

**Ugite Gas Incorporated and Oil, Chemical and Atomic Workers International Union, AFL-CIO.** *Case No. 4-CA-1927. February 5, 1960*

DECISION AND ORDER

On August 25, 1959, Trial Examiner C. W. Whittemore issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondent filed exceptions to the Intermediate Report, a supporting brief, and a request for oral argument.<sup>1</sup>

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, the Board has delegated its powers in connection with this proceeding to a three-member panel [Members Rodgers, Jenkins, and Fanning].

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and briefs, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, with the following additions and modifications.

1. We do not adopt the finding of the Trial Examiner that the sale of the business and assets by McNay Gas Corporation to the Respondent was not a bona fide arm's-length transaction. All the evidence adduced at the hearing was taken pursuant to stipulations of the parties. It was established that on March 2, 1959, the Respondent entered into a written agreement with McNay by which the Respondent agreed to purchase the business and all assets relating thereto with certain minor exceptions. Settlement of the agreement was made on April 15, 1959, with the Respondent formally taking over the operation of the business on April 16, 1959. It was further stipulated that the sale was a bona fide arm's-length transaction and not designed or intended to deprive or defeat any person of any rights they might have under the National Labor Relations Act. The Trial Examiner, in finding that the sale was not an arm's-length transaction relies principally upon a speech made to the McNay employees by the new management. Specifically, on March 19, 1959, nearly a month before the sale became final, E. H. Smoker, president of United Gas Improvement Company, which owns and controls the Respondent, met with the McNay employees and announced the intent to purchase the business.

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<sup>1</sup> Because in our opinion the record, exceptions, and briefs adequately set forth the issues and positions of the parties, this request is hereby denied.

Smoker also told the employees, "We are going to have to depend on all of you people to continue running the business substantially as you have done in the past since you are the contact people with the customers. They only know the Company through you and I know you will continue the good work which you have carried on. . . ." We do not find that Smoker's speech nor any other evidence negates the stipulation of the parties that the sale was a bona fide arm's-length transaction, or in effect that the sale was not made as a subterfuge to circumvent the Union's certification. No such violation is alleged. However, our disagreement with the Trial Examiner on this point does not affect our ultimate conclusion in the case.

We agree with the Trial Examiner's finding that Respondent violated Section 8(a)(1) and (5) of the Act by refusing to bargain with the certified Union. We note that Respondent was aware that the Union represented a majority of the McNay employees as early as March 19, 1959, when the Union, on learning of the Respondent's intention to purchase the business, requested a meeting with it for the purposes of bargaining. Respondent argues that it should not be bound by the Union's certification because the terms of the sale agreement provides that Respondent "shall not be liable for any . . . contractual commitments or other liabilities" of McNay, "including liabilities to its employees." There is no merit in this contention, however, for it is well established that private parties may not by contract void an obligation imposed by a Federal act.<sup>2</sup> The Union was certified on December 19, 1958. Respondent, when it assumed control on April 16, 1959, rehired all but two of the former McNay employees, and this constituted its complete work force. As the employer of these employees it was independently obligated under the Act to accord recognition to the majority representative of these employees. Like the Trial Examiner, we reject the Respondent's contention that, as a result of private poll it conducted among the employees, it had a good-faith doubt as to the Union's majority status at such time. It is well settled that a Board certification must be honored for a reasonable period of time, normally 1 year in the absence of unusual circumstances.<sup>3</sup> A change in ownership is not such an unusual circumstance as to affect the force of the certification. Where the enterprise remains substantially the same, as here, the obligation to bargain of a prior employer devolves upon his successor in title. A purchaser in such a situation is a successor employer.<sup>4</sup>

<sup>2</sup> See *J. I. Case Company v. N.L.R.B.*, 321 U.S. 332; *National Licorice Company v. N.L.R.B.*, 309 U.S. 350.

<sup>3</sup> *Ray Brooks v. N.L.R.B.*, 348 U.S. 96.

<sup>4</sup> *N.L.R.B. v. Albert Armato and Wire & Sheet Metal Specialty Co.*, 199 F. 2d 800 (CA 7); *Royal Brand Cutlery Company, etc.*, 122 NLRB 901; *Auto Ventshade Inc.*, 123 NLRB 451; *Investment Building Cafeteria*, 120 NLRB 38; *Cruse Motors Inc.*, 105 NLRB 242

## ORDER

Upon the entire record in this case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Ugite Gas Incorporated, Ephrata and Malvern, Pennsylvania, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Oil, Chemical and Atomic Workers International Union, AFL-CIO, as the exclusive representative of all its drivers and service and maintenance employees, excluding office clerical employees, watchmen, guards, and supervisors as defined in the Act at its Ward Bottle Gas Division at Ephrata, Pennsylvania, formerly known as McNay Gas Corporation d/b/a Ward Bottle Gas Company.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist the above-named or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection or to refrain from any or all such activities except to the extent that such rights may be affected by an agreement requiring membership in a labor organization, as authorized in Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain collectively with Oil, Chemical and Atomic Workers International Union, AFL-CIO, as the exclusive representative of all employees in the aforesaid appropriate unit, with respect to rates of pay, wages, hours of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its place of business in Ephrata and Malvern, Pennsylvania, copies of the notice attached to the Intermediate Report marked "Appendix."<sup>5</sup> Copies of said notice, to be furnished by the Regional Director for the Fourth Region, shall, after being duly signed by the Respondent's representative, be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to

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<sup>5</sup>This notice is amended by substituting for the words "The Recommendations of a Trial Examiner" the words "A Decision and Order." In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "Pursuant to a Decision and Order" the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order."

employees are customarily posted. Reasonable steps shall be taken to insure that such notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for the Fourth Region, in writing, within 10 days from the date of this Order, what steps the Respondent has taken to comply herewith.

## INTERMEDIATE REPORT

### STATEMENT OF THE CASE

A charge having been duly filed and served, a complaint and notice of hearing thereon having been issued and served by the General Counsel of the National Labor Relations Board, and an answer having been filed by the above-named Respondent Company, a hearing involving allegations of unfair labor practices in violation of Section 8(a)(5) and (1) of the National Labor Relations Act, as amended, was held in Philadelphia, Pennsylvania, on August 5, 1959, before the duly designated Trial Examiner.

All parties were represented at the hearing. In lieu of adducing oral testimony relating to the issues, counsel entered into a stipulation concerning the authenticity and admission of certain documents and including the testimony which would have been given under oath, if called, by certain individuals. Counsel for General Counsel and for the Respondent argued orally. A brief has been received from the Respondent.

Upon the entire record in the case, the Trial Examiner makes the following:

### FINDINGS OF FACT

#### I. THE BUSINESS OF THE RESPONDENT

Ugite Gas Incorporated is a Pennsylvania corporation, maintaining places of business at Ephrata and Malvern, Pennsylvania, where it is engaged in the bottling, distributing, and servicing of propane gas and/or related and similar types of liquid and gaseous fuels. It annually delivers and sells products valued at more than \$50,000 to firms and businesses in the Commonwealth of Pennsylvania which themselves are engaged in commerce within the meaning of the Act.

Ugite Gas Incorporated is engaged in commerce within the meaning of the Act.

#### II. THE LABOR ORGANIZATION INVOLVED

Oil, Chemical and Atomic Workers International Union, AFL-CIO, is a labor organization within the meaning of the Act.

#### III. THE UNFAIR LABOR PRACTICES

In a nutshell, the major question for resolution here is whether or not the Respondent was legally obligated to recognize and bargain collectively with the Charging Union in April 1959 (after it had assumed formal control and direction of the business it then purchased from McNay Gas Corporation d/b/a Ward Bottle Gas Company. There is no dispute that the Union requested such recognition and bargaining, or that the Respondent declined to meet these requests.

The various stipulations establish and it is here found:

1. After a Board-conducted election, held in December 1958, pursuant to a consent-election agreement (Case No. 4-RC-3748) the Union was certified as the exclusive bargaining representative of all employees in an appropriate unit which consisted of all "drivers, service and maintenance employees" of McNay Gas Corporation.

2. Negotiations between the Union and McNay continued until early March 1959, when they were suspended upon announcement by McNay of the pending sale of the business to an unidentified purchaser.

3. On March 2, 1959, the Respondent and McNay entered into a written purchase and sales agreement by terms of which the Respondent agreed to purchase the "business and all assets relating thereto" (with certain specified exceptions) of McNay, and that settlement of this agreement was made on April 15, 1959, with the Respondent formally taking over the operations on April 16, 1959.

4. On March 19, 1959, *before* having actually taken over the enterprise, E. H. Smoker, president of United Gas Improvement Company of Philadelphia, Pennsylvania, which owns and controls the Respondent, assembled the employees on McNay's payroll, announced the intent to purchase McNay's business, and stated, among other things:

We are going to have to depend on all of you people to continue running the business substantially as you have done in the past since you are the contact people with the customers. They only know the Company through you, and I know you will continue the good work which you have carried on. . . .

5. Pursuant to the sales agreement, the Respondent purchased from McNay, among other things, certain real estate, buildings, motor vehicles, equipment, contracts with consumer customers in McNay's service area, materials, supplies, furniture and fixtures, and "all other property and assets, but excluding cash, accounts receivable, prepaid insurance," and certain real estate and buildings.

6. By terms of the same agreement, McNay agreed not to engage in or have ownership in "any liquified petroleum gas business within a radius of 100 miles from" its then place of business, "for a period of ten years."

7. Other terms provided that the Respondent "shall not be liable for any . . . contractual commitments or other liabilities" of McNay, "including liabilities to its employees."

8. On or about March 30, 1959, after Smoker's talk to them, a number of employees on McNay's payroll signed the following statement, obviously addressed to the Respondent:

We, the undersigned employees of Ward Bottle Gas wish to thank Mr. Smoker Pres. of UGI for taking time out to meet with the employees, touching on the work policy of our future employment. It is our thought that any further union negotiations shall be discontinued and that within a reasonable time a meeting be arranged to promote our future relationship with the new Company and employees. It is also our wish that a new steward or stewards be appointed to represent the employees.

9. On March 19, and again on April 13, 1959, Representative Sterling of the Union called Smoker and requested to bargain.<sup>1</sup>

10. Active control was assumed by the Respondent on April 16, 1959, with A. E. Bone, president of the Respondent corporation, taking over the responsibilities for directing the operations.

11. On the morning of April 16, Bone assembled all the employees, explained management policies, and after telling them they would "be paid by Ugitte for all work beginning" that day, asked them to fill out employment application blanks.

12. All but 2 of the 17 employees casting unchallenged ballots at the Board election were on April 16 transferred to the Respondent's payroll. (The two exceptions had voluntarily quit their employment before Ugitte took over.)

13. No employees, other than those who had worked for McNay, have been hired by the Respondent in the appropriate unit.

14. Upon placing these employees upon its payroll, the Respondent unilaterally and without consultation with the Union altered their wages and working conditions.

15. On April 20, 1959, H. S. Rand, director of industrial relations for the parent organization, UGI, assembled all but two of the employees and polled them by having them mark ballots containing the following text:

Yes, I want a union.

No, I do not want a union.

Of the 14 present, 7 voted "Yes" and 7 voted "No."

16. On April 20 and again on April 22, Union Representative Sterling met with President Smoker, but Smoker refused to recognize the Board's certification and bargain with the Union.

#### Conclusions

As to the foregoing facts counsel for the Respondent urges in his brief that it is not bound by the certification to recognize and bargain with the Union for the following reasons, in substance:

1. The parties at the hearing "stipulated that the sale of McNay Gas Corporation to Respondent . . . was a bona-fide arm's length transaction and not designed or

<sup>1</sup> The stipulated testimony of Sterling and Smoker does not reveal what the latter's response was, if any, to either of these two requests.

intended to deprive or defeat any person of any rights which they might have under the National Labor Relations Act.”

2. The sales agreement specifically provided that the Respondent should not be liable for any liabilities of McNay to its employees.

3. The above-quoted “petition” to Smoker indicated “dissatisfaction” among the employees.

4. The Respondent conducted a poll and found that the Union did not represent a majority.

5. There was a complete change in management personnel as well as a substantial change in wages and working conditions.

As to point 1, above, while the quoted stipulation does appear in the record it is plainly one of characterization and conclusion—not of fact—and the Trial Examiner considers that neither the Board nor himself is bound by it. The facts do not warrant the conclusion, so far as employer-employee relations are concerned, and it is mainly with such relations that the Act is concerned. Contrary to the characterization of an “arms-length” transaction, the above facts show that nearly a month before the actual purchase of the business, Smoker assembled McNay’s employees and effectively assumed control over them, by stating: “We are going to have to depend on all of you people to continue running the business substantially as you have done in the past, since you are the contact people with the customers.” There is no merit to point 1 as support for the Respondent’s disclaimer of obligation under the Act.

Point 2 needs little discussion. Private parties obviously may not, by agreement, void a public law, or evade obligations under a Federal act.<sup>2</sup>

Point 3 comes squarely within the *Ray Brooks* doctrine,<sup>3</sup> in the opinion of the Trial Examiner, for as found more specifically below, the “employing industry” remains the same. So far as the Trial Examiner is aware, the mere change in ownership has never been found by the Board or the courts to be an “exceptional circumstance” vitiating the 1-year certification rule approved by the Supreme Court in the cited case.

Point 4 is likewise without merit. An employer may not substitute, by polling or other means of his own, a determination already made by the Board.<sup>4</sup>

As to point 5, it has been found above that Smoker, nearly a month before assuming control over other “assets,” solicited the loyalty and “good work” of the employees of McNay—so effectively informing them of his dependency upon them “to continue running the business substantially as” they had done in the past that while still on McNay’s payroll they addressed a communication to Smoker as the employer. The factor of wage changes, without consultation with the Union, merely supports the admitted fact of refusal to bargain, and plainly is not determinative of the question of “employing industry.” There is no merit in this point.

On the other hand, the Trial Examiner concludes and finds that the foregoing findings of fact fully sustain General Counsel’s position that this case is governed by Board and court decisions cited in his oral argument, as well as by others.

The essential and basic fact here is that the employing industry remains the same—as Smoker himself made plain to the employees. As the Court of Appeals, Sixth Circuit, said in *Arthur J. Colten and Abe J. Coleman, d/b/a Kiddie Kover Manufacturing Company*, 105 F. 2d 179.

It is the employing industry that is sought to be regulated and brought within the corrective and remedial provisions of the Act in the interest of industrial peace. The term “co-partners” may not then be regarded as more than a term of description, or as denoting a legal entity which alone is subject to the command of the order. It needs no demonstration that the strike which is sought to be averted is no less a subject of legislative solicitude when contract, death or operation of law brings about a change of ownership in the employing industry.

In *Albert Armato and Wire & Sheet Metal Specialty Co.*, 199 F. 2d 800 (C.A. 7), the court said:

The crucial question presented is whether the certification of the union, issued by the Board during Krantz’ ownership of the business, continued to be binding

<sup>2</sup> Section 10(a) of the Act empowers the Board to prevent unfair labor practices. “This power shall not be affected by any other means of adjustment or prevention which has been or may be established by agreement, law, or otherwise.”

<sup>3</sup> *Ray Brooks v. N.L.R.B.*, 348 U.S. 96. See also *Poole Foundry and Machine Company v. N.L.R.B.*, 192 F. 2d 740 (C.A. 4), cert. denied 342 U.S. 954.

<sup>4</sup> See cases cited immediately above.

on Armato and the subsequently formed corporation. The very nature of the certification of a union as a bargaining agent for a group of employees impels the conclusion that a mere change in employers does not operate to destroy the effectiveness of the certification.

In *Cruse Motors*, 105 NLRB 242, the Board said, in part:

. . . a mere change of ownership of the employment industry is not so unusual a circumstance as to affect the certification. Where the enterprise remains substantially the same, the obligation to bargain of a prior employer devolves upon his successor in title. A purchaser in such a situation is a successor employer . . . .

In short, the Trial Examiner concludes and finds that the Respondent has the legal obligation to recognize and bargain with the Charging Union.<sup>5</sup>

In summary, it is concluded and found that the appropriate unit for purposes of collective bargaining within the meaning of the Act consists of—

All drivers and service and maintenance employees, excluding office clerical employees, watchmen, guards, and supervisors as defined in the Act at the Respondent's Ward Bottle Gas Division at Ephrata, Pennsylvania, formerly known as McNay Gas Corporation d/b/a Ward Bottle Gas Company.

The complaint alleges, the above facts establish, and it is concluded and found that on or about April 16, 1959, and thereafter the Respondent refused, and is continuing to refuse, to bargain collectively with the Charging Union, although said Union, by virtue of the Board's certification, was on that date and at all times since then has continued to be the exclusive representative of all employees in the aforesaid unit for the purposes of collective bargaining.

The Trial Examiner further concludes and finds that by refusing to bargain with the Charging Union the Respondent has interfered with, restrained, and coerced employees in the exercise of rights guaranteed in the Act.

#### IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent set forth in section III, above, occurring in connection with the operations of the Respondent described in section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

#### V. THE REMEDY

Having found that the Respondent has engaged in unfair labor practices, the Trial Examiner will recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

It will be recommended that the Respondent bargain collectively and in good faith, upon request, with the Union as the exclusive representative of its employees in the appropriate unit.

It will also be recommended that the Respondent cease and desist from in any like or related manner infringing upon the rights of employees guaranteed in Section 7 of the Act.

Upon the basis of the foregoing findings of fact, and upon the entire record in the case, the Trial Examiner makes the following:

#### CONCLUSIONS OF LAW

1. Oil, Chemical and Atomic Workers International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

2. All drivers and service and maintenance employees, excluding office clerical employees, watchmen, guards, and supervisors as defined in the Act at the Respondent's Ward Bottle Gas Division at Ephrata, Pennsylvania, formerly known as McNay Gas Corporation d/b/a Ward Bottle Gas Company, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

3. The above-named labor organization at all times since December 19, 1958, has been the exclusive representative of all employees in the aforesaid unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

<sup>5</sup> See also *Boyce Wallace and Louise M. Wallace, t/a Investment Building Cafeteria*, 120 NLRB 38; and *Royal Brand Cutlery Company, etc.*, 122 NLRB 901.

4. By refusing on and after April 16, 1959, to bargain collectively with the afore-said labor organization as the exclusive bargaining representative of all employees in the appropriate unit, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

5. By interfering with, restraining, and coercing employees in the exercise of rights guaranteed in Section 7 of the Act, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

[Recommendations omitted from publication.]

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to the recommendations of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

WE WILL bargain collectively, upon request, with Oil, Chemical and Atomic Workers International Union, AFL-CIO, as the exclusive representative of all our employees in the unit described herein with respect to rates of pay, hours of employment, or other conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All drivers and service and maintenance employees, excluding office clerical employees, watchmen, guards, and supervisors as defined in the Act, at our Ward Bottle Gas Division at Ephrata, Pennsylvania.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist the above-named or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or refrain from any and all such activities, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) of the Act.

UGITE GAS INCORPORATED,  
*Employer.*

Dated----- By-----  
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

United Brotherhood of Carpenters and Joiners of America, AFL-CIO; Carpenters District Council of Milwaukee County and Vicinity of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO; and Their Agents Ralph Bowes and Henry Kamoske and Del-Mar Cabinet Company, Inc. Case No. 13-CC-158. February 8, 1960

SUPPLEMENTAL DECISION AND AMENDED  
ORDER ON REMAND

On October 1, 1958, the Board issued a Decision and Order in this case,<sup>1</sup> finding that the District Council and its agent, Kamoske, had violated Section 8(b)(4)(A) of the Act. The finding was based

<sup>1</sup> 121 NLRB 1117.

<sup>2</sup> 126 NLRB No. 55.