Wm. Kugler & Bro., Inc. *and* International Union of Operating Engineers, Local Union No. 463 and 463–C, AFL–CIO. Case 3–CA–4343

September 29, 1971

DECISION AND ORDER

BY CHAIRMAN MILLER AND MEMBERS JENKINS AND KENNEDY

On June 16, 1971, Trial Examiner Paul E. Weil issued his Decision in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety, as set forth in the attached Trial Examiner's Decision. Thereafter, the General Counsel and the Union filed exceptions to the Trial Examiner's Decision, the General Counsel filed a supporting brief, and the Respondent filed an answering brief.

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, the briefs, and the entire record[1] in the case, and, except as indicated in the margin, hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.[2]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner and hereby orders that the complaint herein be, and it hereby is, dismissed in its entirety.

[1] As the record, exceptions, and briefs in our opinion adequately present the issues and the positions of the parties, the General Counsel's request for rehearing is hereby denied

[2] We do not pass on the alleged illegality of the Union's proposed checkoff clause, or on the Union's argument that this matter was not properly before the Trial Examiner or fully litigated, since we find in any event insufficient evidence that the parties had reached final understanding on the terms of a contract It is clear the parties had not agreed on either the general or particular language of a checkoff clause, and the Trial Examiner seems not to have discredited testimony by Respondent that no agreement at all was reached on checkoff The clause as presented by the Union appears, on its fact, ambiguous In view of this, and the more general confusion about the agreement that even the Union's steward admitted to having (see fn 1 of the Trial Examiner's Decision), we are unable to find the General Counsel sustained his burden of proving that final agreement had been reached. We rely only on the foregoing in adopting the Trial Examiner's dismissal of this allegation of the complaint

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

PAUL E. WEIL, Trial Examiner: On January 7, 1971, International Union of Operating Engineers, Local 463 and 463–C, AFL–CIO, hereinafter called the Union, filed a charge with the Regional Director for Region 3 of the National Labor Relations Board, hereinafter called the Board, alleging that Wm. Kugler & Bro., Inc., hereinafter called Respondent, violated Section 8(a)(1) and (5) by various acts and conduct. On March 19, 1971, the said Regional Director issued a complaint alleging that Respondent has failed and refused to bargain with the Union by bypassing the Union and bargaining directly with employees and by repudiating and rescinding contract provisions previously agreed upon in the course of negotiations on January 6 and again on February 11, 1971. By an answer duly filed the Respondent admitted various allegations of the complaint but denied the commission of any unfair labor practices. The matter came on for hearing before me on April 29, 1971, in Buffalo, New York. All parties were present and represented by counsel. All parties had an opportunity to call witnesses and examine and cross-examine them, to adduce relevant and material evidence, to argue on the record and to file briefs. Briefs have been received from the Charging Party and the Respondent.

Upon the entire record in this matter and in consideration of the briefs I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

It is alleged and admitted that Respondent is a New York corporation engaged in the salvaging, processing, sale and distribution of scrap metal and paper at two plants located near Lockport, New York. Respondent annually salvages, processes, sells and distributes, at its two Lockport plants, products valued at about $300,000 of which products valued in excess of $100,000 are shipped from said plant directly to States of the United States other than the State of New York. Respondent is now and has been at all times material herein an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. I so find.

II. THE LABOR ORGANIZATION INVOLVED

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

The Union has, at least since 1967, represented a unit consisting of all crane operators, burners, press operators, shear operators, metal sorters, maintenance employees, laborers and mechanics employed at the Respondent's Lockport Junction and West Genesee plants, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act and all other employees, which I find to constitute a unit appropriate for the purpose of collective bargaining within the meaning of

Section 9(b) of the Act. The Union was certified by the National Labor Relations Board October 9, 1967, as the representative of the employees in this unit. Thereafter it entered into a collective-bargaining agreement with the Respondent which, by its terms, expired on November 30, 1970.

In mid-November 1970 the Union requested Respondent to bargain for a new contract. At the same time it demanded that Respondent discharge five employees who had not complied with the union-security clause of the expiring contract. The Employer, after giving each of the five employees an opportunity to join the Union, which was declined by the employees, discharged them and so announced to the Union a week later. For personal reasons a collective-bargaining session which was scheduled before the expiration of the contract had to be put off until December 12, 1970, at which time the parties met.

The spokesman for the Respondent was John F. Kugler, the president of the Company. At the negotiating session, according to the credible testimony of the Union's business agent, Eugene McCarthy, Kugler informed the union committee that he had to go into the hospital almost immediately and had no idea how long he would be there and that he wanted to conclude an agreement prior to his entry into the hospital. The Union supplied a list of 19 subjects on which it desired to negotiate and the Employer supplied a list of subjects on which it chose to negotiate. Bargaining went on for about 4 hours, apparently in a very confused state, with various provisions being taken up and discussed, dropped in favor of other discussions and then taken up again.

At the end of the negotiation on December 12 the Employer offered a wage raise of 43 cents for the first year and 42 cents for the second year of a 2-year contract with a participating hospitalization insurance to remain as it then existed. The parties agreed that almost all issues were resolved between them. The Respondent contends that another issue with regard to dues deductions was not agreed upon. The Union contends that the Respondent agreed that it would deduct dues from all employees and turn them over to the Union monthly and that to meet the Employer's complaint that dues deduction was expensive to the Company, the Employer would be privileged to collect a 1-percent surcharge for the money it collected, that is, it would be entitled to tack on 1-percent service fee for collection of the dues.

The Union agreed to take the wage offer to the employees and the parties agreed to meet again after Mr. Kugler was released from the hospital. While Mr. Kugler testified that he had no recollection of the matter being mentioned, I find that his partner, Mr. Clark, agreed with the Union's business agent that any wage raise would be retroactive to December 14.

On December 14, according to the testimony of Kugler, some employees came to him and asked him just what his wage raise offer was, stating that the shop steward had told them about it and did not appear to understand it. Kugler called the shop steward and one of the employees into his office and explained to the shop steward precisely what his wage offer was and told him to go ahead and inform the employees and poll them as to its acceptability.[1]

The parties met again on January 6. The Union's business agent, McCarthy, brought with him a document that he himself had prepared purporting to contain the full agreement between the parties and asked Kugler to sign it. McCarthy stated that the Union was prepared to accept the Respondent's wage offer. Kugler declined to sign the document and stated that he had not agreed to the dues-deduction clause and was not satisfied with it. After considerable discussion and further negotiation the parties again reached agreement on all but the dues-deduction clause and apparently, although it is not clear in the record, the Union announced that it would strike. After the strike commenced both parties shifted their positions in various respects.

The General Counsel contends that the interview between Kugler and the shop steward on December 14, as recited above, constituted an attempt to circumvent the Union and to bargain individually with the employees. I am not convinced that the evidence reveals that such was the case. As I see it Kugler did no more than straighten out the confusion of the shop steward with regard to his offer and send him on his way to poll the employees as the Union had stated would be done. There was no attempt, revealed in the evidence, on the part of Kugler to change any agreement reached with the Union or to do anything other than make clear what his offer had been. I shall recommend that the complaint insofar as this is alleged to be a violation be dismissed.

The General Counsel contends that by withdrawing from the tentatively agreed-upon proposal regarding dues deduction without good cause Respondent evidenced a lack of good-faith bargaining in violation of Section 8(a)(5). Generally speaking this legal principle is well established.[2] However, in the instant circumstances other considerations must prevail. The record contains the document which was presented on January 6 by the Union to Respondent. The document purports to be an agreement which provides for amendments to the last prior contract. Paragraph 6 thereof is the paragraph relating to the dues checkoff which Kugler testified was the sole issue remaining and was the issue that prevented agreement on January 6. That paragraph states as follows:

> Dues and Application check-off shall be the responsibility of the Wm. Kugler & Bro., Inc. and shall be paid monthly to Local 463 and the Company shall be solely responsible in this matter. The Company is granted the privilege of charging 1% per month for each employee working under this contract.

As I read this article it appears to me to be ambiguous and, resolving the ambiguity against the party who caused the document to be drafted, that is to say the Union, unlawful. The paragraph appears to require Respondent to force its employees to sign checkoff authorizations or to check the moneys off without authorizations, either of which are actions by Respondent that would be unlawful, and grants Respondent the "privilege" of assessing an additional 1 percent against the employees for so doing.

[1] The shop steward on the witness stand admitted that he was confused about the precise offer of Respondent

[2] *American Seating Company of Mississippi* v. *N.L.R.B.*, 424 F.2d 106 (C.A. 5), and cases there cited

A further provision of the purported agreement reads as follows:

> 13. The Company shall immediately reimburse Local 463 if any of the following men are hired in any capacity other than clerical for the full initiation fee. One or more days shall make the Company responsible for the following: Jack Carew; Kenny Miller; Andy Clinch; Eli Nelson; Leroy Buncy.

This paragraph too appears to be unlawful in its intent, providing that full initiation fee shall be paid for any of the five men[3] even though they should work only a few days. This would appear to be an exaction illegal under Section 302 of the Act.

I cannot find Respondent guilty of a refusal to bargain in withdrawing from an illegal agreement, for no matter what reason. It does not appear that Kugler viewed either of the provisions recited above as unlawful nor was the matter raised in the trial of this matter in any regard. Nevertheless in my opinion Respondent was not only privileged to withdraw from an agreement containing illegal language, as set forth above, but was under a duty to do so.

Finally the General Counsel contends that at a negotiating meeting on February 11, 1971, Respondent again violated the Act by repudiating and rescinding all contract provisions which were previously agreed upon in the course of negotiations. At this time the parties had changed their position in various respects and the Union continued to press for its agreement for dues deduction. The agreements from which Respondent withdrew, according to the testimony of the Union's business agent, McCarthy, are the same agreements which the Union contends Respondent repudiated and rescinded on January 6 and include the two set forth above. I am not convinced that the purposes of the Act would be fulfilled by issuing a bargaining order under the circumstances of this case. As far as the record reveals the Union has at all times since December 12 insisted on the inclusion in the contract of the illegal provisions I have found. This in itself is warrant for Employer to decline to bargain thereupon. Accordingly I shall recommend that the complaint be dismissed in its entirety.

[3] Presumably these are the five men discharged by the Employer in November at the demand of the Union

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The General Counsel has not shown by a preponderance of the evidence that any unfair labor practice was committed by Respondent.

RECOMMENDED ORDER

I recommend that the complaint be dismissed in its entirety.