Luigi Ferraioli d/b/a/ Hess Service Station *and* New York Local Union 10, International Brotherhood of Production, Maintenance and Operating Employees *and* Local 917, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Party to the Contract.

Local 917, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America *and* New York Local Union 10, International Brotherhood of Production, Maintenance and Operating Employees *and* Luigi Ferraioli d/b/a/ Hess Service Station, Party to the Contract. Cases 29–CA–584 and 29–CB–193.

June 14, 1967

DECISION AND ORDER

BY MEMBERS BROWN, JENKINS, AND ZAGORIA

On January 4, 1967, Trial Examiner Sydney S. Asher, Jr., issued his Decision in the above-entitled proceeding, finding that the Respondents had not engaged in unfair labor practices as alleged in the complaint and recommending that the complaint be dismissed in its entirety. Thereafter, the General Counsel filed exceptions to the Trial Examiner's Decision and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

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.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner and hereby orders that the complaint herein be, and it hereby is, dismissed in its entirety.

TRIAL EXAMINER'S DECISION

SYDNEY S. ASHER, JR., Trial Examiner: On May 6, 1966, New York Local Union 10, International Brotherhood of Production, Maintenance and Operating Employees, New York, New York, herein called Local 10, filed charges in Case 29–CA–584 against Luigi Ferraioli d/b/a Hess Service Station, Brooklyn, New York, herein called Respondent Employer. On the same date, Local 10 filed charges in Case 29–CB–193 against Local 917, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, New York, New York, herein called Respondent Union. On September 13, 1966, Local 10 filed amended charges against each Respondent. On September 21, 1966, the Regional Director consolidated the cases and issued a consolidated complaint alleging that: on or about February 23, 1965, the Respondents entered into a collective-bargaining contract covering the employees of Respondent Employer which contained provisions requiring membership in Respondent Union as a condition of employment; until on or about April 29, 1966, the Respondents failed to give effect to the contract; on or about April 28, 1966, a majority of these employees selected Local 10 as their bargaining agent; on or about April 28, 1966, Local 10 requested Respondent Employer to recognize it as exclusive collective-bargaining representative of his employees but he refused to do so; and on or about April 28 and 29, 1966, Respondent Employer interrogated his employees concerning their union activities and on the same day distributed applications for membership in Respondent Union and required his employees to sign such applications pursuant to the agreement referred to above, and he did this notwithstanding the fact that the Respondents had failed to give effect to their contract and in order to prevent his employees from supporting Local 10. It is alleged that the conduct of Respondent Employer violated Section 8(a)(1), (2), and (3) of the National Labor Relations Act, as amended (29 U.S.C. Sec. 151, *et seq.)*, herein called the Act, and the conduct of Respondent Union violated Section 8(b)(1)(A) and (2) of the Act. Respondent Union filed an answer admitting that it executed a contract with Respondent Employer on February 23, 1965, admitting that on April 28 and 29 Respondent Employer distributed to his employees applications for membership in Respondent Union and required his employees to sign them, but denying the commission of any unfair labor practice. Respondent Employer filed no formal answer.[1]

Upon due notice, a consolidated hearing was held before me on November 21, 1966, at Brooklyn, New York. All parties were afforded an opportunity to be represented and to participate fully in the hearing. No witnesses were called. The General Counsel and the Respondents entered into a stipulation. Local 10 neither entered into the stipulation nor objected thereto. After the close of the hearing, the General Counsel and Respondent Union filed briefs. These have been duly considered.

Upon the entire record in these cases, I make the following:

FINDINGS OF FACT

1. At all material times Respondent Employer, doing business as Hess Service Station, has operated a gasoline service station in Brooklyn, New York.

2. During the year prior to the hearing Respondent Employer derived gross annual revenue from his gasoline service station in excess of $500,000. During the same period of time he caused gasoline, oil, and other materials

[1] The General Counsel and the Respondents stipulated that Respondent Employer denies the allegations of the consolidated complaint, except as otherwise contained in the stipulation described below.

valued at more than $50,000 to be delivered to his place of business directly from sources outside the State of New York.

3. Respondent Union and Local 10 each is, and at all material times has been, a labor organization as defined by the Act.

4. On February 23, 1965, the Respondents entered into a collective-bargaining contract covering Respondent Employer's employees. This contract was to be effective from February 23, 1965, until February 22, 1967, and provided, among other things:

> . . . the employer agrees to employ at his gasoline and/or service station or parking lot . . . only such employees as are members of the Union in good standing during the life of this agreement. The Union shall be the sole judge of the standing of its members. No employee not a member of the Union and no new employee shall be required to become a member of the Union until 31 days after the execution of this agreement or the date of his employment, whichever is later.

5. At the time this contract was entered into, Respondent Employer had three employees, all of whom were members of Respondent Union. One of these, Alfredo Ferraioli, went into the service of the United States Army during the week ending September 24, 1965, and thereafter returned to his employment during the week ending August 5, 1966. Another of the original employees, Vincent Gioeni, died during the week ending April 29, 1966. The third such employee, Louis Cavaliere, terminated his employment with Respondent Employer during the week ending April 30, 1965.

6. From February 23, 1965, until on or about April 29, 1966, the Respondents "failed to give effect to and failed to maintain and enforce and failed in any other manner to notify Respondent Employer's employees of the existence of the collective bargaining agreement, other than the original three employees mentioned above." During that period "grievances were not filed by or on behalf of the employees" of Respondent Employer. These employees—except the original three employees named above—"were unaware of the existence" of the contract and did not know that Respondent Union was their collective-bargaining representative.

7. On or about April 26, 1966, Local 10 commenced an organizational campaign among the employees of Respondent Employer.

8. On or about April 28, 1966, a majority of these employees designated and selected Local 10 as their representative for the purposes of collective bargaining with Respondent Employer.

9. On the same date Local 10 requested Respondent Employer to recognize it as the exclusive collective-bargaining representative of Respondent Employer's employees and to bargain with it as such, but Respondent Employer refused to do so, and has continued to refuse to do so, on the ground that he had an existing collective-bargaining agreement with Respondent Union.

10. On April 28, 1966, Local 10 filed a petition with the Board in Case 29–RC–459, seeking certification as the exclusive collective-bargaining representative of Respondent Employer's employees. This petition is still pending.

11. On or about April 28 and 29, 1966, Respondent Employer, at his place of business, interrogated his employees concerning their membership in, activities on behalf of, and sympathy for, Local 10.

12. On or about April 28 and 29, 1966, Respondent Employer, during working time and on his premises, distributed applications for membership in Respondent Union and required his employees to sign these applications, pursuant to the collective-bargaining agreement referred to above. He did so "notwithstanding that [the Respondents] had failed to give effect to and had failed to maintain and enforce their collective bargaining agreement" as set forth above.

13. Since May 5, 1966, Respondent Union "has serviced the collective bargaining agreement" referred to above. This contract "has been performed to date."

Discussion

1. Legality of the contract

The General Counsel does not attack the legality of the contract at its inception. The contract covers an appropriate unit, is to be effective for a reasonable period of time, and contains a valid 31-day union-security clause. Moreover, at the time the contract was signed, the contracting union represented an uncoerced majority of the employees in the unit.[2] It is accordingly found that the contract was valid at its inception.

2. Respondent Union's conduct

Respondent Union has remained in existence at all times since February 23, 1965, when the contract was executed. There is neither allegation nor proof that it became defunct. The record reveals no expressed or implied cancellation or revocation of the contract by either Respondent. Nor does it disclose any deliberate deceit or concealment practiced on the employees by either Respondent.[3] Moreover, it does not show that Respondent Union distributed membership applications to Respondent Employer's employees. There is no proof that any representative of Respondent Union was present on April 28 and 29, 1966, when Respondent Employer distributed such applications to his employees. The *only* activity of Respondent Union shown is that, since May 5, 1966, it "serviced" the contract; that is to say, maintained and enforced it.

It has been found above that the contract was valid in all respects at its inception and that the parties never affirmatively repudiated it. The General Counsel's theory of the alleged violations by Respondent Union seems to be that the parties allowed the contract to become "moribund" and that thereafter Respondent Union, having meanwhile lost its numerical majority, somehow lost its status as statutory representative of the employees, and therefore was forbidden by Section 8(b)(1)(A) and (2) of the Act to revive the contract at a time when a rival union had

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[2] Contrast *Local Lodge No. 1424, International Association of Machinists, AFL–CIO* [*Bryan Manufacturing Company*] v *N.L.R.B.*, 362 U.S. 411.

[3] The General Counsel cites *N.L.R.B.* v. *Hotel, Motel and Club Employees' Union, Local 568, AFL–CIO (Philadephia Sheraton Corp.)*, 320 F 2d 254 (C.A. 3). That case is clearly distinguishable on its facts. There the union deliberately withheld data requested by employees, and then caused the discharge of the employees for nonpayment of dues. Here, on the contrary, no employee sought any information of any kind from either Respondent, and Respondent Union took no action detrimental to any employee's job tenure.

made a claim to represent the employees.[4] I cannot agree. Given a contract of reasonable duration, it is well settled that, in the interest of industrial stability, the contracting union retains its position as exclusive bargaining agent (despite loss of numerical majority) for the duration of the contract.[5] Accordingly, I find that Respondent Union's conduct herein did not constitute a violation of the Act.[6]

It is possible, perhaps, to argue that Respondent Union may have been derelict in its statutory duty in failing to enforce the contract vigorously and in "sleeping on its rights," thus depriving the employees of proper and effective representation. But the complaint does not so allege, and this issue has not been presented to me for decision. I accordingly decline to rule thereon. However, in passing it should be noted that no employee—even among the original three—filed any grievance or otherwise sought Respondent Union's aid during the period from February 23, 1965, to April 29, 1966.

3. Respondent Employer's conduct

The complaint alleges three types of conduct by Respondent Employer. The first is his refusal on or about April 28, 1966, to recognize Local 10 on its demand that he do so. He based this refusal on the ground that he had an existing collective-bargaining agreement with Respondent Union. However, the complaint does not allege any violation of Section 8(a)(5) of the Act. Therefore the refusal to recognize Local 10 need not be further discussed.[7]

The second type of conduct of Respondent Employer mentioned in the complaint is his distribution to his employees on April 28 and 29, 1966, of applications for membership in Respondent Union and his requirement that the employees sign them. At oral argument, the General Counsel contended that "the employees in the station were totally unaware of the fact. that Respondent Union was their bargaining representative]. To the best of their knowledge [Respondent Employer] didn't have a labor agreement.... Knowledge ... should be an important point in this case ... knowledge is an aspect in this case." Although conceding that the original three employees had the requisite knowledge, the General Counsel, pointing to the high labor turnover in this particular industry, indicated that he considered it the duty of Respondent Employer to enlighten new employees about the representation situation. I believe this contention misconstrues the issue. So far as I have been able to ascertain, knowledge of the employees and labor turnover have never been considered factors determinative of contract bar.

In his brief, the General Counsel takes the basic position that, having let the contract remain unused, the parties violated the Act by "reviving" it when they did "with the sole purpose in mind of preventing Local 10 from obtaining recognition." Once again, the argument misses the mark. Section 8(a)(3) of the Act would normally be violated when an employer compels his employees, as a condition of employment, to join a union. But Congress provided for an exception: a valid 31-day union-security clause negotiated with a majority union, as was done here. The issue therefore is whether the inactivity of the contracting parties caused the otherwise valid union-security clause to atrophy, so that it no longer fulfills the requirements of the proviso to Section 8(a)(3). I think not.[8] As I view the matter, the contract retained its full vitality and vigor. It still had almost 10 months to run; therefore the contract constituted a bar and the time was not ripe for a change of bargaining representative. Under these circumstances—especially the absence of showing that any employee had not already been accorded the statutory 31-day grace period—Respondent Employer's enforcement of the valid union-security clause was wholly benign.[9]

The third type of conduct of Respondent Employer mentioned in the complaint is that on or about April 28 or 29, 1966, he interrogated his employees concerning their membership in, activities on behalf of, and sympathy for, Local 10. It will be assumed, without deciding, that by such conduct Respondent Employer violated Section 8(a)(1) of the Act. Considering the context in which this occurred it was, at most, a trivial infraction. Standing alone and isolated as it does, I am convinced that such a venial violation does not require or warrant a remedial order.

Upon the basis of the above findings of fact, and upon the entire record in these cases, I make the following:

CONCLUSIONS OF LAW

1. Luigi Ferraioli d/b/a/ Hess Service Station is, and at all material times has been, an employer within the meaning of Section 2(2) of the Act and is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. New York Local Union 10, International Brotherhood of Production, Maintenance and Operating Employees, and Local 917, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America are,

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[4] The General Counsel cites several cases to support this contention, all of which are distinguishable on their facts In *Appalachian Shale Products Co.*, 121 NLRB 1160, the Board held that, in order to bar an election, a contract must contain substantive terms and be in writing and signed. The contract in issue in the instant case meets these requirements In *Raymond's Inc*, 161 NLRB 838, the parties orally substantially altered the terms of the written contract, there is no showing in the instant case of mutually agreed-upon oral changes In *Eli M Goldberg*, 28 NYSLRB 460, the contract was prematurely extended, no such action appears here And in *Carlson Furniture Industries, Inc.*, 153 NLRB 162, the union explicitly withdrew its claim to represent the employees and the parties by mutual consent abrogated the existing contract, there was no similar disclaimer or mutual abrogation here

[5] *N L R.B* v. *Marcus Trucking Company, Inc.*, 286 F 2d 583, 592–593 (C.A. 2)

[6] In so concluding, I have not reached Respondent Union's defense based on the 6-months statute of limitations contained in Section 10(b) of the Act and the decision in *Local 1424, IAM [Bryan Manufacturing Company]* v *N.L.R B., supra.* In view of my disposition of the charges against Respondent Union, I deem it unnecessary to rule upon this particular defense

[7] In this connection it should be noted in passing that, had Respondent Employer recognized Local 10 at that time, he might well have violated Section 8(a)(1), (2), and (3) of the Act See *N L R B* v. *Marcus Trucking Company, Inc , supra.* But that issue need not be determined

[8] The vital difference between outright abandonment of a contract, or its voluntary relinquishment, on the one hand, and mere neglect or failure to police its terms on the other hand, is illustrated in *N L R.B* v *Teamsters, Chauffeurs, Warehousemen and Helpers, Local 901 (Valencia Baxt Express, Inc)*, 314 F.2d 792, 795 (C.A. 1).

[9] Compare *Retail Clerks International Association, AFL–CIO, Locals 698 and 298 (Skorman's Miracle Mart)*, 160 NLRB 709.

and at all material times have been, labor organizations within the meaning of Section 2(5) of the Act.

3. The General Counsel has failed to establish by a fair preponderance of the evidence that Respondent Union is engaging in or has engaged in unfair labor practices within the meaning of Section 8(b)(1)(A) or (2) of the Act.

4. The General Counsel has failed to establish by a fair preponderance of the evidence that Respondent Employer is engaging in or has engaged in unfair labor practices within the meaning of Section 8(a)(1), (2), or (3) of the Act, of sufficient gravity to warrant a remedial order.

RECOMMENDED ORDER

Upon the basis of the above findings of fact and conclusions of law, and on the entire record in these cases, I recommend that the consolidated complaint herein be dismissed in its entirety.