

Mor Paskesz and Local 105, International Ladies' Garment Workers Union, AFL-CIO. Case 29-CA-1008

April 30, 1968

DECISION AND ORDER

BY CHAIRMAN McCULLOCH AND MEMBERS FANNING AND ZAGORIA

On January 31, 1968, 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 General Counsel, Respondent, and Charging Party filed exceptions to the Trial Examiner's Decision, and supporting briefs, and the General Counsel filed an answering 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, briefs, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner as herein modified.¹

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, Mor Paskesz, Brooklyn, New York, his agents, successors, and as-

¹ We find, in agreement with the Trial Examiner, that the Respondent violated Section 8(a)(5) and (1) of the Act in view of its untimely withdrawal from multiemployer bargaining without the consent of the Union after the commencement of negotiations for a new contract, and by its refusal to adhere to the new contract thereafter negotiated by the Association and the Union. Nor were there any special circumstances justifying the Respondent's conduct as were present in *U S Lingerie Corporation*, 170 NLRB 750. We further find that the factors relied on by the Trial Examiner in fn 15 of his decision do not warrant a departure from Board policy as to remedy. Accordingly, we shall order the Respondent to remedy its unfair labor practices by giving retroactive effect to all the terms and conditions of the 1967-70 contract from its effective date. See *Shamrock Systems, Inc*, 155 NLRB 1120, *Tulsa Sheet Metal Works, Inc*, 149 NLRB 1487, 1503.

signs, shall take the action set forth in the Trial Examiner's Recommended Order, as herein modified:

1. Delete that portion of paragraph 2(a) beginning with "comply" and substitute the following:

"give retroactive effect thereto from its effective date in 1967."

2. Delete the period at the end of the first indented paragraph of the Appendix and substitute the following:

"and give retroactive effect to the terms and conditions of said agreement from its effective date in 1967."

TRIAL EXAMINER'S DECISION

SIDNEY SHERMAN, Trial Examiner: The charge herein was served upon Respondent on June 5,¹ the complaint issued on August 31, and the case was heard on November 6 and 7. Briefs were filed by all parties. The only issue litigated was whether Respondent's refusal to subscribe to a multiemployer contract violated Section 8(a)(5) and (1) of the Act.

Upon the entire record,² including my observation of the witnesses, I adopt the following findings and conclusions.

I. RESPONDENT'S BUSINESS

Mor Paskesz,³ hereinafter called Respondent, is engaged at his plant in Brooklyn, New York, in the manufacture of sportswear, as a contractor for various so-called "jobbers," who distribute such garments to wholesale or retail outlets. The complaint alleges, and Respondent, in effect, conceded at the hearing,⁴ that Respondent annually performs services valued in excess of \$50,000 for various firms located in the State of New York, each of which annually ships more than \$50,000 worth of goods directly to out-of-State points. It is found that Respondent is engaged in commerce under the Act.

II. THE UNION

Local 105, International Ladies' Garment Workers Union, AFL-CIO, herein called the Union, is a labor organization under the Act.

III. THE UNFAIR LABOR PRACTICES

The sole issue raised by the pleadings is whether

¹ All dates relate to 1967, unless otherwise stated.

² For corrections of the transcript of testimony see the order of January 10, 1968.

³ I have struck from the name of Respondent as it appears in the complaint the phrase "d/b/a Mor Paskesz," since it is patently redundant.

⁴ At the hearing Respondent's counsel orally withdrew the denial in his answer of the commerce allegations of the complaint relating to Respondent.

Respondent violated Section 8(a)(5) and (1) of the Act by refusing to adhere to the Union's current contract with Infants' and Children's Novelties Association, Inc. (hereinafter called the Association).

A. Sequence of Events

The membership of the Association consists of about 200 firms, which, like Respondent, are engaged in the manufacture of sportswear under contract for jobbers. The Association has for many years bargained with the Union and a sister local of the Union on behalf of its members.⁵ Respondent, who joined the Association in 1959, is one of the smallest operators among the members of the Association, having at times as few as four employees. In October 1964 the Association executed a contract which was due to expire on May 31, 1967. On December 22, 1966, the Union gave the Association notice of intent to negotiate for a new contract. Negotiations began in February and continued until May 26, when the negotiators reached agreement on new terms, and embodied such terms in a "Memorandum of Agreement." This memorandum was duly ratified by the Association's board of directors in mid-June, and the new union contract was formally executed in September. It provides for a 3-year term ending May 31, 1970.

Meantime, Respondent had failed to maintain his dues to the Association, being 4 months in arrears in May. On May 1, the Association warned him that, unless he paid his arrears within 5 days, he would be suspended. Respondent's tender of a part payment was rejected, and, on May 15, he was advised of his suspension.

Upon learning of such suspension, the Union dispatched a representative to Respondent, who was referred to a clause of the current contract which required that in case of resignation or suspension an association member deposit with the Union a cash bond for the faithful performance of his obligations under the contract. However, Respondent refused to post such a bond, and on May 22 wrote the Union that the Association was not authorized to represent him in negotiations with the Union. The Union thereupon called a strike at his premises, which was still in effect at the time of the hearing, and on June 1 the Union wrote him characterizing his letter of May 22 as an "untimely effort to escape coverage" under the recently

⁵ The sister local represents three job categories (cutters, markers, and graders) and the Union represents all other production workers. The result of the bargaining by the two unions is incorporated in a single contract.

⁶ When a member worked for a union jobber, the contributions were assessed only against the jobber. Respondent was at the time working mainly for nonunion jobbers.

⁷ This is the longstanding contract unit, for which the Union has bargained. As to the exclusion of the cutters, markers, and graders, see fn. 5, above.

After the hearing, I solicited memoranda from the parties on the appropriateness of such exclusion. The General Counsel contended, *inter alia*, that the issue had not been litigated at the hearing. Respondent replied

that this was immaterial because the issue was "jurisdictional," and the interest of justice required the Respondent be allowed to raise it even now. However, I am inclined to agree with the General Counsel's contention. Had the issue been litigated, the alleged appropriate unit might well have been justified on the ground that it was a historical or residual group or that the excluded categories possessed craft skills. See, e.g., *Rothschild-Kaufman Co., Inc.*, 98 NLRB 353. Accordingly, I deem Respondent to be estopped from now raising any objection to the unit⁸ on the foregoing ground.

On July 3, Respondent met with Prastien, a union agent, and indicated that his only reason for not settling his difference with the Association and for not adhering to the newly negotiated agreement was the longstanding requirement in the Association's contracts that a member who worked for nonunion jobbers pay the Union the health and welfare contributions provided for in the contract.⁶

B. Discussion

1. The appropriate unit

Respondent conceded at the hearing, and it is found, that as alleged in the complaint, the following unit is appropriate for purposes of collective bargaining:

All production employees of the employer-members of the Association, including operators, machine pressers, underpressers, finishers, floor workers, and shipping clerks, but excluding cutters, markers, graders, and all supervisors as defined in the Act.⁷

2. The Union's majority status

The answer denies that the Union is the bargaining representative of those employees of Respondent included in the above unit, and at the hearing Respondent offered some testimony tending to indicate that his employees no longer desired to be represented by the Union. However, the relevant question at this point is not whether a majority of Respondent's employees still desire the Union but whether it is still the choice of a majority of the employees in the appropriate, associationwide unit.⁸ As the current contract recognizes the Union as the exclusive representative of such employees, and there is nothing in the record to overcome the presumption arising from such recognition, it is found that the Union was at all times here relevant designated by a majority of the employees in the foregoing associationwide unit, including Respondent's employees, as their representative.⁹

3. The "withdrawal" issue

There is no dispute that up to mid-May, when

that this was immaterial because the issue was "jurisdictional," and the interest of justice required the Respondent be allowed to raise it even now. However, I am inclined to agree with the General Counsel's contention. Had the issue been litigated, the alleged appropriate unit might well have been justified on the ground that it was a historical or residual group or that the excluded categories possessed craft skills. See, e.g., *Rothschild-Kaufman Co., Inc.*, 98 NLRB 353. Accordingly, I deem Respondent to be estopped from now raising any objection to the unit⁸ on the foregoing ground.

⁸ *Sheridan Creations, Inc.*, 148 NLRB 1503, 1505-06, enfd. 357 F 2d 245 (C.A. 2, 1966)

⁹ *Sheridan Creations, Inc.*, *supra*

Respondent was suspended by the Association, his employees formed part of the above-described, multiemployer unit. There is sharp disagreement, however, as to whether, after such suspension, they continued to be in that unit, and whether Respondent is bound by the subsequently concluded contract between the Union and the Association.

The answer to these questions appears to depend on the applicability here of the Board's well-settled rule, stemming from its opinion in *Retail Associates*,¹⁰ that, absent consent thereto by the union involved, a member of a multiemployer bargaining group may not withdraw therefrom after bargaining for a new contract has begun, but is bound by the outcome of the negotiations.¹¹ The General Counsel and the Union contend (1) that there was in fact no unequivocal withdrawal by Respondent from the association bargaining, (2) that, even if there were such a withdrawal, it was not timely, and (3) there was no consent by the Union thereto. Respondent, on the other hand, contends that there was a timely, unequivocal withdrawal and that, in any event, the Union consented to the withdrawal. The issues posed by the foregoing, opposing contentions will next be considered.

a. *Did Respondent unequivocally withdraw from the Association bargaining?*

The General Counsel contends that here there was no definitive "withdrawal" from group bargaining within the meaning of the *Retail Associates* rule, because there was no complete severance of the relations between Respondent and the Association, since Respondent could at any time have effected his reinstatement by merely paying his delinquent dues, and would not have been required, as in the case of expulsion from the Association, to reapply for membership and tender a new initiation fee. This precise question does not appear to have been heretofore considered by the Board.

However, it seems that the critical question here is not the effect of Respondent's suspension on his financial obligations to the Association, but rather the effect thereof on the Association's authority to represent him in future bargaining. There is no dispute that, as Miller, the Association's executive director, testified, the Association ceased on May 15, to act as Respondent's representative in the contract negotiations. Moreover, it is clear that Respondent so interpreted his suspension, since on May 22 he notified the Union that the Association was no longer authorized to represent him in the collective bargaining.

Accordingly, it is found, in accord with Respondent's contention, that on May 15, the date of his suspension, the Association's authority to act for

Respondent terminated just as effectively as if he had withdrawn from the Association.

b. *Was the "withdrawal" timely?*

As already noted, the General Counsel contends that, even if Respondent's suspension be regarded as an unequivocal withdrawal from the joint bargaining, it was of no effect because untimely.

It is abundantly clear from *Retail Associates* and subsequent cases that any withdrawal from group bargaining, after such bargaining has commenced, as was the case here, is untimely. However, all those cases involved the voluntary resignation or defection of the respondent-employer from the multiemployer organization. It may be proper to consider, therefore, whether the foregoing time limitation on abstentions by an employer from group bargaining should apply where, as here, the abstention is precipitated by the involuntary suspension or removal of the employer from membership in the multiemployer group.

The *Retail Associates* rule is predicated on the desirability of preserving the integrity of multiemployer units, and the assumed unstabilizing effect on such units of permitting members to break away during the course of negotiations in the hope of obtaining, through separate negotiations, more favorable contract terms than those which are foreshadowed by the course of the bargaining. In other words, the rule is designed to prevent disruption of the multiemployer group via a race for bargaining leverage. However, such a race presupposes a deliberate, voluntary choice by the nonconforming employer, whereas, here, it is arguable that there was no such voluntary action but a forced separation of Respondent from the multiemployer group. The General Counsel's answer to this argument is (1) that the *Retail Associates* rule is a *per se* rule, so that any inquiry into the actual reason for separation from the multiemployer unit is inadmissible, and (2) that, in any event, Respondent's separation from the unit, while involuntary in form, was in essence voluntary, and was for the purpose of obtaining more advantageous contract terms.

As to (1), above, while the Board does not appear to have passed on the precise point, the General Counsel's position seems to find support in the dictum by the court in *Sheridan Creations, supra*.

As to (2), the General Counsel points out that Respondent's suspension was the result of his voluntary act in ceasing to pay dues to the Association, and that, as noted above, at his July 3 meeting with Union Agent Prastien Respondent indicated his willingness to make peace with the Union and the Association, if he could be exempted from the burdensome requirement that he pay the stipulated

¹⁰ *Retail Associates, Inc.*, 120 NLRB 388, 395

¹¹ *Sheridan Creations, Inc.*, *supra*, *The Kroger Co.*, 148 NLRB 569, *Wayne Johnson*, 155 NLRB 674, 680

contributions to the Union's health and welfare fund, which amounted in his case to about 8 percent of payroll or, allegedly, about \$100 a week.¹²

All things considered, it is difficult to escape the conclusion that, whatever the reason for Respondent's initial reluctance early in May to pay the association dues, his principal reason for continuing to withhold his dues after his suspension, even in the face of prolonged picketing by the Union,¹³ was not the relatively small amount of his dues arrears but the far more substantial sum he would have been required to contribute to the Union's fund under the association contract. Accordingly it is found that the involuntary form of Respondent's separation from the group bargaining does not preclude the application of *Retail Associates* here.

c. Did the Union consent to Respondent's elimination from the association unit?

To prove that the Union consented to his "withdrawal" from the association unit, Respondent relies on the testimony of Cohen, a union officer, that on May 15, when the Union received a copy of the Association's letter suspending Respondent, he dispatched Levin, a union business agent, to Respondent to inform him that under paragraph 54 of the collective agreement it was "not compulsory" to belong to the Association and that he might sign "an independent agreement" with the Union, which would conform to the terms of the association agreement.

The contract clause in question appears in the 1964-67 agreement and provides, in part, as follows:

When, during the term of this agreement, any member of the Association resigns therefrom or is suspended, said firm shall be required forthwith to deposit with Local 105 cash security for the faithful performance of all of the provisions herein on his part to be performed.

Levin confirmed that on the occasion referred to by Cohen he asked Respondent to post security as required in the contract.

Concerning that incident, Respondent testified that Levin told him that he did not have to belong to the Association if he deposited \$5,000 with the Union as security; that Levin further warned him that, if he did not put up the \$5,000 or restore himself to good standing in the Association, Respondent would have to close his shop; that Respondent

pleaded inability to raise the \$5,000; that later, on June 1, Levin visited Respondent's premises and demanded that he come to the union hall and sign a "new contract"; and that, when the witness refused to comply, picketing was instituted. It is undisputed that by letter of June 1, the Union rejected as "untimely" Respondent's disclaimer of representation by the Association and took the position that he was bound by the Association's negotiations.

It is apparent from the foregoing that, relying on a rather strained construction of the aforementioned contract clause,¹⁴ the Union offered Respondent the alternative of (1) reinstating himself as a member of the Association in good standing or (2) signing an individual contract, which conformed in all respects to the new association contract, and posting a performance bond, and that Respondent rejected both alternatives. It follows from this that such consent as the Union may have given to the severance of Respondent's employees from the association bargaining unit was predicated upon conditions that were not met. A consent given upon unfulfilled conditions is no consent. Accordingly, I find no merit in the Respondent's contention that the Union effectively consented to his ceasing to participate in the multiemployer bargaining.

4. Conclusion

Upon consideration of all the foregoing matters it is found that, by repudiating the current contract, Respondent violated Section 8(a)(5) and (1) of the Act.

THE REMEDY

It having been found that Respondent violated its bargaining obligation by repudiating the current association contract with the Union, it will be recommended that Respondent be required to assume the obligations of such contract.¹⁵

CONCLUSION OF LAW

1. Respondent is engaged in commerce under the Act.

2. The Union has at all times here relevant been the statutory representative of the employees of the employer-members of the Association, including Respondent, in the following, appropriate unit:

All production employees, including operators, machine pressers, underpressers, finishers,

¹² By contrast, Respondent's monthly dues payments were only \$20 a month plus one half percent of payroll

¹³ Respondent admitted that the Union's picketing of his shop had caused him substantial loss, which presumably far exceeded the amount that was needed to remove his suspension.

¹⁴ The clause was evidently designed to ensure the performance of an employer's obligations for the balance of the term of an existing contract, and does not seem to have been addressed to the situation where, as here, an employer refuses to be bound *in futuro* by a newly negotiated association contract.

¹⁵ However, nothing herein is to be construed as requiring Respondent to comply with the provisions of such contract pertaining to contributions to union funds with respect to any period prior to the date of this Decision. Whether or not such retroactivity would be proper under different circumstances, it is not deemed equitable here, in view of (1) the novel nature of the legal questions bearing on Respondent's liability, (2) Respondent's apparent lack of sophistication and limited familiarity even with the English language, and (3) Respondent's meagre financial resources, which would make the imposition of a retroactive obligation for contributions to the Union's fund virtually confiscatory

floor workers, and shipping clerks, but excluding cutters, markers, and graders, and all supervisors as defined in the Act.

3. By refusing, with respect to such unit, to adhere to the Association contract for the 1967-70 period, Respondent has violated Section 8(a)(5) and (1) of the Act.

RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record herein, it is recommended that Mor Paskesz, of Brooklyn, New York, his agents, successors, and assigns shall be required to:

1. Cease and desist from:

(a) Refusing to sign, or otherwise manifest his adoption of, the 1967-70 contract between Infants' and Children's Novelties Association, Inc., and Local 105, International Ladies' Garment Workers Union, AFL-CIO, with respect to his employees in the following bargaining unit:

All production employees of Respondent and all other employer-members of the Association, including operators, machine pressers, underpressers, finishers, floor workers, and shipping clerks, but excluding cutters, markers, and graders, and all supervisors as defined in the Act.

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

2. Take the following affirmative action, which is deemed necessary to effectuate the policies of the Act:

(a) Forthwith, sign, or otherwise manifest Respondent's adoption of the 1967-70 contract between said Association and Union, insofar as it applies to employees of Respondent in the above-described unit, and comply therewith to the extent indicated in the section entitled "The Remedy."

(b) Post at his plant in Brooklyn, New York, copies of the attached notice marked "Appendix."¹⁶ Copies of said notice, on forms provided by the Regional Director for Region 29, after being duly

¹⁶ In the event that this Recommended Order is adopted by the Board, the words "a Decision and Order" shall be substituted for the words "the Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "a Decree of the United States Court of Appeals Enforcing an Order" shall be substituted for the words "a Decision and Order."

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

(c) Notify the Regional Director for Region 29, in writing, within 20 days from the receipt of this Decision, what steps have been taken to comply herewith.¹⁷

¹⁷ 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 ALL EMPLOYEES

Pursuant to the Recommended Order of a Trial Examiner of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL forthwith sign, or otherwise manifest our adoption of, the agreement reached in September 1967, between Infants' and Children's Novelties Association, Inc., and Local 105, International Ladies' Garment Workers Union, AFL-CIO.

WE WILL NOT, by refusing to adopt such contract, or in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed in Section 7 of the Act.

MOR PASKESZ
(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, 16 Court Street, 4th Floor, Brooklyn, New York 11201, Telephone 596-5386.