IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-5163

Summary Calendar

NATIONAL LABOR RELATIONS BOARD,

Petitioner -
Cross-Respondent,

v.

NEW ORLEANS STEVEDORING COMPANY,

Respondent -
Cross-Petitioner.

Application for Enforcement and Cross-Petition for Review
of an Order of the National Labor Relations Board
15 CA 11565

July 2, 1993

Before KING, DAVIS and WIENER, Circuit Judges.

PER CURIAM:[*]

The National Labor Relations Board (the Board) has petitioned this court to enforce its order of September 30, 1992, directing New Orleans Stevedoring Company (NOSC) to sign a collective bargaining agreement with General Longshoremen Workers, Local No. 3000, International Longshoremen's Association

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[*]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

(the Union). NOSC has filed a cross-petition seeking review of the Board's decision and order. Because we conclude that substantial evidence supports the Board's finding that NOSC reached an agreement with the Union, we affirm the Board's decision and order and grant its petition for enforcement.

I.

A.

Since 1970, NOSC and the Union have been parties to two types of collective bargaining agreements: the Deep Sea Agreement and the Gear Yard Agreement. The Union's practice was to negotiate the Deep Sea Agreement, which covers longshoremen, on a multi-employer basis with the New Orleans Steamship Association.[1] By contrast, the Union negotiated the Gear Yard Agreement, which covers gear yard employees, on an individual basis with each employer.

On October 1, 1980, the Union and NOSC signed a three-year Gear Yard Agreement. This contract was extended by various letters and memoranda of agreement to November 30, 1990. On September 18, 1990, a month before the Gear Yard Agreement was to expire, the Union notified NOSC, as well as the other individual employers of gear yard workers, that it would not extend the

[1] The New Orleans Steamship Association consists of three employers, NOSC, Ryan Walsh, Inc., and Transocean Terminal Operators--all of which operate stevedoring and gear yard service and maintenance terminals at the port of New Orleans.

current contract. The Union requested instead that negotiations begin for a new Gear Yard Agreement.

In November 1990, as negotiations were underway for a new Deep Sea Agreement, the Union also began negotiating with the individual employers for a new Gear Yard Agreement. The Union presented its first proposal to NOSC on November 20, 1990. On January 3, 1991, after several bargaining sessions over the provisions that the Union wished to add to the agreement, the bargaining representative for NOSC, Henry Flanagan, told the Union that they "had an agreement in principle" and shook hands with the Union's negotiators.

Thereafter, the Union continued negotiating with the other employers, among them Transocean Terminal Operators (Transocean). The Union reduced its agreement with Transocean to writing in April or May 1991 and, on May 9, 1991, delivered a copy of the new agreement to Flanagan's office with a note that read:

> Enclosed is the final version of the gear yard contract with Transocean Terminal Operators. All areas of concern were worked out and agreed to including the seniority provisions. We will be ratifying this document tonight. Please review this contract as soon as possible. I would like to present it to your employees for ratification on Tuesday, May 14, 1991.

On May 14, 1991, Flanagan telephoned the Union's representative, Mark Ellis, who in turn asked Flanagan whether he had reviewed the document and whether he had any questions. Flanagan stated that he had reviewed the document and asked how Transocean and the Union had resolved the problems over the work assignments provision. At the end of their discussion, Flanagan

told Ellis that the contract "looked okay" to him, but asked Ellis to delay the ratification vote until May 20, 1991, when the gear yard supervisor at NOSC would be back from vacation.

On May 30, 1991, NOSC's gear yard employees ratified the new Gear Yard Agreement. Despite Flanagan's earlier representations to the contrary, NOSC refused to sign the agreement.

B.

The Union complained to the National Labor Relations Board. It asserted that NOSC, by refusing to sign the Gear Yard Agreement, violated sections 8(a)(5) and (1) of the National Labor Relations Act. The Board's Regional Director, after investigating the charge, issued a complaint and notice of hearing on August 9, 1991.

At the scheduled hearing, the administrative law judge (ALJ) heard testimony from several witnesses, including Flanagan and Ellis. Based on this testimony and the other evidence introduced at the hearing, the ALJ concluded that NOSC had violated sections 8(a)(5) and (1) of the National Labor Relations Act. The ALJ specifically found that Flanagan, on behalf of NOSC, agreed to the terms of the new Gear Yard Agreement, which Ellis had mailed to him, on May 14, 1991. The judge recommended, among other things, that NOSC be ordered "to execute the collective bargaining agreement it agreed to on May 14, with effective dates as set forth at Article XVI of the agreement."

NOSC filed exceptions to the ALJ's decision. It argued primarily that the uncontroverted evidence established that there was no meeting of the minds on all of the terms of the proposed Gear Yard Agreement. The Board, after considering NOSC's objections, decided to affirm the ALJ's ruling and to adopt the recommended order. The Board specifically stated:

> We agree with the judge's finding that [NOSC] agreed to the proposed contract on May 14, 1991, when General Manager Flanagan, after receiving a copy of the agreement, told Union Representative Ellis that it "looked okay to him."

The Board has now filed a petition to enforce its order, and NOSC has filed a cross-petition seeking review of the Board's decision and order.

II.

Section 8(a) of the National Labor Relations Act, 29 U.S.C. § 151 et seq., provides that it shall be an unfair labor practice for an employer:

> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

29 U.S.C. § 158(a)(5). Section 8(d) of the Act defines the duty to bargain collectively as "the mutual obligation of the employer and representative to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions. . ." 29 U.S.C. § 158(d). Encompassed within the duty to bargain collectively is the obligation to execute "a

written contract incorporating any agreement reached if requested by either party . . . ." Id.

Although an employer may not be compelled to enter into a collective bargaining agreement with a union, see H.K. Potter Co. v. National Labor Relations Bd., 397 U.S. 99, 107-08 (1970), once an agreement has been reached, the employer's refusal to reduce the agreement to writing constitutes a per se violation of section 8(a)(5) of the Act. See H.J. Heinz Co. v. National Labor Relations Bd., 311 U.S. 514, 525-26 (1941); National Labor Relations Bd. v. Schill Steel Prods., Inc., 480 F.2d 586, 589 n.1 (5th Cir. 1973). Such a refusal, according to the Supreme Court, reveals a lack of good faith on the part of the employer. See H.J. Heinz, 311 U.S. at 526. Moreover, an employer who refuses "to honor, with his signature, the agreement which he has made with a labor organization, discredits the organization, impairs the bargaining process, and tends to frustrate the aim of the statute to secure industrial peace through collective bargaining." Id.

In determining whether a union and an employer have reached an agreement under the Act, the Board is not strictly bound by the technical rules of contract law. San Antonio Machine & Supply Corp. v. National Labor Relations Bd., 363 F.2d 633, 636-37 (5th Cir. 1966); Loranzo Enterprises v. National Labor Relations Bd., 327 F.2d 814, 818 (9th Cir. 1964). Indeed, we have noted that "[t]he doctrines of traditional contract law are to a large extent inapplicable in the collective bargaining

context." National Labor Relations Bd. v. Alterman Transp. Lines, 587 F.2d 212, 221 (5th Cir. 1979). However, the Board is free to adapt general contract principles, such as the principle of "offer and acceptance," to the collective bargaining context. See National Labor Relations Bd. v. Electra-Food Machinery, Inc., 621 F.2d 956, 958-59 (9th Cir. 1980).

Ultimately, the Board's finding concerning the existence of an agreement is a factual determination, which will be reversed only if it is not supported by substantial evidence. See Capitol-Husting Co. v. National Labor Relations Bd., 671 F.2d 237, 243 (7th Cir. 1982); 29 U.S.C. § 160(e). That is, where substantial evidence on the record as a whole supports the Board's finding that an agreement between an employer and a union existed, we will not reverse its finding--even if we justifiably might have made a different finding than the Board. See Universal Camera Corp. v. National Labor Relations Bd., 340 U.S. 474, 488 (1951).

III.

NOSC argues that the Board's finding of an agreement is not supported by substantial evidence. NOSC maintains that its representative never agreed to the terms of the document delivered to him by the Union on May 9, 1991. NOSC specifically argues that, when Flanagan spoke with the Union's representative on May 14, 1991, he stated that the document "looked okay" but that he could not yet approve the agreement. NOSC also argues

that "[t]here is clear and uncontroverted evidence that there was never a meeting of the minds on all terms of [the Gear Yard Agreement]."

Initially, we note that Flanagan, as General Manager, had the authority to negotiate and execute a collective bargaining agreement on behalf of NOSC. Indeed, NOSC does not seriously dispute his authority. Rather, NOSC essentially argues that Flanagan did not manifest his assent to the Gear Yard Agreement.

Our review of the record uncovers substantial evidence to the contrary. First, there is the credited testimony of Ellis, the Union's representative, who stated that Flanagan expressed an unconditional acceptance of the Gear Yard Agreement on May 14, 1991.[2] There is also evidence that, as early as January 3, 1991, Flanagan shook hands with Ellis and indicated that they had an

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[2] In this regard, we rely on the credibility findings of the ALJ, which were affirmed by the Board. With respect to the testimony of Ellis and Flanagan, the ALJ specifically found:

> Union Representative Ellis appeared generally candid and impressed me that he was attempting as best he could to testify truthfully. I am not unmindful of his interest in the outcome of this case; however, I found him to be a believable witness. . . . The overall circumstances of the case as well as the documentation presented at trial generally supports Ellis' testimony. Accordingly, I credit his testimony and specifically do so where it conflicts with the testimony given by General Manager Flanagan. General Manager Flanagan was to a great extent unresponsive to questions generally and specifically to questions related to limitations or restrictions placed on his authority by the Company's Texas headquarters. Flanagan seemed anxious to shift the responsibility for his actions (or inactions) to higher officials of the Company in Texas. In light of all the above, I am unwilling to rely on Flanagan's testimony where it is contradicted by that of other witnesses.

agreement in principle. Finally, there is evidence that Flanagan was involved in, or at least apprised of, the negotiations between Transocean and the Union--negotiations culminating in the agreement that was ultimately forwarded to NOSC for approval.

Accordingly, we reject NOSC's argument that there is no substantial evidence supporting the Board's finding of an agreement. We also reject NOSC's related argument that no substantial evidence supports a finding that it agreed to all of the terms of the Gear Yard Agreement. When Flanagan stated that the agreement "looked okay" to him, he was effectively accepting all the terms of the agreement. See Kelly's Private Car Service, 289 N.L.R.B. 30 (1988) (a party's assent to an unsigned paper can serve as the formation of an agreement). Moreover, we agree with the Union that many of the terms about which NOSC now complains are not material and therefore would not preclude the finding of an agreement even in the absence of Flanagan's assent to them.

IV.

For the foregoing reasons, we AFFIRM the Board's conclusion that NOSC violated section 8(a)(5) and (1) of the National Labor Relations Act, as well as its order directing NOSC to sign the Gear Yard Agreement. We also GRANT the Board's petition for enforcement of the order.