Allis-Chalmers Manufacturing Company[1] ***and*** **International Union of Electrical, Radio & Machine Workers, AFL-CIO, CLC, Petitioner.**[1]
Case 1-RC-10,338

October 3, 1969

DECISION ON APPEAL AND ORDER

BY CHAIRMAN MCCULLOCH AND MEMBERS JENKINS AND ZAGORIA

On November 22, 1968, International Union of Electrical, Radio & Machine Workers, AFL-CIO, CLC, filed a petition seeking to represent certain employees at the Employer's Boston plant. On December 18, 1968, the Regional Director for Region 1 dismissed the petition finding that it was barred by the current collective-bargaining agreement between the parties. On December 30, 1968, Petitioner filed an appeal from the Regional Director's dismissal with the National Labor Relations Board contending that the contract was not a bar to the petition.

The Board concluded that the appeal raised substantial and material issues which could best be resolved on the basis of record testimony and, accordingly, on February 19, 1969, reversed the Regional Director's dismissal of the petition, reinstated the petition, and directed that a hearing be held on the issue raised by the appeal. Thereafter, the Board issued an Order on March 26, 1969, granting the Employer's motion that the hearing be limited to the single issue of whether a valid bar exists to further proceedings in the case. A hearing was held on April 15, 1969. On April 24, 1969, the case was transferred to the Board in Washington, D.C. Thereafter the parties filed briefs in support of their respective positions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the Board has delegated its powers in connection with this case to a three-member panel.

Except as indicated hereinafter, the Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. The Board has considered the entire record in the case including the briefs, and makes the following findings:[2]

The Petitioner (also called the International) filed a petition seeking to represent a unit of clerical and technical employees, including draftsmen, timekeepers, electrical testers and inspectors at the Employer's Boston plant. The Regional Director dismissed the petition on the ground that in a current collective-bargaining contract between the Employer and the Petitioner and its Local 279, the Petitioner agreed not to represent the employees petitioned for herein during the term of the agreement, citing *Briggs Indiana Corporation*[3] and *Cessna Aircraft Company.*[4] We agree with the Regional Director's disposition of the petition.

On April 19, 1968, the Employer and both the International and its Local 279, hereinafter called the Local, executed a 3-year collective-bargaining contract covering a unit of some 400 production and maintenance employees.

The first paragraph of the contract provides that the Petitioner shall be referred to as the "International" and Local 279 as the "Union." Paragraph 3 defines the appropriate unit and expressly excludes, *inter alia,* "draftsmen, technical engineers, powerhouse engineers. . . timestudy men, timekeepers, clerical employees, electrical testers . . . ." Immediately thereafter, the following provision appears:

> 4. Section C The Union shall not, during the term of this agreement, solicit or accept into membership any person in the employ of the Company excluded from the coverage of the agreement under the provisions of paragraph 3 above.

The Employer, in contending that the 1968-1971 collective-bargaining agreement bars the petition, relies on the rule announced in *Briggs Indiana.* In that case, the Board held that where a union has promised not to seek to represent certain employees for the term of an agreement, a petition by that union seeking to represent such employees during the contract term will not be entertained. Petitioner argues, however, that the express language of the agreement makes it clear that paragraph 4 applies solely to the Local. Since in paragraph 1, the Local was identified as the "Union" and only the word "Union" is used in paragraph 4, Petitioner submits that it is not bound by that provision.

We find no merit in Petitioner's position. It is unreasonable to assume that the word "Union" was so literally used. The strict reading urged by Petitioner would lead to the untenable conclusion that while the Employer had bargained and executed a contract with both the International and the Local, it was concerned with and wished to forestall future solicitation among unrepresented employees by the Local alone.

Further, an analysis of other provisions in the contract establishes that the term "Union" was used occasionally to refer to both the International and the Local. For example, article II, section C, of the contract reads: "The Company declares that it will pursue the firm policy of not aiding . . . any employee . . . for the purpose of undermining the Union." Narrowly interpreted, this paragraph obligates the Employer not to undermine the Local but leaves it quite free to undermine the International. Similarly, another paragraph relating

[1] The names of the Employer and Petitioner appear as amended at the hearing.

[2] As the record, including the briefs of the parties, adequately presents the issues and the positions of the parties, Petitioner's request for oral argument is hereby denied.

[3] 63 NLRB 1270.

[4] 123 NLRB 855,857.

to checkoff of dues, requires that the authorization shall be irrevocable for a period of 1 year from the date of delivery of the authorization "or until the termination of the collective bargaining agreement between the Company and the Union." Clearly, "Union" again refers to both the International and the Local since both are signatories to the agreement.

Petitioner also alleges that it is merely a nominal party to the agreement; that it is bound as a joint promisor with the Local in only two provisions in the contract where it is individually identified.[5] In the past, however, the Board has held petitioning unions bound by contractual promises not to represent certain employees even where they were not themselves parties to the agreement.[6] *A fortiori,* where, as in the present case, the petitioning union is a signatory to the contract, we find that the limitations of paragraph 4 apply to it.

Petitioner further contends that paragraph 4 was discussed during the negotiations prior to the execution of the contract and was construed by the parties as not applying to the International. In particular, the International maintains that at the final bargaining session, it waived its demand that paragraph 4 be deleted only after the Employer gave assurances that the provision extended solely to the Local. The Employer on the contrary, insists that it drew no distinctions between the obligations of the Local and those of the International.

To corroborate its version of the parties' understanding regarding the reach of paragraph 4 the Employer offered in evidence written minutes of the bargaining sessions, which were rejected by the Hearing Officer. We find that this rejection constituted error.[7]

The minutes were prepared by John Barry, a supervisor, who served as recorder for the Employer and attended each of the meetings. Barry stated that he took long-hand notes at the meetings and then transcribed them into completed minutes as soon as possible thereafter. He testified that although he did not record what was said verbatim, he did try to cover the "high points in the words of the individual" who was speaking without consciously censoring their statements.

Under the rule of past memory recorded, such writings may be received as evidence of the facts recited therein provided that: (1) the witness had first-hand knowledge of the facts; (2) the writings were made or recognized by the witness as correct at or near the time of the events; (3) the writings were recorded at a time when the events were fairly fresh in the memory of the witness; and (4) the witness can attest that he recorded the facts as accurately as possible.[8]

In view of Barry's uncontradicted statements as to the methods he used in taking the minutes, we find that the guarantees attesting to their reliability have been met and hereby accept them into evidence as Employer's Exhibit 12.[9]

We particularly take notice of excerpts from these minutes relevant to the discussion of paragraph 4 at the final bargaining session which are set forth verbatim in the footnote below.[10] In our opinion, these excerpts establish that the International was concerned only with the legality of paragraph 4, and apparently assumed the provision extended it. We conclude, therefore, contrary to Petitioner's contention, that the parties understood that paragraph 4 applied to the International.

[5]In article II, section H, paragraph 20 dealing with a no-strike clause, the International and the Local are both mentioned, and in article II, section G, paragraph 15, both Unions promise not to intimidate or coerce employees.

[6]In *Briggs Indiana, supra,* the rule was first applied to a newly chartered local. In *Cessna Aircraft, supra* at 857, the Board stated that where an International is party to a contract, the rule will be applied to any locals of the International as well as to the International itself, or where a local is a party to the contract, the rule applies to any other local of the same International.

[7]Although the Hearing Officer refused to admit the proffered exhibit into evidence, he placed it in the Rejected Exhibit File, which has been transmitted to the Board.

[8]*McCormick on Evidence,* (1954 ed.) Sec. 277-278.

[9]See *N.L.R.B.* v. *Tex-Tan, Inc.,* 318 F.2d 191 (C.A. 5, 1963) where the court held admissible detailed summaries of bargaining sessions prepared by the employer's chief negotiator within a day or two after the completion of each session from notes kept in his own handwriting.

[10]Mr. Blackman [International representative] stated, there was subject matter that the Union had expressed an opinion on and the company had given no answer, Par 4-Sec C, what does this mean to the company? Mr. Oliver [Employer's representative] replied, it means the Union will not accept employees into the Union. He added that the paragraph spells out what it means. Mr. Blackman asked, if this was not a violation of the labor relations law. Mr. Oliver replied, not to his knowledge. Blackman stated that it does not mean the Union cannot organize the unorganized, those spelled out by the act are one thing, also something else. Mr. Oliver stated there was no problem. Mr. Blackman indicated the paragraph language had been amended before the labor board. He added, if the company meant, clericals, draftsmen, testers or technicians then the paragraph was illegal. Mr. Desmond [Member of Employer's Negotiating Committee] asked, when the language was amended. Blackman replied in 1947. Desmond commented the company had checked with their legal people and there was no problem. Carter [International representative] interjected that the Union checked with their legal people and the company was in violation.

Mr. Blackman stated, it claimed the Union the right to organize people into an organized group and a violation of the law, cannot be written into a contract. He added there was no fixed answer to law changes. He cited that a repetition of the article would allow plant raiding by other Unions. He continued he didn't know whether the International would sign with this in the contract but he would check the legality of the paragraph. He commented, if the company was speaking of people in exclusion, there was no problem and maybe the language needed clarification. Desmond stated he had discussions with the former Union president, he checked and agreed it was o.k. Blackman replied it should be made clear who is excluded, but if it meant the union cannot accept people who are unorganized and eligible then its wrong. Carter interjected he recalled a drive among the clerks and now seeks it clearly. He commented the Teamsters could organize these people, but the I.U.E. couldn't.

Mr. Blackman asked if it was the companys intent not to accept the Unions proposals. He added they would give a letter of intent that it refers to Par. 3. He stated, nothing can be written into the contract that abrogates the law. He continued that Paragraph 4 applied to Paragraph 3.

Mr. Desmond said, the legality would be checked. Blackman replied, as he read it, it applied to par. 3 Clericals, he added if presented a card demanding recognition, and the company says go to the board, then the board will say it.

Petitioner urges us to re-examine the *Briggs Indiana* rule on two grounds. First, it is argued that the rule was initially applied in a case involving plant guards, employees whose inclusion in bargaining units was "the subject of doubt and protracted litigation."[11] As the 1947 Taft-Hartley amendments to the Act resolved the status of such employees,[12] Petitioner submits that the rationale underlying *Briggs Indiana* no longer applies.

We find no merit in this argument,for the Board has invoked the rule in a number of cases concerning categories of workers other than plant guards.[13]

Petitioner also contends that the *Briggs Indiana* rule restricts employees in their right to bargain collectively through representatives of their own choosing.[14]

We do not view the rule as an undue encroachment on rights guaranteed by Section 7 of the Act. Employees excluded by such a provision are not disenfranchised; rather, their options as to which unions are available to them are merely diminished by one. As the Board recognized in *Briggs Indiana*, "the exercise of rights of given employees to choose any representative they desire is never literally unrestricted. . . ."[15] We do not interpret Section 7 to mean, then, that employees have an unqualified right to membership in a particular labor organization. Nor does the Act declare unlawful a union's decision not to organize and represent certain employees.

Moreover, the Board in *Briggs Indiana* stated that it was reluctant to "expend its energies . . . to confirm a result which the Union agreed it would refrain temporarily, from seeking to achieve."[16] Similarly, we too are unwilling to lend government sanction to undo the terms of a bargain which the rties themselves have struck. Such a result would be at variance with Board precedent[17] and contrary to the statutory policy directed toward stabilizing the collective-bargaining relationship.

Accordingly, we shall dismiss the petition.

ORDER

It is hereby ordered that the petition filed herein be, and it hereby is, dismissed.

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[11] *Briggs Indiana, supra* at 1273.

[12] Section 9(b)(3) of the Act restricts plant guards to bargaining units which do not include employees other than guards.

[13] E.g., *Essex County News Co.*, 76 NLRB 1341; *Huron Portland Cement Co.*, 115 NLRB 879; *Cessna Aircraft, supra.*

[14] See *Matter of Packard Motor Car Company*, 47 NLRB 932.

[15] *Supra* at 1272.

[16] *Id.* at 1273.

[17] See *Budd Company Automotive Division*, 154 NLRB 421; *Fullview Industries, Inc.*, 149 NLRB 427, 429; *Montgomery Ward & Co. Inc.*, 137 NLRB 346; *Huron Portland Cement Co.*, 115 NLRB 879.