

**Ace-Doran Hauling & Rigging Co. and Victor I. Smedstad, An Individual.** Case 9-CA-4228

May 22, 1968

DECISION AND ORDER

BY CHAIRMAN McCULLOCH AND MEMBERS  
FANNING, BROWN, AND JENKINS

On December 28, 1967, Trial Examiner Boyd Leedom issued his Decision in the above-entitled case, finding that the Respondent had not engaged in any unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety, as set forth in the attached Trial Examiner's Decision. Thereafter, the Charging Party filed exceptions to the Decision and a supporting brief. The Respondent filed a brief in support of the Trial Examiner's Decision.

The National Labor Relations 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 this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner with the following modifications and additions:

The Trial Examiner found that the Respondent was under no obligation to bargain with the "Union"<sup>1</sup> since at no time did the Union represent a majority of the employees in "any" appropriate unit. In finding lack of majority status, the Trial Examiner did not decide whether or not the General Counsel had established a *prima facie* showing of majority representation in a defined unit by virtue of the execution of an agreement or agreements purportedly recognizing the Union as majority representative. Nor did he pass on the status of the drivers as employees or independent contractors. Rather, he accepted evidence, whose accuracy was conceded by the General Counsel, that, at the time of the execution of certain alleged contracts, only a small minority of drivers had executed dues deduction authorizations. He concluded therefrom and from the testimony of Respondent's President Doran, whom he credited, that it was a fair inference that the Union at no time represented a majority of Respondent's employees. It is not disputed that the evidence admitted by the Trial Examiner to show lack of majority representation re-

lated to a period of time antedating the filing of the charge in this proceeding by more than 6 months, and it is the Union's contention that such evidence was barred by the 6-month limitation provision of Section 10(b) of the National Labor Relations Act, as amended. However, in affirming the Trial Examiner's ultimate conclusion and adopting his recommendation that the complaint herein be dismissed, we do not undertake to pass on the admissibility of the evidence in question, for, in our opinion, the complaint's allegations must fall because the agreements in evidence failed to define a unit with a sufficient degree of clarity to warrant a finding that the contracts are ones to which a presumption of majority status can attach, and because the practice under the "contracts" makes it evident that the parties had no intention of entering into real collective-bargaining relationships.

It is true that in *Shamrock Dairy*,<sup>2</sup> we held that the execution of a valid collective-bargaining agreement "raises a presumption of regularity, namely, that the Union was the majority representative of the employees at the time of the execution of the contract; for, otherwise, it would have been unlawful for the Respondent to have extended such recognition." That case raised no issue, however, as to the definition of the unit involved. But obviously it cannot be said that a presumption of majority status can attach to a contract, if in fact the boundaries of the unit in which a majority must exist are not defined.

In the present case, the General Counsel claims that the appropriate unit is employerwide, and the Charging Party contends that it is a multiemployer unit, but the evidence demonstrates neither. Respondent maintains 22 terminals in different locations in 10 States. It was a member of the National Steel Carriers Association which maintained a contractual relationship with the Teamsters for a number of years. The most recent contract negotiated between the Teamsters and the Association was entered into in 1964 for a period of 3 years, terminating in March 1967. The only evidence offered in support of the allegations of the complaint or the contentions of the Charging Party was in the form of three contracts signed by Respondent, one with each of three Teamsters locals, each with jurisdiction in the area of three terminals, and three other contracts which admittedly were signed by George Mantho, managing director and labor counsel of the Association, on an undocumented claim of express authority from Respondent to sign its behalf, a claim disputed by

<sup>1</sup> The charge filed in this case did not identify the labor organization or organizations on behalf of which the charge was filed. The complaint herein designates eight enumerated locals as the "Union" and alleges that

the "Union" has been the bargaining representative in a unit comprising "all" of Respondent's employees except for the customary exclusions

<sup>2</sup> 124 NLRB 494

Respondent. No explanation was offered for the variance in the method of the signing of the contracts or the absence of agreements applicable to all 22 terminals. In the light of these circumstances, we cannot conclude that these contracts raise a presumption of regularity or that the "Union" was the majority representative of Respondent's employees, either in an employerwide or multiemployer unit.

The evidence relating to the practice under the agreements further makes it clear that the parties did not intend them to be effective collective-bargaining contracts, but instead merely regarded them as arrangements under which Respondent agreed to check off dues, health and welfare, and pension payments for union members only. The acquiescence of the Unions in Respondent's failure both to enforce the union-security provisions of the agreements and to pay health and welfare contributions for all employees (as ostensibly provided by the "contracts"), makes it clear that the parties did not believe that they were in true collective-bargaining relationships.

Since the alleged agreements are not such as would give rise to a presumption of majority status, we find that the General Counsel has failed to sustain his burden of proof and therefore that the complaint should be dismissed.<sup>3</sup>

#### ORDER

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

<sup>3</sup> The Trial Examiner made no specific finding as to the 8(a)(3) allegations of the complaint. However, in finding that the Union had not established its majority status, it follows that the Respondent was under no contractual obligation to pay to the Union health, welfare, and pension moneys. Its individual contracts obliged Respondent only to see that members who declared themselves by checkoff authorization have payments withheld. It had no obligation as to employees who were not members of the Union and therefore did not violate the contract in that regard. Nor do we find that such conduct on Respondent's part amounted to discriminatory treatment of nonunion employees. While the Respondent conceded that it had paid health, welfare, and pension moneys to the Union on behalf of those employees who executed dues deduction authorizations, the record establishes that such payments were made in accordance with the parties' understanding that they be deducted from the earnings of the drivers, and were not contributions made by the Respondent from its own funds. We find, therefore, on the record as a whole, that the Respondent did not violate Section 8(a)(3) of the Act, as amended.

#### TRIAL EXAMINER'S DECISION

##### STATEMENT OF THE CASE

BOYD LEEDOM, Trial Examiner: This case was tried at Cincinnati, Ohio, on November 16 through

19 on a complaint dated July 21, issued pursuant to a charge filed March 22, all in 1967. The charge was made by the individual named in the caption hereof in behalf of numerous locals of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. The complaint alleges that the Respondent Employer, engaged in hauling steel, has collective-bargaining contracts with the various Teamsters locals involved herein; that Respondent has discriminated against its employees who are not members of the locals, by failing to pay in their behalf moneys due under the contracts to the health, welfare, and pension funds; that Respondent failed to furnish union representatives with certain information relating to said delinquent payments, necessary to process effectively grievances of employees in connection therewith; that Respondent unilaterally modified the terms and conditions of the existing collective-bargaining agreements; and that Respondent by reason of the foregoing violated Sections 8(a)(1), (3), and (5) and 8(d) of the Act. The complaint also alleges that the appropriate unit consists of all of Respondent's employees excepting office clericals and statutory exclusions. In a pretrial conference, however, it was announced that the Charging Party, contrary to the General Counsel, entertained the view that the appropriate unit was a multiemployer unit consisting of many employers, steel haulers, by virtue of their membership in the National Steel Carriers' Association, Inc. Amendments to the complaint added allegations that certain of Respondent's employees went on strike on or about January 16, 1967, and that the strike was caused by unfair labor practices of Respondent and was prolonged by reason of the same unfair labor practices, those alleged in the complaint.

Respondent's answer sets up several defenses. Respondent admits that it is engaged in "commerce" and in operations "affecting commerce" as defined in the Labor-Management Relations Act and is therefore within the jurisdiction of the National Labor Relations Board, and that the local unions involved are and have been labor organizations at all times material herein; but it defends on the grounds that there is no employer-employee relationship between Respondent and the drivers alleged to be covered by the collective-bargaining agreements; and it alleges that even if the drivers were "employees" within the meaning of the Act, and not independent contractors as Respondent contends, none of the locals ever represented a majority and that therefore there could not be any lawful collective-bargaining agreement made between Respondent and any of the local unions. Respondent also denies that it engaged in any discrimination whatever within the meaning of the Act against any employee; it admits that it has refused and does refuse to bargain collectively with the Union but denies that the refusal constitutes a violation of any provision of the Act and that there

is any duty on Respondent to bargain. Without acknowledging in the answer that Respondent had executed papers purporting to be lawful collective-bargaining agreements with various ones of the locals involved, Robert J. Doran, president of Respondent, freely admitted on the witness stand that he had signed such documents, some of which are in evidence. His testimony, however, in conformity with Respondent's answer, characterizes these signed documents as invalid or void for all the reasons set up as Respondent's defenses to the complaint, and tends to justify the signing on the grounds that the execution was a necessary expedient to the continuation of undisturbed business operations.

On the basis of the complete record of evidence, the demeanor of the witnesses, and due consideration of the briefs filed by all the parties, I have determined that the General Counsel has not established any violation of the Act on the part of Respondent, and therefore recommend that the complaint be dismissed on the basis of the following:

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW

##### I. THE EMPLOYER AND THE LABOR ORGANIZATION

###### JURISDICTION

I find and conclude that the allegations of the complaint, as to the nature and extent of the business carried on by Ace-Doran Hauling & Rigging Co. are true and conclude therefrom that it is an "employer" engaged in commerce within the meaning of the Act. Respondent admits this fact, but denies that there is any employer-employee relationship between it and any of the workers involved in this action, alleging that they are all independent contractors.

I also find and conclude that the local unions involved herein are labor organizations within the meaning of the Act, and that this matter is therefore within the jurisdiction of the National Labor Relations Board.

##### II. THE ALLEGED UNFAIR LABOR PRACTICES

###### A. *The Status of the Drivers, and the Unit Questions*

Because of the determination hereinafter made that none of the local unions involved herein represented a majority of Respondent's drivers, it is not necessary to resolve the question raised by the pleadings, whether the drivers are actually "employees" within the meaning of the Act, or independent contractors, and I make no such resolution. For the same reason it is not necessary to make a determination as to the appropriate, or an appropriate, unit of Respondent's drivers, assuming that they are "employees," or to resolve an ap-

parent conflict between the General Counsel and the Charging Party as to the unit. While certain parts of the record, and suggestions in the briefs, imply that the unit is multiemployer, there is no allegation in the complaint to this effect, or any direct evidence adduced to support the contention. As an observation only it is noted that the evidence tends to reveal a pattern of units based on Respondent's separate terminal operations, coinciding with each of the local's geographic jurisdiction, a pattern hardly in conformity with the allegation of the complaint that the appropriate unit included all of Respondent's drivers (varying in number roughly from 200 to 400). The significant fact is that there is no majority in any unit.

###### B. *The Majority, and the 10(b) Questions*

###### 1. The majority and question

Oral and documentary evidence establishes, and I find, that Respondent signed papers purporting to be collective-bargaining agreements with one or more of the Teamsters locals involved herein for two contract periods, or more, one of the two from February 1, 1961, to January 31, 1964; and the second from February 1, 1964, to March 31, 1967. All of these "contracts" appear to be between one or another of the locals involved herein and Respondent, and are entitled either "Central States Area Over-the-Road Motor Freight Agreement" or "National Master Freight Agreement and National Iron and Steel and Special Commodity Supplemental Agreement," some supplemented by an "Ohio Rider." All "contracts" appear to have been somewhat carelessly executed in that seldom is the name of the contracting party inserted at the beginning of the "contract" in the special place provided therefor; the parties signatory are often designated by inaccurate abbreviations as to precise names and addresses; and sometimes signatures are almost illegibly written.

Inevitably the impression gained from the evidence is that the execution of the "contracts," administered in behalf of employers in the office of the National Steel Carriers' Association, Inc. (of which Respondent had been a member), is a mass operation, the contracts sometimes being signed and delivered to the Association's employer-members months after agreement is reached. This manner of handling the making and execution of contracts plus the wide geographic area in which Respondent operated (its authority covers 10 Central States) and the great number of Teamsters locals having jurisdiction in small segments of such wider geographic area of Respondent's authority, appear to be responsible for the quite evident fact that Doran, president of Respondent, had no real awareness, or accurate record, of the number of contracts Respondent had signed with the various locals involved.

I also find and conclude that occasionally over the period of years covered by the "contracts" certain employee grievances against Respondent, in which the employee was represented by the appropriate local, were participated in by Respondent before the Joint Steel Committee under the Iron and Steel Addendum, pursuant to the purported agreements. The joint committee consists of employer and union representatives, and is constituted to consider and resolve grievances filed by employees against the employer members (and in some cases nonmembers) of the National Steel Carriers' Association, Inc.

There is nothing in the record to refute the testimony of Doran that at no time did any of the locals involved herein, or any other union, ever represent a majority of the drivers engaged in Respondent's enterprise. I credit his testimony and therefore find and conclude that none of the locals, signatory to the "contracts" executed by Respondent, represented a majority of the drivers hauling for Respondent at the time the "contracts" were signed, or at any other time; and that the "contracts" were in fact "sweetheart contracts," that is agreements executed to serve the convenience of the Union and the "Employer" without any regard for the question of majority representation of the "employees" by the Union, or for the "employees" Section 7 rights.

The record also amply reveals, and I find and conclude, that during all the years the purported contracts were effective between Respondent and the local unions involved, the unions represented only a small minority of the Respondent's drivers, and that the drivers who were members of any of the locals were required to give and did give cards to the Respondent authorizing Respondent to check off union dues. Thus the number of checkoff authorizations, as I find and conclude from the evidence, coincides with the number of drivers hauling for Respondent who were members of the Teamsters locals.

## 2. The 10(b) question

Although the Charging Party and the General Counsel did not admit that the "contracts" involved herein were made at times when the Union did not represent a majority of the people in the alleged unit, General Counsel's Exhibit 8, admitted by stipulation, contains figures which, when considered with other undisputed evidence, irrefutably establish that in the entire period encompassing the years covered by the purported contracts, the Union represented only small minorities of the drivers. Illustrative of the ratio of union members to total drivers are these figures: in July 1960, of 294 drivers, 12 belonged to the Union; in March 1961, of 249 drivers, 12 belonged to the Union; in September 1962, of 426 drivers, 38 belonged to the Union; in December 1963, of 351 drivers, 21 be-

longed to the Union; in March 1964, of 334 drivers, 43 belonged to the Union; in June 1965, of 357 drivers, 17 belonged to the Union; in October 1966, of 358 drivers, 40 belonged to the Union. In this exhibit the number of union members is indicated in the column entitled "Total Drivers Who Authorized Check-off of Union Dues."

As previously found, the evidence reveals that the union members hauling for Respondent signed authorization cards for checkoff of dues, and the total number of union members coincides with the total number of those drivers who signed the checkoff authorizations. This determination is based on colloquy of counsel with the Trial Examiner and testimony of Doran, not refuted. While the Charging Party and counsel for the General Counsel object to the relevancy of all the figures in General Counsel's Exhibit 8 that antedate the 10(b) period, which is September 22, 1966, to March 22, 1967 (the date the charge was filed in the case), they have stipulated to the accuracy of these figures. Thus, in the light of proof that the "contracts" involved were signed when the Union represented at most, in any given month of the latest contract period of February 1, 1964, to March 31, 1967, about 17 percent of the drivers, the General Counsel's case depends on the applicability of Section 10(b) of the Act to the defense of an unfair labor practice rather than to the filing of a complaint.

For the reasons hereafter appearing I find and conclude that Section 10(b) has no application against a defense, and that the Respondent has the right to go back of the 10(b) period to show that the "contracts" on which the General Counsel's case must be grounded are a nullity.

The pertinent part of the language of Section 10(b) of the National Labor Relations Act, on which this case actually hinges, applies only to complaints and not to defenses. The briefs of the General Counsel and the Charging Party contain no discussion of this clear, simple, and ordinary language or the usual meaning of the words used there. In pertinent part it reads

*Provided.* . . no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made. . . .

Clearly this language makes no proscription and sets up no limitation except as to the *issuance of a complaint based upon an unfair labor practice occurring more than 6 months prior to the filing of the charge*. The Charging Party is the loudest to proclaim, and rightly so, that the unfair labor practice alleged in this case occurred, if at all, during the 6 months preceding the filing of the charge. The statute has no application whatever, by its own terms, to the Respondent's right to go back as far as it pleases in finding evidence to be adduced in its

defense of the charge of the current unfair labor practice.

Both counsel for the General Counsel and the Charging Party rely almost exclusively on *Local Lodge No.1424, Machinists (Bryan Manufacturing Co.)*, 362 U.S. 411, 80 S.Ct 822 (1960). Inasmuch as *Bryan* holds only that no unfair labor practice can be found against a respondent if an essential element thereof is proof of an event antedating the 10(b) limitation, it is not at odds with the instant ruling that permits a respondent to offer proof of events occurring before the 10(b) period in his effort to defend against the charge that he committed an unfair labor practice. Other cases cited by the General Counsel and the Charging Party are inapposite or dovetail with the theory of *Bryan* and offer no more substantial foundation for a finding of a violation.

No Board or court decision is cited by any of the parties on the precise point involved in this case, and nothing has been found excepting the opinion of Mr. Justice Whittaker, in *Bryan* (in which Mr. Justice Frankfurter concurred) hereafter discussed. Resort is therefore had to other areas of the law to find authority for the proposition that a statute of limitations may be used only as a shield and not as a sword.

It is a misconception that a statute limiting a right of action *a fortiori* limits the defenses to the action. The general rule to the contrary is stated thus in 34 Am Jur 57, 63:

The purpose of statutes of limitation is to bar actions but not to suppress or deny matters of defense, whether legal or equitable; and it is a general rule that such statutes are not applicable to defenses, but apply only where affirmative relief is sought.

The case of *Stone Trustees v. White*, 301 U.S. 532, involved a suit against the United States brought by testamentary trustees to recover a tax they had paid on the income of a trust estate. The tax should have been paid by the beneficiary under the trust. The Collector of Internal Revenue had interposed the defense, sustained by the Court below, that inasmuch as the tax erroneously paid by the petitioners was less than that due from the beneficiary and the excess of any recovery would be for the benefit of the beneficiary, the Government could properly set off in the action the tax due from the beneficiary. To this defense of the Collector, the petitioners relied on certain provisions of the Revenue Act of 1928 that limited the right of the Government to collect taxes after the statutory limitation had run. To this effort on the part of the petitioners to invoke a statutory limitation on a right of action, against a defense to an action that could be maintained, the Court said:

But the demand made upon the trustees was not barred by limitation and it would be an unreasonable construction of the statute, *not called for by its words*, to hold that it is in-

tended to deprive the Government of defenses based on special equities establishing its right to withhold a refund from the demanding taxpayer. 301 U.S. 539 [Emphasis supplied.]

I read nothing in *Bryan* that rejects, either indirectly or directly, application of the general rule, stated above, to Section 10(b). The sum of the three opinions in *Bryan*, on the contrary, indicates clearly that 10(b) does not run against defenses to charges of unfair labor practices but only against complaints alleging the violations. It may be that the only judicial expression of record, bearing directly on this question (the precise question involved in the instant case) is the following statement of Mr. Justice Whittaker, in his dissenting opinion, concurred in by Mr. Justice Frankfurter, in *Bryan*:

That issue would call for a defense, and the burden of producing the defense would necessarily fall on the employer and the union. Surely it will not be said that anything in § 10(b), or elsewhere in the law, makes incompetent all evidence that might be adduced by the employer and the union to meet their burden and justify their action.

This statement of the dissenting Justices is not the focal point of their differences with the majority; that is to say, the Court's result cannot be construed to indicate a different view as to 10(b) with respect to defenses.

If Section 10(b), which by its words clearly applies only to the right of action, and not to defenses of such action, should be construed to apply actually to defenses, the result would be to permit a union deliberately entering into an unlawful collective-bargaining agreement with an employer, equally in violation, to gain a very substantial, and really unconscionable, advantage through its own wrongdoing. Not only this, but such a strained construction of the statute would lend the processes of the National Labor Relations Board to an organizational device that in and of itself is totally destructive of Section 7 employee rights, the right to be represented only by a union of the employees' choice, and not to join a union except voluntarily or pursuant to a lawful union-security clause contained in a valid collective-bargaining agreement. Not only this, but an additional burden of tremendous weight would be laid on the trucking industry that is already uniquely susceptible to a "sign-the-contract-or-else" organizing technique. Elements of such methods, effectively implemented by congenial and efficient union officials having fine rapport with employers, are reflected in these significant, credited statements appearing in Doran's testimony: (1) (by an official of one of the locals involved herein). "Hell, you've got 90, 95 drivers up there, and we have only got 20 or 25 people on checkoff"; and (2) (respecting an official of another local) "... that it was my responsibility to get these guys in the Union, get them signed up. He

flatly said in this meeting, in front of the whole group, that he wasn't going to chase our G- d—drivers all over the country to get them signed up. And that's exactly what he said."

The purported collective-bargaining agreements involved in this case all contain union-security clauses requiring all employees to join or remain members of the locals involved following the statutory grace periods. Nothing is made of such union-security clauses either in the pleadings or in the evidence presented by the General Counsel. Rather the action is predicated on that other section of the contract requiring payments into the health, welfare, and pension funds by the Employer for and on behalf of nonunion members as well as union members. Thus the onerous practice in this situation which forces employees to join a minority union is an obscure circumstance in the litigation, and the more palatable provision of the contract requiring the payments for the benefit of nonunion members, is highlighted.

Any objective reading of the record in this case reveals that there was no serious difficulty between this Respondent Employer and the local unions involved for most of the years of the relationship established by the spurious contracts. The locals seemed content to accept union dues and benefit payments from only those drivers who joined the Union under such pressures as may have been applied. The alleged discrimination that became the subject of the charge of unfair labor practices, that is Respondent's failure to pay into the benefit funds, for nonunion "employees," quite clearly appears to have become a concern of the Union, only

after Respondent took steps leading to termination of the whole relationship.

It would be unfortunate to say the least if there should be found lurking in the decision of the Court in *Bryan* language susceptible of a construction that would apply Section 10(b) to this Respondent's defense, and thus prevent the liberation of workers from the kind of unhealthy alliance that exists here between the Company and the Union.

The Charging Party argues in his brief that the record does not establish a lack of majority. This position presupposes relevancy of the majority issue. Assuming, *arguendo*, that the record does not establish a lack of majority, it can surely be said that neither does it establish a majority. Either state of the record is fatal to the General Counsel's case. There being no union representing the drivers (assuming *arguendo*, any appropriate unit and that the drivers are "employees") there is no contract, no obligation for Respondent to bargain with any union, and no discrimination within the meaning of the Act.

The written motion filed in writing by the Charging Party to correct the record in numerous specified ways, to which no opposition has been filed, is granted and the record is hereby corrected in each instance and in the manner set out in said motion.

Because of the view I have taken of this case, certain subsidiary issues, in addition to those hereinbefore specifically mentioned, are not reached.

For the reasons hereinbefore set forth, I recommend that the complaint be dismissed.