

bargaining agent one already selected by fewer than 70 employees of Worcester Stamped would appear to be, by mandate, depriving them of the statutory right accorded them as long ago as 1935 of selecting, as principals, their own bargaining agent.

It may well be that the Board would determine the all-embracing unit claimed by the Union and General Counsel to be appropriate for the purposes of collective bargaining, but it is doubtful if it would certify any Union as the bargaining agent of such unit without according the vast majority of employees involved the right, by election, to record their choice.

In short, the Trial Examiner is not convinced that General Counsel has proven, by a preponderance of the evidence, that the "accretion," if any, here existing is of a nature or degree sufficient to warrant the conclusion that the Respondent has violated Section 8(a)(5) and (1) of the Act by declining, in effect, to bargain with the Union as the exclusive representative of all employees in a unit consisting of maintenance and production employees of both Worcester Stamped and American Emblem.¹

It will therefore be recommended that the complaint be dismissed in its entirety.

RECOMMENDED ORDER

Having concluded that the evidence is insufficient to establish a violation of Section 8(a)(5) and (1) of the Act, the Trial Examiner recommends that the complaint in its entirety be dismissed.

¹ It has appeared unnecessary to set out here undisputed details of conferences between a Rice Barton and a union representative, before the actual purchase of American Emblem, the substance of which indicates that the parent concern itself wished to have the Union represent employees of the company it was to absorb. Neither an employer nor a labor organization, nor the two acting in concert, have any right under the Act except as provided in Section 8(f), not applicable here, to select and determine the bargaining agent of employees.

Perfect Service Gas Company, Inc. and Local 863, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Cases Nos. 22-CA-1366 and 22-CA-1527. May 15, 1964

DECISION AND ORDER

On October 14, 1963, Trial Examiner John F. Funke issued his Decision in the above-entitled proceeding, finding that the Respondent had not engaged in unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety, as set forth in the attached Decision. Thereafter, the General Counsel filed exceptions to the Trial Examiner's Decision and a supporting brief. The Respondent filed a brief in reply to the General Counsel's exceptions and in support of the Trial Examiner's Decision.

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

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 entire

record in this case, including the Trial Examiner's Decision, the exceptions and briefs, and hereby adopts the Trial Examiner's findings, conclusions, and recommendation.¹

[The Board dismissed the complaint.]

¹ The General Counsel concedes in his brief to the Board that the Respondent had not refused to bargain subsequent to the settlement agreement of January 18, 1963, but contends that the discharge of Dorey on March 9, 1963, was discriminatory and warrants setting aside the settlement agreement and issuing a remedial order for the alleged refusal to bargain occurring before the date of the settlement agreement. As we conclude, in agreement with the Trial Examiner, that Dorey's discharge was not discriminatorily motivated, we do not pass upon Respondent's presettlement bargaining, and absent exceptions thereto, we adopt *pro forma* the Trial Examiner's finding that the Respondent did not refuse to bargain in violation of Section 8(a) (5) of the Act, subsequent to the settlement agreement.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

Upon charges filed against Perfect Service Gas Company, herein called Perfect or the Respondent, in Case No. 22-CA-1366 on September 26, 1962, and in Case No. 22-CA-1527 on March 11, 1963, by Local 863, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called Local 863 or the Union, the General Counsel issued an order consolidating the cases and a complaint alleging Respondent engaged in unfair labor practices in violation of Section 8(a) (1), (3), and (5) of the Act.

The answer denied that Respondent was engaged in commerce within the meaning of the Act and denied the commission of unfair labor practices.

This proceeding, with all parties represented, was heard before Trial Examiner John F. Funke on July 25, 29, 30, and 31 and August 1, 1963, at Newark, New Jersey.

Upon the entire record¹ in this case, and from my observation of the witnesses, I make the following:

FINDINGS AND CONCLUSIONS

I. THE BUSINESS OF RESPONDENT

Perfect is a New Jersey corporation having its principal place of business at Freehold, New Jersey, where it is engaged in the sale and distribution of bottled gas and related products. During 1961 Perfect had a gross income in excess of \$100,000 and made gross purchases in excess of \$70,000.

Fuelgas Corp. is a New York corporation maintaining its principal place of business at Chester, New York, where it is engaged in the purchase, sale, and distribution of gas and related products. Fuelgas, during 1961, had a gross revenue in excess of \$500,000 and made purchases of goods and materials in excess of \$50,000 which were transported to Chester directly from States other than the State of New York.

It was stipulated by the parties² that Perfect and Fuelgas had common ownership, directors, and officers; that the common officers, directors, and stockholders were Morris Birnbaum, president, and Daniel Birnbaum, secretary-treasurer;³ that these officers directed the operations of Fuelgas and Perfect and formulated and administered labor policies affecting both corporations; that Fuelgas and Perfect maintained separate offices and places of business located at the same street address at Freehold; that each maintained separate books of account; that the payroll for employees for both Fuelgas and Perfect were prepared at the Chester, New York, plant; that Perfect bought all the gas which it distributed from Fuelgas although the gas was not delivered from the Chester plant of Fuelgas but from the refinery located at Bayonne, New Jersey.

On the terms of this stipulation I find that Fuelgas and Perfect constitute a single employer within the meaning of the Act.⁴ I therefore find the Respondent's opera-

¹ Respondent's motion to correct the record is hereby granted.

² General Counsel's Exhibit No. 2.

³ The stipulation is in error. Birnbaum was secretary-assistant treasurer.

⁴ *Overton Markets, Inc., et al., d/b/a Overton Markets*, 142 NLRB 615; *N.L.R.B. v. Stowe Spinning Company, et al.*, 336 U.S. 226; *Schnell Tool & Die Corporation, et al.*, 144 NLRB 385, and cases cited.

tions meet the Board's jurisdictional standards for a retail enterprise and that it would effectuate the policies of the Act to assert jurisdiction.⁶

II. LABOR ORGANIZATION INVOLVED

Local 863 is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The fact*

1. Background

In June 1962 Perfect employed five delivery-service drivers and two clericals at its Freehold plant. They were under the immediate supervision of Michael Dorey,⁶ who, in turn, received his general instructions from the Chester plant of Fuelgas. During June the five drivers signed applications for membership in Local 863 and on June 23 all five drivers voted in favor of representation by Local 863.⁷ Negotiations between Local 863 and Perfect commenced on June 2 and following a meeting on August 14 the drivers voted to strike. The strike began the next day and on September 23, 1962, Local 863 filed unfair labor practices against Perfect in Case No. 22-CA-1366. A complaint was issued by the Regional Director on November 9, 1962, and an informal settlement agreement was executed by the parties on January 18, 1963, and approved by the Regional Director on January 21.

The immediate issue presented is whether there has been a breach of that settlement agreement. The General Counsel has advanced two contentions to establish such a breach. The first is that the discharge of Christopher Dorey, a brother of Mike Dorey, was discriminatory within the meaning of Section 8(a)(3) of the Act and the second is that, subsequent to the settlement agreement, the Respondent refused to bargain in good faith with Local 863 in violation of Section 8(a)(5) of the Act.

2. The discharge of Dorey

Christopher Dorey had been employed by Perfect as a delivery and service man⁸ for a period of over 7 years when he was discharged on March 9, 1963. In June 1962 he joined Local 863, he went out on strike on August 15, 1962, with the other drivers, and performed picket duty during the strike. Dorey returned to work with the other drivers when the strike was terminated in January 1963. He was also a member of the negotiating committee of Local 863 which was attempting to negotiate a contract with Perfect.⁹ His union membership and activities were, therefore, well known to Perfect.

Sometime in 1959 Chris Dorey was working with his brother on a tubing installation when the tubing pierced the wall and struck Chris in the eye. Mike Dorey testified that he made a written report of the accident to Chester, New York, the office of Fuelgas. In addition to this written report Dorey testified that he had conversations with Kenneth Quick, treasurer of Perfect, Daniel Birnbaum, and Bruce McCoach.¹⁰ The condition of Chris Dorey's eye became progressively worse and Mike testified that Chris lost the sight of it, he believed, sometime in 1962,¹¹ and that this fact was mentioned to Quick, Birnbaum, and McCoach.¹² Apart from these reports Mike testified that he forwarded to Fuelgas doctors' bills which he received from Chris.

⁶ *Siemens Mailing Service*, 122 NLRB 81.

⁷ Mike Dorey resigned from Perfect on March 31, 1963.

⁸ See stipulation of the parties, General Counsel's Exhibit No. 2.

⁹ Dorey testified that he delivered gas cylinders to customers and that he repaired hot water heaters, stoves, furnaces, etc.

¹⁰ The testimony indicates that all of the drivers attended negotiating meetings and that Chris participated to no greater extent than the others.

¹¹ McCoach testified that he was a salesman for Fuelgas.

¹² Chris testified that he lost the sight in his eye in 1961. On October 19, 1961, Kenneth Quick wrote the insurance carrier, Michigan Mutual Liability Company, requesting information respecting Dorey's claim and fixing the date of injury as September 11, 1959. This letter indicates that Quick was aware at that time that the sight had been lost. (General Counsel's Exhibit No. 5.)

¹³ This is denied by Quick, Birnbaum, and McCoach, despite the letter of Quick referred to above. Quick explained this by stating that Dorey told him his brother had lost "some sight of his eye."

According to the testimony of Chris Dorey a settlement of his workmen's compensation claim was effected in October 1962, and that he had stopped forwarding bills to Perfect sometime before the summer of 1962. During a negotiation meeting on February 13, 1963, Chris gave Daniel Birnbaum some bills for further treatment of his eye with the request that they be taken care of under Perfect's hospitalization coverage. According to Birnbaum the bills were submitted by a Dr. Pietri and Birnbaum requested a detailed list of the bills and a medical statement respecting Chris Dorey from the doctor. He further testified that such a statement was received by him in the early part of March and that he then learned for the first time that Chris Dorey had lost the sight of his eye. It was then that Birnbaum decided that, due in part to the volatile nature of the material Dorey was delivering, he was no longer employable as a driver. This safety factor was the single reason given by Birnbaum for the discharge of Dorey and he expressly denied that Mike Dorey had at any time informed him of Chris' complete loss of vision. On Friday, March 9, Chris was advised in a letter from Mike Dorey that he was fired due to this loss of vision.¹³

3. The refusal to bargain

The parties stipulated that on or about June 23, 1962, an election was held among the five drivers for Perfect and that all five voted for representation by Local 863.¹⁴ Although the answer of Respondent neither admitted nor denied the appropriateness of the unit as set forth in paragraph 16 of the complaint this issue was not litigated by Respondent and I find the unit set forth therein appropriate.

The complaint alleges two specific allegations of violations of Section 8(a)(5): (1) Respondent refused to embody an existing welfare plan in any agreement reached, and (2) Respondent refused to embody an existing profit-sharing plan in any agreement reached. It also contains a general allegation that Respondent refused to bargain in good faith. Again the General Counsel must first establish a breach of Section 8(a)(5) following the settlement agreement of January 1963.

Clifford Fredricks, business agent and organizer for Local 863, was the sole witness for General Counsel on this issue. Fredricks, unfortunately, appeared to have kept no notes of the meetings and his recollection of exactly what transpired at specific meetings was faulty and confused. According to Fredricks the first meeting following the settlement agreement was held in early February at the Robert Treat Hotel in Newark. (The meeting was held February 4.) He testified that Local 863 wanted "to pick up from where we left off. The Company didn't want it that way." His explanation of this is that the Respondent wanted to hear what the Union had to say. He also stated that Perfect asked the cost of a 2-year contract.¹⁵ Among the union demands were a 40-cent increase,¹⁶ an added holiday, 3-day death benefits, and sick leave. Local 863 also asked for information regarding the profit-sharing plan and the welfare (hospitalization) plan which Respondent offered to provide. According to Fredricks, Respondent still refused, as it had since the beginning of negotiations, to put the plans in any contract.

The next meeting was held February 13. Respondent then offered 1 week's vacation after 1 year and 2 weeks' vacation after 3 years, a retreat from its previous position of only 1 week for all employees. Fredrick stated that the Respondent agreed to put the hospitalization in the contract but not the profit-sharing plan.¹⁷ Respondent dropped the idea of a 2-year contract. Respondent, according to Fredricks, still refused sick leave and stuck to its offer of a 10-cent increase. Another issue on which there was disagreement was the retroactivity of any pay increase. On July 13, 1962, the Respondent had agreed that any pay increase would be retroactive to July 11.¹⁸

¹³ General Counsel's Exhibit No. 4.

¹⁴ General Counsel's Exhibit No. 2.

¹⁵ Although prior discussions had considered only a 1-year contract I find no bad faith in asking the cost of a 2-year contract. Absent evidence that Respondent knew or believed a 2-year contract would be disadvantageous to the Union it is not an unreasonable proposal. For the most part it is unions which seek longer term contracts. Respondent abandoned this request at the next meeting.

¹⁶ The Union's original demand was for an increase of about 90 cents.

¹⁷ Fredricks' testimony is contradictory on this. At one point he testified the Respondent agreed to put the plan in the contract at possibly the sixth or seventh meeting. He then agreed it could have been the fifth meeting, which was the second after the settlement. Birnbaum unequivocally testified the Respondent agreed at the second meeting after the settlement and I so find.

¹⁸ General Counsel's Exhibit No. 6.

Fredricks testified that at the February 13 meeting Respondent informed him that it was reneging on this agreement due to the strike.¹⁹ The third poststrike meeting was held in either late February or early March and at this meeting, which according to Fredricks was largely devoted to the mechanics of the profit-sharing plan, agreement was reached on sick leave and vacations.

Fredricks testified that sometime prior to the last meeting Respondent increased its wage offer to 12½ cents per hour. This offer was rejected by Local 863 since it was still based on a staggered workweek. Under this system one driver would start on Monday, another on Tuesday, etc., and the Respondent refused to make Saturday a premium or overtime day. The Respondent was willing to grant time-and-one-half for all work in excess of 40 hours but it would not grant automatic overtime for Saturday. Local 863 claimed the men would not receive overtime under the staggered plan although it is not made clear and perhaps the local itself did not understand why this would be so. There is no reason why there would not be as many hours of work available for five drivers under either plan and overtime would be paid regardless of whether the excess work fell on a Saturday. While Respondent agreed to put the profit-sharing plan in the contract Local 863 objected to the plan itself on the ground that it did not want its members "to buy a pig in a blanket." Since the General Counsel agreed that there was no failure to provide adequate information this statement has little meaning. In any event the reasons given by Fredricks for his objections to the staggered workweek and the profit-sharing plan are so ambiguous as to make any finding of bad faith on the part of Respondent impossible on these issues.

Although Birnbaum was a clearer and more convincing witness I have set forth the testimony of Fredricks because it is the testimony on which the General Counsel must rely. I have quoted and shall quote the testimony of Birnbaum only where it is contradictory or is required to clarify ambiguity.

B. Conclusions

1. The discharge of Dorey

In reaching a conclusion as to the discharge of Dorey I have not considered as material the testimony that, on the day before the hearing in this case opened, Dorey approached Perfect with an offer to "be gone" and to fail to appear as a witness at the hearing for the sum of \$5,000.²⁰ Nor do I consider the alleged threats made by Mike Dorey to the drivers that two employees, including his brother, might be fired on the grounds of physical defects, if the men selected Local 863 as their bargaining agent as establishing Birnbaum's motive in discharging Chris Dorey. Although Mike Dorey was a supervisor and the threats would be binding upon Respondent if I were considering them as violations of Section 8(a)(1),²¹ there is nothing in the record to indicate that Birnbaum knew of these physical defects at the time the threats were made or that he authorized them. While, therefore, they could be binding upon him under Section 8(a)(1) they could not be binding to establish his subsequent motive in discharging Chris. There is evidence, based on the testimony of Mike Dorey and the letter of Quick to the insurance carrier, that Dorey advised not only Quick but also Birnbaum of Chris Dorey's blindness sometime in 1962 and that he kept working despite that knowledge. On the other hand, if Birnbaum was to seize upon the blindness as a pretext for the discharge there is no reason why he should have kept Chris working from June 23, when he acquired knowledge of the union membership of Chris Dorey, until the strike, rehired him after the strike and kept him working until March 9. There was no discrimination in regard to hire or conditions of employment respecting any of the other strikers.

The inference that Chris Dorey was discharged for discriminatory reasons finds no support in the record unless resort is made to violation of Section 8(a)(1) on the part of supervisors prior to the settlement agreement and that evidence I do not believe competent until a breach of the settlement has been established. On the other hand I do have the fact that Chris Dorey went to Birnbaum with his medical bills on February 13 and that Birnbaum then asked for a report from Dr. Pietri and learned

¹⁹ The Respondent took the position that the strike had terminated negotiations and that bargaining began *de novo*.

²⁰ The General Counsel estimated the backpay which might be due as between \$800 and \$1,200.

²¹ There is no allegation of independent violation of Section 8(a)(1) following the settlement agreement.

definitely in early March that Chris was blind in one eye.²² The date of his discharge is proximate to the time this knowledge was acquired. The more reasonable inference to be drawn from these facts is that the discharge was not in violation of Section 8(a)(3) and I so find.

2. The refusal to bargain

I find no violation with respect to the two specific issues cited by General Counsel as violative of Section 8(a)(5), namely, the refusal to incorporate the profit-sharing and hospitalization plans into the contract. While there is evidence of such refusal before the settlement agreement there is none thereafter unless Fredricks' testimony is accepted that such a refusal occurred at the first meeting after the settlement (February 4, 1962).²³ Both Fredricks and Birnbaum are in accord that the Respondent agreed to such incorporation at the second meeting held on February 13. I am unwilling to find a violation which, if it occurred at all,²⁴ lasted only for the period from one bargaining meeting to the next and which was not an issue at the time of the hearing. If the Board were to intrude at every bargaining session to evaluate each position taken by the parties on each particular issue, however temporary that position, its caseload would proliferate beyond manageable proportions (if, indeed, it has not done so already) in the service of no purpose except the gratification of administrative authoritarianism.

Nor do I agree that Respondent's general course of conduct indicated bad faith. The General Counsel asserts that the Union "accepted" many of the Respondent's proposals. This is a strained use of that word since the agreements reached on these issues were reached as the result of negotiation and were "accepted" by both parties. Thus, while the Respondent originally offered no sick leave and the Union requested 1 day per month, agreement was reached on 5 days per year. Respondent agreed to seniority as to layoff and recall, but not as to promotions. The Union asked for 11 paid holidays and agreement was reached on 8 (there had previously been 7). But there is little purpose in reviewing this case issue by issue to determine how much Respondent should have conceded on this issue, how much on that, which demand of the Union was reasonable, and which was not. As has been stated above, that is not the responsibility of the Board and would approach compulsory arbitration rather than the prevention of unfair labor practices. It suffices to say that the parties reached agreement on many issues and remained apart on others. The demands may have been excessive on some of these, the Respondent's rejection adamant on others. I have studied the testimony of Fredricks and Birnbaum with relation to the bargaining negotiations from the meeting of February 4, 1963, to the last meeting with care. I cannot find that Respondent, by the totality of its conduct during this period, indicated a refusal to bargain in good faith.

In view of my finding that the Respondent did not engage in unfair labor practices as alleged in Case No. 22-CA-1527, I find it unnecessary to consider whether it committed unfair labor practices in Case No. 22-CA-1366. There has been no subsequent breach of the settlement agreement in that case and the agreement remains in full force and effect.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of the Act.
2. Local 863 is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent has not engaged in unfair labor practices in violation of Section 8(a)(1), (3), and (5) of the Act.

RECOMMENDED ORDER

It is recommended that the complaint be dismissed in its entirety.

²² Dr. Pietri was not called as a witness by either party.

²³ Birnbaum testified that the Respondent made no response to the Union's proposals at this meeting but told the Union the Respondent would consider them.

²⁴ I make no finding upon the qualification imposed by Birnbaum that the incorporation be subject to approval by the Treasury Department. There is no evidence that Birnbaum knew that such approval was not required (nor any evidence that it was not, in fact, required) and no evidence that the qualification was suggested in bad faith.