Desilu Productions, Inc. *and* Building Service Employees Union, Local 278. Case 31–CA–372

August 9, 1967

DECISION AND ORDER

BY MEMBERS BROWN, JENKINS, AND ZAGORIA

On February 20, 1967, Trial Examiner James R. Hemingway issued his Decision in the above-entitled proceeding, finding that the Respondent had not engaged in any unfair labor practices which warrant the issuance of a remedial order and recommending that the complaint be dismissed in its entirety, as set forth in the attached Trial Examiner's Decision. 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 AND RECOMMENDED ORDER

STATEMENT OF THE CASE

JAMES R. HEMINGWAY, Trial Examiner: This case was initiated by a charge filed by Building Service Employees Union, Local 278, herein called the Union, against Desilu Studios, herein called the Respondent, on April 7, 1966.[1] Upon this charge the General Counsel for the National Labor Relations Board issued a complaint on September 30, 1966, alleging that Respondent had violated Section 8(a)(1) and (5) of the Act. Respondent on October 10, 1966, filed its answer to the foregoing complaint denying the commission of any unfair labor practices.

Pursuant to notice, a hearing was held in Los Angeles, California, on December 14, 1966, before me. Following the close of the hearing, briefs were filed by the General Counsel and the Respondent on January 6, 1967.

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

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent is a corporation engaged in various locations in Los Angeles, California, including a studio at Culver City, California, in the production and distribution of motion pictures and television productions.

In the course and conduct of its business operations, the Respondent annually derives revenue in excess of $500,000, annually makes sales directly to, and perform services directly for, customers outside the State of California valued in excess of $50,000, and annually purchases and receives goods and services directly from suppliers located outside the State of California valued in excess of $50,000. No issue is raised with respect to jurisdiction, and I find that the Board has jurisdiction and that it will effectuate the policies of the Act to assert jurisdiction in this case.

II. THE LABOR ORGANIZATION INVOLVED

The Union is a labor organization representing janitorial and maintenance employees of the Respondent in a unit described in an agreement between the Union and the Respondent dated February 1, 1965, and extending to January 31, 1969. The appropriateness of the unit and the fact that the Union is a labor organization within the meaning of the Act are not disputed in this case.

III. THE UNFAIR LABOR PRACTICES

A. *The Question Involved*

The question presented here is whether or not the Respondent, by unilaterally entering into a lease or license of part of its premises to another company without notice to the Union until after the terms of the lease or license had been settled, although the effect of such lease was to require the layoff of some employees in the unit and the transfer of others, constituted a refusal to bargain within the scope of the decision in the *Fibreboard* case.[2]

B. *The Facts*

Prior to the incident herein involved, the Union had had amicable relations with the Respondent for more than 15 years and they were operating under an agreement extending from 1965 to 1969 at the time of the events hereinafter related. The contract unit covered the janitorial services at two of the Respondent's facilities, one at Culver City and one at Gower Street in Hollywood. The agreement contained a union-shop clause. Among other provisions in this agreement are found extensive provisions for seniority and for servance pay on a graduated scale determined by length of service. In the section on

[1] An amended charge was filed on September 30, 1966. The original charge alleged violations of Section 8(a)(1), (3), and (5) of the Act, the amended charge alleged violation only of Section 8(a)(1) and (5).

[2] *Fibreboard Paper Products Corporation*, 130 NLRB 1558, enfd 322 F 2d 411 (C.A.D C.), affd. 379 U.S. 203.

severance pay, there is found a clause entitled "Severance Obligation of Successor Company." This provision reads:

> If a successor company buys out Producer and continues the operation of Producer's studio, and if the buying company continues the employment at the studio of an employee of Producer, such employee shall retain with the buying company his appropriate severance pay experience credit accrued with Producer and his employment shall not be considered to be terminated for severance pay purposes as a result of such successor company's acquisition of Producer. If such employee is not so continued in employment by the buying company, then Producer is responsible for any severance pay due the employee at the time of his termination. . . .

Background evidence establishes that, about October 1965, the Union's executive secretary, John Buchanan, told Respondent's personnel director, Ernest Scanlon, that the foreman at the Culver City facility was giving the janitors a bad time— that nobody could get along with him— and he suggested to Scanlon that he would prefer to have the work subcontracted by a union contractor rather than have to keep fighting the manager of the Culver City facility. By a subcontract, Buchanan meant that the Respondent would hire the janitors through a contractor who had a contract with the Union, but that no other change would be effected thereby, since the same men would remain on the job, although they would be paid by the subcontractor instead of by the Respondent. Further conversations between Scanlon and Buchanan about such a subcontract took place, and Scanlon undertook to investigate the possibility of such a subcontract. Buchanan gave Scanlon the name of one (among others) such subcontractor who would be approved by the Union. Scanlon got in touch with the owner of that company and requested that that company give a bid. Such bid was submitted on March 1, 1966.

Scanlon testified that in the first or second week of March, he called Buchanan and told him that the Respondent was terminating talks on a subcontract because it was then discussing a lease or licensing arrangement with 20th Century Fox, herein called Fox, and that the latter would furnish the janitorial service. Buchanan testified that he was not notified of any later decision regarding a subcontract. Although Buchanan conceded on cross-examination that he might have had discussions with Scanlon about the possibility of a subcontract later than January 1966, I conclude that Scanlon did not mention the Fox negotiations, because before March 25 the Respondent had expected to continue to carry the janitorial expenses itself. There had not been even a possibility of terminating janitorial services taken up in Respondent's negotiations with Fox before March 24 or 25, 1966. Hence, Scanlon could not have known that such a lease or licensing arrangement would have any effect upon janitorial employees.[3]

Fox's interest in leasing the Respondent's facility at Culver City for use in production of a television series, scheduled to commence in early April, came to Respondent's attention in early March 1966, but no meeting concerning the terms of such an arrangement was set before March 14. On that date, various management representatives of each side (not including Scanlon) met, and the Respondent made a proposal to Fox. A further meeting was held on March 24, 1966, at which Fox made a counterproposal. The Respondent told the Fox people that the Respondent would have to receive a certain net amount and that if the Fox offer was "fixed," that is if that was Fox's limit, there would have to be a division of costs. Fox agreed to this in principle. The final division of costs was made in a telephone conversation on March 25, and the deal was verbally closed and was ratified by the board of directors on that day. One of the cost items that Fox agreed to bear was that for janitorial services. Since it had janitorial employees of its own, it decided to use them instead of Respondent's janitorial employees. The result was that only one of the Respondent's Culver City janitorial employees was kept on its payroll there. It is not clear whether retention of this one was decided upon by Respondent on March 25 or was agreed upon between Scanlon and Buchanan at a later date.

On March 29, 1966, Buchanan learned from employees of the fact that there was to be a lease or licensing arrangement which would result in the termination of some of the janitorial employees, and he called Scanlon on the telephone and asked him whether it was true that Fox was taking over the Culver City facilities. Scanlon told him that it "would happen," and Buchanan said that this was the first he had heard of it and that Scanlon should have talked it over with him. Scanlon replied that he had had nothing to do with it, that the lease had been made by his superiors. Scanlon testified that he did not learn that Fox was going to take over the janitorial service until about March 29, but he must have learned of this, in any event, before Buchanan telephoned him, because he testified that he told Buchanan that the licensing agreement had been made and that under this agreement Fox would be responsible for the janitorial services. He suggested that Buchanan talk with a man by the name of Metzler, with Fox, about the janitorial service. Scanlon told Buchanan that the Respondent would comply with the provisions of the contract with regard to seniority and severance pay as to any laid-off employees. In this same telephone conversation on March 29, Buchanan and Scanlon went over the seniority of the employees that might be affected and agreed as to which ones would be transferred to the Gower Street facility and which ones would be laid off. The provisions of the collective-bargaining agreement were thereafter carried out as agreed between Scanlon and Buchanan. Buchanan spoke with Metzler thereafter, but without any change in Fox's decision to use its own employees.

C. *Concluding Findings*

It is the General Counsel's contention that the Respondent failed in its duty to bargain with the Union and thus violated Section 8(a)(1) and (5) of the Act by neglecting to give the Union notice before consummating the lease agreement with Fox whereby Fox was privileged to employ its own janitorial employees and whereby, as a result, some of Respondent's employees were laid off.

[3] Vice President Holly spoke with Scanlon about the insurance aspect under such a lease, in early March 1966, but he did not discuss the janitorial services with Scanlon until March 25 or thereafter.

The General Counsel argues that had bargaining been conducted on the matter, "a real likelihood existed that alternatives could have been found. . ."

Respondent contends first, that, by the telephone call allegedly made by Scanlon to Buchanan in early March 1966, Respondent gave the Union notice of the possiblity that Respondent's Culver City lot would be licensed to Fox and that there was doubt as to whether Respondent would continue with the janitorial services or whether Fox would take over such services. Second, Respondent contends that there was no bad faith and that, as soon as the Union indicated a desire to discuss the matter, Scanlon did so and agreed with Buchanan to carry out the transfer or layoff of men by seniority in accordance with contract provisions and to pay severance pay in accordance with contract provisions. I have already found that the first ground (that Respondent gave notice in early March) is not in accordance with fact and that the true fact is that the Union had no notice of Respondent's dealings with Fox (and especially of the result that Fox would supply its own janitorial services) before March 29, 1966, just a few days before that time to carry out the provisions of the contract, while showing, perhaps, an absence of bad faith, would not serve to rectify its omission to notify the Union in advance, if required, because bargaining *ab initio* would then have been rendered impossible without another agreement with Fox. Even Scanlon's referring Buchanan to an official of Fox was not a substitute. By that time, Fox had already decided to use its own janitorial employees and it was under no obligation to bargain with the Union.

Whether or not, as the General Counsel asserts, there would have been a "real likelihood that alternatives could be found" is a speculation; the probabilities depend on all the facts; it should not be just assumed. The General Counsel concedes that the Respondent was not motivated by antiunion considerations in leasing or licensing its Culver City premises to Fox. Had this lease not potentially affected the employment of employees represented by the Union, the General Counsel apparently would not contend that notice to the Union was even a requirement of good-faith bargaining. Before March 24, 1966, the Respondent had no basis for assuming that the janitorial employees would not continue during the term of the lease or license.[4] At the outset of negotiations, it had every expectation of continuing the janitorial services even if it leased the premises, and, before that date, the parties had not yet reached a point where employment of any janitorial employees might be affected. But at that meeting, the parties decided to make a division of costs by putting certain employees on Fox's payroll and by carrying some on Respondent's own. Holly, who testified to this, did not indicate that even this decision contemplated a layoff of certain of Respondent's employees. He testified that he and two other representatives of Respondent who were attending the lease-negotiating meetings had, either on the night of March 24 or on March 25, gone "through the cost areas and picked out the ones that we felt that Fox should carry" and then he so notified the Fox representative on March 25 and the latter accepted the proposed division. The evidence does not clearly indicate whether Respondent's proposal on March 25 included one that Fox use its own janitorial employees or whether it was just a proposal that Fox should pay the costs of janitorial services, and it does not appear whether or not, as a part of the lease arrangement, both Respondent and Fox agreed to a substitution of Fox's janitorial employees for Respondent's or whether Fox unilaterally decided to use its own employees after having agreed to pay for janitorial services. Personnel Director Scanlon was aware of the fact that Fox would use its own janitorial employees when he spoke with Buchanan on March 29, but evidence is lacking as to when any responsible representative of Respondent first learned of this— whether before the final handshake on March 25 or thereafter. Scanlon testified that he believed that it was on March 29 that he learned that the janitorial service would be furnished by Fox. His testimony might imply that the arrangement to substitute Fox's janitorial employees for Respondent's was a part of the lease or licensing arrangement, but Scanlon was not present at the time that arrangement was settled, and he was not questioned about whether he had been specifically so informed or whether he had inferred that it was a part of the bilateral agreement because he had learned at the same time and from the same source about the licensing and the fact that Fox would supply its own janitorial employees.

If the decision to substitute Fox's janitorial employees for Respondent's was a bilateral arrangement, then it was within the Respondent's knowledge in advance, and Respondent should have given the Union notice of such a prospect before agreeing thereto with Fox. On the other hand, if the Respondent had believed that the division of costs would mean only that Fox would pay the janitorial employees and if Fox had taken advantage of general language to make its own unilateral decision to substitute employees of its own for those of Respondent, then the Respondent might have recognized, only after the bargain had been struck, that Fox was permitted to do this under the agreement. The Respondent did not expressly contend that the latter situation was actually fact, but it did not negative the possibility either. The General Counsel has the burden of making out an unfair labor practice and, in this case, it would appear not to have been nailed down.

It is clear that the Union had, in its collective-bargaining agreement with the Respondent, contemplated the possibility of layoffs both as a result of Respondent's own conduct and as a result of a sale of the premises and had made provision therein for application of seniority rules and for severance pay in such an eventuality. Perhaps this might not excuse notice of intent to dispose of the premises, in the case of a sale,[5] but it does furnish some evidence of what remedy the Union felt was appropriate in such an instance. Although a lease or license is legally different from a sale, the effect of a lease or license of Respondent's premises upon employment of employees in the unit would be similar. There is evidence that sales of facilities by one company to another in the motion picture and television producing industry are not uncommon but that leases or licenses of those facilities are unusual. This could account for the fact that transfers of premises by means other than sales were not covered in the collec-

[4] Since the agreement between Respondent and Fox had not been reduced to writing, it is impossible here to determine whether the arrangement should be classified as a lease or license

[5] *Saul Harberg, d/b/a Ilfeld Hardware & Furniture Co*, 157 NLRB 1401

tive-bargaining agreement. It is not illogical, however, to infer that, had the parties contemplated the possible transfer by lease or license instead of by sale, they would have made the same provision in the Union's contract for the employees' benefit in such instance as they actually did in case of sale.

The General Counsel argues that this case is controlled by the *Fibreboard* decision and he requests the remedy required in *Winn-Dixie Stores, Inc.*[6]

The Respondent, in its brief, relies on the Third Circuit Court decision in *N.L.R.B.* v. *Royal Plating and Polishing Company, Inc.*, 350 F.2d 191, and on *New York Mirror*, 151 NLRB 834. The Board has not accepted views of either the Third Circuit Court or the Eighth Circuit Court[7] regarding an employer's duty to bargain about the termination of a portion on his businesss.[8] The *New York Mirror* case, however, bears some factual similarity to the case at hand. As here, the collective-bargaining contract in that case made provision for severance pay. As here, there was no advance notice. As here, the union's discussions in that case centered on assurances that the provisions of the contract regarding severance pay and employee benefits would be carried out. And, as here, no union animus existed, and the termination of one portion of the business of the employer was based on economic considerations. There were facts shown in that case, however, which are not shown here. In the *New York Mirror* case, the employer permanently terminated operations and unit jobs, and restoration of such jobs was not sought by any party. This could hardly be said here. The arrangement here was not permanent and the Union did seek restoration of the jobs when it contacted Fox. However, the Respondent here did demonstrate good faith not only by carrying out the terms of the contract but also by reemploying, on a basis of seniority, employees who had been laid off at Culver City, when jobs became available at the Gower Street facility

Good faith does not, in itself, excuse the duty of an employer to give the collective-bargaining representative notice and an opportunity to bargain concerning the termination of part of the employer's business where such termination will affect employment of employees in the bargaining unit; but the absence of bad faith or the absence of a rejection by an employer of the collective-bargaining principle is an element that may be considered in the employer's overall conduct in such a case as this.[9] And, if it appears that he has done all that can reasonably be expected of him under the circumstances, this effort, plus his good faith, may be considered in ascertaining the necessity of a remedy, even if a technical violation might be found.[10]

In the case at hand, there might, *prima facie*, appear to be a violation because of Respondent's failure to give the Union notice in advance, but in view of the uncertainty of the evidence with respect to Respondent's part in the decision of Fox to substitute its own employees for those of Respondent, I am not convinced that a finding is warranted that the Rspondent was responsible for that decision. In view of this uncertainty, the Respondent's long history of bargaining with resultant contracts, Respondent's amicable relations with the Union, and the fact that the Union's efforts in this case were devoted mainly to giving effect to the provisions of the collective-bargaining contract with respect to rights of laid-off employees, I find that, even if a technical violation of the Act could be found in this case, a remedial order is not required to effectuate the policies of the Act.[11]

RECOMMENDED ORDER

Accordingly, I recommend an order dismissing the complaint in its entirety.

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[6] 147 NLRB 788, enfd. in part 361 F.2d 512 (C.A. 5).
[7] *N.L.R.B.* v. *Adams Dairy, Inc.*, 350 F.2d 108 (C.A. 8).
[8] *Ozark Trailers, Incorporated*, 161 NLRB 561.
[9] *Hartmann Luggage Company*, 145 NLRB 1572, *New York Mirror*, 151 NLRB 834; *White Consolidated Industries, Inc.*, 154 NLRB 1593.
[10] *Saul Harberg, d/b/a Ilfeld Hardware & Furniture Co.*, 157 NLRB 1401.
[11] See cases cited *supra*, fns. 9 and 10.

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