

Nick Augustine and Irving Gould d/b/a Victorville Glass Company and Glaziers and Glassworkers Local Union No. 636. Case 31-CA-2068

September 22, 1971

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND
KENNEDY

On April 19, 1971, Trial Examiner Stanley Gilbert issued his Decision in the above-entitled proceeding, finding that Respondents had engaged in and were engaging in certain unfair labor practices within the meaning of the National Labor Relations Act, as amended, and recommending that Respondents cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, Respondents filed exceptions, with a brief in support, to the Trial Examiner's Decision.

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 and brief, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner only insofar as they are consistent with this Decision and Order.

The Trial Examiner concluded that Respondents were estopped from denying their membership in a multiemployer (Association) bargaining unit and, consequently, were bound by the terms of the multiemployer agreement negotiated between the Association and the Union. This conclusion rests upon his finding that Respondents gave the Union reasonable grounds to believe that an agreement had been reached regarding Respondents' membership in the Association. In support thereof, the Trial Examiner relied on two incidents, both of which occurred after agreement had been reached on the new contract between the Association and the Union. These two incidents involving a statement from one Respondent on behalf of the other Respondent to a union agent and a conversation concerning membership by Respondent in the Association are insufficient, in our opinion, to sustain the General Counsel's burden of proof that Respondents were members of such Association.

Respondents took no part in the negotiations and,

indeed, were not considered to be members of the Association during negotiations and final agreement. In fact, Respondents did not make certain payments to the Association required of its members. Furthermore the two incidents relied upon by the Trial Examiner appear even more inconsequential when viewed against Respondents' continued refusal to bind themselves clearly and unequivocally to the Association, despite repeated efforts by the Union and the Association to secure Respondents' consent.

Under these circumstances, we conclude that Respondents did not evince a clear and unequivocal intent to join the Association and therefore did not violate Section 8(a)(5) and (1) of the Act when they refused to sign and honor the collective-bargaining agreement negotiated by the Association and the Union. Accordingly, we shall dismiss the complaint in its entirety.¹

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.

¹ The Trial Examiner recommended that certain additional allegations in the complaint be dismissed, noting that the General Counsel made no attempt to litigate these allegations. No exceptions were filed to that recommendation.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

STANLEY GILBERT, Trial Examiner: Based on a charge filed on September 21, 1970,¹ as amended on October 29, 1970, by Glaziers and Glassworkers Local Union No. 636, hereinafter referred to as the Charging Party or the Union, the complaint herein was issued on December 8, 1970. Said complaint, as amended during the course of the hearing,² alleges that Nick Augustine and Irving Gould, d/b/a Victorville Glass Company, hereinafter referred to as the Company or the Respondents, engaged in conduct violative of Section 8(a)(5) and (1) of the Act. Respondents, by their answers, in effect deny that they committed the unfair labor practices alleged in the complaint.³

Pursuant to notice a hearing was held in San Bernardino, California, February 9, 1971, before me. Appearances were entered on behalf of all of the parties. Briefs were received from the General Counsel and Charging Party within the

¹ Based on a charge filed in Case 31-CA-2131, Carter F Collier and June E Brown, d/b/a Victorville Glass Company, were named as additional Respondents in the caption of the complaint as issued. Collier and Brown purchased the business of Victorville Glass Company on October 1, 1970. Based on a representation that a settlement was effected with Collier and Brown, the complaint was amended to delete said persons as Respondents (as well as all allegations therein with respect to them) and Case 31-CA-2131 was dismissed.

² See fn. 1

³ The answers are letters from each of the two individuals which are construed as denials of the allegations of unfair labor practices and of their membership in the Association referred to in the complaint.

time designated therefor; no brief was received from either of the Respondents.

Upon the entire record in this proceeding and my observation of the witnesses as they testified, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE COMPANY

It was stipulated by the parties and it is found as follows:

Respondents Augustine-Gould, a partnership consisting of Nick Augustine and Irving Gould,⁴ at all times material herein until on or about October 1, 1970, engaged in business at 15313 Seventh Street, Victorville, California, where under the name of Victorville Glass Company they sold glass and installed and glazed glass for the public including commercial enterprises and business enterprises with whom they did more than an insubstantial amount of business.

It was stipulated by the parties and it is found as follows:

Riverside-San Bernardino Counties Glass Dealers Association, hereafter referred to as the Association, has been at all times material herein, and is now, an unincorporated association of employers located in the counties of Riverside and San Bernardino, California, where said employers sell glass and install and glaze said glass for the public including commercial enterprises and business enterprises.

The Association exists, in part, for the purpose of bargaining on a multiemployer basis with the Union concerning wages, hours, and working conditions of employees employed by the Association's members and by employers authorizing the Association to represent them.

For the calendar year ending December 31, 1969, the employers whose employees are employed in the multiemployer bargaining unit under the Union Contract in the normal course and conduct of their businesses described above received gross revenue in excess of \$500,000 and purchased and received goods or materials valued in excess of \$50,000 from distributors located in California who in turn received said goods or materials directly from suppliers located outside the State of California.

For the calendar year ending December 31, 1969, Respondents Augustine-Gould in the normal course and conduct of their business operations described above . . . purchased and received goods or materials valued at \$40,817 from distributors located in California who in turn received said goods or materials directly from suppliers located outside the State of California.

Respondents deny that during the time material herein they were members of the aforesaid Association and testimony was elicited from Augustine in support of their said denials. Based on the findings of fact and conclusions set forth hereinbelow, it is concluded that with respect to the issues involved in this proceeding Respondents were members of said Association during the time material herein.

⁴ Despite this stipulation, Augustine testified that he purchased Gould's interest in the partnership at a time prior to that material herein. This claim

Therefore, it is found that the Association and the employer members of the Association, including Respondents Augustine and Gould, d/b/a Victorville Glass Company, have been at all times material herein an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

As is admitted by the Respondents, the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Bargaining Unit Involved Herein*

All glaziers and glassworkers employed by the employer members of the Association, including those employed by Respondents, d/b/a Victorville Glass Company, during the time material herein, excluding guards and supervisors as defined in the Act constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

At all times material herein the Union has been designated or selected by a majority of the employees in the unit described above and at all times material herein has been the exclusive representative of all the employees in the aforesaid unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

B. *Background Information*

The findings of fact set forth in this section entitled "Background Information" are based on stipulations or undisputed testimony.

In October 1968 Respondents acquired the business known as Victorville Glass Company. The predecessor owner was a member of the Association and as such was bound by a contract negotiated between the Association and the Union, which according to its terms was for a 5-year period ending July 25, 1970. Shortly after acquiring the business, Respondents, rather than remaining subject to their predecessor's Association contract, insisted upon individually executing a contract which was signed by both Augustine and Gould on November 7, 1968. The contract was one that had been negotiated earlier with an association called the Glass, Glazing and Mirror Contractors of Los Angeles, hereinafter referred to as the LA Association. The aforesaid LA Association contract which the Respondents signed also terminated on July 25, 1970, according to its terms.

On June 25, 1970, the Union mailed a letter to the Respondents as well as to the then members of the Association notifying them of the termination of the then existing contract and the desire to begin negotiating "a new agreement to become effective July 1, 1970." Enclosed with the letter was a copy of the agreement which had been negotiated (apparently a short time prior thereto) between the Union and the LA Association. Said letter stated that

is not set forth in either of the answers (letters) filed by the Respondents

the enclosed agreement was its proposal for a new agreement to be effective July 1, 1970. Said letter offered the Company the choice of accepting the proposed agreement or, if it was not acceptable, the Union indicated that it would be willing to negotiate a new agreement.

On July 23, 1970, representatives of the Association and the Union conferred with respect to a new contract between the parties and arrived at an agreement. Said agreement was subsequently set forth in a letter dated August 7, 1970, addressed to the attorney for the Union and signed by the attorneys for the Association. It appears that the attorney for the Union executed his acceptance of the provisions contained in said letter of August 7 by fixing his signature thereto on August 26. The letter (which set forth the agreement arrived at on July 23, 1970) recited that the parties agreed to the provisions in the Union's proposed contract (the LA Association agreement) subject to certain modifications set forth in said letter.

C. Resolution of the Issues Herein

Johnny Rich, the union business representative, testified that subsequent to the letter of June 25 (which notified the Company that its contract was terminating on July 25 and that the Union desired to negotiate a new agreement) he had a number of conversations with Augustine and Gould.

Rich testified that at the end of June or the first of July he met with Augustine in the latter's office and asked him if he had received the aforementioned letter of June 25; that Augustine said he had received it but had not had the time to study it; and that he told Augustine he would check with him later. Rich also testified that he had a second conversation with Augustine about July 7; that he asked Augustine if he had read the proposed agreement; that Augustine said he had but that he had also been approached by the Association and had not decided what he wanted to do, but would advise him "in plenty of time"; and that he told Augustine he would check with him later. About July 12 or 13 Rich again visited the Company's office and spoke to Gould. His testimony as to his conversation with Gould is as follows:

A. I asked Mr. Gould if he had decided what they were going to do yet; that Mr. Augustine had said he had been approached by the Association.

* * * * *

THE WITNESS: He said that they felt they had decided to go along with the Association; but that he wasn't sure yet.

And I explained to Mr. Gould that the time was growing short; that the agreement was just about to expire in a few more days, and that I needed a commitment from him one way or another.

He further testified that on or about July 17 he had a subsequent conversation with Augustine in the latter's office in which Augustine asked him for an extension of the existing agreement because he had a prospective buyer whom he was supposed to meet on Wednesday (July 22); that he told Augustine he did not need an extension because the agreement did not expire until the following Sunday; that Augustine said he would know by Wednesday

whether he had sold the business or not; and that he told Augustine he would check with him later.

Rich also testified that on July 24 he called the Company and spoke to Gould. His testimony with respect to their conversation is as follows:

I asked Mr. Gould if Dan had told [sold] his business.

And he said, "I don't think so, but I'm not sure.[""]

And I told him that the contract was ending on the weekend and that I had to have something from him now or I would have to take economic action against him come Monday morning.

And he said that Danny had instructed him to tell me that he was going to go along with the Association.

And he asked me if there was going to be any problem.

And I said, "No, if you are represented by the Association, there is no problem."

And he said, "Well, we don't want a strike."

And I said, "If you're represented by the Association, there will be no problem."

And he told me that Danny would like to talk to me and asked if I would come back up Monday morning; asked me if I would come back up Monday morning, that Danny would like to talk to me.

And I told him yes, that I'd be there early.

Augustine's testimony does not contradict any of the above testimony of Rich. Augustine testified that he told Rich that he would not sign the LA Association agreement, but that he wanted to see the agreement negotiated by the Association. His testimony as to what he stated to Rich is as follows:

THE WITNESS: I said that I would definitely not sign this contract; that I wanted to see the other contract; that if it's the same way, then I'm going to go non-Union.

And at that time he says, "Well, it's your choice; and if you do, I will pull the men out."

TRIAL EXAMINER: All right.

Then, around July 17 you had another talk with Rich; didn't you? That was when you asked him for an extension of your then-Union contract?

THE WITNESS: When I had the buyer, yes.

TRIAL EXAMINER: All right.

THE WITNESS: And I don't think he showed up.

Augustine testified that he did not tell Gould to inform Rich that he wanted to go along with the Association, but that he did tell Gould or the secretary to tell Rich that he (Augustine) wanted to see him on Monday (July 27). Gould was not called as a witness; Augustine testified that Gould was ill in Cleveland, Ohio. Augustine further testified that in the latter part of 1969 he purchased Gould's interest in the partnership with the understanding that Gould would continue to draw the same amount of money from the partnership; that all of the arrangements between him and Gould were oral and that there were no books or records which showed the transfer to him of Gould's interest.

The above-outlined testimony of Rich as to his conversations with Augustine and Gould is credited. It does not appear necessary to determine whether or not Augustine did, in fact, purchase Gould's interest in the partnership, inasmuch as it is found that in the circumstances the Union was entitled to rely on the statement made to Rich by

Gould that Augustine instructed him to say that "he was going to go along with the Association."⁵

On Monday morning, July 27, in accordance with Augustine's request relayed through Gould, Rich went to the Company's office to meet Augustine. When he arrived there, Gould told him that Augustine had gone to have his car repaired and had left word for him, Rich, to meet Augustine at the office of Everett Cisco, president of San Bernardino Glass Company and president of the Association. According to the credited testimony of both Rich and Cisco, Rich asked Cisco if Augustine had arrived and was informed that he had not. It appears that Cisco did not know that Augustine was to be there. It further appears that Rich spent a considerable portion of the day waiting for Augustine at Cisco's office and checking back with Cisco to determine if Augustine had arrived. Augustine never arrived at Cisco's office. Augustine testified that he spent a considerable portion of time that day getting his car repaired, and that he had wanted to meet Rich at Cisco's office "Because he was coming to tell me he was going to close me up, and I was trying to get time to see that other contract." However, there is no evidence that he communicated such a purpose to either Cisco or Rich.

Cisco testified that for a considerable period of time he had been trying to get Augustine to become a member of the Association and had invited Augustine to several meetings; that Augustine accepted the invitations, but never attended any of the meetings. Cisco further testified that on July 28, the day after Augustine was supposed to meet Rich in his (Cisco's) office, Augustine called him on the telephone. Cisco's testimony as to their conversation is as follows:

A. He said, "Mr. Cisco, I would like to join your organization."

Q. And what did you say to him?

A. I said that I could not approve his membership in the organization, because the contract had been negotiated the twenty-third or fourth and this was the twenty-eighth, three or four days before

But I told him that I would call our attorney and ask him if his name could be put on the list that I had already given—previously given the Union.

Augustine testified that the above-quoted testimony of Cisco is only partially true. His version of their conversation is as follows:

THE WITNESS: The way it was is he said to belong to the Association, first I have to get approved. And he says, "You're supposed to come down to several meetings. And you never showed up. But I can take care of that. Don't worry about that." And then he says—

TRIAL EXAMINER: Well, why did he say that to you?

THE WITNESS: Because I wanted to see the other contract. See, there is two contracts.

TRIAL EXAMINER: Well, why did he tell you that if you only wanted to see the contract? Why did he tell you you had to come down to some meetings, but that he could take care of that?

THE WITNESS: He said that the other associations—the the other people in there should know

who I am, and I never came down to any meetings. He meant it as a joke, because I kept promising to come down to meetings and I never was able to make it. And I apologized for not making it. But that is just hearsay conversation. I mean, I don't think he meant anything by it. He called several times, and I promised I would be down, but I never did make it.

* * * * *

Q. (By Mr. Robin) What else was said in that conversation, if anything?

A. He told me first he wanted to find out if I could join the Association before he can ever even let me look at the contract.

He says, "Why look at a contract if you can't even join our Association?" And he says, "I'll check."

So then he calls me back and he says he talked to somebody from Local—I don't know whether he talked to Leroy Rich or somebody else. I forget who he talked to. And he said he didn't care—I think it was Mr. Rich—he didn't care who we belonged to.

So at that time he told me that as soon as the contract come due he would let me know; that he checked and Leroy said—yes, it was Leroy—that Leroy said he didn't care whether he joined that Company or our Company. It didn't make any difference, as long as he joined one of them. [Sic]

He says, "Now, when we get our contract, we'll let you look at it." I think that's the way the conversation went.

Cisco testified on cross-examination that in his conversation with Augustine (on July 28) Augustine did not tell him "that he wanted to see the contract before he made up his mind as to what he was going to do," as Augustine testified, but that Augustine "merely said he wanted to join" the Association. Cisco further testified that after his conversation on July 28 with Augustine, he called the attorney for the Association and told him that he had received a request from Augustine to become a member of the Association and that the attorney told him he would check into it with the attorney for the Union.

Rich testified that on July 28 or 29 he called Cisco and his testimony is as follows:

I asked Mr. Cisco if Mr. Augustine had ever shown up Monday; and he said no, he had not.

And I asked him if he had talked to him since then; and he said yes.

I asked him what Mr. Augustine wanted.

He said that Mr. Augustine wanted him to—Mr. Augustine told him that he wanted to join the Association.

And he said he could not do that himself, but he would get ahold of the guy who could do it.

* * * * *

And I asked Mr. Cisco if he had done this.

And he said, "Yes, I called the authority [attorney]

⁵ Particularly the circumstances of Gould's ostensible partnership interest and the succeeding events which caused the Union to believe that

the Respondent had carried out the decision "to go along with the Association"

for the Association and told him that Victorville Glass wanted to be a member.”

Leo Geffner, attorney for the Union, testified that at the meeting of July 23 between the Union and Association, during which the contract was negotiated, the attorney for the Association stated that he did not have a complete list of the members of the Association and that they would all be identified in a complete list at a later time along with a letter incorporating the terms of the agreement arrived at said meeting.

Cisco testified that, after he talked to the attorney for the Association about Augustine's request, he received a call from said attorney who informed him that he had conferred with the attorney for the Union and obtained the Union's approval to have the Company's name (Victorville Glass Company) listed among the members of the Association. The aforementioned letter of August 7 written by the attorney for the Association (which set forth the modifications of the LA Association agreement) contained a list of members of the Association which included Victorville Glass Company. Cisco further testified that sometime in August he called Augustine and told him that his Company's membership in the organization had been approved.

The above-outlined testimony of Cisco, Rich, and Geffner (relating to the inclusion of the Company's name among the members of the Association listed in the letter of August 7) is credited and those portions of Augustine's testimony contradicting that of Cisco are not credited. Cisco was an impressive witness as contrasted with Augustine. Moreover, that portion of Cisco's testimony which is contradicted by Augustine dovetails with that of Rich and Geffner, whereas there is little in the record to support Augustine's version of his conversation with Cisco on July 28.⁶

It is concluded from the above-credited testimony that Augustine did notify Cisco that he wished to join the Association and that Cisco, through the attorney for the Association, obtained the Union's approval of the Company's inclusion among the members of the Association. It is further concluded that based on the representation made by Gould to Rich and the representation in the aforesaid letter of August 7, the Union had reasonable grounds to believe that an agreement had been reached between the Union and Respondents that the Company was to be considered as a member of the multiemployer bargaining unit represented by the Association and that the Respondents were to be bound by the contract arrived at between the Union and the Association on July 23. It is also concluded that by reason of the actions of Gould and Augustine (Gould's statement to Rich of Augustine's decision to join the Association and Augustine's request of Cisco that he be included among the members of the Association) the Respondents are estopped in this proceed-

⁶ A letter dated September 17, from the attorney for the Association to the attorney for the Union, would tend to support Augustine's version, but, for the reasons set forth hereinbelow, it is considered to be of little probative value.

⁷ Although the record discloses that Respondents did not make certain payments to the Association required of its members, it is concluded that this does not alter the appropriateness of the finding of an estoppel.

⁸ Robertson was not called as a witness in view of the credited

ing from denying their membership in the aforesaid multiemployer bargaining unit. Cf. *American Sign & Neon Company*, 176 NLRB No. 147.⁷ Consequently, it is also concluded that Respondents were bound by the terms of the Association agreement until the sale of the Company on October 1, 1970.

In arriving at the above conclusions, the Trial Examiner has not overlooked the aforementioned letter from the attorney for the Association, Barton W. Robertson, to the attorney for the Union, dated September 17, 1970, in which he stated that he "was in error" when he informed him in the letter of August 7 that Victorville Glass Company was a member of the Association. There is nothing in the record to indicate what the basis was for Robertson's statement as to his error.⁸

It appears that in the middle of September Rich discovered that Respondents were not complying with the Association agreement and that he confronted Augustine with this fact. It further appears that Augustine replied that he was not signed to an agreement and was not a member of the Association. Rich showed him the August 7 letter in which the Company's name was listed as a member of the Association and Augustine insisted that he had signed nothing and was not a member.⁹ Augustine called the attorney for the Association and the attorney was advised of the problem. The attorney asked for time "to get the matter straightened out." Shortly after that Rich called the attorney for the Association who informed him that Victorville Glass Company's name had been included in the letter of August 7 through error and that he had sent a letter to that effect to the Union's attorney (the aforementioned letter of September 17). It does not appear that said letter of September 17, without more, is of sufficient probative value to negate the appropriateness of the above conclusions (as to the Company's membership in the Association and Respondents' obligations with respect to the Association agreement).

It is concluded that by failing and refusing to abide by or to honor the terms and conditions of the Association agreement, Respondents violated Section 8(a)(5) and (1) of the Act. *American Sign & Neon Company, supra*.

There are allegations in the complaint (par. 9 and 10) with respect to a strike commencing on September 21, 1970. It does not appear that the General Counsel attempted to litigate the issues with respect to said allegations and no mention is made in his brief of said allegations. Consequently, it is concluded that the General Counsel abandoned that portion of the complaint and the recommended order will provide for the dismissal of said allegations.

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

testimony of Cisco, who was president of the Association at the time, as to the reason for including the Company's name in the letter of August 7, there is nothing in the record from which a reason can be inferred for Robertson's confession of error or an assessment made of the validity of his confession.

⁹ It is noted that the record does not indicate that members of the Association were required to sign the contract negotiated by the Association.

CONCLUSIONS OF LAW

1. By failing and refusing to abide by or to honor the terms and conditions of the Association agreement for the period from its effective date to October 1, 1970, Respondents violated Section 8(a)(5) and (1) of the Act.

2. The aforesaid unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

It having been found that Respondents engaged in an unfair labor practice it will be recommended that Respondents be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Specifically, it will be recommended that Respondents forthwith give retroactive effect to the terms and conditions of the agreement arrived at between

the Association and the Union on July 23, 1970, for the period between the effective date of said agreement and October 1, 1970, and that they make whole those persons who were their employees during said period for any loss of wages or other employment benefits which they failed to receive as a result of Respondents' unfair labor practice. Since it appears that on October 1, 1970, the Respondents sold the Victorville Glass Company business, it does not appear that it would be appropriate to require the posting of a notice at Respondents' former place of business. However, it will be required that copies of the attached notice be sent to those persons who were employees of Respondents for the period during which the Respondents were bound by the aforesaid agreement between the Association and the Union.

[Recommended Order omitted from publication.]