

Food Fair Stores, Inc. d/b/a United Packing Co. and Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, Schochtim Division of the Chicago Fur Workers Union, Local 45. Case 27-CA-4869-2

May 17, 1977

DECISION AND ORDER

BY MEMBERS JENKINS, MURPHY, AND WALTHER

On January 7, 1977, Administrative Law Judge Martin S. Bennett issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,¹ and conclusions² of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

¹ The General Counsel has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

The Administrative Law Judge noted in his Decision that during the first week of March 1976, Respondent notified its Kosher meat customers that it was discontinuing its Kosher slaughtering operations as of April 2, 1976. Examination of the record reveals that Plant Manager Wiley only notified these customers that a possibility existed that Respondent might terminate its Kosher operations, without specifying the date April 2. The decision to close down the operation on April 2 did not receive final authorization from higher management until approximately the middle of March. These corrections to the Administrative Law Judge's Decision do not detract from our affirmance of his Decision that Respondent did not violate the Act herein.

² At fn. 5 of his Decision, the Administrative Law Judge found that, based on the authorization cards it had proffered, the Union was the majority representative of the Kosher operation employees from the date of its demand for recognition on March 25, 1976. Such findings, however, are usually made in the context of employer unfair labor practices which have made the cards a more valid indicator of employee preference than an election. Here, however, the Administrative Law Judge found that Respondent did not violate the Act. Therefore, in light of the above facts, and in view of the Supreme Court's decision in *Linden Lumber Division, Sumner & Co., v. N.L.R.B.*, 419 U.S. 301 (1974), in which it held that in the absence of independent unfair labor practices an employer has no obligation to recognize or bargain with a union solely on the basis of

authorization cards, we disavow the Administrative Law Judge's finding at fn. 5.

DECISION

STATEMENT OF THE CASE

MARTIN S. BENNETT, Administrative Law Judge: This matter was heard at Denver, Colorado, on August 31 and September 1, 1976. The amended complaint, dated June 3 and based upon a charge filed April 12, 1976, by Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, Schochtim Division of the Chicago Fur Workers Union, Local 45, herein the Union, alleges that Respondent, Food Fair Stores, Inc. d/b/a United Packing Co., has engaged in unfair labor practices within the meaning of Section 8(a)(1), (3), and (5) of the Act. Briefs have been submitted by the General Counsel and Respondent.

Upon the entire record in the case, and from my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. JURISDICTIONAL FINDINGS

Respondent, Food Fair Stores, Inc. d/b/a United Packing Co., is a Pennsylvania corporation which maintains an office and place of business at Denver, Colorado, where it is engaged in the business of packing and sale of meat products. It respectively sells and purchases goods valued in excess of \$50,000 per annum to and from points outside the State of Colorado. I find that the operations of Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, Schochtim Division of the Chicago Fur Workers Union, Local 45, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Introduction; The Issues

Respondent, at the time material herein, was engaged in the slaughtering and sale of meat, both kosher and nonkosher, at its Denver plant. Kosher meat must be slaughtered according to ritual by individuals who have studied the Jewish laws and are certified as qualified to do same by the supervising rabbi, who is not necessarily in the plant. There were some 12 to 13 persons so engaged in Denver and all are referred to herein as rabbis although only 1 of them, Merdoch Abdelhak,¹ was a religious rabbi in the customarily understood sense.

There are some 425 production employees who are employed in the non-kosher operation of the plant and they have for many years been represented by Amalgamated Meat Cutters and Butcher Workmen of North America, Local No. 641, AFL-CIO, herein Local 641,

¹ Spelled otherwise in the complaint and at various places in the transcript.

which manifestly is a labor organization within the meaning of Section 2(5) of the Act. The kosher employees have never belonged to or been represented by Local 641. There is also a contract between Respondent and Local Union No. 1 of the International Union of Operating Engineers, covering a small unit of maintenance employees; the latter group is not involved herein. Respondent has contended that a separate unit of the kosher kill employees is not appropriate.

The complaint, as amended at the hearing, alleges that Respondent promised its kosher employees economic and other benefits for refraining from union activities or giving support or assistance to the Union; discharged 11 named employees of the kosher department, in essence the entire complement, because of their union activities; and refused to meet and bargain with the Union as the representative of the kosher department employees, this unit reflecting the customary exclusions.

B. Sequence of Events

In October 1975, Robert Wiley, with considerable experience in the field, was appointed general manager of the Denver operation. From the outset, he was unhappy with the kosher portion of Respondent's slaughtering operations and within 2 weeks so expressed himself to this group. He stated that the yield was poor, that the percentage of bloodshots or hemorrhages was much too high and that if these conditions did not improve he would feel constrained to discontinue this operation.

Wiley uncontrovertedly testified, and I find, that the yield from kosher slaughtering operations, based upon his experience, should be between 75 and 80 percent and the record demonstrates that the yield at Respondent was substantially less.² In October 1975, soon after the arrival of Wiley upon the scene, there was a 4-day walkout by the kosher department employees over wages; this was settled by a 10-percent wage increase. At that time, according to Wiley, the employees were told by Vice President Silver of Respondent that, if there was no improvement in the yield and the elimination of bloodshots, it was doubtful that kosher operations could continue.

The thrust of the case for the General Counsel is that the rabbis thereafter became interested in unionization. They held several meetings, contacted Local 641, encountered disinterest on the part of the latter, and ultimately contacted the Union in March 1976. On March 23, eight of the group held a meeting at which cards were signed and these were duly mailed to the office of the Union in Chicago. A ninth card, that of Rabbi Lowinger, was duly mailed on March 24. The Union wrote to Wiley on March 25, declared its majority status, enclosed copies of the authorization cards, requested recognition, and asked to meet for the purpose of collective bargaining.

On April 2, 1976, the kosher department was shut down under circumstances allegedly involving poor yield, as described. The General Counsel stresses that on April 6 counsel for Respondent, located in Beverly Hills, California, wrote to the Union in Chicago and referred to the

March 25 request for a meeting. He denied the request until such time as the Union was duly certified by the Board, but made no reference to the April 2 shutdown. On the other hand, the record does not disclose when counsel for Respondent was apprised thereof.

C. Concluding Findings

As set forth, Wiley uncontrovertedly testified that an operation as this could not be profitable unless the yield ran between 75 and 80 percent. There is evidence that during the period from January 22 through April 2, 1976, the yield was in the 30-to 50-percent bracket. Significantly, from March 10 on, the yield did not reach 50 percent. And the bloodshot meat is condemned by inspectors from the U.S. Department of Agriculture who are regularly on duty in the plant.

There is evidence that during the October walkout the slaughtering was conducted by the production and maintenance employees of the much larger unit who employed the stunning method and that there were no bloodshots.³ There is also evidence that in November Wiley and Superintendent Robert Holloway of the slaughtering department advised the kosher group that the yield had not increased significantly and that, absent better yields and less bloodshots, Respondent would abandon its kosher operations. There are admissions in essence to this effect from Rabbis Wolf and Fishbane.

Later, in January 1976, Wiley met with Silver and with Sam and Jack Friedland, respectively the founder and president of Respondent. Wiley reaffirmed his view that the kosher operations were a loss to Respondent and that it was economically unsound to continue same. As stated, the record amply demonstrates the experience of Wiley with other concerns in this type of operation.

About that time Wiley also met with Rabbi Abdelhak and Rabbi Twerski, also spelled as Twersky; the latter was the local rabbinical supervisor. Wiley reiterated his previously expressed views, but did agree to add an additional man or men. One rabbi was added late in January or early in February. Wiley met with Abdelhak and Holloway once or twice a week thereafter concerning the problem, there was no improvement and Wiley, an impressive and manifestly knowledgeable witness, obtained approval from management in the last week of February or the first week of March to shut down the kosher operations.

He decided to set the date for April 2, this being the end of a pay period. Respondent's largest customer, on the east coast, was so informed as well as others; all were advised to seek other sources of supply. Wiley told Holloway and Rabbi Abdelhak in the second week of March of this decision, but asked that it be kept confidential so as to avoid an upheaval in the plant; he did not at that time specify the closing date.

On April 2, Wiley told these two, as well as Rabbi Twerski, that this was the final date of kosher operations. Respondent then ceased same and Respondent has not since engaged in any kosher slaughtering.

² There is much testimony, not controverted, concerning the loss therefrom of meat yield and revenues at Respondent, but I deem it unnecessary to set this forth in detail.

³ Compliance with the religious ritual or lack thereof at that time is not before me.

David Wolf, one of the group of rabbis, testified for the General Counsel that Rabbi Abdelhak told him on April 2, in a private conversation, that "If we dropped the Union, at least we will be able to go back to work" ⁴ Abdelhak flatly denied the conversation, claiming that the two had never discussed union organization. I deem it significant, as Respondent stresses, that Abdelhak himself was discharged along with the rest of the group and has no job with Respondent. Indeed, if he is rank and file, as he testified, a reinstatement and make whole order might well be addressed and applied to him.

Rabbi Zvi Fishbane testified that a meeting was held at the home of Rabbi Twerski on May 4 and Abdelhak then asked if the employees were ready to leave the Union. Abdelhak flatly denied this, testifying rather that Twerski, on this occasion, proposed that he, Twerski, as an independent contractor, undertake the kosher slaughtering operations at the premises of Respondent. I credit Abdelhak herein; Twerski did not testify.

The evidence preponderates that Respondent was long dissatisfied with the lack of profitability of its kosher operations, that the employees in this group had long been on notice thereof, and that they were well aware that a cessation of these operations might be imminent. It was then that they embraced the Union. I do not, on this record, with the very much larger complement elsewhere in the plant which had long been organized, regard this action

⁴ The alleged supervisory status of Abdelhak is in issue. It would seem that he was at best a straw boss and not an agent of Respondent. In any event, the case clearly does not stand or fall upon his status.

⁵ I do find that at all times material herein the rabbis of Respondent's Kosher division, excluding office clerical and professional employees, guards and supervisors constituted a unit appropriate for the purposes of collective bargaining within the meaning of Sec. 9(b) of the Act. I further find that as of March 25, 1976, the Union was the representative of the employees in this unit within the meaning of Sec. 9(a) of the Act.

as having a potential chilling effect on unionization, as expressed in *Textile Workers Union of America v. Darlington Manufacturing Co.*, 380 U.S. 263 (1965).⁵

In view of the foregoing considerations, I shall recommend that the complaint be dismissed in its entirety.

CONCLUSIONS OF LAW

1. Food Fair Stores, Inc. d/b/a United Packing Co., Denver, Colorado, is an employer whose operations affect commerce within the meaning of Section 2(6) and (7) of the Act.

2. Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, Schochtim Division of the Chicago Fur Workers Union, Local 45, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has not engaged in unfair labor practices within the meaning of Section 8(a)(5), (3), and (1) of the Act.

Upon the basis of the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER⁶

The complaint is dismissed in its entirety.

⁶ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.