North American Linen, LLC *and* Local 621, United Workers of America. Case 22–CA–27783

February 25, 2008

DECISION AND ORDER

BY MEMBERS LIEBMAN AND SCHAUMBER

On October 29, 2007, Administrative Law Judge Lawrence W. Cullen issued the attached decision and, on November 14, 2007, he issued an erratum. The Respondent filed exceptions and a supporting brief pertaining only to the remedy.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified below.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, North American Linen, LLC, Long Branch, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(c).

"(c) Honor the Memorandum Agreement referred to above for employees in the unit, retroactive to May 15, 2006."

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT continue to withhold recognition from, or fail and refuse to bargain with, Local 621, United Workers of America as the exclusive collective-bargaining representative of employees in the following unit:

All full-time and regular part-time laundry drivers excluding all other employees covered by other Collective Bargaining Agreements, supervisors, professionals and guards.

WE WILL NOT refuse to prepare and execute and implement a collective-bargaining agreement incorporating the parties' agreed-upon terms and conditions of employment as referenced in the parties' memorandum agreement effective from May 15, 2006, to May 14, 2009.

[1] The Respondent does not except to the judge's findings that the Respondent violated Sec. 8(a)(5) and (1) of the Act by refusing to reduce to writing the collective-bargaining agreement it negotiated and entered into with the Union, by failing and refusing to implement the terms of the collective-bargaining agreement, and by withdrawing recognition from the Union.

[2] We find no merit in the Respondent's exception to the judge's recommendation that the Respondent be required to make "all contractually required payments" to the health benefit and pension funds. Citing *Agathos v. Starlite Motel*, 977 F.2d 1500 (3d Cir. 1992), a case brought under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1145, the Respondent argues that this remedy would result in a "windfall" to the funds. We find *Agathos*, which does not involve the NLRA, to be inapposite. There, the court recognized that "[a]s a general rule, an employer is liable for fund contributions on behalf of all employees covered by a facially valid collective bargaining agreement, regardless of whether the employees actually collect benefits." Id. at 1506. In that case, however, the court remanded a claim for welfare and pension fund contributions for further hearing in light of evidence suggesting that the funds that brought the action had violated their "watchdog" duties under ERISA over a several year period. Id. at 1507. There is no such evidence in this case. Further, the record does not support the Respondent's assertion that none of the Respondent's employees "may collect on any claims because they did not submit any claims within one (1) year." Regardless, in cases of the type involved here, arising under the NLRA, the Board requires the employer to make all delinquent contributions in order to protect the employees' economic interest in the future viability of the fund. *Arandess Mgmt. Co.*, 337 NLRB 245, 247–248 (2001) (citing cases); see also *Schwickert's of Rochester, Inc.*, 349 NLRB 687 fn. 2 (2007) (citing cases). The Respondent does not argue that its employees do not have an economic interest in the future viability of the funds.

[3] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Members Liebman and Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

We shall modify the judge's recommended Order to include the Board's standard remedial language for the violations found, and we shall substitute a new notice to conform to the language set forth in the Order.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize Local 621, United Workers of America and WE WILL prepare and execute a collective-bargaining agreement incorporating the parties' agreed-upon terms and conditions of employment as referenced in the parties' memorandum agreement effective from May 15, 2006, to May 14, 2009.

WE WILL honor the memorandum agreement referred to above for employees of the unit, retroactive to May 15, 2006, and WE WILL make the unit employees whole for any loss they may have sustained as a result of the unlawful refusal to implement the agreement, with interest.

NORTH AMERICAN LINEN, LLC

Jeffrey P. Gardner, Esq., for the General Counsel.
Jeffrey Berezny, Esq., for the Respondent.
Joseph Mercadante, for the Respondent.
Stephen G. Sombrotto, for the Charging Party.

DECISION

STATEMENT OF THE CASE

LAWRENCE W. CULLEN, Administrative Law Judge. This case was heard before me in Newark, New Jersey, on July 18, 2007. The complaint is based on an amended charge filed by Local 621, United Workers of America (the Charging Party or the Union) in Case 22–CA–27783. The complaint alleges that North American Linen, LLC (Respondent or the Company) has violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act). The complaint is joined by the answer filed by the Respondent wherein it denies the commission of any violations of the Act.

After due consideration of the testimony and evidence received at the hearing and the briefs filed by the parties, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The complaint alleges, Respondent admits, and I find, that at all times material herein the Respondent has been a corporation, with an office and place of business in Long Branch, New Jersey, where it has been engaged in commercial laundering and providing linens and other services, that during the preceding 12 months, Respondent, in conducting its aforementioned business operations, purchased and received at its Long Branch, New Jersey facility goods valued in excess of $50,000 directly from points outside the State of New Jersey, and Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

The complaint alleges, Respondent admits, and I find, that at all times material herein, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE APPROPRIATE UNIT

The complaint alleges, Respondent admits, and I find, that the following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time laundry drivers excluding all other employees covered by other Collective Bargaining Agreements, supervisors, professionals and guards.

IV. THE ALLEGED UNFAIR LABOR PRACTICES

In early 2006, the Union began to organize the above-appropriate unit which consisted of approximately 10 truck-drivers. In the spring of 2006, the Union presented the Respondent with signed union authorization cards thus demonstrating that it had the support of a majority of the drivers. Upon receiving this information the Respondent voluntarily recognized the Union. Union President Stephen Sombrotto testified he telephoned Larry Cole, Respondent's attorney, and informed Cole that the Union had obtained a majority of the employees in the unit who had signed union authorization cards. Cole did not dispute this assertion and he and Sombrotto engaged in a series of three to four telephone discussions of items to be covered by a collective-bargaining agreement (CBA) including pension benefits, wage increases, and health care benefits. Sombrotto testified that the Union and Respondent met with Cole and Michael D'Ambrosio, Respondent's chief financial officer, and Sombrotto present in Cole's office on May 11, 2006. At the meeting, the parties discussed medical insurance, holidays, vacations, and wages and reached agreement and Cole drafted a memorandum agreement which was signed by Sombrotto and D'Ambrosio. Respondent agreed at the hearing that D'Ambrosio had full authority to represent and commit the Company in negotiations. The meeting concluded with Cole stating that he would forward to the Union a complete CBA. On June 8, 2006, the Union processed the authorization cards signed by the employees and commenced billing Respondent for dues and for welfare fund and 401(k) contributions. Cole did not at any time tell Sombrotto that the Respondent was not recognizing the Union as the representative of the drivers. Sombrotto testified that during the negotiation meeting held on May 11, 2006, Chief Financial Officer D'Ambrosio was initially offering only a single plan, medical plan, and lower wages and the parties discussed the duration of the agreement and wages and holidays. The meeting lasted 2-1/2 hours and during this meeting, the parties were engaged in negotiations and ultimately came to an agreement and Cole drafted the memorandum agreement which was signed by the parties. The memorandum agreement sets out and addresses the following areas of the terms of the agreement: recognition, union security, check off, seniority, shop steward, hours and overtime, holidays, vacation, probationary period, union visitation, welfare benefits, 401(k) benefits, strikes and lockouts, grievance and arbitration, sick leave, successors and assigns, prior benefits, most favored nation clause, term, schedule "A"—wages. It was agreed that Cole would draft a full-form CBA and that the parties would discuss any problems with this at a later time. No further negotiations were scheduled. Som-

brotto testified he presented the names of the drivers to the Union's office secretary and instructed her to commence the process of billing the Respondent for the dues and the health and pension contributions. The bills contained the items of dues and contributions to the welfare fund and the employers' and the employees' contribution for the 401(k) plan in accordance with the memorandum agreement. The Union never received any of the amounts due under the agreement. When Sombrotto became aware of the Respondent's failure to forward the dues and contribution amounts, numerous calls were made to the Respondent but they were not returned. Sombrotto then called Cole a number of times. Cole basically put him off by saying he would call the Company and see what was happening. In late October or the beginning of November, Sombrotto sent Union Business Agent Ceasar Alarcon to speak to the drivers and Respondent's chief operating officer, Joseph Mercadante. Alarcon did so and informed Sombrotto that Mercadante had told him there was no contract but only a memorandum. Alarcon reported that he told Mercadante that the memorandum was a contract. Mercadante disagreed and told Alarcon he was willing to sit down with Sombrotto and discuss the memorandum. Sombrotto then called Cole and advised him of the position that Mercadante was taking. Sombrotto testified that Cole appeared confused and said he would call the Respondent and get back to Sombrotto. Cole did so and a meeting was called for January 2007, with Sombrotto, D'Ambrosio, and Cole in attendance. D'Ambrosio opened the meeting and contended that the memorandum agreement was too expensive and would put the Company out of business. Sombrotto told D'Ambrosio that he had signed the agreement and that he (Sombrotto) did not want to negotiate against himself. However, the parties did discuss various modifications that Sombrotto was willing to consider but these were never drafted by Cole or entered into by the parties. Cole never did send Sombrotto a complete labor agreement including the original terms of the memorandum agreement. Cole had to leave the January 2007 meeting early. Within a few days of the meeting, Cole called Sombrotto and told him that his client (the Respondent) had said that the memorandum agreement would still cost Respondent too much money. Cole told Sombrotto to do what he had to do.

Respondent presented in its case the testimony of its Chief Operating Officer Joseph Mercadante who admitted that Respondent has not implemented any of the terms of the memorandum agreement, including the health and welfare benefits and the holiday and vacation benefits under the plan set out in the memorandum. He testified that:

> Nothing has ever changed. Our employees get the same holidays that they got before 621. They get the same pay that they got before 621. Nothing is ever changed. The same vacation, the same sick leave, they get the overtime the way they're supposed to. Everything they got before 621.

It is undisputed that Mercadante was not present in any of the initial negotiations or at the subsequent meeting in January 2007. Neither D'Ambrosio nor Cole testified at the hearing. I credit Sombrotto's testimony which was unrebutted.

Respondent for its part in this hearing contends that there was no contract between the parties and that the memorandum agreement which was admittedly signed by D'Ambrosio was not a contract. Respondent further contends that the Union has abandoned the unit employees and thus has lost any rights it may have had, if any, under the memorandum agreement. Respondent also contends that the Union has waived its rights to enforce the memorandum, and has abandoned the memorandum and is barred by the doctrines of laches and estoppel from asserting any claims.

Analysis

I find that the Respondent has unlawfully refused to reduce to writing the agreement which had been negotiated between D'Ambrosio and the Union. I find that this refusal violated Section 8(a)(1) and (5) of the Act. *H. J. Heinz Co. v. NLRB*, 311 U.S. 514 (1941), *NLRB v. Strong*, 393 U.S. 89 (1969). Technical rules of contract law are not determinative as to issues under Board law concerning the parties' engagement in collective bargaining and the entry into and establishment of collective-bargaining agreements. *Pepsi-Cola Bottling Co. v. NLRB*, 659 F.2d 87, 89 (8th Cir. 1981); *Americana Healthcare Center*, 273 NLRB 1728 (1985).

In support of its defense, the Respondent contends that "the conduct of the parties demonstrated that there was no intention to carry out its terms or enter into a full collective bargaining agreement." I find this defense to be without merit as the unrebutted testimony of Sombrotto establishes that he made efforts to contact Respondent to discuss the Respondent's failure to comply with the terms of the memorandum agreement and that the Union was rebuffed by Mercadante who asserted that the memorandum agreement did not constitute a contract. I also find no merit to the Respondent's contentions that the Union waived its rights or abandoned the contract and its defenses that this case should be dismissed on grounds of estoppel or laches. The evidence simply does not support Respondent's position that the Union abandoned the agreement or waived its rights under the memorandum agreement. It is clear that the Union did not abandon the agreement from its attempts to contact the Respondent and that the agreement was a valid contract to which the Respondent had agreed. It is well established that the doctrine of laches is inapplicable to governmental functions, *W. C. Nabors Co.*, 134 NLRB 1078 (1961), affd. 323 F.2d 686 (5th Cir. 1963). See *Rutter-Rex Mfg. Co.*, 396 U.S. 258 (1969). It is also well established that traditional motions asserting estoppel as a defense are not applicable to proceedings before the Board. *Gulf States Manufacturers, Inc.,* 598 F.2d 896 (5th Cir. 1979). In *Alto Plastics Mfg. Corp.*, 136 NLRB 850 (1962), the Board held that attacks on a union's eligibility to serve as a bargaining representative, such as that the union is dormant, will not be heard. The Board held that to be a labor organization, the union first, must be an organization in which employees participate and second, it must exist for the purpose, in whole, or in part, of dealing with employers concerning wages, hours, and other terms of employment. In the instant case before me it is clear that the Union satisfies the above criteria to establish its status as a labor organization.

I find that the evidence clearly establishes that the Respondent and the Union negotiated the memorandum agreement which was signed by D'Ambrosio on behalf of the Respondent and by Sombrotto on behalf of the Union. I find no support in the record for the Respondent's contention that the Union waived any rights it had under the agreement or that the Union abandoned the contract and the bargaining unit. Sombrotto's unrebutted testimony establishes that the Union attempted to contact the Respondent to check on why the Respondent was not complying with the terms of the agreement but was unsuccessful.

CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees of Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time laundry drivers excluding all other employees covered by other Collective Bargaining Agreements, supervisors, professionals and guards.

4. Respondent violated Section 8 (a)(1) and (5) of the Act by refusing to reduce to writing the collective-bargaining agreement it negotiated and entered into with the Union and by failing and refusing to implement its terms.

5. Respondent violated Section 8(a)(1) and (5) of the Act by withdrawing recognition from the Union.

6. The above unfair labor practices in connection with the business engaged in by Respondent as set out above have the effect of burdening commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has violated Section 8(a)(1) and (5) of the Act, it shall be ordered to cease and desist therefrom and to take certain affirmative actions designed to effectuate the policies of the Act.

Having found that Respondent unlawfully refused to implement the terms of the labor agreement, Respondent shall make whole the unit employees who may have sustained a loss as a result thereof with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[1]

ORDER

The Respondent, North American Linen, LLC, Long Branch, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Withdrawing recognition from, and failing and refusing to bargain with Local 621, United Workers of America as the exclusive collective-bargaining representative of employees in the following unit:

> All full-time and regular part-time laundry drivers excluding all other employees covered by other Collective Bargaining Agreements, supervisors, professionals and guards.

(b) Refusing to prepare and execute a full collective-bargaining agreement incorporating the parties' agreed-upon terms and conditions of employment as referenced in the parties' memorandum agreement effective from May 15, 2006, to May 14, 2009.

(c) Refusing to give effect to and applying the terms of the memorandum agreement referred to above.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize Local 621, United Workers of America.

(b) Prepare and execute a collective-bargaining agreement incorporating the parties' agreed-upon terms and conditions of employment as referenced in the parties' memorandum agreement effective from May 15, 2006, to May 14, 2009.

(c) Honor the memorandum agreement referred to above for employees in the unit.

(d) Make all contractually required payments to the health benefit funds and pension funds, and make the unit employees whole in the manner set forth in the remedy section of this decision, including interest on any backpay due.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Long Branch, New Jersey facility, copies of the attached notice marked "Appendix."[2] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall

[1] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[2] If this Order is enforced by a judgment of the United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 15, 2006.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.