

**Windemuller Electric, Inc. and United Construction Workers Local No. 10, Christian Labor Association.** Case 7-CA-7372

January 13, 1970

### DECISION AND ORDER

BY CHAIRMAN McCULLOCH AND MEMBERS  
BROWN AND JENKINS

On October 30, 1969, Trial Examiner William J. Brown 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 Decision and a supporting brief, and the General Counsel filed a brief in answer thereto.

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 briefs, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations<sup>1</sup> 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 Respondent, Windemuller

<sup>1</sup>We find no merit in the Respondent's argument that by the Union's failure to seek to negotiate concerning the bonus and pension fund when first established, it has thereby waived forever its right to bargain over that subject. While it is clear that a mandatory subject of bargaining can be waived, it is equally clear that mere failure to insist upon discussion is effective as a waiver only for the duration of the contract then under negotiation, the waiver is not automatically continued beyond the life of that contract. *Pacific Coast Association of Pulp and Paper Manufacturers*, 304 F.2d 760, 765 (C.A. 9), enfg. 133 NLRB 690.

We also find no merit in the Respondent's contention to the extent that it argues that a valid decertification petition was filed which casts doubt upon the Union's continuing majority status. On the contrary, we find that the petition is not sufficient to rebut the presumption of continuing majority enjoyed by the Union. The Respondent's refusal to bargain over the bonus and pension plan, in violation of Section 8(a)(5) and (1) of the Act, predated the filing of the petition, and hence the Respondent cannot rely on that petition, which could have resulted from the Respondent's unlawful conduct. Furthermore, we note that the validity of the petition may be questionable, as it is supported by undated signatures, contrary to the requirement articulated in the National Labor Relations Board Statements of Procedure, Series 8, as amended, Section 101.17. And see, *A. Werman and Sons, Inc.*, 114 NLRB 629, 630.

Electric, Inc., Grand Rapids, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

### TRIAL EXAMINER'S DECISION

WILLIAM J. BROWN, Trial Examiner: This proceeding under Section 10(b) of the National Labor Relations Act, as amended, hereinafter referred to as the "Act," came on to be heard at Grand Rapids, Michigan, on August 25, 1969.<sup>1</sup> The original charge of unfair labor practices had been filed on June 12, by the above-indicated Charging Party, hereinafter referred to as the Union, and the complaint herein was issued July 18 by the General Counsel of the National Labor Relations Board acting through the Board's Regional Director for Region 7. It alleged, in addition to jurisdictional matter, that the above-indicated Respondent, hereinafter referred to as the "Company," engaged in unfair labor practices defined in Sections 8(a)(5) and (1) of the Act. The Company's duly filed answer has denied the commission of the unfair labor practices alleged in the complaint and affirmatively alleged that the filing of the charge herein was occasioned by the Union's loss of majority status and its desire to regain the same through the means of a Board order requiring it to bargain.

At the hearing the parties appeared and participated, as noted above with full opportunity to present evidence and argument on the issues. Subsequent to the taking of the evidence herein representatives of the General Counsel and the Company argued orally and waived the filing of briefs. On the entire record herein and on the basis of my observation of the single witness and my analysis of the oral argument, I make the following.

### FINDINGS OF FACT

#### I. THE BUSINESS OF THE COMPANY

I find, in accordance with the pleadings and evidence, that the Company is a corporation organized and existing under and by virtue of the laws of the State of Michigan and maintains its principal office in the City of Grand Rapids, Michigan, where it is engaged in the electric wiring aspect of the building and construction industry. During its current fiscal year, admittedly a representative period, the Company is performing and will perform services valued in excess of \$50,000 for a corporation which annually ships from Michigan locations directly to customers outside Michigan goods valued in excess of \$50,000 while receiving directly from suppliers outside Michigan goods valued in excess of \$50,000. I find, as the Company concedes, that it is an employer engaged in commerce within the meaning of Sections 2(6) and (7) of the Act.

#### II. THE LABOR ORGANIZATION INVOLVED

The pleadings and evidence indicate and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

<sup>1</sup>Dates hereinafter, unless otherwise indicated, relate to the year 1969

## III. THE UNFAIR LABOR PRACTICES

Contractual relations between the Company and Union commenced in 1961<sup>2</sup> and have governed terms and conditions of employment of about 20 company employees in an admittedly appropriate unit consisting of all company electricians and apprentices, excluding office clerical employees, guards and supervisors as defined in the Act. The annual contract negotiations have been carried on by Company President Edward Windemuller and Union Business Agent Harry Vander Laan who are neighbors and personal friends. Vander Laan's son has been a company employee for 6 or 7 years.

After meeting with employees on February 27, Vander Laan delivered the union proposals for a renewal agreement to Windemuller on February 28; there was no discussion of the proposals at that time, Vander Laan leaving before Windemuller opened the envelope containing the union proposals. At Windemuller's call a meeting was set for March 4 at which Windemuller referred to the union proposals as a 'stab in the back' and delivered to each of the union committee a memorandum (G. C. Exh. 3) listing a number of jobs performed during the preceding year and, apparently, secured through under-bidding competitors. The memorandum also listed various elements of the Company's costs<sup>3</sup> as follows:

	Per hr.
base pay	\$4.50
insurance hospitalization	.09
vacation pay	.10
holiday pay	.10
travel pay	.05
bonus	.20
pension fund	.20
total	\$5.24

On receipt of the Company's cost breakdown figures at the March 4 meeting Vander Laan stated that the items of bonuses and pensions were negotiable items and, according to Vander Laan's account, which I credit, Windemuller refused to negotiate on these subjects, stating that they were over and above the pay rate. The meeting lasted 2 1/2 hours and ended with no agreement reached. The next meeting of the parties took place on March 11 at which the Union submitted written proposals (G. C. Exh. 4) and essentially reached agreement on five out of the six union proposals but, with respect to the union request that the pension plan formula be incorporated in the labor agreement, Windemuller adamantly insisted that it had no place in the labor agreement. The meeting terminated with Vander Laan's telling Windemuller that the Union would continue efforts to find language on the profit-sharing pension plan acceptable to the Company for incorporation into the agreement.

By letter of March 25, Vander Laan submitted three alternate clauses (G. C. Exh. 5) relating to the profit-sharing plan and these were discussed at a meeting

<sup>2</sup>The Company's recognition of the Union as employee bargaining representative was voluntarily accorded. The most recent agreement, that expiring April 30, 1969, and presumably its predecessors, contained a union shop clause. A decertification petition was filed June 9 and dismissed by the Regional Director on July 15 because of the pendency of the charge in the instant case. The petition was supported by 19 unit employees. The annual negotiations have been carried on without strikes.

<sup>3</sup>I credit Vander Laan's testimony that this was the first time that such cost breakdowns had been submitted in bargaining

on April 17. At that meeting, apparently only Vander Laan and Windemuller being present, the union proposals were not accepted nor were counterproposals made by the Company.

Thereafter a union meeting was convened on April 24, attended by 16 or 17 employee-members, and it was voted that the Union would ask that the profit-sharing pension plan be abolished and a part of its cost be translated into the wage scale. This position was communicated to Windemuller by Vander Laan's letter of April 25, (G. C. Exh. 6). The parties met on April 28 and Windemuller delivered to the union representatives a letter (G. C. Exh. 7) reiterating his position that the profit-sharing plan was not an item for negotiation. In the interim and before the April 28 meeting the parties orally agreed on an extension of the labor agreement on a day-to-day basis. Although a June 4 letter from Windemuller to the Union (Resp. Exh. 2) refers to a no-contract period, I credit Vander Laan's testimony that the parties continued to operate under the contract up until the hearing in the instant case.

Following the April 28 meeting, a meeting of the union membership was held on May 6 with 18 members present and it was voted to rescind the earlier proposal to abolish the profit-sharing pension program and incorporated its costs into the wage scale, in favor of incorporating the pension profit-sharing plan into the labor agreement. This position was communicated to the Company by letter of May 7 (G. C. Exh. 8). No written reply was ever received and on May 16 the Union wrote Windemuller threatening the filing of unfair labor practice charges unless agreement were reached by May 26. No further meetings were held except for an informal meeting between Vander Laan and Windemuller about July 21 at which Vander Laan presented Windemuller with a proposal concerning the profit-sharing plan to which, according to Vander Laan, Windemuller replied that the proposal was in effect being employed, but he refused to incorporate its provisions into the labor agreement. The following morning Windemuller informed Vander Laan that the Union proposal was not acceptable and that he did not have a counterproposal. There were no further discussions respecting the profit-sharing pension plan.

It is quite plain on the evidence herein that the Company at all material times took the position that its profit-sharing pension plan was a subject for its unilateral control. This position was asserted by Windemuller at the first collective-bargaining meeting, that of March 4, and consistently maintained thereafter. Thus, at the March 11 meeting Windemuller insisted that the formula on which the profit-sharing pension plan amounts were based had no place in the collective-bargaining agreement; again at the April 28 meeting Windemuller delivered his written position that the profit-sharing pension plan was not an item for negotiations; finally at the July 21 meeting Windemuller, although asserting that a Union proposal on the subject was in fact in effect, refused to reduce the apparent agreement to writing in the collective-bargaining agreement.

Thus the case is one in which the Company, although plainly basing its position in collective bargaining in part on the costs of its profit-sharing pension plan has adamantly insisted on unilateral control in this subject and consistently refused to incorporate into the agreement any items which would adversely affect the Company's retention of unilateral control on the matter. Since it is abundantly clear from Board and court decisions that a profit-sharing plan is a mandatory subject of collective bargaining, *Como Plastics, Inc.* 143 NLRB 151; *The*

*Kroger Co.* 164 NLRB No. 54, enfd. 401 F.2d 682 (C.A.6); cert. denied 395 U.S. 904, I find that the Company by its insistence on the subject has engaged in the unfair labor practices alleged in the complaint.

#### IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Company set forth in section III, above, and there found to constitute unfair labor practices, occurring in connection with the business operations set forth in section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing such commerce and the free flow thereof.

#### V THE REMEDY

In view of the findings set forth above to the effect that the Company has engaged in unfair labor practices affecting commerce it will be recommended that it be required to cease and desist therefrom and take such affirmative action as appears necessary and appropriate to effectuate the policies of the Act.

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

#### CONCLUSIONS OF LAW

1. The Company is an employer engaged in commerce within the meaning of Sections 2(6) and (7) of the Act.

2. The Union is a labor organization within the purview of Section 2(5) of the Act.

3. By refusing to bargain collectively with the Union as exclusive representative of employees in the appropriate unit, viz. all apprentices and electricians of the Company, exclusive of all office clerical employees, guards and supervisors as defined in the Act, with respect to the subject of the Company's profit-sharing plan, the Company has engaged in unfair labor practices defined in Sections 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

On the basis of the foregoing findings of fact and conclusions of law and upon the entire record in this case it is recommended that the Company, its officers, directors, agents, successors and assigns be required to:

1. Cease and desist from:

(a) Refusing to bargain on request with the Union on the subject of the Company's profit-sharing pension plan.

(b) Threatening to refuse or refusing to incorporate in a signed memorandum of agreement any understanding reached as a result of bargaining on the aforementioned subject.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed under Section 7 of the Act.

2. Take the following affirmative action which appears necessary and appropriate to effectuate the policies of the Act.

(a) On request bargain with the Union as exclusive representative of employees in the aforesaid appropriate unit with respect to the matter of its profit-sharing pension plan and incorporate in a signed memorandum of

agreement any understanding reached as a result of such bargaining.

(b) Post at its Grand Rapids, Michigan, plant and office copies of the attached notice marked "Appendix."<sup>4</sup> Copies of said notices on forms provided by the Board's Regional Director for Region 7, shall, after being duly signed by the Company's president, be posted immediately upon receipt thereof and maintained thereafter for a period of 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Company to ensure that said notices are not altered, defaced or covered by other material.

(c) Notify the Regional Director for Region 7, in writing, within 20 days from receipt of this Decision, what steps have been taken to comply with the provisions hereof.<sup>5</sup>

<sup>4</sup>In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, recommendations, and Recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and order, and all objections thereto shall be deemed waived for all purposes. In the event that the Board's Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "posted by order of the National Labor Relations Board" shall be changed to read "posted pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

<sup>5</sup>In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read "Notify said Regional Director, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith."

#### APPENDIX

##### NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board an agency of the United States Government

WE WILL NOT refuse to bargain collectively with United Construction Workers Local No. 10, Christian Labor Association concerning the Company's profit-sharing pension plan or any other proper subject of collective bargaining.

WE WILL on request bargain collectively with the aforesaid Union concerning the profit-sharing pension plan and we will reduce to a written and signed memorandum of agreement any understanding reached as a result of such bargaining.

WE WILL NOT by refusing to bargain concerning the profit-sharing pension plan or in any like or related manner interfere with, restrain or coerce employees in the exercise of their rights under the National Labor Relations Act, as amended.

WINDEMULLER ELECTRIC,  
INC.  
(Employer)

Dated \_\_\_\_\_ By \_\_\_\_\_ (Representative) \_\_\_\_\_ (Title)

This is an official notice and must not be defaced by anyone

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.

Any questions concerning this notice or compliance with its provisions, may be directed to the Board's Office,

500 Book Building, 1249 Washington Boulevard, Detroit, Michigan 48226, Telephone 313-226-3244