Teamsters Local 557, affiliated with International Brotherhood of Teamsters *and* General Motors and New Concept Solutions. Case 5–CC–1247

March 31, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND ACOSTA

On July 18, 2002, Administrative Law Judge William G. Kocol issued the attached bench decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and the Charging Party each filed a brief in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions[1] and to adopt the recommended Order.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Teamsters Local 557, affiliated with International Brotherhood of Teamsters, its officers, agents, and representatives, shall take the action set forth in the Order, except for the attached notice.

MEMBER LIEBMAN, concurring.

I agree with my colleagues that current law compels the result reached here, at least on the present record. I write separately to highlight how strained the concept of "neutrality" is, as applied in certain labor disputes.[1]

The Respondent, Teamsters Local 557, affiliated with International Brotherhood of Teamsters (Local 557), has alleged that Charging Party General Motors was "deeply involved" in a scheme to terminate the drivers employed by General Motors' (GM) car-haul subcontractor, Leaseway Auto Carriers (Leaseway), because these drivers were represented by the Teamsters. Accordingly, Local 557 contends, GM was not a "neutral" employer within the meaning of Section 8(b)(4)(B), and its members' picket line against GM was lawful. I would agree, had the Respondent proved its allegations.

However, the record establishes only that GM shifted a contract relationship from Leaseway, which recognized Local 557, to New Concepts Solutions (NCS), which did not.[2] Before the switch took effect, Leaseway's employees and their families set up the picket line at the GM facility during GM work hours to protest the loss of their jobs. As the judge found, the picket line was clearly directed at GM and not at NCS. I therefore agree that, under current Board law, GM must be treated as a protected secondary employer, and that the picket line was unlawful.

But, in treating GM as a "neutral" to this dispute, we strain the plain meaning of that word. GM was clearly a critical party to what happened here—in fact, it was the primary actor. It was GM's decision, and GM's alone, to shift its car-hauling work from Leaseway to NCS. And GM's decision, in turn, led to NCS's decision not to retain the Leaseway drivers. Even if GM was not complicit in NCS's decision, GM was at least aware, as the Respondent emphasizes, that NCS did not intend to recognize the Teamsters as its employees' bargaining representative. Notwithstanding GM's obvious role in precipitating this labor dispute, GM is treated under current law as a "neutral" to the dispute, who cannot be a lawful target for picketing by the Leaseway drivers who lost their jobs.

In my view, the concept of "neutrality," as it has been applied, turns on a legal fiction. It shields from legitimate concerted activity employers who are by no real definition neutral to a labor dispute. A secondary employer will be treated as a "neutral" and protected from picketing, regardless of its actual involvement in a labor dispute, its involvement in determining employees' terms and conditions of employment through contracting decisions, or its demonstrated antiunion animus.[3]

[1] Chairman Battista notes Member Liebman's concurrence. As she recognizes, her view is not in accordance with the law. Further, in addition to the fact that the evidence does not establish that General Motors (GM) acted for an anti-Teamster motive, Chairman Battista notes that the record shows only that GM made a decision to replace the contractor Leaseway Auto Carriers (Leaseway) with another, New Concept Solutions (NCS). NCS made the decision not to hire Leaseway employees, and made the decision not to recognize Teamsters Local 557.

In addition, this is not a case where an employer has made an unlawful decision to subcontract work away from its own employees.

[2] We will substitute a new notice in accordance with our recent decision in *Ishikawa Gasket American, Inc.*, 337 NLRB 175 (2001).

[1] Whether current law represents the inevitable evolution of early decisions, as Member Acosta argues, I need not address. To the extent that the law has been static, as he suggests, perhaps it is time for another look.

[2] The Respondent points to a notice in GM's newsletter indicating an early awareness that NCS employees would be represented by a union other than the Teamsters. The Respondent also characterizes a complaint (not in the record) against NCS now pending in another Board case, as alleging in part that NCS gave unlawful assistance to two other unions shortly after it replaced Leaseway, in violation of Sec. 8(a)(2). However, the Respondent has failed to show that GM was involved in a concerted plan to terminate Teamster-represented drivers.

[3] The burden on a union to demonstrate that an entity has lost its neutrality is a heavy one. For all practical purposes, a third party is a neutral unless its shown to be an "ally" of the primary employer. The third party is an ally, in turn, only if it fits one of three criteria: It must have performed "struck work"; have exercised "substantial, actual and

The legal concept of "neutrality" accordingly fails to contend with the role that many "secondary" employers actually play in employment decisions.[4] The concept is also increasingly out of sync with the growing business practice of contracting out functions once performed in-house (and with the effective codetermination by such "secondary" contractors of subcontractor labor relations and terms of employment). See *Airborne Express*, 338 NLRB 597, 599 (2002) (Member Liebman, concurring). As applied in many cases, then, the 8(B)(4) concept of neutrality shields from concerted activity many entities that are not "neutral" in any meaningful sense, thereby diluting the right of employees to exercise Section 7 guarantees against employers who in fact determine their terms of employment or who are in fact enmeshed in a labor dispute. See *Service Employees Local 525 (General Maintenance Co.)*, 329 NLRB at 647–651 (1999) (Member Liebman, dissenting).

Accordingly, although I join in the finding that the Respondent's picket line was unlawful, I do so only because the Respondent was unable to establish that GM shifted its car-hauling contract from Leaseway to NCS with antiunion animus.

MEMBER ACOSTA, concurring.

I write individually to address the concerns raised by Member Liebman in her concurrence. The thrust of Member Liebman's concerns is that the concept of neutrality as it has been applied in 8(b)(4) parlance has been strained and distorted.

The view of "neutrality" that Member Liebman disputes is nearly as longstanding as Section 8(b)(4) itself. In *NLRB v. Denver Building Trades Council*, 341 U.S. 675 (1951), one of the Supreme Court's first decisions involving the then-recently enacted Section 8(b)(4), a general contractor on a construction project awarded a subcontract for electrical work to a nonunion contractor. The Council, representing all of the construction unions at the jobsite, picketed, and the unions' members ceased work. In response to this pressure, the general contractor discharged the electrical subcontractor, who in turn filed an unfair labor practice charge.

In upholding the Board's decision that the unions' conduct violated Section 8(b)(4), the Supreme Court rejected the unions' argument that the "doing business" relationship between the general contractor and the subcontractor created a primary dispute between the unions and the general contractor that legitimized the picketing. As the Court explained (341 U.S. at 689–690):

> We agree with the Board also in its conclusion that the fact that the contractor and subcontractor were engaged on the same construction project, and that the contractor had some supervision over the subcontractor's work, did not eliminate the status of each as an independent contractor or make the employees of one the employees of the other. The business relationship between independent contractors is too well established in the law to be overridden without clear language doing so.

See also *NLRB v. Enterprise Assn. of Steam Pipefitters Local 638 (Austin Co.)*, 429 U.S. 507 (1977); *NLRB v. Operating Engineers Local 825 (Burns & Roe, Inc.)*, 400 U.S. 297 (1971). In short our decision today is consistent with the original interpretation of the secondary boycott provisions of the Act.

APPENDIX B

NOTICE TO EMPLOYEES AND MEMBERS
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 on your behalf with your employer

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten, coerce, or restrain General Motors or any other person engaged in commerce or in an industry affecting commerce where an object thereof is to force or require General Motors or any other person to cease doing business with New Concept Solutions or to force or require New Concept Solutions to recognize or bargain with Respondent.

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active control" over the picketers' terms of employment; or be found a "joint employer" with the primary employer. E.g., *Service Employees Local 525 (General Maintenance Service)*, 329 NLRB 638, 640 (1999); *Teamsters Local 560 (Curtin Matheson)*, 248 NLRB 1212, 1213 (1980). In the absence of one of these highly specific scenarios, a targeted employer's antiunion animus, and its contracting decisions or other actions based on that animus, are legally irrelevant.

[4] For that matter, the Board's failure to recognize the role that many "secondary" employers play through their contracting decisions has also resulted in the protection of contractors who discriminate with antiunion animus in violation of Sec. 8(a)(3). See *Airborne Express*, 338 NLRB 597, 598 fn. 1 (2002) (Member Liebman, concurring) (criticizing Board's application of *Plumbers Local 447 (Malbaff)*, 172 NLRB 128 (1968), to cases not involving 8(b)(4) misconduct).

TEAMSTERS LOCAL 557, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS

Timothy F. McCarthy, Esq., for the General Counsel.
James F. Wallington, Esq. (Baptiste & Wilder, P.C.), of Washington, D.C., for the Respondent.
Roger D. Meade and *Traci L. Burch, Esqs. (Littler Mendelson),* of Baltimore, Maryland, for the Charging Party.
J. Michael McQuire, Esq. (Shaw & Rosenthal, LLP), of Baltimore, Maryland, New Concept Solutions.

BENCH DECISION

WILLIAM G. KOCOL, Administrative Law Judge. This case was heard in Baltimore, Maryland, on June 19 and 20, 2002. At the conclusion of the trial and following closing arguments by all parties, I issued a bench decision pursuant to Section 102.35(a)(10) of the Board's Rules and Regulations, setting forth findings of fact and conclusions of law. In accordance with Section 102.45 of the Board's Rules and Regulations, I certify the accuracy of the portion of the transcript containing the Bench Decision; it is attached as Appendix A [pp. 444–450].

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

ORDER

The Respondent, Teamsters Local 557 affiliated with International Brotherhood of Teamsters, Baltimore, Maryland, its officers, agents, successors, and assigns, shall

1. Cease and desist from threatening, coercing, or restraining General Motors or any other person engaged in commerce or in an industry affecting commerce where an object thereof is to force or require General Motors or any other person to cease doing business with New Concept Solutions or to force or require New Concept Solutions to recognize or bargain with Respondent.

2. Take the following affirmative action necessary to effectuate the policies of the Act. Within 14 days after service by the Region, post at its union office in Baltimore, Maryland, copies of the attached notice marked "Appendix B."[2] Copies of the notice, on forms provided by the Regional Director for Region 5, 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 and members 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.

[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."

APPENDIX A

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brief its response. That would be our preference.

Absent that, I believe that the argument in evidence presented in the last few days warrants dismissal of the complaint.

JUDGE KOCOL: All right. The following is my decision in this case. Concerning your request to supply additional authority, I think the matter has been fully argued before me; and it has been argued in the form of the memos that went back and forth on the motions for the subpoenas and we had extensive opening statements with citations to authority; and we had additional citations here that I considered, so I do not feel that any more case authority would be useful to me at this point.

So this is my decision: The Government alleges that Respondent violated Section 8B4IIB of the Act by virtue of the conduct that occurred at the GM facility on December 4, 2001. Those sections of the law reflect the dual objectives of Congress to allow a union to engage in certain conduct against an employer with whom it has a primary labor dispute, but also to shield from such conduct as other employers with whom the union does not have a primary labor dispute.

First, I need to take care of some preliminary matters. Based on the pleadings in this case, I conclude that Respondent, that is Teamsters' Local 557, affiliated with

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the International Brotherhood of Teamsters, is a labor organization within the meaning—within 25 of the Act. I conclude that General Motors is an employer engaged in conduct within the meaning of Section 225, I am sorry 226 and 7 of the Act. I conclude that Mr. McClain is an agent of the Respondent within the meaning of Section 213 of the Act; and I conclude that, at all times material herein, Respondent was at a labor dispute with New Concepts Solutions.

Now, prior to January 1, 2002, Leaseway performed services for GM at GM's facility. Leaseway performed those services on property leased from GM and adjacent to GM's facility. Leaseway employees were represented by Respondent, many of whom had worked for Leaseway for many years. Respondent, however, did not represent any employees of GM at the Baltimore facility. At some point in 2001, it became apparent that Leaseway would no longer perform those services. Instead, those services would be performed by New Concepts Solutions.

The employees of New Concepts are not represented by Respondent. GM and New Concepts do not share common offices or management. Each determines its own labor relations policy. On January 1, 2001, New Concepts began performing the services that were formerly provided by Leaseway. There is no substantial evidence to indicate that the relationship

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between GM and New Concepts was anything other than arms 2 length.

On December 4th, Respondent was responsible for a demonstration that occurred at GM's facility. On that day, about 150

to 200 men, women and children met in the parking lot across the street on Holabird Avenue. These demonstrations initially—these demonstrators, I am sorry, initially distributed handbills to GM employees but that conduct is not alleged to have violated the Act.

After the handbilling ended, the demonstrators reorganized in the parking lot and picket signs and placards were distributed. Those signs read—those signs displayed the Dr. Seuss image of the Grinch and they read: THE GRINCH WHO STOLE LEASEWAY WORKERS' CHRISTMAS. And then in small lettering, it had Teamsters' Local 557; and then it also had: We are the Teamsters printed on them. The signs were displayed in two ways. Most of the signs were affixed to a stick that was about six-feet tall. Other signs had rope that allowed the demonstrators to wear the signs by placing the rope over their heads.

At around 7 a.m., the demonstrators proceeded from the parking lot across Holabird Avenue, walked down Holabird and turned on Broening Highway and walked in front of GM's administration building. They turned around in front of that building and walked back in the opposite direction and

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continued to do so in front of the administration building for about two hours.

In the process, the demonstrators approached entrances and exits to the GM facility used by GM employees, customers and suppliers. I do not determine that it is necessary to resolve the precise credibility issue of how close to the entrances these demonstrators came to those entrances and exits while they were demonstrating in front of the administration building.

During this time, those entrances and exits were actually used by GM's employees, customers and suppliers. However, other than walking past the entrances on the way to the administration building and other than assembling there for a brief period of time to exchange signs, no patrolling occurred at the entrances or exits to the facility.

During the two hours that the demonstrators patrolled in front of the administration building at the GM facility, many of the demonstrators carried and displayed the signs that I have previously described. Respondents used their bullhorns to shout chants that included reference to GM and the demonstrators responded to those chants in unison. This was loud enough to be clearly heard in the administration building. The demonstrators frequently raised the signs up and down; they interacted with some passing drivers, who sounded their horns to show support for the demonstrators.

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At no time during the demonstration did New Concepts have a presence at the GM facility. The day after the demonstration, that is December 5th, Respondent requested recognition from New Concepts.

I conclude that the conduct at GM's facility on December 4th constituted picketing. It involved patrolling, the carrying and raising of picket signs, and the shouting of slogans and interaction between picketers and passersby. I further conclude that the picketing was coercive within the meaning of Section 8B4IIB. The picketing occurred while General Motors was engaged in its normal operations and occurred on sidewalks directly in front of the facility.

I further conclude that the object of the picketing was to force General Motors to cease doing business with New Concepts and/or to force New Concepts to recognize Respondent. The signs, themselves, identified General Motors as the object of the picketing. New Concepts was not present on the site at the time of the picketing. All this occurred in the backdrop of the union's deep concern over General Motors' business relationship with New Concepts that would result in the loss of jobs to the estranged employees.

Respondent asserts that GM is not a neutral employer and I disagree. The fact that GM may have terminated its business relationship with Leaseway does not make GM a primary employer. It remained a neutral employer.

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Respondent relies on the fact that Mr. Harkins, GM's finance director, solicited and received a letter from New Concepts concerning the fact that New Concepts' president would not be present at the site during the picketing and then transmitted that letter to the union.

Our Respondent argues that this is evidence of General Motors' lack of neutrality. In my view, this shows nothing more than what a normal employer might do in anticipation of picketing. Our Respondent also relies on the article in the November 21st Baltimore Assembly Times. That article, in pertinent part, reads—it actually has been read in the record already so I won't repeat it here. But I—Respondent also conceded that the article showed the nature of its dispute with GM.

I conclude that this article, together with the concession, actually serves to strengthen my conclusion that Respondent had an unlawful secondary object.

To summarize: I conclude that the union picketed General Motors on December 4th; that the picketing was coercive and for an unlawful object. I have further rejected all affirmative defenses asserted by Respondent. I make the following conclusions of law: By picketing General Motors on December 4, 2001, Respondent violated Section 8B4IIB of the Act. My written order in this case will be sent to all parties at a later date. This concludes my

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decision. The Hearing is now closed.

MR. McCARTHY: Thank you, Your Honor.

MR. WALLINGTON: Thank you, Your Honor.