Saul Harberg d/b/a Ilfeld Hardware & Furniture Co. *and* New Mexico District Council of Carpenters and Joiners of America of the United Brotherhood of Carpenters & Joiners of America, AFL–CIO. *Case No. 28–CA–1217. April 4, 1966*

DECISION AND ORDER

On December 17, 1965, Trial Examiner E. Don Wilson issued his Decision in the above-entitled proceeding, finding that Respondent had engaged in and was engaging in certain unfair labor practices within the meaning of the National Labor Relations Act, as amended, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, Respondent filed an exception to the Trial Examiner's Decision and a supporting brief.

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

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exception and the brief, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, but only to the extent consistent herewith.

The Trial Examiner found that the Respondent, by selling a part of its operations, Taos Gas, to Arrow Gas without first notifying the Union, denied the Union an opportunity to bargain and thereby to suggest alternatives to the sale that might have extended some protection to the jobs of the employees in the unit. He therefore found that the Respondent had failed to fulfill its obligations under the Act in violation of Section 8(a)(5).

The record shows that the Respondent placed Taos Gas on the market in 1962. It was almost sold in 1963, but the sale fell through because the buyer had insufficient capital. At the representation hearing in May 1964, Harberg, the Respondent's president, informed the Union's representatives during an off-the-record discussion that he contemplated the sale of Taos Gas. And in a speech to his employees while the ballots were being counted after the representation election on June 23, 1964, Harberg told his employees that he was past 61 years of age, that he could not keep up his present pace, and that when he returned from a vacation he planned to sell Taos Gas if he could.

At the time of the election Taos Gas had been listed with a sales agent in Scotts Bluff, Nebraska. Arrow Gas, the ultimate purchaser, was in touch with the agent regarding the purchase of Taos Gas at this time.

Shortly after the certification of the Union on July 1, 1964, the parties engaged in collective bargaining. The parties reached a tentative agreement on a "management rights" clause but did not reach agreement on a clause proposed by the Respondent which would have specifically freed any purchaser of Taos Gas from any obligation under the contract being negotiated by the parties, the Union objecting that such a provision would eliminate its traditional "successorship" clause. There is no evidence in the record that the Union, at these bargaining sessions, demanded or suggested that there be bargaining regarding the decision to sell Taos Gas before such a sale occurred.

On December 15, 1964, the Respondent began negotiations with Arrow Gas regarding the sale of Taos Gas, and on December 24, 1964, the sale was completed, effective January 4, 1965. On December 24 the Respondent notified the affected employees that it was quitting its gas business as of January 1, 1965. It did not notify the Union.

On January 18, 1965, Respondent's attorney wrote a letter to the Union's attorney informing him of the sale of Taos Gas. On January 29 the two attorneys met at a contract negotiation meeting. Kool, the union attorney, asserted that the Union should have been notified of the sale to Arrow Gas prior to its consummation to permit bargaining. Reynolds, the Respondent's attorney, maintained that to have done so would have been "bad business." The two attorneys then discussed the fate of the personnel who had worked for Taos Gas. Of the five male employees, two had been hired by the successor, Arrow Gas, one had been hired by a competitor in Taos, Washum Gas, and a fourth who had been unable to obtain a job with Arrow Gas was retained by the Respondent in its lumber and hardware operations. The fifth male employee apparently obtained a job shortly after the conference. The single female employee had been retained on the Respondent's payroll to give her an opportunity to obtain another job. Her employment was to terminate on February 1, but during the discussion Reynolds went to the Respondent's store and obtained an additional 2 weeks for her to give her more time in which to secure other employment.

We are satisfied that, on the above facts, a remedial order would not be warranted in this case. Concededly, union animus played no part in the decision to sell Taos Gas. The Respondent had been attempting to sell Taos Gas prior to the advent of the Union and continued to do so thereafter. The Union was well aware of the

Respondent's intentions from the outset and made no effort to assert its right to bargain about any future decision to sell the gas operation. On the contrary, at negotiation meetings in July 1964, when the parties were bargaining over the Respondent's right to sell, it was apparently concerned only with obtaining a contract clause binding a purchaser and not with bargaining about the actual sale of the property itself. After the sale, although the Union raised the question regarding its right to notification prior to the sale, it did not press the point but instead concerned itself primarily with the effect of the sale on the six employees. We therefore find that, with respect to the effects of the sale, the Respondent bargained in accordance with its obligations under the Act. And we further find, under all the circumstances above set forth, that a remedial order, based upon the Respondent's failure to notify the Union of specific negotiations regarding the sale of Taos Gas as described above, is not required to effectuate the policies of the Act even though a technical violation might be found.[1] Accordingly, we shall dismiss the complaint in its entirety.

[The Board dismissed the complaint.]

[1] Cf. *Eaborn Trucking Service*, 156 NLRB 1370; *New York Mirror, Division of Hearst Corporation*, 151 NLRB 834.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

Upon a charge filed on April 7, 1965, by New Mexico District Council of Carpenters and Joiners of America of the United Brotherhood of Carpenters & Joiners of America, AFL–CIO, herein called the Union, the General Counsel of the National Labor Relations Board, herein called the Board, issued a complaint dated June 15, 1965, alleging that Saul Harberg, d/b/a Ilfeld Hardware & Furniture Co., herein called Respondent, violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended, herein called the Act.

Pursuant to due notice, a hearing in this matter was held before Trial Examiner E. Don Wilson at Albuquerque, New Mexico, on August 26, 1965. The parties fully participated. General Counsel's and Respondent's briefs have been received and considered.

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

FINDINGS OF FACT

I. RESPONDENT'S BUSINESS

Respondent, Saul Harberg, is an individual operating under the firm name and style of Ilfeld Hardware & Furniture Co. and he has also conducted business in the form of a corporation using the name of Taos Gas Co., Inc. Respondent has maintained its office and principal place of business at Taos, New Mexico, and at all material times has been engaged in the retail and nonretail sale of furniture, hardware, and propane gas. In its business operation during 1964, Respondent purchased and had delivered to its place of business at Taos, New Mexico, materials and equipment valued in excess of $50,000 directly from States of the United States other than the State of New Mexico. Respondent, at all times material, has been engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION

At all times material, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The issues*

Did Respondent, in violation of the Act, on or about January 4, 1965, without notice to or consultation with the Union and without affording the Union an opportunity to bargain about Respondent's decision or its impact on the job tenure of Respondent's employees, sell its propane gas operations, known as Taos, to a purchaser known as Arrow Gas Company, herein called Arrow, and terminate employees Gene Sanchez, Val Jiron, Mariano Morgas, Henry Vallerero, Frank Lujan, and Petra Garcia? It is to be noted that the alleged violations of the Act involve only Section 8(a)(5) and (1) of the Act.

B. *The certification of the Union*

Following, a Board-conducted secret election, the Union was certified as the collective-bargaining representative of all Respondent's employees, including the cashier, excluding office clerical employees, guards, watchmen, and supervisors as defined in the Act, on July 1, 1964.

C. *Background*

Saul Harberg, at all material times prior to the sale of Taos, was the principal owner who, with others, owned and directed the activities of Taos and Ilfeld. The gas operation of Taos became part of the Ilfeld enterprise in the mid-thirties and Taos was incorporated in 1945. For many years, Harberg considered the Taos operation hazardous and he decided to sell it about 1961 or 1962. It was put on the market in 1962. It was "almost" sold in 1963. It was "almost" sold in July or August of 1964. Harberg still wanted to sell the Taos gas operation. During the course of the Board election, on June 23, 1964, Harberg told all the employees that he intended to sell Taos. He advised them he had been trying to sell and would if he could. He had no definite prospects in mind when he spoke to the employees. I consider it immaterial whether Union Representative Rodriguez, who was present, heard these remarks to the employees.

Shortly after the Union was certified, it and Respondent entered into collective-bargaining negotiations.[1]

The Union was aware, as early as, or perhaps earlier than, the election, at least from information supplied by Respondent's attorney, Reynolds, that Respondent wanted to sell the Taos gas operations. When this information, at these dates, was brought to the attention of the Union, the Union made no comments.

At a bargaining meeting on July 29, 1964, Reynolds proposed a contract clause to Rodriguez by which a buyer from Harberg would be free of any contract obligation to the Union. Rodriguez took the position that such clause would not be legal. He did not agree to it. There is no question that prior to December 1964 the Union knew Respondent was desirous of disposing of its interest in Taos. I find it probable that the Union knew such had been Respondent's unfulfilled desire for several years.

D. *The refusal to bargain*

In the fall of 1964, Harberg took an extended trip and upon his return he engaged in some further negotiations with prospective purchasers of Taos. No information as to these dealings was conveyed to the Union. About December 15, 1964, Respondent, through Harberg, began negotiations with Arrow. The deal to sell Taos to Arrow became firm on December 24, 1964. On December 24, 1964, without any information to the Union which was represented by a business agent, Rodriguez, and an attorney, Kool, Harberg told the employees [2] that he had an unpleasant Christmas present for them but he was quitting business at Taos on January 1, 1965,

[1] Bargaining through April 1965 resulted in no agreement. There was no further bargaining.

[2] Including two who had sat in on some union negotiations as employee observers.

and Arrow was taking over.[3] He told particular employees they were going to be terminated because of the sale of Taos.[4] There is no question that the employment of Sanchez, Jiron, Morgas, Vallerero, and Garcia was terminated because of Respondent's sale of Taos to Arrow.

At no time and in no manner did Respondent advise the Union it was negotiating with Arrow about the sale of Taos. At no time and in no manner did Respondent notify the Union that the prospective sale to Arrow would result in the termination of any of the employees. I do not consider notice of termination given to an employee committeeman, in the circumstances of this case, to amount to any notice to the Union of anything.

It was not until the sale and the terminations, excepting for Garcia, were accomplished facts that Respondent, on January 18, 1965, as part of the bargaining negotiations, advised the Union that Harberg had sold the Taos gas business and that Respondent no longer had operators, mechanics, or servicemen in its employ. This was the first advice of the sale to the Union. The Union promptly arranged for another negotiation meeting to be held on January 29, 1965. On January 29, 1965, the attorneys for the Union and Respondent met. As to the sale and the terminations of Sanchez, Jiron, Morgas, and Vallerero, there was nothing to discuss. Return to status quo was recognized as an impossibility. Kool, the Union's attorney, advised Reynolds, Respondent's attorney, that the sale of Taos without notice to the Union was a violation of the Act. Reynolds replied it would have been foolish businesswise to let anyone know about the sale before it was consummated. At this meeting Kool requested additional time for Garcia, the clerical employee, to find a job. Reynolds agreed her termination would not become effective until February 15, 1965. Kool requested Respondent to rehire the terminated people who had so many years' seniority. Reynolds replied that Harberg felt very badly about having to let the employees go but he had done all he could do. Nothing else material to the issues in this case was discussed. As I have found, the sale and terminations were treated by Respondent as accomplished facts.

It is not contended by General Counsel that either the sale or the terminations were motivated by union animus.

It should be noted that Respondent contends that during the course of negotiations prior to December 15, 1964, there was a "tentative" agreement as to a management rights clause in a possible contract. I find such alleged "tentative" agreement to be immaterial. On July 16, 1964, Respondent through a letter signed by Reynolds made it clear "that there will be no final agreement on particular portions of a contract until a total agreement on all parts thereof is reached and ratified." There has never been a contract or "total agreement."

E. *Concluding findings*

Without giving any notice to the Union other than vague and indefinite statements concerning a desire to sell its gas operations at some time, to someone, Respondent sold its Taos gas operations to Arrow and terminated five employees. Respondent's contention that it had no obligation to advise the Union and bargain with it if it desired, because it would not have been good business, is rejected as entirely without merit. It was Respondent's duty to refrain from unilaterally changing the terms and conditions of employment of the employees in the certified bargaining unit. That Respondent may have had valid personal or economic reasons for disposing of its gas operations did not relieve it from its statutory obligation to bargain with the Union about the terms and conditions of employment of its employees. Clearly, in eliminating jobs or positions from the certified unit, Respondent engaged in action affecting "other terms and conditions of employment." Respondent's elimination of job units involved a mandatory subject of collective bargaining.

That Respondent may have had no union animus did not relieve it of its obligations, under Section 8(a)(5) of the Act, first to notify the Union and afford it an opportunity to bargain with respect to the changes contemplated by Respondent. By failing to

[3] There is no evidence that the employees who had participated in the negotiation meetings ever advised the Union of this announcement.

[4] Sanchez, Jiron, Morgas, and Vallerero were notified on December 24, 1964, and terminated on December 31, 1964. Lujan was not terminated. Garcia was notified about January 15, 1965, that there would be no further need for her services after February 1, 1965. She was permitted to stay on until February 15, 1965, when she was terminated because of the sale.

advise the Union of the contemplated sale to Arrow, Respondent effectively foreclosed the Union from demonstrating what joint efforts at the bargaining table could accomplish with respect to the proposed sale and its effects upon the employees in the bargaining unit. Certainly, the Union might have suggested alternatives which might or would have assured some protection for unit jobs of employees. Repsondent's secretive dealings with Arrow effectively frustrated the Union in its raison d'etre. As the certified representative of all employees in the bargaining unit including the five [5] who were terminated, the Union was deprived of its right to be heard in connection with the terms and conditions of their employment.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with Respondent's operations described in section I, above, have a close, intimate, and substantial relationship 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 Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

To remedy Respondent's refusal and failure to bargain with the Union, Respondent will be required to cease and desist from making unilateral changes in wages, hours, working conditions, and other terms and conditions of employment, unless it has first consulted with the Union at the Union's request.

To remedy the elimination of the jobs of Sanchez, Jiron, Morgas, Vallerero, and Garcia and their terminations, and to compensate them because of the elimination of their jobs without consultation with their union representative, Respondent will be ordered to make each whole for the loss of earnings he or she suffered by reason of Respondent's misconduct.

Each is to be made whole by payment to each of a sum of money he or she would have normally earned from the date of his or her discharge until the time that he or she obtains or obtained substantially equivalent employment elsewhere. They are to be made whole in the manner set forth in *F. W. Woolworth Company*, 90 NLRB 289, with interest on backpay computed in the manner described in *Isis Plumbing & Heating Co.*, 138 NLRB 716.

Further, Respondent is to place the names of the employees it discharged as described above, on a preferential hiring list and, in the event a job vacancy appears in Respondent's business operations which were not disposed of by its sale to Arrow, to offer these employees immediate and full reinstatement to their former or substantially equivalent positions without prejudice to their seniority and other rights and privileges.

By its conduct, as described herein, Respondent has deprived the Union of an opportunity to bargain during a substantial portion of the certification year. To remedy this, Respondent is to bargain with the Union for at least a year from the date Respondent undertakes to comply with this Decision and Recommended Order, or the Board's Order herein or any court decree in this matter.

I find no need for a so-called broad order in this matter. There is no complaint of bad faith on the part of Respondent.

Upon the basis of the foregoing findings of fact and upon the entire record in the case, I make the following:

CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of the Act.
2. The Union is a labor organization within the meaning of the Act.
3. By unilaterally deciding to sell and selling its Taos gas operations to Arrow and discharging Sanchez, Jiron, Morgas, Vallerero, and Garcia without consulting or bargaining with the Union, the certified representative of its employees in an appropriate unit, Respondent violated Section 8(a)(5) and (1) of the Act.
4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommended Order omitted from publication.]

[5] A substantial number.