

Triangle Maintenance Corporation, Triangle Building Cleaning Co. Inc., International Building Maintenance Supply Co., Inc. and Transport Workers Union of America, AFL-CIO and Local 504, Transport Workers Union of America, AFL-CIO and Local 732, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Party to the Contract. Case 29-CA-1792

December 8, 1971

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND
KENNEDY

On July 22, 1971, Trial Examiner Frederick U. Reel issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and the Respondents filed cross-exceptions, a supporting brief, and a brief in answer to the General Counsel's exceptions.

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

The Board has considered the record and the Trial Examiner's Decision in light of the exceptions and brief and has decided to affirm the Trial Examiner's rulings, findings, and conclusions and to adopt his recommended Order.

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.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

FREDERICK U. REEL, Trial Examiner: This proceeding, heard at Brooklyn, New York, on April 21 and 22 and May 19, 1971, pursuant to a charge filed August 12, 1969, and a complaint issued December 31, 1970, presents questions whether Respondents (a) violated Section 8(a)(3) and (5) of the Act when, in taking over certain building cleaning and maintenance operations at J. F. Kennedy International Airport (herein called the airport), they failed to hire the employees who had performed the work under prior contractors or to recognize their union as bargaining representative; and (b) violated Section 8(a)(2) of the Act by assisting another union in organizing the newly hired employees. For related litigation, see *Transport Workers*

Union (Triangle Maintenance Corp.), 186 NLRB No. 71, and *Kaynard v. Transport Workers Union*, 306 F.Supp. 344 (S.D.N.Y., 1969).

Upon the entire record,¹ including my observation of the witnesses, and after due consideration of the exceptionally able briefs filed by Respondents and by General Counsel, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENTS AND THE LABOR ORGANIZATIONS INVOLVED

Respondents, hereinafter sometimes called Triangle, are closely interrelated New York corporations which provide building cleaning and maintenance services at various places, including the airport where their contracts with interstate and foreign air carriers establish that Respondents are employers engaged in activities affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Charging Parties (herein called TWU), the Party to the Contract (herein called the Teamsters), and Local 32-B of the Service Employees International Union (herein called Local 32-B) are labor organizations within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Discrimination and Refusal To Bargain*

On August 1, 1969, Triangle took over the janitorial servicing of the public areas in the International Arrivals Building (IAB) at the airport, which function for many years had been performed by a competitor of Triangle known as Allied Aviation Service Company, herein called Allied. The employees of Allied were represented by TWU. Triangle, when it took over the operation, hired new employees. General Counsel alleges that Triangle, by its failure and refusal to hire the prior crew, discriminated against those employees because of their membership in TWU, that Triangle's motive in so doing was to avoid having to deal with TWU, that the refusal to hire therefore violated Section 8(a)(3) and (1) of the Act, and that but for that allegedly unlawful conduct Triangle would have had to deal with TWU, so that a refusal-to-bargain finding should be made, or at the very least an order to recognize TWU and bargain with it should be entered. For reasons outlined below, I find that Triangle was under no duty to hire the former crew, that its reasons for not doing so were not discriminatory or unlawful, and that it therefore was and is under no duty to recognize or bargain with TWU.

1. Background

Several cleaning firms, including Triangle, Allied, and others, have been engaged for many years in cleaning various buildings at the airport, under contracts awarded by the Port of New York Authority pursuant to bids. In general, each of those companies has been dealing with a particular union as the representative of its employees. Most of Triangle's employees were represented by Local

¹ On my own motion, I hereby correct the transcript, p. 196, l. 8, changing the word "on" to "no."

32-B, although prior to the events here involved at least one group of Triangle employees (ramp employees) was represented by the Teamsters. Some of Allied's labor contracts were with TWU, although it also had contracts with Local 32-B. On several occasions when one employer succeeded in ousting another—i.e., when a cleaning contract with the Port Authority expired and a new company obtained the next contract—the new employer would bring in his own crew of workmen, and the men previously employed would have to seek jobs elsewhere. However, ever since the opening of the International Arrivals Building, and up to the events here involved, TWU had represented the employees doing janitorial service in the “public area” there, although the contract from the Port Authority for that cleaning had been held at one time by American Building Maintenance Company and at other times by Allied.

In 1959 a dispute arose between Local 32-B and a corporation known as Eastern Maintenance Service, which was a predecessor to Triangle with similar officers. At that time Eastern Maintenance had a contract with Local 32-B covering janitorial service for one building at the airport, and the employer started work in a second building. The dispute arose because Local 32-B claimed that the new work was likewise subject to its contract. The union's contention was sustained by an arbitrator whose award was upheld by the courts. Since that time, and until the present controversy arose in the summer of 1969, all Triangle's janitorial contracts at the airport had been with Local 32-B. Because of that history, when Triangle in 1969 submitted its bid for the contract held by Allied covering the public areas of the IAB, Triangle expected that, if it was awarded the contract, it would be dealing with Local 32-B as representative of the employees in that building. Indeed, Triangle's contract with Local 32-B already encompassed the cleaning of *private* areas in the IAB.

2. The events of July and August 1969

As noted, Allied's contract with the Port Authority was due to expire at midnight on July 31, 1969. This contract covered janitorial services for the public areas of the IAB, the control tower, and several outlying buildings. Allied had contracts with TWU covering the IAB and control tower and with Local 32-B covering the outlying buildings. These contracts also expired at midnight on July 31, 1969. Late in July all interested parties learned that Triangle had been awarded the contract formerly held by Allied covering these buildings. TWU had previously notified Triangle that if Triangle obtained the contract “it must retain” the employees then employed by Allied in the IAB, and, on July 24, TWU sent a telegram to Triangle requesting a meeting “to discuss transfer of present employees . . . from Allied to Triangle . . .” Triangle ignored these communications and commenced advertising for and hiring new employees to whom it offered the wage rate set in Triangle's

² General Counsel argues that the Board found in 186 NLRB No. 71 that Ralph Fine, president of Triangle, made no offer to employ TWU men at this meeting. A fair reading of that decision indicates that the Board's statement of “no offer to the former Allied employees” refers to the period between the award of the contract and the meeting on July 31. In any

contract with Local 32-B, which was a lower rate than TWU had in its contract with Allied.

On July 31, the day before Triangle took over the janitorial services under the new contract, Local 32-B officials invited Triangle officials to a meeting at the offices of Local 32-B. Also present at the meeting were representatives of TWU. At this meeting, to the surprise of Triangle, Local 32-B took the position that it would not seek to represent the employees of Triangle in the public areas of the IAB and in the control tower and that Local 32-B would respect “the jurisdiction of TWU” in those places. Triangle took the position that it had made its bid on the assumption that its Local 32-B contract would apply, that it was willing to employ any people who were willing to work for Triangle² but that the wages would be those in the Local 32-B contract, and that Triangle had no relationship with TWU. The Triangle representatives then left the meeting; the Local 32-B and TWU representatives remained but did not communicate with Triangle again that day.

At midnight that night, Triangle took over the operations formerly performed by Allied. Triangle transported a number of men to the IAB to begin work there. A large crowd collected outside, as the former employees (TWU men) gathered there to picket the premises, and a number of curious spectators augmented the throng. During the commotion, a Triangle official made an announcement over a bullhorn that anyone desiring to work for Triangle should come in and fill out an application for employment. His message was greeted with jeers, and apparently none of the former work crew applied, but instead continued to picket, claiming that Triangle was “unfair” in seeking to enforce a substantial wage cut.³

Later that night (i.e., in the early hours of August 1), Triangle learned that the Local 32-B men, who had been working in the outlying areas under contract with Allied and who Triangle had expected would continue to work there, had not reported for work. Triangle dispatched some of its new employees to service these areas. Some weeks later Triangle concluded an agreement with Local 32-B under which the men formerly employed at the outlying areas returned to those jobs and were paid at a rate which recognized their previous service rather than at the “beginners” rate.

3. Conclusions as to the 8(a)(3) and (5) allegations

As General Counsel apparently concedes, Triangle was not a “successor” to Allied in the sense that any duty devolved on Triangle to hire the Allied employees en masse. It may well be that, if Triangle had hired those employees, it would have been a successor in the sense that it would have been obligated to recognize and bargain with TWU. But, unless and until Triangle hired them (or *unlawfully* refused to hire them, so that they were by operation of law its employees), it was not a “successor.” *Lincoln Private Police, Inc.*, 189 NLRB No. 103. See also *Tri State Maintenance*

event, the finding in this case rests on the evidence in this record.

³ I premit discussion of subsequent offers which Triangle made to employ TWU men at rates acceptable to Triangle. As noted below I find no violation in Triangle's conduct on July 31–August 1, and I therefore see no need to discuss the later efforts to reach amicable adjustment.

Corp. v. N.L.R.B., 408 F.2d 171, 173 (C.A.D.C., 1968). It follows, as General Counsel conceded, that Triangle's only statutory obligation to the TWU men employed by Allied was not to discriminate against them because of their union membership. On this record, I find that General Counsel fell far short of sustaining his burden of proving that any such discrimination occurred.

TWU made several demands on Triangle on and before July 31, 1969, that Triangle retain all the TWU men then employed in the IAB and the control tower. At the time of these demands, Triangle had no relationship with, and no obligation to, TWU or its members. It may well be that TWU was the agent or representative of these men in making application for future employment by Triangle. But, as noted above, TWU erred in believing that Triangle was obligated to hire the men en masse. So far as this record shows, Triangle was willing and ready at all times to hire any or all of the TWU men, but at wage rates lower than those set in TWU's contract with Allied.⁴ This falls far short of establishing a discriminatory refusal to hire, particularly as Triangle's bid for the contract was premised on its hypothesis that it would be paying wage rates based on its contract with Local 32-B. *Piasecki Aircraft Corp. v. N.L.R.B.*, 280 F.2d 575 (C.A. 3, 1960), cert. denied 364 U.S. 933, is distinguishable, for in that case the new employer "locked out these applicants for employment . . . because of their affiliation with the Union." 280 F.2d at 584. Likewise distinguishable is *Chemrock Corp.*, 151 NLRB 1074, where the Board found a successorship because the new employer hired the production employees of the prior employer and in other significant respects took over the operation of the business it had purchased. In the instant case, Triangle took over no employees and no equipment. Moreover, Chemrock had a contractual relationship with its "predecessor," whereas Triangle was a stranger to Allied, acquiring the work not by purchase but by bid.

B. Support of the Teamsters

At 10 p.m. on the night of August 1, William Olsen, a representative of the Teamsters, went to the Triangle office and there presented Ralph Fine, president of Triangle, with a demand for recognition supported by 50 to 60 authorization cards signed by the newly hired Triangle employees. Fine, after checking a few of the cards, signed the "Interim Recognition Agreement" which Olsen presented and which recited that Triangle recognized Teamsters as exclusive bargaining agent for all Triangle employees. Notwithstanding the sweeping nature of the language, Fine testified that he understood Olsen was claiming to represent the employees at the airport in the areas just acquired by Triangle. This "Interim Recognition Agreement" contained no substantive terms of employment. During the ensuing weeks Triangle paid these employees at the rates set in its old contract with Local 32-B. Eventually Triangle concluded a new formal contract with Teamsters. This contract,

however, covered only the IAB and the control tower. Before its execution, Triangle had made its peace with Local 32-B by reemploying at the outlying areas the Local 32-B men who had worked there for Allied and by signing a new agreement with Local 32-B covering those employees which recognized for wage rate purposes their prior employment in those buildings.

General Counsel does not deny that, at the time Olsen presented, and Fine signed, the Interim Recognition Agreement, Teamsters had obtained applications for membership from a majority of the Triangle employees in the IAB and the control tower. General Counsel contends, however, that Triangle unlawfully assisted Teamsters by urging employees to sign Teamster cards and by permitting Teamsters to conduct union business on Triangle premises during working hours. I find on consideration of the record evidence summarized below that General Counsel failed to sustain his burden of proof. The cynical may suggest that Triangle naturally abhorred the vacuum created by the abdication of Local 32-B and hastened to fill it with the Teamsters rather than risk the advent of some other union,⁵ but the question is whether the evidence actually adduced fleshes out what is otherwise a mere skeleton of suspicion.

General Counsel called three employee witnesses to testify concerning the circumstances under which employees signed Teamster cards. Employee Joseph Peyton testified that on July 31 he answered an advertisement for work and was given a slip of paper directing him to report to Triangle's office on the morning of August 1. That morning he and several other newly hired employees were at the Triangle office when Olsen came up to them, introduced himself as a delegate of the Teamsters, and gave them cards to sign. It appears that at this time Olsen and the other men were in the street outside the office. The closest Peyton came to linking the Company to Olsen was his statement that "a supervisor," who later worked with the men washing planes, was in the group and later went with them from the office to the hangar where they worked. Peyton's testimony falls short of even establishing that the man to whom he referred was in fact a "supervisor" within the meaning of the Act, and *a fortiori* furnishes no support for the allegations that Triangle by "persons acting on its behalf urged and solicited its employees to sign [Teamster] cards" or permitted Teamster representatives "to conduct union business on [Triangle] premises . . ."

Employee William Bell was hired by Joe Magro, operations manager of Triangle, a few days before August 1, 1969, and began work at the Eastern Air Lines building at the airport. When he came to work on the night of July 31 after 11 p.m., he and several other employees were taken to the Triangle office in a company truck and then transported to the IAB to work there. He signed a Teamster card on the street in front of the office. Bell described what transpired as follows:

Q. Tell us what happened when you got to the New York Boulevard location.

judgment, establish any anti-TWU motivation at that time.

⁵ Triangle's relations with Teamsters began in 1964 when Olsen organized certain ramp employees. At that time Olsen enforced his bargaining demand with a strike, and he threatened similar action when he demanded recognition on August 1, 1969.

⁴ General Counsel argues that Triangle's alleged concern over wage rates was merely a mask for its determination to avoid dealing with TWU and in support thereof points to the higher wages eventually paid by Triangle when it reemployed the Local 32-B men at outlying areas and in its ultimate contract with Teamsters. These economic concessions which Triangle made long after the events of July 31-August 1 do not, in my

A. Well, Mr. Olsen was there. He asked Mr. Morgan,⁶ say, can I speak to the employees.

So he answered be-my guest.

So he came over and he told us that we were going to work for the Airport, and we had to be in the Union. So he passed the cards out, and the guys start signing them.

So I walks over to Mr. Magro and I asked him, I says should I sign this card, what do you think.

He says go ahead, because I want to know, you know—he said he wanted no labor trouble.

And then I went ahead and I signed the card.

On cross-examination Bell modified his testimony to quote Magro as telling him to sign the card, "If you want to, because I want no labor problems." Later Bell testified that he could not recall Magro's exact words, "but he didn't tell me not to sign the card. He said, 'I want no labor trouble because, as I told you, I wanted [you], you know, as a crew chief.'" Bell also testified that he did not see any other employee speak to Magro.

Considering Bell's testimony as a whole, I find it does not contribute appreciably, if at all, to General Counsel's case. The fact that Olsen requested and was given permission to speak to the employees on the sidewalk in front of the company office is insufficient to show unlawful company assistance. Of course, if Magro told Bell to sign a card, this would be evidence of assistance, but to tell Bell that he can sign "if he wants to" is quite a different matter. As the record stands, Bell's testimony is not sufficiently clear to warrant a finding that Magro gave him any directive. To be sure, Magro's statement that he did not want any labor trouble might give rise to an inference that Magro wanted Bell and the others to sign the cards. But Bell's later testimony ties in the "labor trouble" observation with some possible future supervisory status for Bell. Finally, Bell testified that the reason he asked Magro at all was that "a lot of companies doesn't want unions." As I read Bell's testimony, he was ready to sign with Teamsters unless Magro objected. I find that Magro did not give any unlawful assistance to Teamsters.

Employee David Miles testified that, having heard that Triangle was hiring at the airport, he went to the Eastern building on the morning of August 1 and was transported along with other applicants from there to the main Triangle office about noon. Miles' testimony continues:

Q. What happened when you got there?

A. Well, when we went inside, one of the men greeted us, and he asked us were you, you know, looking for jobs, and we told him yes.

So he told us to fill out this Union card, the card that was presented to me, and we all went outside, because the office was sort of small for the crowd that was in there, and we filled out the cards in front of the building, and we gave the cards back to the man.

* * * * *

Q. (By Mr. Monat) Was there any time during the day when you actually were told you were hired?

A. Yes.

Q. When was that?

A. When we were taken back to the Triangle Maintenance building at the International Arrivals Building, and there we met the supervisor, a Joe Magro, and he asked us if we wanted to work that night.

But I couldn't, because I had to go and see my mother, and my brother, Stephen Felton and I, he told him he worked that night, and my friend Peter and I, and we worked the following day, the following night.

Q. Now—

TRIAL EXAMINER: You say this was Magro at the Terminal?

THE WITNESS: Right, at the International Arrivals Building.

TRIAL EXAMINER: Who was the man who told you to sign the cards?

THE WITNESS: I don't know his name. I've only seen him once.

After I saw him just that one time when I signed the card, I haven't seen him again.

TRIAL EXAMINER: Was it the man who told you you were hired?

THE WITNESS: No. He just gave us the cards and told us to go over to the International Arrivals Building.

* * * * *

TRIAL EXAMINER: All right. Let me back track.

The first time you saw this Union card was at the Triangle office on New York Boulevard?

THE WITNESS: Right.

TRIAL EXAMINER: You don't know who it was who gave you the Union card?

THE WITNESS: No.

TRIAL EXAMINER: What else did the man say?

THE WITNESS: No. He just said are we looking for jobs. He said are you looking for jobs. He said here, sign this card, and he told the other guy to take us over to the International Arrivals Building at Kennedy Airport.

Later in his testimony Miles made it reasonably clear that he had actually received his blank Teamster card after he left the office from the driver who thereafter took him in a Triangle-owned car to the IAB. According to Miles, this driver received the cards from some person inside the office who told the driver to distribute them to the men. Miles signed the card after being reassured by some person he asked (possibly Olsen, but Miles was not certain) that he would owe no dues for 30 days.

Miles' identification of the people involved left a great deal to be desired. If we can assume that the man who drove Triangle's car was a Triangle agent for other purposes, then it was a Triangle agent who distributed those cards. Whether the man who told the driver to do so was a Triangle supervisor, or whether it was Olsen giving a directive to one of his members, is shrouded in mystery.

On this record I cannot find that Miles' testimony is sufficient to sustain the General Counsel's burden of proof. General Counsel argued that "there is some presumption that the Company has knowledge of what transpires in its offices," but the record does not contain proof of any illegality at those offices. General Counsel also stated that

⁶ Bell stated that the Morgan to whom he referred was "a supervisor," and the record contains nothing further as to him.

he did not "plan on resting on [Miles'] testimony alone, either," but even when that testimony is taken in conjunction with that of Bell and Peyton, I find a failure of proof.⁷

CONCLUSION OF LAW

Respondent has not engaged in the unfair labor practices alleged in the complaint.

⁷ There was no charge of violation of Section 8(a)(2). The complaint, issued 17 months after the events, contains the first hint of unlawful assistance. However, Respondent did not urge that the 6-month limitation

Upon the foregoing findings of fact, conclusion of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER

The complaint is dismissed in its entirety.

period prescribed in Section 10(b) bars this issue, and I therefore do not pass on the point.