United Steelworkers of America, AFL–CIO, and United Steelworkers of America, Local 4102 *and* Capitol Foundry Division, Midland Ross Corporation. Case 28–CB–654

September 20, 1972

DECISION AND ORDER

Upon a charge filed on November 29, 1971, by Capitol Foundry Division, Midland Ross Corporation, herein called the Company, and duly served on United Steelworkers of America, AFL–CIO, and United Steelworkers of America, Local 4102, herein called the Respondents, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 28, issued a complaint on February 22, 1972, against Respondents, alleging that Respondents had engaged in and were engaging in unfair labor practices affecting commerce within the meaning of Section 8(b)(3) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing before an Administrative Law Judge [1] were duly served on the parties to this proceeding. Thereafter, Respondents filed their answer to the complaint admitting in part, and denying in part, the allegations in the complaint. Subsequently, the General Counsel, by counsel, and counsel for Respondents entered into a stipulation werein Respondents withdrew their denials of paragraphs 4 and 5 of the complaint.

On April 3, 1972, counsel for the General Counsel filed directly with the Board a motion for summary judgment. Subsequently, on April 7, 1972, the Board issued an order transferring the proceeding to the Board and a notice to show cause why the General Counsel's motion for summary judgment should not be granted. Respondents thereafter filed a response to the General Counsel's motion and a motion for summary judgment. Briefs in support of the General Counsel's motion were filed by the Company and by the General Counsel.

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I THE BUSINESS OF THE COMPANY

The Company is an Arizona corporation with its principal office and place of business at Kyrene Drive, south of Baseline near Phoenix, Arizona, and has been continuously engaged in the business of a foundry, manufacturing castings and grinding balls. During the 12-month period preceding the issuance of the complaint, the Company, in the course and conduct of its business operations, purchased and received goods or services directly from outside the State of Arizona valued in excess of $50,000, and during the same period sold and shipped goods in interstate commerce directly to States of the United States other than the State of Arizona.

We find, on the basis of the foregoing, that the Company is, 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, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II THE LABOR ORGANIZATIONS INVOLVED

United Steelworkers of America, AFL–CIO, and United Steelworkers of America, Local 4102, are labor organizations within the meaning of Section 2(5) of the Act.

III THE ALLEGED UNFAIR LABOR PRACTICES

The complaint herein alleges, in material part, the following: Until on or about August 31, 1971, Respondents and the Company have been parties to a series of collective-bargaining agreements covering wages, hours, and other conditions of employment of employees of the Company in an appropriate unit and until on or about January 14, 1972, Respondents and the Company engaged in negotiations toward a collective-bargaining agreement to replace the agreement having an August 31, 1971, expiration date. During early July 1971, and continuing until on or about January 14, 1972, Respondents insisted, and continue to insist, that before they would sign a contract with the Company the Company would have to agree to incorporate in the contract the following clause:

> *Agency Shop* Article
> It is hereby agreed between the parties that the company shall deduct from the monthly pay of each employee, who shall be free to decline membership in the union, an amount equal to the local union dues that his hourly pay shall be equal to, had he seen fit to belong to the union. This agency fee shall in no way, obligate such employee under the Constitution or By-laws of the union. Despite the employees' freedom and decision to decline membership in the union when he is first employed: It will not be effective to deprive him from active membership in the union should he later decide to become an actual

[1] The title of "Trial Examiner" was changed to "Administrative Law Judge" effective August 19, 1972.

member of such union; by continuing to pay the legal union membership fee.

Nothing contained herein shall require the company to employ, or refuse to employ an individual by reason of his or her membership, or non-membership in a union.

On or about November 15, 1971, and continuing until on or about November 26, 1971, Respondents engaged in a strike in furtherance of their demands described above. On or about November 26, 1971, Respondent's and the Company agreed on all terms of a contract, except the clause set out above, and executed a memorandum reading as follows:

This agreement, together with supplements and/or interpretative grievance settlements, and including Insurance and Pensions, constitutes the entire Agreement with the exception that an agreement has not been reached between the parties over the issue of the Union's demand for an Agency Shop clause to be included in this agreement and it is understood that this entire agreement shall not become effective until the Agency Shop issue is resolved.

On November 27, 1971, Respondents and the Company entered into a memorandum of understanding reading as follows:

The Union (United Steelworkers of America and its Local No. 4102) and the Company (Capitol Foundry Div., Midland-Ross Corporation) have reached agreement on all items for a new Labor Agreement as indicated by the attached sheet dated November 26, 1971, except for the union-security clause. The Union continues its demand for an Agency Shop provision in the Agreement and refuses to sign the Labor Agreement until such Agency Shop issue is resolved.

The Company contends that such an Agency Shop provision would violate Arizona's Constitution (Art. XXV) and the "Right to Work" laws (Secs. 23–1301–7 incl. A.R.S.) and intends to file a Charge with the N.L.R.B. that the Union is committing unfair labor practices.

Pending resolution of this issue by the N.L.R.B. and the Courts, the Union agrees to withdraw pickets and to encourage employees of the Company to immediately return to work as scheduled by the Company on a day to day basis.

On or about January 14, 1972, Respondents and the Company entered into a memorandum agreement which reads as follows:

On November 26, 1971, the parties below reached an agreement for a Collective Bargaining Agreement to remain in effect until November 26, 1972; however, there remained a dispute on the matter of the Union's request that an Agency Shop clause be included in the Contract. This matter is now before the NLRB in case #28–CB–654.

The parties agree that when and if the NLRB and the courts determine that an Agency Shop provision as proposed by the Union is legal in Arizona, the Collective Bargaining Agreement may be reopened for negotiations on the Agency Shop issue only. However, until such time, the parties agree that the terms resolved by the Company and the Union committee on November 26, 1971, and ratified by the membership shall constitute a complete and entire Agreement between the parties and such Agreement shall remain in effect until November 26, 1972.

The complaint also states that it is provided in article XXV of the constitution of the State of Arizona and in section 23–1302 of the Arizona revised statutes that:

No person shall be denied the opportunity to obtain or retain employment because of nonmembership in a labor organization, nor shall the State or any subdivision thereof, or any corporation, individual or association of any kind enter into any agreement, written or oral, which excludes any person from employment or continuation of employment because of nonmembership in a labor organization.

None of the above allegations are in dispute, Respondents having admitted them in their answer.

It is the position of the General Counsel, and that of the company, too, that the clause the Unions insisted be incorporated in the contract is an agency shop union-security clause, that such is illegal under the constitution and statutes of Arizona—therefore a nonmandatory subject of bargaining—and that by refusing to sign the agreed-upon contract without the clause, by demanding that the clause be included, and by striking in furtherance of its demand, Respondents violated Section 8(b)(3) of the Act. The General Counsel further contends that the above-described conduct was unlawful in that the insisted-upon clause would require the Company to deduct the equivalent of dues from the wages of each employee without providing that such deduction be made voluntary by the employee, and in that no provision is made for a 30-day grace period. In support of the General Counsel's motion for summary judgment, the General Counsel and the Company rely, *inter alia,* on an opinion of the attorney general of Arizona holding that an agency-shop agreement is unlawful under the Arizona constitution and Arizona statutes,[2] and a similar ruling of an Arizona trial court.[3] Conversely, in support of their motion for summary judgment, the Respon-

[2] Opinion 62–2, November 24, 1961. See 49 LRRM 107

[3] *Arizona Flame Restaurant, Inc* v *Baldwin,* 34 LRRM 2707, 26 L.C. par 68,647

dents argue that the Arizona constitution and statutes prohibit only forced "membership" in a labor organization and do not bar agency-shop agreements. The supreme court of Arizona has not passed on the issue of whether an agency-shop agreement is unlawful under that State's constitution and statutes.

Although for differing reasons, a majority of the Board is of the opinion that both motions for summary judgment should be denied.

Chairman Miller and Member Penello are of the opinion from a reading of the proposed contract clause in issue that it is not clear whether this clause would in fact provide for an agency shop; i.e., establish as a condition of employment a requirement that nonmembers of Respondents pay the equivalent of dues. The clause does not state on its face that the dues deductions would be made without individual voluntary checkoff authorizations, nor, if such authorizations are contemplated, how, if at all, an individual's status as an employee would be affected if he failed to execute such an authorization. While the heading "agency shop" may imply that the payment of dues is intended to be made a condition of employment, such an intent does not appear clearly or unmistakably from the mere language of, or heading adopted for, the clause. In view of this ambiguity, they cannot, on this motion for summary judgment, determine the meaning of the clause with sufficient clarity to pass on its legality under Arizona law, and would, accordingly, deny both motions for summary judgment.

Members Fanning and Jenkins are of the opinion that as there has been no authoritative Arizona court opinion, i.e., an opinion of the supreme court of Arizona, interpreting the Arizona constitution and statutes and ruling upon the legality of agency-shop agreements thereunder, they cannot make a determination as to the validity of such agreements in Arizona, and for this reason would deny both motions.

Accordingly, as a majority of the Board agrees that the motions for summary judgment should be denied, the Board issues the following:

ORDER

It is hereby ordered that the motions of the General Counsel and of the Respondents for summary judgment be, and they hereby are, denied.

MEMBER KENNEDY, dissenting:

I would grant the General Counsel's motion for summary judgment. In my opinion, there is no genuine issue as to any material fact warranting further hearing.

It is now well settled that Sections 8(a)(3) and 14(b) of the Act, each of which is written in terms of "membership," include in them agency-shop provisions which do not require union membership but only the payment of proscribed union charges. *N.L.R.B.* v. *General Motors Corporation,* 373 U.S. 734; *Retail Clerks International Association, Local 1625, AFL–CIO* v. *Schermerhorn,* 373 U.S. 746. The "agency fee" contract clauses involved in the instant case, in my judgment, violate Arizona's constitution and its right-to-work laws, and insistence by Respondents on their inclusion in the contract, and strike in furtherance thereof, violates Section 8(b)(3).

An Arizona trial court and that State's attorney general have ruled that the Arizona constitution and Arizona statutes outlaw an agency-shop agreement. *Baldwin* v. *Arizona Flame Restaurant, Inc.,* modified and affirmed by the Arizona supreme court 82 Ariz. 385, 313 P.2d 759 (1957). And it is well recognized that in construing a statute the courts will give great weight to the opinion thereon of the State's attorney general. *Amalgamated Association of Street Electric Railway and Motor Coach Employees, Division 1225* v. *Las Vegas Stage Line,* 319 F.2d 783, 786–787 (C.A. 9, 1963). The agency-shop clause involved herein having been construed by an Arizona court and by that State's executive department as unlawful, and virtually identical clauses having been declared illegal in other right-to-work States *(Motor Coach Employees, supra),* I fail to see the need for further hearing and would grant the General Counsel's motion for summary judgment.