

Arden Furniture Industries of Pennsylvania, Inc. and Keystone District Council, United Brotherhood of Carpenters and Joiners of America, AFL-CIO and Local Union No. 15386, District 50, United Mine Workers of America. Case 4-CA-3776

May 29, 1967

DECISION AND ORDER

On July 12, 1966, Trial Examiner Sidney Sherman issued his Decision 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 attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision and a supporting brief.

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 Trial Examiner's Decision, the exceptions and brief, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, with the following exceptions, additions, and modifications.

As described more fully in the Trial Examiner's Decision, the Respondent commenced operations at its present location in Pittston, Pennsylvania, about March 1964. Shortly thereafter, Respondent's Plant Manager Tittler called the employees together, urging them to consider joining a union, but stating he did not want them to select an independent union. The employees decided, however, that they wanted an independent union, and delegated a committee to apprise Tittler of this decision. Tittler insisted that Respondent wanted only District 50, and refused to deal with the committee, even though it offered Respondent the same contract as did District 50. Bressler, the committee spokesman, reported Tittler's position to the employees, and Singer, a representative of District 50, approached the employees during working time, arranged for the election of officers for a District 50 local, and obtained cards authorizing District 50 to represent them.

On June 2, 1964, a representative of the Charging Party,¹ spoke to Tittler about organizing Respondent's employees. Tittler remarked that Respondent was "committed" to District 50 by "the people who brought them into Pittston."

On June 19, 1964, Respondent entered into a 3-year contract with District 50, on behalf of its newly

formed Local Union No. 15386. During the term of the contract, the employees became dissatisfied with District 50, and on July 31, 1965, at a special meeting called by the employees and attended by 18 employees, a motion to disaffiliate from District 50 passed unanimously. On August 2, 1965, Tittler told the District 50 shop steward that if a new union was forced upon him he would have to shut down. A week later, the president of the District 50 Local obtained signed cards from the employees designating the Charging Party as their representative. Shortly thereafter, Tittler called a meeting of the officers of the District 50 Local, and, after discussing with them their objections to District 50, announced that, if District 50 ceased to represent the employees, Respondent would have to move the plant to Baltimore. Tittler then called all the employees together and repeated the same warning to them. Later the same day, the motion to disaffiliate from District 50 was "withdrawn" by the employees.

The Trial Examiner concluded that in view of the limitations of Section 10(b), no violation finding may be based on any of the events which occurred before March 23, 1965. He found, however, that the events after that date, specifically, Tittler's threats to employees in August 1965 that Respondent would move the plant if the employees did not abandon their disaffiliation action, which threats prompted abandonment of such action, constituted unlawful assistance to District 50, and by such action, Respondent violated Section 8(a)(2) and (1) of the Act.

To remedy this violation, the Trial Examiner recommended that Respondent be ordered to cease giving effect to its current contract with District 50 or any renewal thereof. In framing this remedy, the Trial Examiner gave consideration to Respondent's prelimitations conduct "in foisting District 50 and its contract upon the employees, despite their desire for an independent union." We agree with the Trial Examiner's 8(a)(2) and (1) findings; we do not, however, adopt his recommended remedy for the reasons stated below.

The Board has refused to grant a cease-recognition remedy where, as here, the unfair labor practice to be remedied occurred during the term of an agreement, lawful on its face, the execution and maintenance of which are not under attack.² Were we to rely, as did the Trial Examiner, on conduct antedating the limitations period as affecting the execution or maintenance of the agreement, we would in effect be finding that this conduct was an unfair labor practice, a finding which is barred by Section 10(b) of the Act.³ We therefore reject the

¹ Keystone District Council, United Brotherhood of Carpenters and Joiners of America, AFL-CIO.

² *M Eskin & Son*, 135 NLRB 666 (Member Fanning, dissenting in part); *Lykes Bros Inc of Georgia*, 128 NLRB 606

³ *Local Lodge No 1424, International Association of Machinists, AFL-CIO (Bryan Manufacturing Co) v. N.L.R.B.*, 362 U.S. 411

Trial Examiner's recommendation that Respondent cease giving effect to its contract with District 50.⁴

However, in the special circumstances of this case, we believe that more than the routine cease-assistance remedy is required. Respondent during the 10(b) period threatened employees with reprisals if they engaged in activity on behalf of the Charging Party. When these threats took place, employees did not have the right, because of the contract, to change their bargaining representative. But, near the termination date of the contract, a representation petition for an election among these employees will be timely; under Board procedure, however, a showing of interest consisting of authorization cards signed by employees will be required to support such a petition.⁵ Plainly, Respondent's threats are such as to have a continuing coercive effect upon employees at once discouraging their activity on behalf of a rival union and encouraging their support of District 50, thus interfering with their right to replace District 50, violative of Section 8(a)(2) as well as of Section 8(a)(1) of the Act. To expunge the effect of these unfair labor practices, we shall order that Respondent refrain from recognizing or bargaining with District 50 or its Local Union No. 15386 as representative of its employees when the current contract expires on June 18, 1967, unless and until it is certified by the Board as such representative.⁶

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Arden Furniture Industries of Pennsylvania, Inc.,

Pittston, Pennsylvania, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening to shut down or move its plant or to take other economic reprisals because of its employees' selection of a union other than Local Union No. 15386, District 50, United Mine Workers of America, or of any other union not approved by Respondent.

(b) Recognizing or bargaining with Local Union No. 15386, District 50, United Mine Workers of America, as the representative of its employees when their current agreement expires on June 18, 1967, unless and until such Union is certified after a Board election.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under the Act.

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

(a) At the expiration of the current contract between the Respondent and Local Union No. 15386, District 50, United Mine Workers of America, withdraw and withhold all recognition from that Union as the representative of its employees for the purpose of dealing with Respondent concerning grievances, wages, rates of pay, hours of employment, or other terms or conditions of employment, unless and until such Union is certified after a Board election.

(b) Post at its plant in Pittston, Pennsylvania, copies of the attached notice marked "Appendix."⁷ Copies of said notice, to be furnished by the Regional Director for Region 4, after being duly signed by the Respondent's representative, shall, be posted by the Respondent immediately upon receipt

⁴ *Lundy Manufacturing Corporation*, 136 NLRB 1230, enf'd 316 F.2d 921 (C.A. 2), cert. denied 375 U.S. 895, relied on by the Trial Examiner, is distinguishable. There, when the Board issued its Supplemental Decision ordering the employer to cease recognizing the assisted union, the contract between the employer and the assisted union had already expired, here, as noted, the contract between Respondent and District 50 is still in effect. That the contract has expired in *Lundy* would appear from the fact that the remedy required only that Respondent withdraw recognition, not that it cease giving effect to an existing contract. In any event, if there were any renewal or extension, as suggested in the dissent, it occurred after the unlawful assistance which was the subject of the complaint then before the Board, and under such circumstances a contract could afford a union no right to maintain its representative status.

Nor do we view the other cases cited in the dissenting opinion as requiring a contrary result. In *The Post Publishing Company*, 136 NLRB 272, 273, the Order set aside an existing contract which was presumptively valid in its execution but did so on special considerations that the assisted union was shown on that record to be unable to maintain its exclusive representative status and carry out its functions without the respondent's unlawful support and assistance which had continued into the 10(b) period. Cf. *Lykes Bros.*, *supra*, 610-611, where a majority of the Board (including Member Fanning) concluded that it should not order the parties to suspend their bargaining relationship because the assistance there found as alleged in that complaint occurred after execution of a presumptively lawful contract and "[did] not

warrant an inference that the [union's] ability to represent the employees in the daily administration of its contract was thereby adversely affected." The Board's statement in *Lykes* concerning the absence of background conduct was only dictum; in any event, the Board did not, contrary to the implication of the dissenting opinion, indicate that the presence of such background evidence would necessarily lead to an order setting aside the contract.

To the extent that *New Orleans Laundries, Inc.*, 114 NLRB 1077, is subject to the interpretation that the Board will rely on pre-10(b) conduct to set aside a contract lawful on its face, we shall not adhere to it. We are of the view that a contract, presumptively lawful when entered into, may be set aside only upon a finding that the union's ability to represent the employees in the daily administration of its contract has been adversely affected by the respondent's unlawful assistance or domination within the 10(b) period, and this in turn depends upon the nature and impact of the respondent's conduct. We find no substantial support for such a finding in this case.

⁵ National Labor Relations Board Rules and Regulations, Series 8, as amended, Sec. 101.18.

⁶ The contract between Respondent and District 50 contains an automatic renewal clause. This order shall be deemed to forestall any automatic renewal of this contract.

⁷ 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 "a Decision and Order" the words "a Decree of the United States Court of Appeals Enforcing an Order."

thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 4, in writing, within 10 days from the date of this Order, what steps have been taken to comply herewith.

Member Fanning, dissenting as to remedy:

I agree with my colleagues that the Respondent violated the Act by threatening to move its plant unless the employees stopped their organizing efforts on behalf of the Carpenters and ceased their efforts to disaffiliate from District 50, with which the Respondent had entered into a 3-year contract. I also agree that the assistance rendered District 50 by Respondent at the time the collective-bargaining agreement was negotiated and executed would have been held to be unlawful but for the statutory limitation of Section 10(b).

However, contrary to the majority, I would adopt the Trial Examiner's recommended cease-recognition order. The majority decision in this regard appears to be predicated on the premise that reliance on the "background" evidence would be the same as finding the assistance an unfair labor practice contrary to the limitation of Section 10(b). I disagree. In *New Orleans Laundries, Inc.*,⁸ a case indistinguishable from the instant one, the Board issued a cease-recognition order based essentially on 8(a)(2) conduct subsequent to the execution of a contract which was otherwise unassailable, and upon minimal background evidence predating the contract. Recognizing the identity between *New Orleans* and the instant case, the majority finds it necessary to overrule the former "to the extent that [it] is subject to the interpretation that the Board will rely on pre-10(b) conduct to set aside a contract lawful on its face." In my judgment, laying down a flat rule which precludes reliance on a certain kind of background evidence is harmful to the Board's remedy-framing responsibility. Indeed, subsequent to *New Orleans*, we refused to issue a cease-recognition order in *Lykes Bros.* for the reason that there was "no evidence of any background conduct

before the execution of the contract which could be said to have strengthened the [union's] representative status," distinguishing that situation from *New Orleans* where "the unlawful assistance as found by the Board occurred against a background of conduct which clearly served to strengthen the incumbent union's status before the execution of the contract. . . ."⁹

Moreover, there have been later cases in which we have followed the *New Orleans* rationale and which, in my judgment, require that the sound principle we have established be adhered to. For example, we have required an employer to cease recognizing a union with which it had had contractual relations for 38 years, because the current and valid contract which bound the parties was framed in a background where virtually all the financial support necessary to the union to carry out its functions had been provided by the employer.¹⁰

Finally, the majority seeks to distinguish *Lundy Manufacturing Company*¹¹ relied on by the Trial Examiner in formulating his remedy, on the ground that the Board's cease-recognition order issued at a time when the contract between *Lundy* and the assisted union had expired.¹² While that fact might explain the omission from the Board's order of a provision requiring *Lundy* to cease giving effect to its contract—although I fail to see any operative difference between a "cease-recognition" and a "cease-giving-effect-to" remedy—it does not alter the plain fact that the Board fashioned its remedy in reliance on "background" facts showing that *Lundy* had coerced its employees into designating the assisted union as their collective-bargaining representative. In this controlling respect, *Lundy* is indistinguishable from the instant case. As the Board's reliance on such "background" evidence in *Lundy* in fashioning its remedy was affirmed by the court of appeals, the majority is in error in claiming that application of the *Lundy* principle to the facts of this case would be tantamount to finding that Respondent's pre-10(b) conduct was an unfair labor practice.¹³

The words of the Second Circuit Court of Appeals in *Lundy* are instructive insofar as the Respondent there had called in question the propriety of the Board's reliance upon "background" evidence to

⁸ 114 NLRB 1077

⁹ *Lykes Bros Inc of Georgia*, 128 NLRB 606, 610-611. A majority of the Board reached the result it did in *Lykes* precisely for the reason that the background conduct did not sufficiently establish that the union's "ability to represent the employees in the daily administration of its contract was thereby adversely affected." The reverse was true in *New Orleans*, although the contract there was not unlawful. The reverse should also be true here, where the contract *itself* would have been declared unlawful had a charge been timely filed.

¹⁰ *The Post Publishing Company*, 136 NLRB 272, 273, enforcement denied 311 F.2d 565 (C.A. 7), on the substantive ground that the assistance found by the Board was only "cooperation." Cf *M Eskin & Son*, 135 NLRB 666, 671, fn. 16

¹¹ *N.L.R.B. v Lundy Manufacturing Corp.*, 316 F.2d 921 (C.A. 2)

¹² The Board and court decisions in the *Lundy* case indicate that a contract was in effect at the time *Lundy* engaged in unlawful acts of assistance, they do not disclose whether such contract had been renewed or extended prior to the date of the Board's Supplemental Decision and Order.

¹³ As there is presently a contract in effect, application of the *Lundy* principle certainly permits, and, in my opinion, requires inclusion of provisions requiring Respondent to cease giving effect to its existing contract with District 50. I can see no point in waiting for the contract to expire before a cease-recognition provision takes effect.

shape a remedy, allegedly in transgression of *Bryan*.¹⁴ Quoting from *Bryan* that "earlier events may be utilized to shed light on the true character of matters occurring within the limitations period" (362 U.S. at 416), the court went on:¹⁵

It follows *a fortiori* that in such a situation the Board may look to earlier events to determine the appropriate remedy to be prescribed; there is no need to cite the many opinions elaborating on the breadth of the discretion accorded to the Board in framing remedies.

My colleagues explicitly acknowledge that the "special circumstances" of this case require something more than the routine cease-and-desist remedy and thus they require that at the end of the contract term the Respondent may not recognize or bargain with District 50 until it is certified. Clearly, these "special circumstances" are the events which immediately preceded the execution of the June 19, 1964, contract and which, though ordinarily cognizable under Section 8(a)(2), are now time-barred. Although the majority rejects the cease-recognition order recommended by the Trial Examiner on the ground that to do so is tantamount to finding a violation barred by time limitations, it nevertheless orders a termination of the bargaining relationship at the contract's end. Thus, the difference between the recommended remedy and the remedy provided by the majority lies not in the different treatment of background events, but in the effective date of the withdrawal of recognition both remedies require.

The majority indicates that its choice of remedy, to be effective at contract's end, is compelled by the fact that the unlawful assistance given by Respondent to District 50 occurred at a time when the "employees did not have the right, because of the contract, to change their bargaining representative." Presumably this means that the majority believes that the Board would have been compelled by its contract bar rules to dismiss any petition resulting from the employees' efforts to designate a bargaining representative of their own choice. However, the Board, in the past, has refused to apply its contract bar rules so rigidly as to foreclose an election because a petition was filed in the midterm of a contract, lawful on its face, which had been executed at a time when the union was not the duly authorized representative of the employees. (*Foothill Electric Corporation*, 120 NLRB 1350.) The circumstances in *Foothill* closely resemble the instant case, for both involved the execution of a contract by unions not truly designated as bargaining representative; and in both, the events which surrounded the execution of the contract, fair on its face, occurred at a time which precluded an unfair labor practice finding based on those events because of our statute of limitations. In *Foothill*, the Board directed an election notwithstanding the fact that we normally presume the regularity of

collective-bargaining agreements which are urged as a bar in representation proceedings. Thus, it is simply not true that the Respondent's employees did not have the right to take the necessary steps to change their collective-bargaining representative at the time of the events of this case, and there is no reason in law or in equity why this Board should honor Respondent's contractual commitment at the expense of the employees' immediate exercise of the right guaranteed by Section 7 to freely select a bargaining representative of their choice.

For the foregoing reasons, I would not delay the effective date of the withdrawal of recognition ordered by the majority, but would adopt the remedy recommended by the Trial Examiner which accords fully with our past practices.

¹⁴ *Local Lodge 1424, IAM v. NLRB*, 362 U.S. 411

¹⁵ *NLRB v. Lundy Manufacturing Corporation*, *supra*, 917

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to a Decision and Order 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 NOT threaten to shut down or move our plant or to take other economic reprisals because of our employees' selection of a union other than Local Union No. 15386, District 50, United Mine Workers of America.

WE WILL NOT recognize or bargain with Local Union No. 15386, District 50, United Mine Workers of America, as the representative of our employees when our current agreement expires on June 18, 1967, unless and until such Union is certified after a Board election.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights under the Act.

ARDEN FURNITURE
INDUSTRIES OF
PENNSYLVANIA, INC.
(Employer)

Dated _____ By _____ (Representative) _____ (Title)

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

If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 1700 Bankers Securities Building, Walnut & Juniper Streets, Philadelphia, Pennsylvania 19107, Telephone 597-7617.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

SIDNEY SHERMAN, Trial Examiner: A copy of the charge herein was served upon Respondent on September 23, 1965. The complaint issued on March 8, 1966, and the case was heard on May 24. The issues litigated involved alleged violations of Section 8(a)(2) and (1) of the National Labor Relations Act, as amended. After the hearing briefs were filed by Respondent, the Charging Party, and the General Counsel.

Upon the entire record and my observation of the witnesses, I adopt the following findings and conclusions:

I. RESPONDENT'S BUSINESS

Arden Furniture Industries of Pennsylvania, Inc., herein called Respondent, is a corporation under Pennsylvania law, and is engaged in its plant at Pittston, Pennsylvania, in the manufacture of plastic furniture. During the past year, Respondent received at its plant from out-of-State points goods valued in excess of \$50,000. Respondent is engaged in commerce under the Act.

II. THE LABOR ORGANIZATIONS INVOLVED

Keystone District Council, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, herein called the Charging Party, and District 50, United Mine Workers of America, herein called District 50, and its Local Union No. 15386, are labor organizations under the Act.

III. THE UNFAIR LABOR PRACTICES¹

The complaint alleges that Respondent violated Section 8(a)(2) and (1) of the Act by contributing support to District 50 in the form of threats of reprisal against the employees if they selected a bargaining agent other than District 50.

The answer denies this allegation.

Respondent began its operations at its present location about March 1964. A month or two later, Plant Manager Tittler called the employees together, and urged them to consider joining a union, but stated that he did not want them to select an independent union. The employees, nevertheless, decided that they wanted an independent union, and a three-man committee was delegated to apprise Tittler of this decision. However, insisting that Respondent wanted only District 50 to represent the employees, he refused to deal with the committee, even though its spokesman, Bressler, offered to give Respondent the same contract as District 50. Bressler reported Tittler's position to the employees, and at this juncture Singer, a representative of District 50, approached the employees, during worktime, arranged the election of officers for a District 50 local, and obtained from the employees signed cards authorizing District 50 to represent them.

On June 2, 1964, when a representative of the Charging Party spoke to him about organizing Respondent's employees, Tittler remarked that Respondent was "committed" to District 50 by "the people who brought them into Pittston."

On June 19, 1964, Respondent executed a contract, for a term of 3 years with District 50, and its newly formed Local Union No. 15386. During the term of this contract

the employees became disenchanted with District 50 and contacted other unions; and on July 31, 1965, at a special meeting called for that purpose, and attended by 18 employees, a motion to disaffiliate from District 50 was carried unanimously. On August 2, Tittler told Centrella, the shop steward, that if a new union was forced upon him he would have to shut down. About a week later, the president of Local Union No. 15386 obtained from the employees signed cards designating the Charging Party as their representative. A few days later Tittler called a meeting of the officers of the Local, and, after discussing with them their objections to District 50, announced, that, if District 50 ceased to represent the employees, Respondent would have to move its plant to Baltimore. Tittler then called all the employees together and, in effect, repeated the same warning to them. Later the same day the motion to disaffiliate from District 50 was "withdrawn" by the employees.

In view of the limitations of Section 10(b) of the Act, no violation finding may be based on any of the aforesaid events which occurred before March 23, 1965. However, the events after that date, particularly Tittler's threats to move the plant if the employees did not abandon their disaffiliation action, which threats prompted abandonment of such action, suffice to establish that Respondent rendered unlawful assistance to District 50, thereby violating Section 8(a)(2) and (1) of the Act.

THE REMEDY

In framing a remedy, it is proper to consider Respondent's prelitigation conduct, in foisting District 50 and its contract upon the employees, despite their desire for an independent union, and, in view of such conduct, to recommend that Respondent be required to cease and desist from recognizing District 50 and its Local No. 15386, unless certified by the Board, and from giving effect to its current contract or any renewal thereof.² (However, Respondent will not be required to vary the substantive terms and conditions of employment established pursuant to such contract.)

V. 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 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.

CONCLUSIONS OF LAW

1. By threatening employees with economic reprisals to influence their choice of a bargaining agent, Respondent has interfered with, restrained, and coerced its employees in the exercise of rights guaranteed in Section 7 of the Act, and has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

2. By contributing support to District 50's Local Union No. 15386 in August 1965, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(2) and (1) of the Act.

[Recommended Order omitted from publication.]

¹ The findings in this section are based on the uncontradicted testimony of the General Counsel's witness

² *Lundy Manufacturing Corp.*, 136 NLRB 1230, enf'd 316 F.2d 912 (C.A. 2)