

In the Matter of KARP METAL PRODUCTS CO., INC., and FABRICATED METAL LOCAL 1225, UNITED ELECTRICAL, RADIO & MACHINE WORKERS OF AMERICA, C. I. O.

*Case No. C-2097*

SUPPLEMENTAL FINDINGS OF FACT  
AND  
RECOMMENDATION

*July 22, 1943*

On July 8, 1942, the National Labor Relations Board, herein called the Board, issued a Decision and Order in this case,<sup>1</sup> in which it found that Karp Metal Products Co., Inc., of New York City, herein called the respondent, had engaged in and was engaging in certain unfair labor practices affecting commerce, and ordered the respondent to cease and desist therefrom and to take certain affirmative remedial action. The Board found, among other things, that on and after June 3, 1941, the respondent had refused to bargain collectively with Fabricated Metal Local 1225, United Electrical, Radio & Machine Workers of America, a labor organization affiliated with the Congress of Industrial Organizations, herein called the Union, in violation of Section 8 (5) and (1) of the National Labor Relations Act, 49 Stat. 449, herein called the Act. To remedy this unfair labor practice, the Board directed the respondent, upon request, to bargain collectively with the Union as the exclusive representative of the employees in the collective bargaining unit which the Board found appropriate, in respect to rates of pay, wages, hours of employment, or other conditions of employment.<sup>2</sup> On March 18, 1942, the respondent moved to reopen the record for the purpose of showing that a majority of the employees in the appropriate unit had become members of Karp Employees Union, an unaffiliated labor organization, which was organized after the Board's hearing in this proceeding had been concluded. The Karp Employees Union moved at the same time for leave to intervene in the proceeding and joined in the respondent's

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<sup>1</sup> 42 N. L. R. B. 119.

<sup>2</sup> Paragraphs 1 (d) and 2 (c) of the Order, 42 N. L. R. B., at 153.

51 N. L. R. B., No. 105.

motion. In its Decision and Order, the Board denied these motions, holding that, "The allegations of these petitions, even if true, are subsequent to and in no way affect the acts complained of or the legal conclusion to be drawn therefrom."<sup>3</sup>

The Board thereafter petitioned the United States Circuit Court of Appeals for the Second Circuit to enforce its Order against the respondent. On March 25, 1943, the Court handed down its opinion, directing that all provisions of the Board's Order be enforced except paragraphs 1 (d) and 2 (c) and the notice provisions in paragraph 2 (d) relating thereto, and that enforcement of paragraphs 1 (d) and 2 (c) and the related notice provisions should await a determination by the Board whether in the altered situation alleged in the petitions of March 18, 1942, the Union is entitled to continued recognition as the bargaining representative of the respondent's employees in the appropriate unit. For the purpose of having the Board make this determination, the Court remanded the proceeding to the Board, with directions to pass upon the question raised by the aforesaid petitions of March 18, 1942, in the light of the situation existing at the time of the Board's determination of that question.<sup>4</sup> On April 21, 1943, the Court entered a decree in conformity with its opinion.

On May 17, 1943, the Board issued an Order directed to the respondent and to the Karp Employees Union, requiring them to show cause why the petitions of March 18, 1942, should not be denied and why the Board should not reaffirm paragraphs 1 (d) and 2 (c) of its Order of July 8, 1942. The Order to Show Cause further provided that the respondent and the Karp Employees Union could, within the time therein specified, file with the Board a verified statement of any additional facts they deemed relevant, together with any written argument they desired to submit in support of their position; and that they might apply, if they so desired, for permission to be heard orally before the Board in support of their position. Copies of the Order to Show Cause were duly served upon all parties to the Board proceeding and upon the Karp Employees Union. Neither the respondent nor the Karp Employees Union availed itself of the opportunity to request oral argument; but the respondent submitted a written statement of its position together with a supporting affidavit of its president, and the Karp Employees Union submitted an affidavit of its president in support of its position.

Pursuant to the remand by the United States Circuit Court of Appeals for the Second Circuit and upon consideration of the entire record in the proceeding, including the affidavits and statement

<sup>3</sup> 42 N. L. R. B., at 152.

<sup>4</sup> 134 F. (2d) 954

filed by the respondent and the Karp Employees Union in response to the Order to Show Cause, the Board hereby exercises its judgment on the aforesaid remanded question and hereby makes the following:

### SUPPLEMENTAL FINDINGS OF FACT

The question for us to determine is whether it will effectuate the policies of the Act to require the respondent to bargain collectively with the Union at the present time, notwithstanding that the Karp Employees Union may now represent a majority of the employees in the appropriate bargaining unit. For the purpose of determining this question we assume, as the respondent and the Karp Employees Union aver, that a majority of the employees in the unit on July 8, 1942, and at present, were and are members of the Karp Employees Union. We likewise assume that, for reasons unconnected with the unfair labor practices which the respondent committed, only 75 of the 172 persons in the unit on June 3, 1941, the date of the refusal to bargain, are still in the respondent's employ. In our judgment, a requirement that the respondent bargain with the Union is appropriate to effectuate the policies of the Act, notwithstanding these facts.

In the circumstances of this case, the adherence of the employees to the Karp Employees Union cannot, in our opinion, be regarded as the untrammelled expression of their will; rather, it is the kind of action that employees would take who have been subjected to unfair labor practices such as the respondent committed. The considerations impelling us to this view are briefly as follows:

The respondent has denied its employees the right to bargain through a union of their own choosing for many years; in 1937 it refused to deal with a nationally affiliated union then representing a majority of its employees and coerced its employees into abandoning a strike which that union called to secure the recognition to which it was entitled; it then foisted upon the employees individual contracts which infringed upon their rights under the Act; it also established an unaffiliated labor organization among them as an adjunct to these illegal contracts; during 1937, 1938, 1939, and the greater part of 1940, the unaffiliated labor organization which the respondent foisted upon its employees held undisputed sway over them; in 1941, however, the Union succeeded in enrolling 112 out of 172 employees then in the appropriate bargaining unit as members, despite unrelenting opposition by the respondent; again, the respondent frustrated its employees' wishes by refusing to bargain with their freely chosen representative; and again it succeeded in breaking a strike which its unfair practices provoked. The latest of these grave unfair labor practices were committed in the summer of 1941. The Board hearing in this case oc-

curred in November and December of that year. The Karp Employees Union was formed within a few weeks of the close of that hearing. During this entire period the respondent did nothing to eradicate the restraints engendered by the flagrant unfair practices it had committed. Indeed, there is nothing before us to show even at this late date that the respondent has complied in any respect with the provisions of our Order that the Court has enforced. In these circumstances it cannot be said that the adherence of the respondent's employees to the Karp Employees Union is the expression of their untrammelled will.

Employees join unions in order to secure collective bargaining. Whether or not the employer bargains with a union chosen by his employees is normally decisive of its ability to secure and retain its members.<sup>5</sup> Consequently, the result of an unremedied refusal to bargain with a union, standing alone, is to discredit the organization in the eyes of the employees, to drive them to a second choice, or to persuade them to abandon collective bargaining altogether. *A fortiori* would employees be driven from the union of their choice when, as here, the refusal to bargain is the climax of a succession of unfair practices. When the respondent refused to deal with the Union, the only alternatives which its employees had were to forego collective bargaining or to designate a representative that would be acceptable to the respondent. Respondent always expressed a willingness to deal with an unaffiliated union; in fact, it had foisted such an organization upon its employees as a means of keeping them from joining nationally affiliated unions. Naturally, therefore, the employees turned to that kind of an organization when the respondent thwarted their efforts to bargain through the Union.

In seeking to convince us that the employees renounced the Union for reasons unrelated to the unfair labor practices, the respondent has submitted affidavits by several employees stating in general terms that they became dissatisfied with the manner in which the Union treated them during the strike. It may be assumed that some of those who abandoned the Union were motivated in part by factors other than the discouraging effects of the unfair labor practices which the respondent committed. But any attempt to disentangle other factors from these discouraging effects is impossible so long as the unfair practices are unremedied.<sup>6</sup> Cf. *N. L. R. B. v. Remington Rand, Inc.*, 94 F. (2d) 862, 872 (C. C. A. 2), cert. denied 304 U. S. 576.

<sup>5</sup> This fact is readily verifiable by common experience and has repeatedly been recognized by the Supreme Court. *International Association of Machinists v. N. L. R. B.*, 311 U. S. 72, 82; *N. L. R. B. v. Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 271; cf. *Texas & N. O. R. Co. v. Brotherhood of Railway Clerks*, 281 U. S. 548, 568-569.

<sup>6</sup> The soundness of this observation was recognized by the Supreme Court in *International Association of Machinists v. N. L. R. B.*, 311 U. S. 72, 82. The company in the *Machinists* case contended that the union with which it had refused to bargain had lost its majority, not because of its unfair labor practices, but because of a supervening jurisdictional strike

The attempt of the respondent to have it appear that the Karp Employees Union was selected by its employees because of its bargaining achievements, and not because of the restraints engendered by its unfair labor practices is subject to the same infirmity. Whether or not the employees could have obtained better terms through the Union than the Karp Employees Union received cannot of course, be known. That a large majority of them considered the Union an effective bargaining agent is a reasonable inference from their having joined the Union. Undoubtedly the ready bestowal by the respondent of recognition and a contract upon the Karp Employees Union may have, in part, attracted some of the employees. But it is not unreasonable to believe that they and others were impelled to join the unaffiliated union in order to secure representation that would avoid the respondent's hostility to a nationally affiliated union. Here, again it is impossible to determine what the employees really desire until they are assured that the Act carries sufficient force to compel their employer to bargain with their freely chosen representative, whether it be a nationally affiliated union or an intramural organization.

In a further effort to neutralize the coercive effect of its unfair labor practices, the respondent stresses the fact that a large number of employees in the appropriate unit when the refusal to bargain occurred have since left its employ and that it has hired many new employees.<sup>7</sup> In themselves these facts do not warrant an inference that the restraints engendered by the respondent's illegal conduct are no longer operative. For, unremedied unfair labor practices exercise a coercive effect not only upon the immediate victims, but upon future employees as well. Thus, for example, in the present case, it is probable that most of the defections from the Union's majority would not have occurred if the respondent had lived up to its bargaining obligation under the Act. Had the respondent accorded the Union the recognition to which it was entitled, the Union would have received a powerful impetus toward further organization; it would therefore be arbitrary to assume that it could not in such case have sustained

(Record, No. 16, October Term, 1940, pp. 12-13). In enforcing the Board's bargaining order, despite this contention, the Supreme Court said (311 U. S., at 82):

"It cannot be assumed that an unremedied refusal of an employer to bargain collectively with an appropriate labor organization has no effect on the development of collective bargaining. See *National Labor Relations Board v. Pacific Greyhound Lines*, 303 U. S. 272, 275. Nor is the conclusion unjustified that unless the effect of the unfair labor practices is completely dissipated, the employees might still be subject to improper restraints and not have the complete freedom of choice which the Act contemplates. Hence the failure of the Board to recognize petitioner's notice of change was wholly proper. *National Labor Relations Board v. Bradford Dyeing Ass'n*, 310 U. S. 318, 339-340

<sup>7</sup> On June 3, 1941, the Union represented 112 out of 172 employees in the appropriate unit. The affidavits submitted by the respondent and the Karp Employees Union state that there are now 182 employees in the unit, 139 of whom are members of the Karp Employees Union. Of these 182 persons, 75 are still old employees, that is, persons who were in the respondent's employ when the refusal to bargain occurred.

itself.<sup>8</sup> As two authorities in the field of labor relations have pointed out:

Where labor turnover is high the union's majority may be diluted by a continued influx of non-union men into the plant . . . Union officers generally appear to believe, however, that this inadequacy is not serious. When the union has no strong rivals in the plant, when it commands a safe majority, and when it enjoys contractual relations with the employer, it is usually not very hard to persuade a majority of new employees to sign up.<sup>9</sup>

Since, however, the respondent coerced its employees into renouncing the Union, it created an atmosphere which made normal growth of the Union impossible. Naturally, new employees would be reluctant to join the Union in the face of the respondent's avowed hostility to it.

In summary, the respondent's unremedied unfair labor practices have in our view deterred the employees from organizational activity in behalf of the Union, have discouraged new employees from becoming members of the Union, have caused members to drop from its ranks, and have impelled both old and new employees to join the Karp Employees Union as the only alternative to foregoing concerted activity altogether.<sup>10</sup> We find that conditions permitting freedom of choice have not been restored; further, that such freedom cannot be restored unless the employees are assured that the Act carries sufficient force to compel the respondent to bargain with their freely chosen representative. For these reasons we conclude that it will effectuate the policies of the Act to require the respondent to bargain collectively with the Union. We therefore hereby deny the motions

<sup>8</sup> The Supreme Court has pointed out in *N. L. R. B. v. Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 267 that, "once an employer has conferred recognition on a particular organization it has a marked advantage over any other in securing the adherence of employees and hence in preventing the recognition of any others."

<sup>9</sup> Reynolds and Killingsworth, "The Union Security Issue," *Annals of the American Academy of Political & Social Science*, Vol. 224, Nov. 1942, p. 38. See also Feller and Hurwitz, *How to Deal With Organized Labor* (N. Y. 1937) p. 657; Cummins, *The Labor Problem in the United States* (N. Y. 1935), p. 207; Rauschenbusch, "The State's Relation to Labor," *Labor Problems in America* (N. Y. 1940), p. 664; Shchter, *Annals*, "The Government and Collective Bargaining," March 1935, p. 116.

<sup>10</sup> The question posed by the remand in this case was present in *Oughton v. N. L. R. B.*, 118 F. (2d) 486, at 494 *et seq.* (C. C. A. 3), cert. denied 315 U. S. 797. In upholding the Board's position in that case, the Court sitting *en banc*, endorsed as sound the chief considerations which have led us to conclude in the present case that enforcement of our bargaining order is essential to restore freedom of choice to the respondent's employees. The Court in the *Oughton* case concluded: "While the [unfair labor] practices endure, no majority can be said to be uncoerced except the last majority chosen by the free and untrammelled will of the employees. It is proper, therefore, for the Board, in its effort to wipe away the effect of the unfair labor practices, to direct the employer to bargain collectively with the agent which, undeniably, had been selected by the free will of the employees although it then be asserted that the agent no longer commands a majority." (118 F. (2d), at 498). See also *N. L. R. B. v. Clinton E. Hobbs Co.*, 132 F. (2d) 249, 252 (C. C. A. 1).

of the respondent and of the Karp Employees Union to set aside paragraphs 1 (d) and 2 (c) of the Board's Order.<sup>11</sup>

### RECOMMENDATION

Upon the basis of the above supplemental findings of fact and of the entire record in the case, the National Labor Relations Board hereby respectfully recommends to the United States Circuit Court of Appeals for the Second Circuit that paragraphs 1 (d) and 2 (c) of the Order issued by the Board on July 8, 1942, and the related notice provisions, be enforced as issued.

MR. JOHN M. HOUSTON took no part in the consideration of the above Supplemental Findings of Fact and Recommendation.

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<sup>11</sup> No valid contention may be made that to require bargaining with the Union at the present time is to saddle upon the employees a representative which they no longer desire. Until the Board's Order has been faithfully carried out, the employees' real desires "are matters of speculation and argument." *N. L. R. B. v. Brown Paper Mill Co.*, 108 F. (2d) 867, 872 (C. C. A. 5), cert. denied 310 U. S. 651. The Board's Order does not grant to the Union a permanent status, or status for any fixed period of time. On the contrary, should the employees, after conditions of free choice have been restored, really desire a different representative, they may readily secure one. As the Supreme Court pointed out in the *Machinists* case, Section 9 of the Act provides "adequate machinery for determining in certification proceedings questions of representation after unfair labor practices have been removed as obstacles to the employees' full freedom of choice" (311 U. S., at 82). When complete freedom of selection has been assured by compliance with our Order, thus removing the impediments which the respondent has erected in the path of an untrammelled selection, any rival union or group of employees will be free to petition as under Section 9 for investigation of the representation question, should one then exist.