

American Beef Packers, Inc., and Arthur L. Morgan Union, Local No. 3 and Amalgamated Meat Cutters and Butcher Workmen of North America, Local Union No. 641, AFL-CIO, Party In Interest. Case 27-CA-2861

January 21, 1971

DECISION AND ORDER

BY CHAIRMAN MILLER AND MEMBERS BROWN AND JENKINS

On August 14, 1970, Trial Examiner James T. Barker issued his Decision in the above-entitled proceeding, finding that Respondent had engaged in certain unfair labor practices alleged in the complaint and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. The Trial Examiner also found that Respondent had not engaged in a certain other unfair labor practice. Thereafter, Respondent filed exceptions and a supporting brief, and the Party in Interest, Amalgamated Meat Cutters and Butcher Workmen of North America, Local Union No. 641, AFL-CIO, hereinafter called Amalgamated, filed cross-exceptions and a brief in support thereof.

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, cross-exceptions, and briefs,¹ and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, only to the extent consistent herewith.²

The pertinent facts are as follows. The plant facility involved in this case is a meatpacking plant located in Fort Morgan, Colorado, which was purchased by Respondent sometime in 1968. Sometime thereafter, Respondent closed the plant for remodeling. It was reopened about the first of September 1969. At or about this time Amalgamated began its organizational drive among Respondent's employees at the Fort Morgan plant.

¹ As the record and briefs adequately set forth the issues and positions of the parties, Respondent's request for oral argument is hereby denied.

² We hereby correct the following inadvertent factual errors in the Trial Examiner's Decision which in no way affect our decision herein: Mr. Arthur L. Morgan appeared on behalf of the Charging Party rather than on behalf of the Party in Interest, and, contrary to fn 6, there is no evidence that a petition was ever filed by the Charging Party much less withdrawn. Instead the facts show that Amalgamated filed a representation petition in Case 27-RC-3756 for a production and maintenance unit at the

On August 23, 1969, Mahmoud "Mike" Amoura was hired as Respondent's personnel director for all its operations. About 2 weeks after he began working Amoura was introduced in Omaha by Frank West, Respondent's president, to four of Amalgamated's representatives. At this meeting the Amalgamated representatives told West that Amalgamated "had a majority of the cards." Thereafter, Amoura was contacted and arrangements were made for him to meet with Amalgamated to discuss the question of recognition. Amoura testified that he entered the subsequent negotiating meetings on the "assumption" that Amalgamated had the cards. However, at no time was Amoura given proof of substance that Amalgamated in fact commanded a majority following.

Between September 12 and 19, 1969, representatives of Respondent and of Amalgamated held three meetings in Denver at which those parties negotiated a collective-bargaining agreement. Before the last meeting on September 19, Amoura asked one of Amalgamated's representatives to furnish him with evidence of Amalgamated's majority status, but this was never done. At the final meeting on September 19, the parties signed a contract. It is undisputed that the contract was never put into effect.

One of the two Amalgamated bargaining representatives testified that he did not at any time on or before September 19 present any evidence to any representative of Respondent establishing that Amalgamated did represent a majority of the employees and that he had no knowledge of any other Amalgamated representative having done so. The second union bargaining representative stated that he at no time represented either to Amoura or West that Amalgamated represented a majority and that he had no knowledge of another named union representative having done so.

Amalgamated's president at first testified that he did not know how many cards he had at the time of the first meeting in Omaha. However, upon being asked to approximate the number, he stated that he had approximately 40 to 50 authorization cards at that time and that there were approximately 80 to 100 employees altogether at that time. He was not asked the number of cards that he had at any other relevant time. After saying that he did not know how many employees Respondent had on September 19, Amoura ventured a "guess" that Respondent employed

Fort Morgan facility on December 8, 1969; that petition was withdrawn on December 16, 1969, after the Board advised Amalgamated that it could not be processed because of a pending unfair labor practice, upon being advised by the Board that it could refile. Amalgamated filed an identical petition in Case 27-RC-3764 which is stayed pending a resolution herein, and on December 23, 1969, the Operating Engineers filed a petition in Case 27-RC-3765 seeking an election in a unit of automobile maintenance mechanics at the Fort Morgan plant.

"about 150" employees at the Fort Morgan plant at that time. No party undertook to introduce payroll records or other documentary evidence to establish the number of employees who were employed in the appropriate unit on September 12, 15, or 19, the three dates on which negotiating meetings were held. Moreover, while the General Counsel had in its possession authorization cards at the hearing, it took the position that its affirmative burden under the allegations of the complaint did not require it to undertake by use of authorization cards, or other similar evidence of union affinity or affiliation, to definitively establish the lack of majority status on the part of Amalgamated on the dates critical to the allegations of the complaint.

The Trial Examiner concluded that an inference may properly be drawn in this case that no majority existed at the time of the alleged acts of assistance based on the failure of Amalgamated ever to proffer signed authorization cards to Respondent before and during the bargaining sessions and prior to the execution of the contract with Respondent's bargaining representative; on the refusal of Respondent ever to give effect to the agreement which it had signed; and on Amalgamated's failure to press for implementation of the contract either with the Company or by filing charges with the National Labor Relations Board. He therefore found that the General Counsel met its *prima facie* burden of establishing Amalgamated's lack of majority, and, as Respondent introduced no countervailing proof, concluded that Respondent violated Section 8(a)(2) and (1) by engaging in collective bargaining and executing a collective-bargaining agreement at times when Amalgamated did not represent a majority of its employees.

We disagree that in the circumstances of this case the evidentiary facts, as found by the Trial Examiner, are sufficient to support his finding that the General Counsel has made out a *prima facie* case. Thus, while there is no question concerning the validity of the authorization cards obtained by the Amalgamated, the General Counsel completely failed to prove the number of employees who had authorized Amalgamated at the relevant times to represent them or the number of the employees in the appropriate unit. The only mention of the number of authorization cards was that in the aforementioned testimony of Amalgamated's president as to the number of cards at the Omaha meeting before negotiations began, and this in no way constitutes proof that Amalgamated did not represent a majority of the employees at the three subsequent negotiating meetings in Denver. In any event, this testimony was entirely speculative and was only elicited after the witness said he did not know the number. The circumstantial evidence relied on by the Trial Examiner in drawing an inference of lack of

majority amounts to nothing more than conjecture. It is no substitute for proof, which is the General Counsel's burden, that Amalgamated did not in fact represent a majority of Respondent's employees at the relevant times. Accordingly, we shall dismiss the complaint in its entirety.

ORDER

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

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

JAMES T. BARKER, Trial Examiner: This matter was heard at Denver, Colorado, on May 21, 1970. On March 13, 1970, the Regional Director of the National Labor Relations Board for Region 27 issued a complaint and notice of hearing deriving from a charge filed on January 2, 1970, by Arthur L. Morgan Union, Local No. 3, hereinafter called Morgan. The parties, except Respondent, filed briefs with me.

Upon consideration of the briefs of the parties and the record in this case, and from my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent is, and has been at all times material herein, an Iowa corporation engaged in the business of the slaughter, processing, and sale of meat and meat products. It maintains its principal office and place of business at Oakland, Iowa, and operates several other places of business, including one located at Ft. Morgan, Colorado.

During the 12-month period immediately preceding the issuance of the complaint herein Respondent sold and shipped meat and meat products valued in excess of \$100,000 directly from one or more of its places of business to points in States other than the State where said meat and meat products were produced. During the same period of time Respondent has purchased and received goods and materials at one or more of its places of business valued in excess of \$100,000 which goods and materials were shipped directly from points in States other than the State in which said goods and materials were received.

Upon these admitted facts I find that Respondent has been at all times material herein an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Amalgamated Meat Cutters and Butcher Workmen of North America, Local Union No. 641, AFL-CIO, herein after called Amalgamated, and Arthur L. Morgan Union,

Local No. 3, are admitted to be labor organizations within the meaning of Section 2(5) of the Act, and I so find.

III. THE UNFAIR LABOR PRACTICES

A. *The Issues*

The principal issues raised by the pleadings in this case are: (1) Whether Respondent violated Section 8(a)(2) of the Act by meeting with representatives of Amalgamated and negotiating a collective-bargaining agreement at a time when Amalgamated did not represent a majority of Respondent's employees in an appropriate unit, and (2) whether Respondent engaged in conduct similarly violative of Section 8(a)(2) of the Act by causing operations at its Ft. Morgan plant to be closed down in order to assist Amalgamated to obtain signed union authorization cards from Respondent's production and maintenance employees.

The first issue raises the further question of whether the General Counsel sustained his burden of establishing a lack of majority on the part of Amalgamated, arising from asserted conduct and admissions by agents of Respondent and Amalgamated. If it is found that the General Counsel sustained his burden, the additional question is raised whether due process requirements are satisfied when, under claims of confidentiality arising from the pendency of "other litigation [involving] the parties," the General Counsel refuses to make available to Respondent for use in defense the signed authorization cards of unit employees submitted to the Regional Director in support of a subsequent representation petition filed by Amalgamated

B. *The Alleged Unlawful Conduct*

1. The setting

The Respondent's Ft. Morgan plant commenced operations in September 1969. It had earlier been acquired by Respondent and had been closed for remodeling. Respondent's president is Frank West. Mahmoud "Mike" Amoura had been, since August 1969, personnel director of all of Respondent's operations. Both West and Amoura have their headquarters in Omaha, Nebraska.

Ray Wentz is district vice president of District 4 of Amalgamated, Willard Ferson is an International representative of Amalgamated, and Alvin Tucker is president and business agent of Local 641 of Amalgamated.

Amalgamated commenced an organizational drive among the Respondent's employees at the Ft. Morgan plant in early September. The organizational effort was

¹ The foregoing is based on a consideration of the testimony of Alvin Tucker and Willard Ferson. Alvin Tucker placed August 30 as the commencement of the organizational effort while Willard Ferson, who was in charge of the effort, specified September as the time when the effort was begun. An analysis of the testimony of record on this subject convinces me that the organizational drive commenced in early September. The record evidence concerning the commencement of operations of the plant and the beginning of the organizational effort has a singularly elusive character.

I have officially noted for background purposes the decision of the Board in *American Beef Packers, Inc.*, 176 NLRB No. 42, which reveals Respondent's initial 1968 opening of the Ft. Morgan plant, and an organizing campaign by Morgan which, as the Board found on charges filed by Amalgamated and the Operating Engineers, was unlawfully assisted by Respondent in a manner similar to that alleged herein, and of

under the direction of Willard Ferson who was assisted by Louis Flores. Ferson had been "watching the progress of the plant" and timed his organizational effort accordingly.¹

2. Respondent and Amalgamated meet

Between September 10 and 19, representatives of Respondent and of Amalgamated held three meetings. The first meeting occurred on September 12.

Prior to the September 12 meeting Amoura, who had entered the Respondent's employ on August 23, met with Respondent's president, Frank West, in West's office in Omaha. On that occasion he was introduced to Messrs. Tucker, Ferson, and Wentz, and to another union functionary, William Sigman. At this meeting the representatives of Amalgamated informed West that Amalgamated "had a majority" of the employees. Thereafter, Amoura was contacted and arrangements were made for Amoura to meet with representatives of Amalgamated for the purpose of discussing the question of recognition.²

3. An agreement is signed

At the two Denver meetings which preceded September 19, Amoura, Tucker, and Ferson discussed a form agreement containing a recognition clause and 25 other articles covering, *inter alia*, union security, hours of work, holidays, vacations, leaves of absence, seniority, adjustment of grievances, checkoff, wages, and the terms of the agreement. At the September 19 meeting, Amoura and Tucker affixed their respective signatures to the document.³

The recognition clause contained in the document which Amoura and Tucker executed read as follows:

The Company recognizes the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO as the sole and exclusive collective bargaining agency for all employees in the bargaining unit which includes all production and maintenance employees of American Beef Packers, Inc., Fort Morgan, Colorado . . ."

Additionally, the final article of the agreement, article XXVI, entitled "Term of Agreement," read as follows:

This Agreement shall become effective and remain in full force and effect from the —. Either party may on or before sixty (60) days prior to— give notice to the other party of the desire of the party giving such notice to terminate the Agreement. If such notice is not given, the Agreement shall renew itself for successive one (1) year periods until such notice is given.

Moreover, above the space designated for signatures of

which Amalgamated is here the alleged beneficiary

² The foregoing is based on a composite of the testimony of Mike Amoura, Alvin Tucker, and Willard Ferson. With respect to the introductory meeting held in the office of President West in Omaha, I rely on the testimony of Amoura. The testimony of Tucker and Ferson confirms the testimony of Amoura to the effect that the introductory meeting between them occurred in the presence of Frank West in Omaha on or about September 10. Additionally, the testimony of Tucker confirms that arrangements were made for a meeting to be held in Denver with Amoura to "discuss the possibility of getting recognition at [the Ft. Morgan] plant."

³ Attached to the document executed by Amoura and Tucker was a schedule of wage rates applicable to the Ft. Morgan plant.

the representatives of the Amalgamated and the Respondent, was a line which read, "Signed this day ___ of ___, 1969."

Alvin Tucker testified convincingly and without contradiction that when he and Amoura affixed their respective signatures to the document on September 19, no dates had been supplied or included in the blanks contained in article XXVI. The blanks revealing the date of signing were also left open. However, both Amoura and Tucker specifically testified that before signing the instrument they had reached agreement on its substantive terms.⁴

The parties approached the three meetings in mid-September which culminated in the affixing of signatures to the document entitled, "Agreement," with the understanding that the Respondent was disposed to grant recognition to Amalgamated. Amoura entered the meetings "assuming" by reason of the representation which the Amalgamated officials had made to President West at the Omaha meeting, that the Amalgamated commanded a majority. Willard Ferson entered the meetings with the impression gained from information conveyed to him by Ray Wentz, vice president of District 4 of Amalgamated, that the Respondent was prepared to extend recognition to Amalgamated. Prior to the third meeting Amoura requested Tucker to furnish him with evidence of Amalgamated's majority status and Tucker failed to do so. He did not present any evidence of majority status at the third meeting on which occasion Amoura and Tucker affixed their respective signatures to the document entitled "Agreement"⁵

Mike Amoura testified without contradiction that no provision of the Agreement has been given effect by Respondent. He testified further that when Tucker failed to present him with evidence of majority status at the September 19 meeting, and in light of a "big turnover in the plant," he "became suspicious maybe they didn't have" majority status and consequently did not put the terms of the Agreement into effect. Amoura further testified that at no time subsequent to the meeting which transpired in early September in Omaha, was he informed whether Amalgamated did or did not represent a majority of the employees. Similarly, Alvin Tucker testified that he did not at any time on or before September 19, present any evidence to any representative of Respondent establishing that Amalgamated did, in fact, represent a majority of the employees. Tucker further testified that he had no knowledge of any other representative of Amalgamated having done so. Additionally, Willard Ferson testified that he at no time represented to either Mike Amoura or President West that Amalgamated represented a majority and that he had no knowledge of Ray Wentz having done so.

Alvin Tucker testified, in substance, that Respondent has not given effect to the checkoff provision contained in the Agreement. In this regard, Tucker testified that Amalgamated has never submitted a list of employees for whom a dues checkoff have been authorized, and that he had no knowledge of the Company having at any time checked off dues for any employee.

⁴ Amoura testified that Respondent does not "now" recognize Amalgamated, while Tucker testified recognition was never extended to Amalgamated

⁵ The foregoing is based on a composite of the credited testimony of Mike Amoura and Willard Ferson

4. The majority status issue

In his testimony, Mike Amoura ventured a "guess" that on September 19 "about 150" employees were employed at the Ft. Morgan plant. Alvin Tucker testified that he estimated that at the time of the initial Denver meeting in September Respondent employed approximately 80 to 100 employees at its Ft. Morgan plant. He further testified that at the same point in time Amalgamated had in its possession approximately 40 to 50 authorization cards of employees.

No party undertook to introduce payroll records or other documentary evidence to establish the number of employees which were employed in the production and maintenance bargaining unit on September 12, 15, or 19. Moreover, at the hearing, the General Counsel took the position, in substance, that its affirmative burden under the allegations of the complaint did not require it to undertake by use of authorization cards, or other similar evidence of union affinity or affiliation, to definitively establish the lack of majority status on the part of Amalgamated on the dates critical to the allegations of the complaint. Moreover, while indicating a willingness to present to the Trial Examiner for *in camera* examination, authorization cards in the possession of the Regional Office in connection with a pending representation case, the General Counsel declined on the basis of confidentiality to make authorization cards available for use by Respondent in defense. At the hearing, the Respondent served on the General Counsel's representative a *subpoena duces tecum* requesting the production of the authorization cards. The counsel for the General Counsel moved to quash the subpoena on the ground that the Respondent had failed to seek and obtain the approval required under Section 102.118 of the Board Rules and Regulations, Series 8, as amended. The Trial Examiner, at the hearing, quashed the subpoena on ground of noncompliance with said provision of the Rules and Regulations. Thereafter, the Respondent timely requested special permission to appeal the ruling of the Trial Examiner and simultaneously filed an appeal to the Board. By order dated June 30, 1970, the Board granted permission to appeal but denied the appeal.

After the initial meeting on or about September 12, the Union received additional signed authorization cards. On December 8, 1969, at which time Amalgamated filed a representation petition in Case 27-RC-3756, Amalgamated had obtained 176 signed authorization cards which were submitted to the Board with its petition.⁶

5. The meeting of November 19

On November 19, Amalgamated held a meeting at the Farmer's Union Hall in Ft. Morgan which was attended by approximately 70 employees of Respondent. Willard Ferson presided over the meeting and spoke to the employees. In speaking to the employees Ferson observed

⁶ The parties stipulated that said petition was subsequently withdrawn as was a representation petition filed by Morgan on December 19, 1969, in Case 27-RC-3764. By its petition, Morgan sought a unit identical to that sought by Amalgamated in its earlier petition

that Ray Wentz had been scheduled to appear at the meeting and speak to the employees.⁷ However, Ferson informed the employees that Wentz had engaged in discussions with Frank West, president of the Company, and that Wentz thought the Company was prepared to recognize Amalgamated. Questions were raised from the floor concerning wages and there was some discussion of wage scales. At the meeting some authorization cards were distributed and some signed authorization cards were returned to Ferson.

Prior to the meeting, on November 19, a flyer, over the signature of Willard Ferson, was distributed to plant employees. The flyer invited the attendance of the production and maintenance employees at the meeting designated to be held on November 19 "at 6:30 p.m." The flyer also contained the following paragraphs:

Vice-President Wentz, director of District 4 of the Amalgamated Meat Cutters and Butcher Workmen of North America, will be present to explain to you an offer made to him by your employer, Frank West, in a meeting held last week.

This is a very important meeting! You will have the opportunity to hear and discuss this offer from your company. You will also vote to accept or reject this company offer.

There is no credible evidence of record to reveal that in arranging the meeting any consultation was held between representatives of Respondent and of Amalgamated. There is no credible evidence of record revealing that normal work scheduled at Respondent's plant was modified or interrupted to facilitate the holding of the meeting.⁸

Conclusions

The complaint alleges a violation of Section 8(a)(2) and (1) of the Act, deriving from conduct of Respondent's agent, Mike Amoura, in meeting with representatives of Amalgamated and negotiating a collective-bargaining agreement "notwithstanding the fact that Amalgamated did not represent a majority of Respondent's employees in an appropriate [production and maintenance] unit." This case arises not in the traditional context of recognition granted despite the pendency of rival claims for recognition, or in face of an existing question concerning representation.⁹ There is alleged no antecedent intrusion of management into the formation or affairs of the assertedly assisted union so as to taint whatever authorization or indicia of support the Union may have possessed from unit

employees. There is no contention that the work complement extant at the time of the contract's execution was not representative.

It is, of course, the law that an employer violates Section 8(a)(2) of the Act by entending recognition to a labor organization which does not represent an uncoerced majority of employees in an appropriate unit.¹⁰ Similarly, an employer renders illegal assistance to a labor organization in violation of Section 8(a)(2) of the Act by executing a collective-bargaining agreement containing a union-shop provision, if, at the time of the execution of the agreement, the labor organization has not been certified or properly designated as the representative of a majority of employer's employees.¹¹ The extension of recognition or grant of a union-shop provision is not made lawful merely because the employer in good faith believed that the labor organization commanded majority status, when in fact it did not.¹² The burden of establishing the lack of majority status on the part of the allegedly assisted labor organization remains at all times throughout the proceeding with the General Counsel.¹³ Once the General Counsel makes out a *prima facie* showing of an absence of majority, it becomes incumbent upon the respondent to come forward with evidence in refutation.¹⁴ A *prima facie* showing of lack of majority may evolve from objective factors sufficient to render improbable majority status on the part of the asserted representative, and thus to create a permissible inference that, in fact, no majority existed at the time of the alleged act of assistance.¹⁵ The absence of circumstances propitious to the union's claim of majority, such as recent rejection of the union, insufficient time or opportunity to organize, actions inconsistent with majority status, hasty recognition, or cursory perusal of authorization cards may attend to aid the General Counsel in its burden of proof. Such considerations have been found to be factors militating against the existence of majority status.¹⁶ However, in the ultimate, to sustain an allegation of employer conduct violative of Section 8(a)(2) of the Act, the record must contain probative evidence of a substantial nature sufficient to establish that, at times crucial under the allegations of the complaint, the assisted union did not command a majority.

As I comprehend the General Counsel's theory, the lack of majority on the part of Amalgamated is a fact to be concluded from a combination of circumstances and inferences. These include the brief time lapse between the commencement of the Amalgamated organizational campaign and the grant of recognition; the failure of

⁷ Ray Wentz was unable to attend the meeting.

⁸ The allegation of the complaint, as amended at the hearing, pertaining to the November 19 meeting, read as follows:

On or about November 19, 1969, Respondent, by Mike Amoura, caused its plant at Ft Morgan, Colorado, to be closed at 3 30 p.m., in order to assist Amalgamated to obtain signed union authorization cards from its production and maintenance employees.

⁹ Respondent's awareness of the interest of Morgan in organizing the employees cannot be doubted but this is not a fact of this litigation.

¹⁰ *International Ladies' Garment Workers' Union, AFL-CIO [Bernhardt-Altmann Texas Corp.] v N L R B*, 366 U.S. 738, *Department Store Food Corp of Penna.*, 172 NLRB No 129 (TXD), enf'd 72 LRRM 2197 (C A 3).

¹¹ *Department Store Food Corp of Penna*, supra, *Lunardi-Central Distributing Co., Inc.*, 161 NLRB 1443, *Lake City Foundry Company, Inc.*, 173 NLRB No 159.

¹² *International Ladies' Garment Workers' Union, AFL-CIO [Bernhardt-Altmann Texas Corp.] v N L R B*, supra.

¹³ *International Metal Products Company*, 104 NLRB 1076.

¹⁴ *International Metal Products Company*, supra.

¹⁵ *International Metal Products Company*, supra, *Ellery Products Manufacturing Co., Inc.*, 149 NLRB 1338, *Dixie Bedding Mfg Co v N L R B*, 269 F.2d 905 (C A 5). See also *Carlton Paper Corporation*, 173 NLRB No 26, *International Association of Machinists, Tool and Die Makers Lodge No 35 [Serrick Corp.] v N L R B*, 311 U.S. 72, 80 (1940).

¹⁶ *American Beef Packers, Inc.*, 172 NLRB No 42, *Carlton Paper Corporation*, supra, *Intalco Aluminum Corporation v N L R B*, 72 LRRM 2368 (C A 9), enf'd 169 NLRB No 136, *Mears Coal Co.*, 175 NLRB No 136, *Midtown Service Co.*, 171 NLRB No 161, enf'd 73 NLRB 2634 (C A 2), *Bernhardt Bros Tugboat Service v N L R B*, 328 F.2d 757 (C A 7), enf'd 142 NLRB 851. Cf *Kimbell [Jolog Sportswear, Inc.] v N L R B*, 290 F.2d 799 (C A 4), aff'd 128 NLRB 886.

Amalgamated representatives during the bargaining sessions and prior to the execution of the contract with Respondent's bargaining representative, Mike Amoura, ever to proffer signed authorization cards for his inspection; the accompanying failure of Amalgamated, prior to the grant of recognition, ever to lodge with Amoura an affirmative claim of majority; the postrecognition efforts of Amalgamated to obtain additional signed authorization cards; and the failure of Amalgamated ever to seek enforcement of the collective-bargaining agreement, which it had signed, by filing unfair labor practice charges with the Board.

Considering the array of factors delineated by the General Counsel as indicating a lack of majority status on the part of Amalgamated on September 19 when the collective-bargaining agreement was executed, I conclude, in agreement with the General Counsel, that the evidence of record is sufficient to establish, *prima facie*, the absence of majority status on the part of the Union on or before September 19. In reaching this conclusion, I find that Mike Amoura entered contract negotiations with Amalgamated at the direction of top management but without proof of substance emanating either from management or Amalgamated that Amalgamated commanded a majority following. Thereafter, during the 3-day negotiations Amoura possessed doubt of Amalgamated's status. This is revealed by his own testimony to the effect that on the first or second day of discussions he requested Amalgamated to furnish proof of majority and became suspicious when on the third day no proof was furnished. To be certain, the organizing campaign launched by Amalgamated was a brief one, but not so truncated as to preclude successful recruitment of a majority following.¹⁷ However, the refusal of Respondent ever to give effect to the agreement which it had signed provides convincing proof that management remained unconvinced that Amalgamated's effort had provided the designations necessary to support a majority claim. That Amalgamated appears not to have thereafter pressed Respondent for implementation of the contract terms, strongly infers a lack of majority standing. This inference is magnified by Amalgamated's related abstention from perfecting avowed contractual recognition rights through institution of unfair labor practice charges.¹⁸

As the General Counsel met its burden of establishing a *prima facie* case of lack of majority, it became incumbent

on Respondent to introduce countervailing proof. It refrained from introducing testimony and sought instead to rest its case on the disclosures to be garnered from signed authorization cards in the possession of the General Counsel. Conceding that he possessed no insight into the number of such cards signed by employees which would bear dates coinciding with or preceding September 19, counsel nonetheless asserted Respondent's dependence on and entitlement to access to the cards for the purpose of defending against the allegations of the complaint. Respondent declined the General Counsel's suggested proffer of the cards to the Trial Examiner for the purpose of permitting an *in camera* study and analysis of the cards by the Trial Examiner to permit him to determine the facts which Respondent sought to establish.

As the record colloquy developed at the hearing, it became apparent that the Respondent desired to have access to the cards for the single and sole purpose of determining the number of cards in possession of the Board which had been dated on or before September 19. It became apparent also that, having ascertained this fact, Respondent recognized the need of proceeding to establish the number of employees in the bargaining unit on the three dates pertinent in September. The *subpoena duces tecum* which the Respondent served on the counsel for the General Counsel seeking possession of the authorization cards was quashed by the Trial Examiner on motion of the counsel for the General Counsel. The General Counsel's motion was premised on Respondent's failure to have obtained the written permission of the Chairman of the National Labor Relations Board, as required by Section 102.118 of the Board Rules and Regulations, Series 8, as amended.¹⁹

Although, as the record reflects, the Trial Examiner was initially disposed to view this issue as one controlled by due process considerations, upon careful analysis of the record, including Respondent's stated purpose for desiring access to the authorization cards, the Trial Examiner concludes and finds that, the *in camera* procedure for determining the very facts which the Respondent sought to adduce, provided for Respondent a reasonable and fair opportunity to establish facts which were crucial to its burden of going forward with the evidence.²⁰ Possession of the cards and opportunity personally to examine them would have availed the Respondent nothing of substance, relevant and

document is subject to the supervision or control of the Board. The rule further provides

Whenever any *subpoena ad testificandum* or *subpoena duces tecum*, the purpose of which is to adduce testimony or require the production of records as described [in Section 102.118 of the Board's Rules and Regulations] . . . shall have been served on any such person or other officer or employee of the Board, he will, unless otherwise expressly directed by the Board or the chairman of the Board . . . move pursuant to the applicable procedure, whether by petition to revoke, motion to quash, or otherwise, to have such subpoena invalidated on the ground that the evidence sought is privileged against disclosure by this rule

²⁰ The record sufficiently reveals that Respondent's counsel was given ample latitude by the Trial Examiner to weigh his options and determine his course of procedure. That Respondent was not misled to its detriment by the Trial Examiner's due process observations is clear from the cautionary observations as to the apparent sufficiency of the evidence to sustain the General Counsel's burden of proof, and the delineation given as to the permissible limits of use to which the authorization cards could be put in the instant proceeding, even if available to Respondent.

¹⁷ In the circumstances prevailing in September 1969, the 1968 effort of Morgan to organize employees of Respondent does not serve to detract from the likelihood of a successful drive by Amalgamated. Although Morgan had been successful, through company assistance, in obtaining cards from the employees employed at the plant in 1968, this drive had been interrupted by a subsequent plant closure. There is no evidence as to the number of former employees who returned to comprise the work complement in September 1969 when the plant reopened.

¹⁸ That Amalgamated abstained from filing charges and later renewed recruitment efforts and filed a representation petition suggests a rapidly expanding work force, but the complaint raises no issue as to the nonrepresentative character of the work complement on September 19.

¹⁹ As found, the record reveals that the authorization cards in question came into the possession of the Regional Director as part of a showing of interest on the part of Amalgamated in connection with its representation petition filed in Case 27-RC-3756 on December 8, 1969. The pertinent rule precludes the Regional Director or attorneys in the employ of the Board from producing files, documents, reports, memorandums, or records of the Board pursuant to a *subpoena duces tecum*, or otherwise, without the written consent of the Board or the Chairman of the Board if the official or

material to the issues of the case, which the *in camera* procedure would not have accorded. It is to be remembered that the cards to which Respondent sought access were cards submitted to the Board by Amalgamated, the alleged assisted union. Considering the unity of interest which prevailed in this proceeding between Amalgamated and the Respondent on the issue of Amalgamated's majority status, it is apparent that Respondent would not have endeavored to impune the validity of the cards by attacking the genuineness of signatures or the free will of the signators. All that would have inured to the Respondent from possession of the cards would have accompanied an *in camera* study of the cards by the Trial Examiner.²¹

In light of the Respondent's failure to obtain the requisite consent of the Chairman of the National Labor Relations Board for production of the authorization cards; as the Trial Examiner, in the circumstances, properly granted the motion of the counsel for the General Counsel to quash the subpoena; and as the Board subsequently denied the Respondent's request for special permission to appeal from the ruling of the Trial Examiner, the determination of the majority status issue, and the legal issues flowing from such a determination must, of necessity, be herein decided.

Having concluded from the evidence that the General Counsel met its *prima facie* burden of establishing Amalgamated's lack of majority at the time of the contract negotiations and contract execution, and as Respondent came forward with no evidence to overcome the proof adduced by the General Counsel,²² I conclude that Respondent and Amalgamated engaged in collective bargaining at a time when Amalgamated did not represent a majority of Respondent's production and maintenance employees. I further find that the Respondent and Amalgamated executed a collective-bargaining agreement at a time when the status of Amalgamated as collective-bargaining representative of unit employees was similarly deficient.²³

I attach no special significance to the fact that, prior to signing the contract, the signators did not complete the blanks in the text of article XXVI specifying the effective inclusive dates of the agreement. The act of signing the agreement may not be viewed as entirely ritualistic. In affixing their respective signatures, Amoura and Tucker were purposefully engaged. They intended a meaningful result for they conceded they had agreed on all substantive

terms. The least that could be attributed to their act was a signification of this latter fact. If they intended, by leaving open the date blanks, to defer the effective date of the instrument and actual recognition of Amalgamated until Amalgamated had secured the necessary majority, Respondent was engaging, nonetheless, in conduct which under Section 8(a)(1) and (2) of the Act is proscribed as an act of assistance, and is alone sufficient to require a remedial order of the Board.²⁴ That Respondent has not given effect to, or in any manner implemented, the contract does not alter the unlawful nature of the conduct.²⁵

Accordingly, in the circumstances above delineated, I find that Respondent violated Section 8(a)(2) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent set forth in section III, above, occurring in connection with the operations of Respondent described 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 commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

I have found that Respondent violated Section 8(a)(1) and (2) of the Act by executing a collective-bargaining agreement which, by its terms, granted exclusive recognition to Amalgamated Meat Cutters and Butcher Workmen of North America, Local Union No. 641, AFL-CIO, at a time when Amalgamated was a minority union and did not represent an uncoerced majority of unit employees; and I have further found that said collective-bargaining agreement contained a union-security clause and other substantive provisions governing the terms and conditions of employment of unit employees. I shall, accordingly, recommend that Respondent, in writing, notify Amalgamated that, by reason of the unlawful nature of the action

²¹ *Intertype Co v NLRB*, 401 F.2d 41 (C.A. 4), enfd 164 NLRB No 108, *Davis v Braswell Motor Freight Lines*, 62 LRRM 2682 (C.A. 5), see also *NLRB v General Armature & Mfg Co*, 29 LRRM 2062, cf *Olson Rub Co v NLRB*, 291 F.2d 655 (C.A. 7)

²² The testimony of Tucker that when the agreement was signed Respondent employed 80 to 100 employees and that Amalgamated had 40 to 50 authorization cards is manifestly insufficient to support a contrary finding

²³ I find no merit in the contention of Amalgamated, advanced in its brief, that the General Counsel failed in his burden of establishing the appropriateness of the bargaining unit. The unit of employees adversely affected by the unlawful assistance is a single-plant unit of production and maintenance employees, presumed to be an appropriate unit for collective-bargaining purposes

²⁴ *Waukesha Lime and Stone Co, Incorporated*, 145 NLRB 973, enfd 343 F.2d 504 (C.A. 7), *Reynolds Corporation*, 74 NLRB 1622, 1651, *International Ladies' Garment Workers' Union, AFL-CIO [Bernhard-Altmann Texas Corp] v NLRB*, 336 U.S. 731, *Lake City Foundry Company, Inc.*, 173 NLRB No 153 (TXD), cf *Consolidated Builders, Inc.*, 99 NLRB 972, *Playboy Club of New York, Inc.*, 173 NLRB No 111

²⁵ *Waukesha Lime and Stone Co, Incorporated, supra*

I adhere to my ruling, made at the hearing, dismissing the allegations of section VI (b) of the complaint. The complaint, as framed, specified assistance on the part of the Respondent, by and through its agent Mike Amoura, in obtaining signed authorization cards from production and maintenance employees. There is hardly a scintilla of evidence relating to the involvement of Amoura or any other company employee in the events of the meeting. Moreover, the record contains no evidence of an interruption of normal production to assist Amalgamated in conducting the meeting or obtaining access to the employees. Indeed, the record does not reveal when the meeting actually commenced and, perforce, does not establish worktime incursions. Moreover, in context of the specific wording of paragraph VI(b) of the complaint, I adhere to my ruling made at the hearing that the testimony of Ferson, International representative of Amalgamated, relating to what he told employees attending the November 19 meeting concerning certain alleged statements made by Frank West, president of Respondent, to Ray Wentz, district vice president of Amalgamated, is not relevant to the issues of paragraph VI(b) of the complaint nor material and probative under the issues of paragraph VI(a) of the complaint.

to which it was a party, it is vitiating and otherwise declaring a nullity, its September 19, 1969, acceptance of the terms and provisions of the collective-bargaining agreement. I shall further recommend that Respondent give no prospective affect to the terms of said agreement. Moreover, I shall recommend that the Respondent post a notice informing unit employees that the September 19, 1969, agreement is a nullity and is void and of no prospective force and effect.

Upon the basis of the foregoing findings of fact and conclusions of law and upon the entire record in this case, I make the following:

CONCLUSIONS OF LAW

1. Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. Amalgamated Meat Cutters and Butcher Workmen

of North America, Local Union No. 641, AFL-CIO, and Arthur L. Morgan Union, Local No. 3, are labor organizations within the meaning of Section 2(5) of the Act.

3. By engaging in collective-bargaining negotiations with representatives of Amalgamated and by executing a collective-bargaining agreement containing substantive provisions governing the terms and conditions of employment of employees of Respondent, both at a time when Amalgamated did not represent a majority of employees in the unit of employees for which Amalgamated endeavored to bargain collectively, the Respondent engaged in conduct violative of Section 8(a)(1) and (2) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommended Order omitted from publication.]