respondent shuttered its Olson Memorial Highway facility on a Saturday, and opened the Boone Avenue facility (about 1.8 miles away) the following Monday, with the same managers, 50% of the same employees, while offering substantially the same products and services. A month later, it closed the Apple Valley facility on a Saturday, and opened the Burnsville facility (about 4 miles away) the

following Monday, again with the same managers, 80% of the same employees, and offering to the public the same products and services. Thus, it is clear that Respondent violated Section 8(a)(5) by refusing to recognize the Union at the relocated facilities and refusing to apply the extant collective bargaining agreement.

Respondent argues that the Union waived its statutory rights by:

(1) entering into neutrality agreements that stated that “new” facilities would not be covered by the contract; and (2) declining to seek to represent employees at new facilities acquired by Respondent in the Milwaukee metropolitan area. As to the first of these arguments, Respondent’s unlawful conduct did not involve any new facilities. Rather, as discussed above, Respondent’s conduct solely involved a failure to recognize the Union and apply the extant collective bargaining agreement at relocated facilities. Indeed, the expired neutrality agreement asserted by Respondent expressly recognized that the employees in stores that were subsequently relocated were represented by the Union. In addition, the most recent neutrality agreement expired on October 1, 2014. Any waiver based on that or any other expired neutrality agreement would be limited to the duration of the agreement.⁷

As to the Union’s conduct regarding the Milwaukee-area facilities, those were new facilities, not relocated facilities like those at issue here. Thus, even putting aside any issues of geographic proximity, any such waiver would not affect the facilities in the instant case. Moreover, unlike with the facilities at issue here, the Union would have been in violation of the Act if it had sought recognition in those facilities, as other labor

⁷ The waiver of a statutory right must be “clear and unequivocal.” *Metropolitan Edison v. N.L.R.B.*, 460 U.S. 693, 708 (1983). A waiver may be found where the contract language is specific or the history of negotiations suggests that the subject was discussed and the right “consciously yielded.” *General Motors Corp.*, 257 NLRB 1068, 1071 (1981).

organizations represented employees at those facilities prior to Respondent acquiring them. Thus, Respondent's waiver arguments must fail. Since Respondent's actions constituted a relocation of existing facilities, at which the Union's representational status and the extant collective bargaining agreement continue to be in effect, it is clear that Respondent unlawfully withdrew recognition from the Union, and unlawfully refused to apply the collective bargaining agreement, at those facilities.

b. Unlawful Unilateral Changes and Direct Dealing

There is no question that Respondent unilaterally implemented wage increases and changes in employees' benefits (including health insurance) when Unit employees moved to their new locations, and there is also no question that such unilateral action violates Section 8(a)(5). See, e.g. *NLRB v. Katz*, 369 U.S. 736, 743 (1962); *NLRB v. Crompton-Highland Mills*, 337 U.S. 217, 225 (1949); and *NLRB v. Frontier-Homes Corporation*, 371 F. 2d 974, 979-981 (8th Cir. 1967). Respondent's meetings and communications with Unit employees to discuss their terms and conditions of employment at the relocated facilities constitute direct dealing with employees and bypassing the Union in violation of Section 8(a)(5). *Midwest Precision Heating & Cooling, Inc.*, 341 NLRB 435, 436 (2004), *enfd.* 408 F.3d 450 (8th Cir. 2005); *Mercy Health Partners*, 358 NLRB No. 69 (2012).

c. Unlawful Declaration that New Facilities Would be Non-Union

An employer cannot require that an employee forgo rights protected by the Act as a condition of continued employment. *Intercon I (Zercom)*, 333 NLRB 223 (2001). This includes circumstances where an employer advises employees that in order to

continue their employment, they must agree to work nonunion. *Schwikert's of Rochester, Inc.*, 343 NLRB 1044 (2004); *Midwest Precision Heating & Cooling, Inc.*, supra at 440; *Excel Fire Protection Co., Inc.*, 308 NLRB 241 (1992). *Jo-Vin Dress Co.*, 279 NLRB 525 (1986), enfd. 819 F.2d 1134 (3rd Cir. 1987). That is exactly what Respondent did in these cases; it advised employees that they could not transfer to the new locations unless they agreed to give up their right to Union representation, in violation of Section 8(a)(1). Even if Respondent had not otherwise violated the Act by withdrawing recognition from the Union prior to the relocations and by repudiating the collective bargaining agreement with regard to the Boone Avenue and Burnsville facilities, conditioning continued employment on giving up any claim to representation by the Union violates Section 8(a)(3) of the Act. Respondent should be ordered to offer reinstatement to the four Olson Memorial Highway facility employees who refused to transfer to the Boone Avenue facility because of Respondent's condition that they give up Union representation.

d. Unlawful Order to Cease Discussing Terms of Employment

An employer cannot prohibit employee discussions with other employees and the public concerning terms and conditions of employment, including the relocation of its facilities. *Waco, Inc.*, 273 NLRB 746, 748 (1984); *Phoenix Transit Systems*, 337 NLRB 510 (2002). Respondent cannot order its employees to cease discussing the Union's picketers (or any other labor organization's picketers) with its customers, nor can it prohibit employees from "jumping" the chain of command to discuss scheduling concerns, absent a business justification. *Phoenix Transit Systems, supra*.

Respondent has offered no business justification for its prohibitions, and has violated Section 8(a)(1) of the Act.

e. Respondent's Interference with the Shop Steward's Duties

A Union Steward or Representative's presence at a disciplinary meeting is provided by the collective bargaining agreement, which contains no limitation on the individual's actions. Respondent cannot eviscerate the Section 7 right of employees to engage in protected, concerted activity by instructing the Union Steward that only the employee can ask questions, or that questions must be as Respondent considers appropriate. In *Barnard College*, 340 NLRB 934 (2003), discussing a union representative's role during an investigatory interview, the Board quoted: "The union representative cannot be made to sit silently like a mere observer." 340 NLRB at 935, citing *Talsol Corp.*, 317 NLRB 290, 331-332 (1995), *enfd.* 155 F.3d 785 (6th Cir. 1998). Even if the Union Steward's attendance was permitted by contract, and not specifically dictated by *Weingarten*, the analysis in *Barnard College* is apropos of this situation because it derives from, as in *Weingarten*, the right of employees to engage in concerted activities. Respondent's interference violated Section 8(a)(1) of the Act.

V. Conclusion

The facts and law of this matter are clear. Respondent unlawfully withdrew recognition from the Union at the "old" facilities and refused to recognize the Union at the "new" facilities. It also unlawfully engaged in direct dealing with employees over their terms and conditions of employment, refused transfers to employees who desired

continuing Union representation, and coercively threatened employees that employment at the new facilities would be on a non-Union basis. Respondent also issued unlawful prohibitions to its employees to cease discussing their terms and conditions of employment with others. During this same time, Respondent interfered with a Steward's representational activities.

It is respectfully requested that Respondent be ordered to recognize the Union as the employees' collective bargaining representative at its Boone Avenue and Burnsville facilities, that it apply the terms of the collective bargaining agreement to those employees, that it offer transfers to the four Olson Memorial Highway facility employees who chose to remain in the Unit, and that it cease and desist from, in any like or related manner, interfering with employees' rights under the Act.

Dated at Minneapolis, Minnesota, February 12, 2016.

/s/ Ashok Bokde

ASHOK C. BOKDE
COUNSEL FOR THE GENERAL
COUNSEL
NATIONAL LABOR RELATIONS BOARD
REGION 18
FEDERAL OFFICE BUILDING
212 3rd AVENUE SOUTH, SUITE 200
MINNEAPOLIS, MN 55401