

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

BROOKS BROTHERS

And

**Case 02-CA-063650
02-CA-156504**

**NEW YORK NEW JERSEY REGIONAL
BOARD AND ITS LOCAL AFFILIATE
LOCAL340 AND LOCAL 25**

Rachel F. Feinberg, Esq., Counsel
for the General Counsel
Thomas M. Murray, Esq., Counsel
for the Charging Party
Theo E.M. Gould, Esq., Counsel for the
Respondent

Decision

Statement of the Case

Raymond P. Green, Administrative Law Judge. I heard this case on October 19, 2012 in New York City. The charge and the amended charge in 02-CA-063650 were filed on August 30, and October 12, 2011. The charge in 02-CA-156502 was filed on July 21, 2015. The Consolidated Complaint that was issued on August 31, 2016 alleged as follows:

1. That the Respondent has refused or unreasonably delayed furnishing to the Union all payroll records, schedules and any other documents that show that an employee working in any other store covered by the collective-bargaining agreement worked at 1180 Madison Avenue, New York, New York.

2. That in March or April 2015, the Respondent by Jill Washington, its General Manager, interrogated employees about their union membership and activities.

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

Findings and Conclusions

I. Jurisdiction

It is admitted and I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. I also find that the Unions are labor organizations within the meaning of Section 2(5) of the Act.

II. The alleged unfair labor practices

5 This case involves two incidents. One relates to an alleged failure to timely furnish information
back in 2011. In this respect, it is conceded by the General Counsel that some of the
information was provided on December 8, 2012 and that ultimately it was fully made available to
the Union in 2012. It is further noted that even if the information was at one time arguably
relevant to a contractual enforcement claim, the information no longer has any relevance to any
10 matter that is either currently a matter of collective bargaining or that is the subject of any
current real or potential contractual grievance.

The other allegation involves a single interrogation involving one employee sometime in
the Spring of 2015.

15 a. The Alleged Refusal to Timely Furnish Information

Brooks Brothers operates a number of retail department stores in New York City,
Westchester, Long Island and Rockland County. For many years it has recognized and
20 maintained collective bargaining agreements with the New York, New Jersey Regional Board
and its local affiliates Local 340 and Local 25. In this regard, Local 25 essentially represents
tailors, while Local 340 represents sales, stock and other non-supervisory employees at these
stores.¹

25 Both local unions have contracts that cover multiple store locations and both contracts
have provisions that purport to require the employer to recognize them upon the opening of a
new store, provided that it is not a factory outlet store. The contracts do not by their respective
terms require that the Unions demonstrate majority status at any new store, albeit in the past,
the company has recognized the Unions at new stores after there had been a demonstration
30 that they represented a majority of the employees.

The applicable collective bargaining agreement with Local 340 ran from November 1,
2009 through March 31, 2013. Article 1A contains the recognition clause with the after acquired
store language. This reads as follows:

35 The Employer recognizes the Union as the ... collective bargaining agent of
all: (i) selling personnel and expeditors, housekeeping, shipping, receiving,
floor cashier, call desk, on-floor stock, concierge, door greeter, off-floor stock,
visual personnel, fitter-tailors (Stamford store only, cash office personnel and
40 mailroom personnel, excluding all selling and support supervisory personnel,
at its retail stores at Madison Avenue, Liberty Plaza, Broadway, Bleeker Street
and Rockefeller Center, New York City, Northern Boulevard, Manhasset L.I.
West Post Road Eastchester, N.Y. The Westchester, White Plains, N.Y.,
Roosevelt Field, L.I., Huntington, L.I. Southampton, L.I., West Nyack, N.Y.
45 Stamford, Ct and any other retail store(s) opened during the term of this
Agreement operated by THE Employer under the name "Brooks Brothers" in
the City of New York and in the Counties of Nassau, Suffolk, Rockland and
Westchester only; and (ii) housekeeping, shipping and receiving and van
drivers at its facility currently located at ... Long Island City, N.Y. If the e

¹ At times in this Decision, the local unions will collectively be referred to as the Union.

5 employer opens any new retail store(s) in the above designated geographic area, the following p provision of this Agreement shall be applicable to such store(s); Article I, II, III, IV, XI, XIII, XV, XVIII, XIX, XX, XXI, XXII, XXIII, XXIV, XXV and XXVI. All other terms and conditions applicable to such store(s) shall be subject to negotiations, on notice to the Union at least 30 days in advance of the store opening, provided that the terms of XXV shall not be suspended in connection with such negotiations regardless of whether or not an agreement is reached. This Agreement shall not apply to at all to any store(s) opened by the Employer that are identified and operated as factory outlet stores.

10 Article II of this contract is a union security agreement requiring employees to become members in the Union after the 30th day of their employment.

15 The collective bargaining agreement with Local 25 ran from December 1, 2008 through November 30, 2012. This contract contains a recognition clause as well as an accretion clause. These read as follows:

20 Article 1 Recognition

The company recognize as the Union as the ... representative for all regular full-time and regular part-time employees scheduled to work 24 hours or more per week performing fitting, altering, finishing, pressing and central alterations ship clerical duties on its premises at the Company's Long Island City central alterations shop and the Madison Avenue, Liberty Plaza, Broadway, Bleeker Street, Southampton, Rockefeller Center, Scarsdale, Manhasset, Roosevelt Field, Huntington and West Nyack retail stores, excluding executive, managers supervisors and assistant supervisors who have administrative or supervisory duties, confidential employees, and all employees covered by collective bargaining agreement made between the Company and other labor unions.

30 Article 25 Accretion

Should any new retail store(s) open during the term of this Agreement in the City of new York and in the Counties of Nassau, Suffolk, Rockland and Westchester and be operated by the Company under the name "Brooks Brothers," the Company shall agree to recognize the union as set forth in Article 1, Recognition. This Agreement shall not apply at all to any store(s) opened by the Company that are operated as factory outlet stores.

40 This contract at Article 2 contains a standard union security clause that requires union membership after 30 days of employment.

Both collective bargaining agreements contain grievance/arbitration provisions.

45 The parties stipulated that the 1180 Madison Avenue store was opened on February 26, 2011. They stipulated that at various times during the first months of its operation, about 16 employees of the Respondent who worked at other union represented store locations worked at 1180 and were covered by the respective collective bargaining agreements. In this connection, it is not clear to me if employees at represented stores who were transferred to the 1180 Madison Avenue store were done on a voluntary or compelled basis. And although there is no dispute that these temporarily transferred employees were deemed to be covered by the respective
50 collective bargaining agreements, I do not know if that arrangement was made

unilaterally by the employer or was made pursuant to an agreement with the respective local unions. In any event, the evidence is that the employees in this group worked at the newly opened store for about one month. Obviously they were transferred in order to assist in the opening of the new store and after a full complement of new employees was hired, the transferees went back to their old stores.

On May 27, 2011 the Union sent a letter to the company. This stated as follows:

The Union is grieving the failure of the Employer to apply the collective bargaining agreement (the "CBA") to its store located at 1180 Madison Avenue and to apply the terms and conditions of employment embodied in the CBHA to the employees at that store. This is a violation of Article 1. Sec. A of the CBA.

Pursuant to Article 1, Sec. C, I am requesting all payroll records, schedules and any other documents that show that an employee employed in any other store covered under the CBA worked at the 1180 Madison Avenue location.

On August 11, 2011, the Union repeated this request for information.

On December 8, 2011, the Company sent the Union a spread sheet "showing the bargaining unit employees who assisted at Brooks Brothers' 1180 Madison Ave store during the opening period while the store came up to full staffing." This showed that for the periods from February 27 to March 27, there were eight named tailors who worked for some time at the store. It also showed that there were five named individuals who, during the same period worked eight or more hours per week at the 1180 Madison Avenue store.

At some point in 2012, Local 340 initiated an arbitration proceeding in relation to its May 27 grievance and asserted that the company breached the collective bargaining agreement when it refused to recognize it in accordance with the recognition and after acquired provision of the contract. At about the same time, the company filed a unit clarification petition with the Board on August 12, 2011.

On November 22, 2012 and November 4, 2015, Brooks Brothers filed a charge in 2-CB-069460 alleging that Local 340 violated the Act by initiating the above described arbitration proceeding.

Initially, the company argued that the matter was not arbitable inasmuch as it claimed that the NLRB had exclusive jurisdiction over what was essentially a question concerning representation. On March 1, 2012, the Arbitrator ruled that that the grievance was arbitable and a hearing was held on March 12, 2012. The Arbitrator issued his decision on June 5, 2012 and concluded that the employer was obligated to recognize local 340 and apply the terms of the contract to the employees who worked at the 1180 Madison Avenue store. In doing so, he concluded that it was not necessary under the terms of the contract for the Union to show that it represented a majority of the store's employees. And indeed there does not appear to have been any contention by the Union that it represented a majority at any time after the new store was opened on February 26, 2011. As to the question of whether the store constituted an "accretion" within the meaning of the National Labor Relations Act, the arbitrator wrote:

Regardless of the accuracy of the Union's contentions that Brooks Brothers stores are a highly integrated operation where all of the factors for determining

an accretion have been met because the employees at the new 1180 Madison Avenue store share an overwhelming community of interest with the rest of the bargaining unit, and consequently that the application of the terms of the collective bargaining agreement in the instant case would not be illegal, the NLRB is the appropriate forum designated to determine if a finding of accretion is appropriate. Such a determination of accretion is not within the Arbitrator's purview, which is limited to interpreting the parties' collective bargaining agreement. The NLRB will ultimately decide whether the Arbitrator's award in the instant case is consistent with the dictates of the National Labor Relations Act, and whether application of the cited after acquired stores decisions and other applicable law to the facts of this case mandates a different outcome from a determination based solely on the collective bargaining agreement.

And so we turn to the parallel proceeding before the Board. As noted, the company filed a unit clarification petition in August 2011. During the hearing, the Union asserted that the employees of the new store constituted an accretion to the existing collective bargaining unit and subpoenaed various documents and records including the information that was requested back on May 27, 2011. This information was in fact produced during the Board hearing which seems to have gone on for quite some time.² Nevertheless, the hearing was ultimately ended and the Regional Director issued her Decision on December 18, 2014. In that decision, the Director described in substantial detail the nature of the company's operations and the relationship between the 1080 Madison Avenue store and the other stores that were part of the existing bargaining unit. The Regional Director concluded that the 1080 Madison Avenue store did not constitute an accretion to the bargaining unit and therefore that the employees of this store were not and never were a part of the existing unit. The Decision of the Regional Director was thereafter affirmed by the Board on September 21, 2015.

On March 17, 2016, the Regional Director approved the partial withdrawal of this charge insofar as it alleged that Brooks Brothers unlawfully failed to recognize and bargain with the Unions in relation to the employees at the 1080 Madison Avenue store. Finally, the Regional Office, on September 15, 2016, filed a Petition For Summary Judgment in Case No. 02-CB-069460 where it was alleged that by seeking to enforce the above noted arbitration award, Local 340 violated Sections 8(b)(1)(A) and (2) of the Act. That matter is still pending before the Board, but in light of the Board's affirmation of the Regional Directors decision in the Unit Clarification case, the outcome is in no doubt. (At least at the level of the Board).

² At footnote 3 of the Regional Director's Decision, it was noted that payroll records showed that Local 340 unit members made up a majority of employees at the 1080 Madison Avenue store for only a one or two day period during the first week of the store's operations. With respect to the Local 25 tailors, it was noted that they constituted a majority of the tailors working at the new store until May 2011. In either case, it is clear that Regional Director did not consider either fact to be relevant to her conclusion that no accretion was created, no doubt because these people were transferred on a temporary basis and did not become part of the regular complement of employees when normal operations commenced. This is therefore a completely different situation from one in which an employer closes a facility and transfers its operations with a substantial number of its employees to another location. In that circumstance, and depending upon a number of factors, the number of employees transferred to the new location, as a percentage of the total complement, would be substantially relevant in determining whether a union's recognition and collective bargaining agreement should follow the transfer. See *Rock Bottom Stores*, 312 NLRB 400 (1993). In that case the Board reaffirmed *Westwood Import Co, Inc.*, 251 NLRB 1213, enf'd. 681 F.2d 664

We now have conflicting decisions. One is from the Arbitrator who held that the employees of the new store were covered by Local 340's contract and the other from the Board holding that they were not.

5

b. Discussion

Pursuant to Section 8(d) of the Act, each party to a bargaining relationship is required to bargain in good faith. And part of that obligation is that both sides must furnish relevant information upon request. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). Requests for information may come in essentially two contexts; **(a)** bargaining for a collective bargaining agreement or **(b)** processing a grievance. With respect to information sought during the term of an existing contract, a Union's responsibilities include: **(a)** monitoring compliance and effectively policing the collective-bargaining agreement, **(b)** enforcing provisions of a collective-bargaining agreement, and **(c)** processing grievances. *American Signature, Inc.*, 334 NRB 880, 885 (2001).

If the information sought relates to the processing of a grievance, (or potential grievance), the legal test is whether the information is relevant to the grievance and the determination of relevancy is made based on a liberal, discovery type of standard. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 437 (1967); *Knappton Maritime Corporation*, 292 NLRB 236 (1985).

Where there is a request for relevant information, the employer (or Union), is obligated to respond within a reasonable time. *NLRB v. John S. Swift Co.*, 277 F.2d. 641 (7th Cir., 1960); *Woodland Clinic*, 331 NLRB 735, 737 (2002) (seven week delay); *Bituminous Roadways of Colorado*, 314 NLRB 1010, 1014 (1994) (six week delay); *Civil Service Employees Association, Inc.*, 311 NLRB 6, (1993), (ten week delay in providing information); *EPE Inc.*, 284 NLRB 191, 200, (1987), (six month delay in providing information); *Tennessee Steel Processor*, 287 NLRB 1132 (1988); *U.S. Postal Service*, 276 NLRB 1282, 1288 (1985); *Quality Engineered Products*, 267 NLRB 593, 598 (1983), (one month delay); *Aeolian Corp.*, 247 NLRB 1231, 1244 (1980) (three week delay).

Finally, the Board has held that even where the underlying grievance has been resolved, this does not moot allegations either that a failure to furnish or a failure to timely furnish information constitutes a violation of Section 8(a)(5) of the Act. *United States Postal Service*, 339 NLRB 1162, 1166, 1168 (2003) and *Grand Rapids Press*, 331 NLRB 703, 709 (1991).

40

It is the position of the General Counsel and the Charging Party that the information requested related to the wages, hours and benefits of bargaining unit employees and therefore was presumptively relevant.

Because the request was essentially for the names, wage and hour information for employees transferred from union represented stores, and because the employer agreed that those employees would continue to be covered by the collective bargaining agreements during their temporary stays at the 1080 Madison Avenue store, it could be argued that information relating to them involved employees covered by the labor agreement. On the other hand, because it has been determined by the NLRB that the employees of the 1080 Madison Avenue store were, at all times, outside the existing

50

5 bargaining units, the information regarding people working at the store could be also be considered as information relating to non-bargaining unit employees. And if they were not, during their time at this store, actually working inside the bargaining unit, then the information request would be for non-bargaining unit employees and no presumption of relevancy would attach.

10 Assuming that the company and the Union had explicitly or implicitly agreed that the temporarily transferred employees would continue to be covered by the respective collective bargaining agreements, then information regarding their wages, hours and benefits would clearly be relevant had there had been any claim that any of these employees, during their tenure at the 1080 Madison Avenue store, were not been being paid in accordance with the terms of the collective bargaining agreements. By the same token, if the Union had sought and the employer had agreed to engage in mid-term bargaining for the purpose of seeking added benefits for the transferred employees, then the information would also be relevant. But neither was the case here and these were not the reasons that the information was being sought.

20 To say that information is presumptively relevant does not mean that it is automatically relevant. Nor does it mean that the information must automatically be produced without any reason at all. And in this case, the only reason that the information was sought was in furtherance of the claim that the employees at the newly opened store were automatically covered by the respective collective bargaining agreements. As such, this claim would encompass the assertion that these employees would automatically be subject to the union security clauses and that they would be required to have union representation without any say as to their representational desires.

30 Since we know the actual reason for the information request, the next question is whether that information would have been arguably relevant to the grievance that was filed.

35 Both collective bargaining agreements require the employer to recognize the respective unions and to apply most of the terms of the extant labor agreements to the employees whenever the employer opens a new store with the Brooks Brothers name. (Except for factory outlet stores). The contracts do not require that the Unions demonstrate majority status in order for the accretion or after acquired provisions to come into effect. Nor do the contracts depend on whether a new store is staffed in whole or in part by employees who were transferred for any length of time from a unionized store. The fact is that as far as I can tell, the Unions did not assert during the arbitration process that either of these preconditions were either dispositive or relevant. And indeed, the Arbitrator agreed that the Unions needed only to show that a new Brooks Brothers store was opened in order for the collective bargaining agreements to be extended to the new location.

45 It is therefore my opinion, that in terms of the contract enforcement dispute, the information relating to the names, wages and hours of the individuals who were temporarily transferred from union stores to the 1080 store was simply not relevant to the breach of contract claims.

50 Nor ultimately was the information even deemed to be relevant in the unit clarification preceding that ensued in 2012.

For the foregoing reasons, I therefore recommend that this allegation of the Complaint be dismissed.

5

c. The alleged Interrogation

Jill Washington, the store manager, testified that in March 2015, she began to hear some talk about the Union amongst the employees. She testified that two employees approached her about union activity and that they asserted that the Union was pressuring them to join. Washington testified that she contacted her superiors about this and they asked her to keep them apprised of any union activity.

During this period of time, Camille Borbouse was employed as a stock person, having transferred from a union represented store in Long Island. In July 2015, she left to obtain work elsewhere, but during her time at the store, she seems to have had a good relationship with Washington who, on various occasions, sought to help or advise her about seeking work at other store locations or in the corporate offices.

According to Borbouse, sometime in the Spring of 2015, Washington asked to see her in a room on the retail floor. Borbouse testified that Washington told her that she was checking in to see if she was happy at the store and that she then said that there were people who were trying to unionize. She states that Washington said that some of the employees were in favor of the union and that some were not. According to Borbouse, Washington asked if she had signed a card. Borbouse testified that she replied that she did sign a union card whereupon Washington said that she thought that Borbouse was happy at the store. According to Borbouse, she replied that she was happy but that if a majority of the people were trying to unionize, she didn't want to hold up the process. Borbouse states that Washington then asked her to keep the conversation private. There was nothing in Bourbouse's testimony that indicated that she was threatened in any way regarding the fact that she signed a union card.

Borbouse testified that on the same day, there were a series of one on one meetings between management and employees at the store. Nevertheless, she could not testify about those meetings and no other employees were called to testify about them. Borbouse testified that after her meeting with Washington, she told another employee about the meeting and that she was thereafter contacted by a union agent to whom she related the transaction. (This ultimately led to her giving an affidavit to the Regional Office on November 13, 2015).

Washington's testimony was that over a period of time Borbouse spoke to her about obtaining a better position either at company headquarters or at other stores. She testified that during the course of these conversations the subject of the Union came up, but only in relation to describing which locations had or did not have union contracts with union benefits. She denies that she ever asked Borbouse about signing a union card or speaking to her about any activity by other employees in seeking to organize the 1180 Madison Avenue store.

There was no evidence that any other employees were questioned about their union activity. Nor, except for the employee to whom Borbouse spoke to, was there any evidence that her conversation with Washington was more widely disseminated.

Given the fact that this transaction took place during a period of time when the Union was attempting to organize and that Washington not only was aware of that activity but

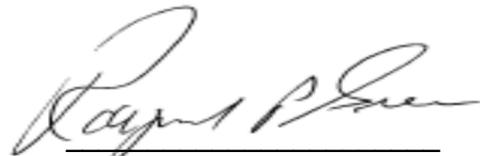
instructed to notify upper management about such activity, it is my opinion that Borbouse's version of this event is more likely to be accurate. I shall therefore credit her testimony.

Nevertheless, it is also my opinion that this single transaction, even without an assurance of non-retaliation, was essentially insignificant. Assuming arguendo that this single interrogation could be construed as coercive, it was only marginally so at best. In the absence of any other illegal conduct by the Respondent I therefore conclude that this involved a matter that was de minimus. I shall I therefore recommend that this allegation be dismissed.

ORDER

The Complaint is dismissed in its entirety.

Dated: Washington, D.C. November 30, 2016



Raymond P. Green
Administrative Law Judge