Central Arizona District Council of Carpenters, AFL-CIO; and Millmen and Cabinet Makers, Local 2093, United Brotherhood of Carpenters & Joiners of America, AFL-CIO *and* Wood Surgeons, Inc. Case 28-CP-53

April 16, 1969

DECISION AND ORDER

On August 28, 1968, Trial Examiner Martin S. Bennett issued his Decision in the above-entitled case, finding that the Respondents had engaged in certain unfair labor practices and recommending that they cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondents filed exceptions to the Trial Examiner's Decision, with a supporting brief; the General Counsel filed limited cross-exceptions and an answering brief.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in this case, and hereby adopts the findings,[1] conclusions, and recommendations of the Trial Examiner.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the Recommended Order of the Trial Examiner, and orders that the Respondents, Central Arizona District Council of Carpenters, AFL-CIO, and Millmen and Cabinet Makers, Local 2093, United Brotherhood of Carpenters & Joiners of America, AFL-CIO, their officers, agents, and representatives, shall take the action set forth in the Trial Examiner's Recommended Order.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

MARTIN S. BENNETT, Trial Examiner: This matter was heard at Phoenix, Arizona, on July 2, 1968. The complaint, issued April 23 and based upon charges filed March 18 and April 3, 1968, by Wood Surgeons, Inc., herein called the Employer, alleges that Respondent Unions, Central Arizona District Council of Carpenters, AFL-CIO, herein called the Council, and Millmen and Cabinet Makers, Local 2093, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, had engaged in unfair labor practices within the meaning of Section 8(b)(7)(C) of the Act. Briefs have been submitted by the parties.[1]

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

FINDINGS OF FACT

I. JURISDICTIONAL FINDINGS

Wood Surgeons, Inc., is an Arizona corporation maintaining its office and place of business at Mesa, Arizona, where it is engaged in the manufacture and sale of cabinets and furniture. It annually purchases and receives goods and materials valued in excess of $50,000 from the employers within the State of Arizona who have purchased and received said goods and materials directly from points outside the State of Arizona. I find that the operations of the Employer affect commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATIONS INVOLVED

Central Arizona District Council of Carpenters, AFL-CIO and Millmen and Cabinet Makers and Locals 2093 and 1089, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, are labor organizations within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *Introduction; Sequence of Events*

Herbert Meisner is president of the Employer and Donald Meisner is its secretary-treasurer. At the time material herein, the Employer operated two adjacent plants in Mesa, Arizona and their employees were not covered by any labor contracts prior to the events set forth below.

Business Manager Lawrence Richardson of Local 2093 visited the plants in November in an effort to obtain a contract and, on December 4, 1967, he and Business Representative Robert Knox of Local 1089 returned. On this occasion, Herbert Meisner signed a contract recognizing Local 2093 as the representative of its so-called inside employees of a commercial cabinet shop. The Council is also a party to this contract.

Also signed was a memorandum binding the Employer to the Arizona Master Labor Agreement with various labor organizations and particularly Local 1089. The Council is also a party to the latter agreement which covers so-called outside employees in contract construction work. The inside contract provided that any work performed on the jobsite, such as installation, was subject to the outside contract.

The Employer had 20 employees as of December 4 and it is undisputed that none of them had signed authorization cards. Respondents argue that it was their contemplation that these were to be prehire contracts

[1] We note and correct the following inadvertent errors in the Trial Examiner's Decision, which do not affect the result in this case. The Employer's telegram canceling its contract with Local 2093 was sent on January 18, and not on January 19. Thus it was sent the day before, rather than the day after, the picketing began. Also, the Trial Examiner found that the Employer's 1967 contracts, in which it guaranteed to the purchaser that the cost of installation of its cabinets would not exceed a specified figure, amounted to $67,490. As the General Counsel points out in his limited exception, the correct figure is $63,490.

[1] An unopposed motion by the General Counsel to correct certain errors in the transcript is hereby granted.

under Section 8(f) of the Act.

Meisner, on the other hand, testified that Knox said on December 4 that it was not "legal" for the outside contract to be signed because the Employer was a "manufacturer", and the two men agreed that any men Meisner referred for installation of his cabinets or to assist the builder would be "Union men."[2] Knox testified that he did not recall making such a statement I credit Meisner herein.

From December 4, 1967 through January 18, 1968, various grievances arose between the Employer and Local 2093 relative to operations under the inside agreement. These included hiring outside the hiring hall and also payment to high school graduates performing heavy work of wage rates below those deemed to be in order by Local 2093 As of January 18, these differences were unresolved and on the morning of January 19, 1968, pickets were placed by Respondents' plants; this picketing lasted until approximately April 18 and they bore signs with the following legend:

Picket

CONTRACTOR

WOOD-SURGEONS

IN VIOLATION OF AGREEMENT

DISTRICT COUNCIL OF CARPENTERS

Later on January 19, Meisner sent the following telegram to Local 2093:

> IT IS THE BELIEF OF THIS CORPORATION THAT YOU LARRY RICHARDSON FRAUDENTLY CONVINCED US THAT YOU HAD GOOD MEN WORTHY OF THE RATE OF PAY STATED IN YOUR CONTRACT. UNION LOCAL 2093 HAS FAILED TO LIVE UP TO THAT AGREEMENT WOOD SURGEONS HEREBY CANCEL ANY AGREEMENT MADE PRIOR TO THIS DATE WITH THE AF OF L CIO, AND HAS STARTED LEGAL PROCESS OF SUCH, ALSO INJUNCTION AGAINST YOU YOURSELF AND THE UNION

B. *Other Pleadings*

On January 23, 1968, Local 2093 filed charges in Case 28-CA-1647 alleging that the Employer had engaged in unfair labor practices within the meaning of Section 8(a)(1), (3), and (5) of the Act by, *inter alia*, refusing to honor the December 4 agreement and thereafter cancelling it.

By letter of May 1, the Regional Director dismissed the 8(a)(3) and (5) allegations, pointing out in part as follows

> Further, as it appears that the Employer was not engaged primarily in the building and construction industry and that the employees involved were not engaged in the building and construction industry, the putative agreement entered into by the Employer and the Charging Party was not a valid 8(f) agreement, and the Charging Party did not represent a majority of the Employer's employees. Since it would, therefore, have been a violation of 8(a)(2) for the Employer to maintain and give effect to this agreement, the Employer's repudiation of it could not be 8(a)(5). In view of the settlement agreement as to 8(a)(1) violations of the case entered into by all parties, further proceedings on the charge are not warranted I am, therefore, refusing to issue a complaint as to the 8(a)(3) and (5) allegations in this matter. This does not affect the 8(a)(1) agreement

On March 18 and April 3, 1968, the Employer filed a petition in Case 28-RM-202 and this matter is presently pending.

The crux of Respondents' defense, as I view it, is that they enjoyed a binding contract with the Employer and that picketing in protest of its violation is not violative of Section 8(b)(7)(C) of the Act. This presents for determination the issue whether the Employer is "engaged primarily in the building and construction industry."[3]

C. *Is the Employer Primarily Engaged in the Building and Construction Industry*

During the calendar year 1967, the Employer enjoyed contracts totaling $131,176 for the manufacture, sale, and delivery of its cabinets f.o.b. jobsite No installation is required by the Employer on these deliveries.

It may be noted that these cabinets and their formica tops are to be attached to the walls in the buildings. This is done by employees of the general or subcontractor under the aegis of Local 1089. There is evidence that employees of the Employer have been loaned to the general or subcontractor for these installations, although they are placed on the payroll of the latter.

This is caused by a shortage of skilled installation personnel. Indeed, the Employer out of interest for its customers, has taken it upon itself on occasion to contact Local 1089 and request that competent workmen be duly dispatched to the general or subcontractor for this purpose.

The Employer also executed contracts in the calendar year 1967 amounting to $67,490 wherein it guaranteed to the purchaser that the cost of installation would not exceed a specified figure; in that event, the excess would be absorbed by the Employer This manifestly was to assuage the purchaser against incurring an excessive installation charge and was not an agreement to install the cabinets. The Employer was not required to install the merchandise on any of these jobs

Indeed, there is evidence that on several of the latter jobs the installation was not performed by employees of the Employer, as contrasted with others where they were borrowed for this purpose and duly paid by the borrower.[4] And, even assuming that the employees of the Employer did the installation work in this latter group of contracts, this work amounts to less than 1/2 of the f o b. work and approximately 31 percent of the total volume of business.[5]

It is readily apparent that the cost of installation is perforce but a fraction of total receipts from the sale, delivery and installation contracts and an even lesser fraction of revenues from the manufacture and sale of all

[2]Apparently meaning members of Local 1089 and this work carried a higher rate of pay

[3]The General Counsel has argued extensively in support of a motion for summary judgment that the ruling or decision by the Regional Director, set forth above, eliminates any legally adequate defense This motion was denied at the hearing and the ruling is reaffirmed See *Sagamore Shirt Co v N L R B*, 365 F 2d 898 (C A D C), and *Stanley Air Tools*, 171 NLRB No 48

[4]Although there is evidence that, on occasion, the wages were paid by the Employer who in turn was duly reimbursed by the borrower

[5]The Employer also manufactures tables, this totalling about 5 percent of its production.

its products. If this Employer is primarily engaged in the building and construction industry, this is most definitely a case of the tail wagging the dog. See *N L.R.B.* v *W L Rives Co.*, 328 F 2d 464 (C.A 5)

In significant contrast, the General Counsel has directed attention to the case of *Indio Paint and Rug Center,* 156 NLRB 951, where some 93 percent of revenues were derived from the sale and installation of hard and soft flooring. There, the company was required to install the purchases as part of the contract price. Here, in the smaller group of contracts, the Employer merely guaranteed that the cost of installation would not exceed a specified figure

And, viewed realistically, this Employer is in the manufacturing business doing what is commonly known and regarded as millwork and all the work, except for installation, is done at its plants. In the cited case, at least 12 of 15 employees worked on installation approximately full time. And here, only minor repairs are done at the jobsite A decision to term these as primarily construction workers would be strongly oblivious of the realities of the situation. I find that they were not.

D. *Conclusions*

It has previously been found that this picketing continued for more than 30 days without the filing of a representation petition under Section 9(c) of the Act, and this presents for consideration the object of the picketing. The legend on the sign is phrased in terms of the Employer violating their contract

But it is readily apparent that this is a contract which the Board cannot honor because it was executed with a union which had no representation among these employees Contrary to the argument of Respondents, this does not constitute a finding that the execution of the contract was an unfair labor practice which may not be gone into because no timely charge attacking it has been filed. I find only that it may not be honored or recognized herein.

Thus, Respondents are perforce in the position of picketing with an object of initial recognition and the only act which could satisfy this would be their recognition. See *Woodward Motors,* 135 NLRB 851 That a previous contractual relationship existed is not a defense. *N L.R B* v. *Local 542, International Union of Operating Engineers,* 331 F.2d 99 (C.A 3) I find, therefore, that Respondents have engaged in unfair labor practices within the meaning of Section 8(b)(7)(C) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondents set forth in section III, above occurring in connection with the operations of the Employer 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 thereof.

V. THE REMEDY

Having found that Respondents have engaged in conduct violative of the Act, it will be recommended that they cease and desist therefrom and take certain affirmative action deemed necessary to effectuate the policies of the Act.

Upon the basis of the above findings of fact, and upon the entire record in the case, I make the following.

CONCLUSIONS OF LAW

1. Central Arizona District Council of Carpenters, AFL-CIO, and Millmen and Cabinet Makers, Locals 2093 and 1089, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, are labor organizations within the meaning of Section 2(5) of the Act.

2 Wood Surgeons, Inc. is an employer within the meaning of Section 2(2) of the Act.

3. By picketing the above-named Employer for more than 30 days without filing a petition under Section 9(c) of the Act, with an object of forcing said Employer to recognize and bargain with them, Respondents have engaged in unfair labor practices within the meaning of Section 8(b)(7)(C) 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

Upon the basis of the foregoing findings of fact and conclusions of law, it is recommended that Respondents, Central Arizona District Council of Carpenters, AFL-CIO, and Millmen and Cabinet Makers, Local 2093, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, Phoenix, Arizona, their officers, representatives, agents, successors, and assigns, shall.

1. Cease and desist from picketing or causing to be picketed the plants of Wood Surgeons, Inc , where an object thereof is forcing or requiring said Employer to recognize or bargain with Respondents as the representative of its employees in violation of Section 8(b)(7)(C) of the Act

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

(a) Post in conspicuous places at their business offices and meeting halls, and all places where notices to their members are customarily posted, copies of the attached notice marked "Appendix."[6] Copies of said notice, on forms provided by the Regional Director for Region 28, shall, after being duly signed by official representatives of Respondents, be posted by Respondents immediately upon receipt thereof and maintained for 60 consecutive days thereafter. Reasonable steps shall be taken by Respondents to insure that said notices are not altered, defaced, or covered by any other material.

(b) Mail to the Regional Director for Region 28 signed copies of the aforementioned notice for posting at the premises of the Employer, the latter willing, in places where notices to employees are customarily posted. Copies of said notice on forms provided by the Regional Director for Region 28, shall, after being signed by Respondents, be forthwith returned to said Regional Director for disposition by him.

(c) Notify the Regional Director for Region 28, in writing, within 20 days from the receipt of this Decision, what steps Respondents have taken to comply herewith.[7]

[6] 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 be 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 "

[7] In the event that this Recommended Order be adopted by the Board,

APPENDIX

NOTICE TO ALL MEMBERS OF CENTRAL ARIZONA DISTRICT COUNCIL OF CARPENTERS, AFL-CIO, AND MILLMEN AND CABINET MAKERS LOCAL 2093, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO AND TO ALL EMPLOYEES OF WOOD SURGEONS, INC.

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 NOT picket or cause to be picketed the premises of Wood Surgeons, Inc., with an object of forcing or requiring said employer to recognize us as the representative of its employees in violation of Section 8 (b)(7)(C) of the Act.

MILLMEN AND CABINET MAKERS, LOCAL 2093, UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, AFL-CIO
(Labor Organization)

Dated By
(Representative) (Title)

CENTRAL ARIZONA DISTRICT COUNCIL OF CARPENTERS, AFL-CIO
(Labor Organization)

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 members or employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 207 Camelback Building, 110 West Camelback Road, Phoenix, Arizona 85013, Telephone 261-3717.

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this provision shall be modified to read: "Notify said Regional Director, in writing, within 10 days from the date of this Order, what steps Respondents have taken to comply herewith."