Transmarine Navigation Corporation and its Subsidiary, International Terminals, Inc. *and* American Federation of Guards, Local #1. Case 21-CA-5766

March 15, 1968

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN MCCULLOCH AND MEMBERS BROWN AND JENKINS

On May 28, 1965, the National Labor Relations Board issued its Decision and Order in this case,[1] in which it found that the Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended, by closing the terminal here involved and terminating certain employees without bargaining with the certified representative of these employees. Under the circumstances of the case, and as the closing was found to be economically motivated, the Board's Order was limited to requiring that the Respondent make whole the affected employees from on or about November 1, 1963, the date on which the Respondent closed its terminal, until June 25, 1964, the date on which it offered to bargain with the Union with respect to any matter in dispute.[2]

Thereafter, on June 21, 1967, the United States Court of Appeals for the Ninth Circuit handed down its opinion in this case.[3] The court held that the Respondent's "decision, based solely on greatly changed economic conditions, to terminate its business and reinvest its capital in a different enterprise in another location as a minority partner, is not a subject of mandatory collective bargaining within the meaning of Section 8(a)(5)," and, therefore, that the Respondent had not violated the Act by failing to bargain with the Union about the decision to close its terminal. The court's opinion also states, however, that "it is clear that the Company, by withholding information from the union of its decision to terminate the Los Angeles operations, deterred the union from bargaining over the effects of the shutdown on the employees." The court concluded that by withholding this information from the Union the Respondent committed an unfair labor practice. On the basis that it could not be certain "that the Board would have issued the same remedial order had it not reached the erroneous conclusion that the Company was required to bargain collectively concerning the crucial managerial decision," the court remanded this matter to give the Board an opportunity to review its Order.

In considering the matter remanded to us,[4] we accept as the law of the case the court's findings and conclusions. In this posture of the case, we adopt the court's view limiting the finding of the unlawful refusal to bargain to the Respondent's failure to bargain with the Union over the effects of its decision to terminate its Los Angeles terminal.

The Board's original Decision and Order of May 28, 1965, required that the Respondent's guards be made whole from on or about November 1, 1963, the date that the Respondent closed its terminal, until June 25, 1964, when the Respondent offered to bargain with the Union.[5] As our original order requiring more than 7 months' backpay was based in part on our finding that the Respondent unlawfully failed to bargain concerning the decision to close its terminal, it appears, in the light of the court's remand, that this order should be modified to accord with the finding of an unlawful refusal to bargain based only upon the Respondent's refusal to bargain about the effects of the shutdown on its employees.

It is apparent that, as a result of the Respondent's unlawful failure to bargain about such effects, the Respondent's guards were denied an opportunity to bargain through their contractual representative at a time prior to the shutdown when such bargaining would have been meaningful in easing the hardship on employees whose jobs were being terminated. The Respondent's only offer to bargain with the Union came more than 7 months after it closed its terminal and when the collective strength of the employees' bargaining unit had been dissipated.

Under the circumstances of this case, including the lapse of time and changes in the corporate nature of the Respondent, it is impossible to reestablish a situation equivalent to that which would have prevailed had the Respondent more timely fulfilled its statutory bargaining obligation. In fashioning an appropriate remedy, we must be guided by the principle that the wrongdoer, rather than the victims of the wrongdoing, should bear the consequences of his unlawful conduct, and that the remedy should "be adapted to the situation that calls for redress."[6]

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[1] 152 NLRB 998

[2] On June 18, 1965, the Respondent filed a motion for reconsideration, which was denied by the Board on June 29, 1965

[3] 380 F 2d 933.

[4] Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel

[5] The Board's decision relied on *Jersey Farms Milk Service, Inc*, 148 NLRB 1392 See also *Royal Plating and Polishing Co, Inc*, 160 NLRB 990

[6] *N L R B* v *Mackay Radio & Telegraph Co*, 304 U S. 333, *Phelps-Dodge Corp* v *N L R B*, 313 U S 177, 194; *N L R B* v *Don Juan, Inc.*, 185 F 2d 393 (C A 2)

Applying these principles to the instant case, we deem it necessary, in order to effectuate the purposes of the Act, to require the Respondent to bargain with the Union concerning the effects of the shutdown on its terminal guards. Under the present circumstances, however, a bargaining order alone cannot serve as an adequate remedy for the unfair labor practices committed by the Respondent. As we recently pointed out in *Royal Plating and Polishing Co., Inc.*,[7] similar in many respects to the instant case:

> The Act required more than *pro forma* bargaining, but *pro forma* bargaining is all that is likely to result unless the Union can now bargain under conditions essentially similar to those that would have obtained, had Respondent bargained at the time the Act required it to do so. If the Union must bargain devoid of all economic strength, we would perpetuate the situation created by Respondent's deliberate concealment of relevant facts from the Union which prevented the Union from meaningful bargaining.

Therefore, in order to assure meaningful bargaining and to effectuate the purposes of the Act, we shall accompany our order to bargain over the effects of the shutdown with a limited backpay requirement designed both to make whole the employees for losses suffered as a result of the violation and to recreate in some practicable manner a situation in which the parties' bargaining position is not entirely devoid of economic consequences for the Respondent. We shall do so in this case by requiring the Respondent to pay backpay to the guards involved in a manner similar to that required in *Royal Plating*. In addition, we shall, further to effectuate the purposes of the Act, require the amounts to be paid to be not less than the amounts the guards would have earned during a 2-week period of employment.

Accordingly, we shall order the Respondent to bargain with the Union, upon request, about the effects on its guards of the Los Angeles terminal shutdown, and to pay these employees amounts at the rate of their normal wages when last in the Respondent's employ from 5 days after the date of this Supplemental Decision until the occurrence of the earliest of the following conditions: (1) the date the Respondent bargains for agreement with the Union on those subjects pertaining to the effects of the closing on guards at its Los Angeles terminal; (2) a bona fide impasse in bargaining; (3) the failure of the Union to request bargaining within 5 days of this Supplemental Decision, or to commence negotiations within 5 days of the Respondent's notice of its desire to bargain with the Union; or (4) the subsequent failure of the Union to bargain in good faith; but in no event shall the sum paid to any of these employees exceed the amount he would have earned as wages from November 1, 1963, the date on which the Respondent terminated its Los Angeles operations, to the time he secured equivalent employment elsewhere, or June 25, 1964, the date when the Respondent offered to bargain, whichever occurred sooner; provided, however, that in no event shall this sum be less than these employees would have earned for a 2-week period at the rate of their normal wages when last in the Respondent's employ.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Transmarine Navigation Corporation and its subsidiary, International Terminals, Inc., Los Angeles and San Francisco, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from refusing to bargain with American Federation of Guards, Local #1 , with respect to the effects on the guards of its decision to close its Los Angeles Terminal.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Pay the guards of the former Los Angeles terminal their normal wages for the period set forth in this Supplemental Decision.

(b) Upon request, bargain collectively with American Federation of Guards, Local #1, with respect to the effects on its guards of its decision to close its Los Angeles terminal, and reduce to writing any agreement reached as a result of such bargaining.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Mail an exact copy of the Notice attached hereto, marked "Appendix," to American Federation of Guards, Local #1, and to all the guards who were employed at its former Los Angeles terminal. Copies of said notice, on forms provided by the Regional Director for Region 21, after being duly

[7] Fn 5, *supra*

signed by its authorized representative, shall be mailed immediately upon receipt thereof, as herein directed.

(e) Notify the Regional Director for Region 21, in writing, within 10 days from the date of this Order, what steps have been taken to comply herewith.

Member Jenkins, dissenting in part:

Since I am unable to perceive any principle upon which my colleagues establish the minimum amount of backpay to be "not less than" 2 weeks' pay, I would delete that portion of the remedy.

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to a Supplemental Decision and Order of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

WE WILL, upon request, bargain collectively with American Federation of Guards, Local # 1, with respect to the effects of our decision to close our Los Angeles terminal on the guards who were employed there, and reduce to writing any agreement reached as a result of such bargaining.

WE WILL pay the guards who were employed at the Los Angeles terminal their normal wages for a period required by a Supplemental Decision and Order of the National Labor Relations Board.

TRANSMARINE NAVIGATION CORPORATION AND ITS SUBSIDIARY INTERNATIONAL TERMINALS, INC.
(Employer)

Dated By
(Representative) (Title)

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.

If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, Eastern Columbia Building, 849 South Broadway, Los Angeles, California 90014, Telephone 688–5200.