

Borden, Inc. and Sales Drivers and Helpers, Local Union No. 274, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 28-CA-1813

July 9, 1971

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS FANNING, BROWN, AND JENKINS

On February 12, 1970, the Board issued a Decision and Order¹ in the above-entitled proceeding finding, *inter alia*, that the Respondent had violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing to bargain with the Union concerning the solicitation of employees to take vendor routes under terms and conditions differing from the union contract, basing its determination on its view that the employees did not become independent contractors as contended by the Respondent. The Board ordered the Respondent to cease and desist from its unfair labor practices and take certain affirmative action to effectuate the policies of the Act.

Thereafter, on April 30, 1970, the United States Court of Appeals for the Ninth Circuit issued its decision in *Carnation Co. v. N.L.R.B.*, 429 F.2d 1130, denying enforcement of the Board's Order therein insofar as it depended on a finding that the drivers were employees and not independent contractors and remanding the case for further consideration of certain other questions.

In view of the foregoing, and in the interest of facilitating the disposition of this matter, the Board, on February 24, 1971, invited the parties to submit briefs or statements of position with respect to the effect of the court of appeals' decision on this proceeding, and such statements were duly received from all parties.

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.

We have reviewed the record in this case, including the statements of position filed by the General Counsel and the Charging Party, and the memorandum on reconsideration filed by the Respondent, and we find ample evidence to reaffirm our original

decision that the employees involved herein remained employees and did not become independent contractors as contended by the Respondent. We note especially the following factors regarding Respondent Borden's employees that differentiate this case from the *Carnation* case: the so-called contract between Borden and each employee was oral, of no definite duration, and could be canceled by Borden at will; the "vendors" were required to attend sales meetings and to wear uniforms; the wholesale vendors were required to serve their customers at the price fixed by Borden; all customers remained customers of Borden; on large sales Borden sold below its price to the vendor, allowing him merely a set amount for delivery; Borden set and changed dock prices at will; Borden did not commit itself to sell to the retail vendor all of his requirements; and there was detailed and frequent supervision of the vendors' activities by Respondent's managerial employees, thus leaving little room for bona fide independent action by the vendors. We therefore find that the Respondent retained the right to control, and did exercise control over, the manner and means of the vendors' operations.

Having noted the above factors regarding the status of the employees, we also note, regarding the Respondent's failure to notify or bargain with the Union concerning the status of the employees, that at the time the Respondent embarked on its attempt to convert the employees to independent contractors there was a recently signed collective-bargaining agreement in existence covering these employees. The Respondent was seeking to modify the terms and conditions of work for the employees covered by the contract, and hence, in fact, to vary the contractual provisions. But it was required by the Act, as well as by general contract law, to secure the agreement of the Union before it could validly put such changes into effect. No attempt was made by the Respondent to secure such agreement, and thus the Respondent did not satisfy its statutory obligation. Rather, it merely informed the Union of its decision to convert to a vendor system, without discussing the question with the Union or even giving it an opportunity to express its views. It is clear that the Respondent thereby violated Section 8(a)(5) and (1) and 8(d) of the Act.

Accordingly, we hereby reaffirm the Board's Decision and Order in this case.

¹ 181 NLRB No. 19.