

**Carnation Company and Sales Drivers and Helpers,  
Local No. 274, International Brotherhood of Team-  
sters, Chauffeurs, Warehousemen and Helpers of  
America. Case 28-CA-1460**

July 26, 1971

**SUPPLEMENTAL DECISION AND  
ORDER**

BY MEMBERS FANNING, BROWN, AND  
KENNEDY

On September 6, 1968, the National Labor Relations Board issued a Decision and Order in the above-entitled proceeding<sup>1</sup> in which it found that the drivers with whom Respondent executed agreements were still employees rather than independent contractors, and that the Respondent thus violated Section 8(a)(5) and (1) of the Act by inducing them to enter into employment agreements in derogation of their bargaining representative and by modifying the existing collective-bargaining agreement without complying with the requirements of Section 8(d). By so holding, the Board found it unnecessary to determine whether Respondent fulfilled its duty to bargain over the question of contracting out part of its distributorship business if in fact contractual relationships were created. The Board also found that Respondent further violated Section 8(a)(5) by terminating the employment of four drivers who would not enter into the agreements.

The Board ordered the Respondent, *inter alia*, to cease giving effect to the individual distributorship agreements, to reactivate the previous collective agreement, to bargain, upon request, with the Union, and to offer reinstatement, with backpay, to the four discharges and the other unit employees to whom the Respondent had offered individual contracts.

Respondent petitioned the United States Court of Appeals for the Ninth Circuit to review the Board's Order. In its opinion, the court differed with the Board, concluding that the drivers became independent contractors. The court, however, found that "these considerations do not necessarily moot the question of past violation by Carnation."<sup>2</sup> The court added:

We are of the opinion that the Board ought to pass upon the refusal-to-bargain issue, but that if it finds a violation it ought to fashion a remedy with the understanding that Carnation and its distributors now occupy a different relationship than that occupied when the alleged violation occurred.<sup>3</sup>

With respect to the four drivers whose jobs had been terminated, the court held that the Board's determina-

tion of these facts should not be disturbed, but "[t]he remedy . . . ought to be re-examined in light of our holding that Carnation cannot be compelled to distribute its products through employee drivers."<sup>4</sup>

The Board petitioned for rehearing, questioning whether the court's opinion precluded the Board from ordering restoration of the *status quo ante* pending bargaining negotiations should it find a violation of the duty to bargain had occurred and that restoration was an appropriate remedy. The court entered a clarifying order, stating that "the Board is not precluded from ordering any appropriate remedy by law, subject, of course to judicial review."<sup>5</sup> The court added that "[n]o remedy, whether for the benefit of [the Union] or for individual drivers, however, can be sustained unless it is predicated upon a finding that Carnation unlawfully refused to bargain."<sup>6</sup>

On April 22, 1971, the Board remanded this case to a Trial Examiner for a further hearing on the issues posed by the court remand. Subsequently, the parties filed motions for reconsideration requesting that the Board decide the matter without a further hearing since the refusal-to-bargain issue was fully litigated.

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 considered the motions, the briefs, and the entire record in this case and hereby grants the parties' motions and makes the following findings:

The record shows that Respondent is part of a multiemployer group that has recognized and bargained with the Union concerning its retail and wholesale milk drivers in Phoenix, Arizona. Concerned with the financial position of its operations, Respondent began in August 1966 to sell its delivery routes to the drivers and enter into distributor agreements with them.

The events that led up to the distributorship arrangements show the following: On February 19, 1966, a meeting requested by Respondent was held between the Respondent and the Union at Los Angeles. Representing Respondent at this meeting was Roland Jones, director of industrial relations. Present for the Union was George Sebastian, director of the Dairy Employees Council of the Western Conference of Teamsters; Vernon Case, secretary-treasurer and business representative of Local 274; and A. D. Ward, attorney for the Union.

Jones testified that at the meeting he told the union representatives that the only solution to the Phoenix

<sup>1</sup> 172 NLRB No. 215.

<sup>2</sup> *Carnation Company v. N.L.R.B.*, 429 F.2d 1130, 1135.

<sup>3</sup> *Supra*.

<sup>4</sup> *Supra* at 1136.

<sup>5</sup> *Supra* at 1136.

<sup>6</sup> *Supra* at 1136.

distribution problem was to change from employee-drivers to independent contractors. He added that it would be acceptable to the Company if the independent contractors were Teamsters members and that the Company would be willing to give the Union an assignment for their premiums on pensions and health and welfare benefits. The Union's response, according to Jones, was that it strongly opposed changing to distribution by independent contractors and also opposed Teamsters membership for the jobbers. Jones also testified that the Union made no proposals but did suggest that a retail committee from the Carnation drivers be formed and that a brainstorming session be held to explore with the drivers whether they had an ideas on how to improve the situation in Phoenix. The parties agreed to have this meeting on March 10 in Phoenix. Jones testified that Sebastian, Case, and a group of drivers were to attend the March 10 meeting.<sup>7</sup>

Jones testified that on March 10, James Bryant, general manager; Charles Graham, assistant general manager; and he showed up at the Teamsters Joint Council office in Phoenix. Case met them and either Bryant or Jones asked Case if Sebastian had arrived. Case responded that Sebastian was not coming and that Sebastian had told him that there was nothing further to talk about. No employee committee was present. At the meeting Jones restated the Company's willingness to have the distributors remain in the Teamsters Union, and also the fact that the Company would be more than happy to keep them under the Teamsters pension and health and welfare plans. Case replied that the jobber route was not the answer and the Union would certainly oppose it. Bryant corroborated Jones' testimony that upon arriving at the March 10 meeting "the gist of what [Case] said was that everything had been discussed between Mr. Sebastian and Mr. Jones and there was no sense in rehashing the subject that had been covered." However, Bryant testified, contrary to Jones, that they did not discuss the matter of owner-operators at that time.

Union Representative Case testified that the subject of distributing Respondent's product by independent contractors was not discussed at the February 19 meeting. Case also testified that the March 10 meeting was set up to resolve problems caused by the Company's recent switch to a 5-day work schedule

<sup>7</sup> Union Attorney Ward, who was present at the February 19 meeting, brought out on cross-examination of Jones the fact that at this meeting the parties also discussed the transaction that was then being worked out where Krufft Dairy was going out of business and selling its vehicles to its former employees and that Carnation was agreeing to sell milk under a Krufft label from the Carnation plant to former Krufft employees who were driving their own vehicles.

<sup>8</sup> General Counsel contends that Sebastian's agency was never established for the purpose of negotiating for the Union. The record shows that Sebastian is the director of the Dairy Employees Council of the

and not for the purpose of discussing the possibility of going owner-operator. In fact, Case testified that it was sometime in August that he became aware that Respondent was contemplating owner-operator operations.

Shortly after this meeting, the first decision was made to sell the routes. This decision was made prior to the commencement of negotiations for a new collective-bargaining agreement executed on May 25, 1966. During the course of these negotiations there was no discussion in regard to Respondent's decision to sell its routes. The Union attempted to obtain, without success, a no-subcontracting clause.

Subsequent to the execution of the collective-bargaining agreement, Jones and Mathews met in Los Angeles, in early June 1966, with George Sebastian, director, of the Dairy Employee Council of the Western Conference of Teamsters.<sup>8</sup> Jones testified that Sebastian requested they come down to his hotel so that they could talk about the Phoenix situation. According to Jones, they discussed the Phoenix distribution question. Jones testified that Mathews reiterated the plight of the distribution system and stated the Company's willingness to keep the distributors in the Teamsters Union and give an assignment for pension and health and welfare funds. Sebastian submitted, as an alternative to distribution by independent contractors, a copy of the Teamsters contract with Foremost Dairies. According to Jones, Mathews told Sebastian that this was not a satisfactory solution because it was still an employee-employer relationship. When there were no further proposals from Sebastian, Mathews said that there was no alternative for Carnation but to go jobber. Sebastian said that if the Company did switch the Union would file unfair labor practice charges.

Sebastian did not testify at this proceeding. Case testified that Sebastian advised him that he had met with Jones concerning the Krufft Dairy matter, but made no report in connection with the Carnation independent contractor situation.

In August 1966, Respondent General Manager Bryant phoned Case and told him that employee Frederick was contemplating buying his route. Case testified that he told Bryant that he "would resist it with everything possible that the union could muster in order to prevent this so-called owner-operator from coming about." Bryant's version of this conversation

Western Conference of Teamsters. He acts as coordinator for all the dairy locals in the Western Conference of Teamsters. Respondent has dealt with Sebastian concerning problems within the dairy industry and particularly within their own Company. In fact, Respondent contacted Sebastian in arranging the February 19 meeting. Therefore we find that Sebastian had sufficient apparent authority to bind the Union. *Operating Engineers Local Union No. 3, AFL-CIO (California Association of Employers)*, 123 NLRB 922; *Sheet Metal Workers Union, Local No. 65, AFL-CIO (Inland Steel Products Co.)*, 120 NLRB 1678.

shows that he called Case and told him that employee Frederick had come in and was interested in becoming an owner-operator. Bryant told Case he wanted to talk to Frederick more about it and give consideration to selling the wholesale route. According to Bryant, Case said that there was nothing specific he could do about it, but he would fight the change all the way. Subsequently, Respondent made similar phone calls to the Union prior to discussing the matter with other drivers. The Union continued to respond that it would resist the change to owner-operator.

Without the benefit of a further hearing, which the parties oppose, we are unable to reconcile the conflicting testimony concerning the substance of the discussions at the February 19 and March 10 meetings.<sup>9</sup> There is no credibility problem, however, with regard to the meeting held in early June at the request of Sebastian. Indeed, the fact that the Union requested this meeting tends to support Respondent's position that there had been prior discussion concerning the distribution operation. In any event, it is clear from the evidence set forth above that the June meeting concluded with both sides adhering to fixed

<sup>9</sup> Trial Examiner Spencer, who had the benefit of observing the demeanor of the witnesses, has since retired from the Agency.

and firm positions. That the Union was adamant in its rejection of Respondent's proposal is further demonstrated by Case's statement that he would resist any attempt by Respondent to change the driver-salesman relationship. No request was made by the Union for further bargaining. In short, the Union had decided to respond to Respondent's proposal with litigation rather than utilizing the bargaining process.

Under these circumstances, we conclude that the Union's fixed position, evidenced at the June meeting, and Case's own statements subsequent thereto show that the parties had reached an impasse. Accordingly, the Respondent was free to initiate changes in its distribution system. We shall therefore 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.