

**S & M Sheet Metal, Inc and Sheet Metal Workers,
Local 9, AFL-CIO Case 27-CA-3373**

November 30, 1972

DECISION AND ORDER

BY CHAIRMAN MILLER AND MEMBERS
KENNEDY AND PENELLO

On May 16, 1972, Administrative Law Judge¹ Martin S Bennett issued the attached Decision in this proceeding. Thereafter, the Charging Party and General Counsel filed exceptions and supporting briefs, and 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 authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.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 Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

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

² In affirming the Administrative Law Judge's dismissal of the 8(a)(5) and (1) allegations based on Respondent's withdrawal from a statewide multiemployer unit, we note that in the special circumstances of this case Respondent's action was lawful despite the absence of notification to the Union. The withdrawal occurred prior to the commencement of negotiations and there was no history of bargaining in the newly established statewide unit. Accordingly, unlike the situation that prevails in the case of established multiemployer units (*Retail Associates Inc.*, 120 NLRB 388, 391), we would not here require notice to the Union of an intent not to participate in or be bound by bargaining which had not yet commenced in a newly established multiemployer unit.

Member Kennedy does not join in the observations contained in this footnote.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

MARTIN S BENNETT, Trial Examiner. This matter was heard at Denver, Colorado, on March 21 and 22, 1972. The complaint, issued November 30, 1971, later amended, and based on a charge filed October 28, 1971, by Sheet Metal Workers, Local 9, AFL-CIO, herein the Union, alleges that Respondent, S & M Sheet Metal, Inc., had engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act. Briefs have been submitted by the General Counsel and Respondent.

Upon the entire record in the case, and from my observation of the witnesses, I make the following

FINDINGS OF FACT

I JURISDICTIONAL FINDINGS

S & M Sheet Metal, Inc., a Colorado corporation maintaining its principal office and place of business at Colorado Springs, Colorado, is engaged in the sale and service of heating and air-conditioning equipment. It annually purchases and directly receives goods and materials valued in excess of \$50,000 from enterprises located within the State of Colorado which in turn receive said goods and materials directly from points outside that State. I find that the operations of Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

II THE LABOR ORGANIZATION INVOLVED

Sheet Metal Workers, Local 9, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III THE UNFAIR LABOR PRACTICES

A Introduction, the Issues

Respondent is a small sheet metal contractor in Colorado Springs, Colorado. Bargaining for the industry in this State has heretofore been carried out by the Union with a number of employer associations. In Colorado Springs, this entity is Sheet Metal and Air Conditioning Contractors Association of Colorado Springs, herein Springs Interest developed among a number of contractors in bargaining on a statewide basis and a new statewide association, Colorado Association of Sheet Metal and Air Conditioning Contractors, herein Colorado, was formed.

On March 30, 1971, Respondent signed a membership agreement with Colorado which authorized the latter to represent it in statewide collective bargaining. The circumstances under which this was signed are attacked by Respondent herein. Thereafter, in September, after negotiations had commenced on April 28, a statewide agreement was executed retroactive to July 1.

The General Counsel alleges that Respondent attempted to withdraw from statewide collective bargaining at an inappropriate time, namely, after the commencement of negotiations on April 28, and, therefore, unlawfully refused to recognize the Union as the representative of its employees under this new statewide agreement. He further alleges that Respondent unlawfully bargained directly with his own employees. Respondent contends that it effectively rescinded its bargaining authorization prior to the commencement of bargaining, and further urges that there are distinct and unusual circumstances present in this case which warrant dismissal. *NLRB v Spun-Jee Corp.*, 385 F.2d 379 (CA 2), and *US Lingerie Corp.*, 170 NLRB 750. A history of the respective organizations and Respondent's participation, or lack thereof, in them is of interest.

B History of Springs and Colorado

Springs was formed in 1957 and its membership has ranged from 7 to 10. Respondent went into business sometime in 1965 and thereafter joined Springs. Van Mundy, president of Respondent, initially attended almost all meetings, but uncontrovertedly testified that he never paid any initiation fee or annual dues. The parties also stipulated that he never paid any dues from 1967 through March 1971. As of January 1971, the dues were \$120 per annum and the initiation fee was \$50 for a new applicant. There is no evidence that Respondent was pressed for payment of these sums and the inference is warranted on this record that this was overlooked in order to keep Respondent, a small shop, active in Springs.

The most recent contract between Springs and the Union covered the period from July 1, 1969, through June 30, 1971, and Mundy was on the employer negotiating committee. Mundy, who operated under a previous contract, was brought a copy to sign, did so, and lived up to its terms, including payment of fringe benefits to appropriate funds through June 30. This contract covered work in 11 named counties in the State, manifestly far less than a statewide unit, and apparently was one of a number of such agreements in the State between the Union and employer associations.

Mundy testified that he lost interest in Springs because he deemed its decisions to be tailored to the larger employers in the area. Also, because of poor business, he became interested in going open shop and this, to some extent, paralleled the formation of Colorado.¹

As for Colorado, two leading proponents thereof in Colorado Springs were Secretary Richard Steward and President George Peacore of Springs, both sheet metal contractors in the area. Thus, in December 1970, Steward wrote to members of Springs and invited them to a January 12, 1971, meeting in Colorado Springs. Mundy was notified thereof and did attend. It was agreed to meet with a sister employer group in Denver to explore statewide bargaining on wages and fringes, and also the concept of bargaining locally on local working conditions. A three-man committee, including Van Mundy and Steward, was appointed for this purpose. The committee met with Denver employers but Mundy did not make the trip.

Springs held its next meeting on March 9, and the two representatives who went to Denver reported that all was progressing well. Mundy was in attendance on this occasion. On March 13, the constitution and bylaws of Colorado were signed by all the employer associations in the State, some seven to nine in number including Springs, and on May 5 the Union was sent a list of employers who had signed authorizations to join Colorado and be bound by it for the purposes of collective bargaining. Respondent was included on this list and this, of course, is predicated upon the March 30 authorization form it executed which is treated below. As noted, bargaining started on April 28.

It may be noted that Springs sent in a dues check in behalf of all its members to Colorado and this was paid

from its treasury, as did other associations. Employers not represented by an association individually sent in checks based on the number of employees on their payrolls. One can only assume that the Springs check covered Respondent. There is no evidence that other members of Springs did not pay their dues and, as stated, Springs made this payment from its treasury.

C The March 30 Application

Peacore visited Mundy on March 30 at his shop and persuaded him to join Colorado. Peacore had held previous discussions with Mundy over the previous 9 to 12 months and was aware Mundy had in mind going open shop. As Peacore testified, in the fall of 1970 Mundy opined that he would resign from Springs because he was not operating profitably and Springs was dominated, allegedly, by the larger shops. Peacore had tried, prior to March 30, to sell Mundy on the merits of statewide bargaining and Mundy had expressed reluctance to remain in Springs.²

The form signed on March 30 states as follows:

MEMBERSHIP AGREEMENT

Colorado Association of Sheet Metal and Air Conditioning Contractors

As a member in good standing of Colorado SMACC, I hereby agree to abide by the following conditions of membership:

1 To accept and comply with the Constitution and By-laws of this Association

2 To pay full dues in the amount provided by the Board of Directors

3 Hereby to become and remain a member of the Colorado statewide multi-employer bargaining unit represented by this Association for the purpose of collective bargaining with local unions having jurisdiction of sheet metal work in our working area. Without in any way detracting from the foregoing warrant for statewide collective bargaining, it is understood that the undersigned firm may or may not be a member of a local association of employers engaged in the sheet metal industry and that the right is reserved to bargain individually or as a member of such local association with the local union in our working area relative to local conditions which may appropriately supplement a statewide agreement. The undersigned firm agrees to be bound by the determination of the Association as to the subjects which are appropriate for such local supplemental agreements without conflicting with a statewide preferential contract clause. (This paragraph shall not apply where a member does not recognize or his employees are not represented by local unions for the purpose of collective bargaining.)

4 To conscientiously live up to the standards and ethics maintained by the Association. This membership agreement shall continue in effect from year to year unless and until (i) terminated by either the under-

¹ As will be set forth there is testimony that his three journeymen proposed to him that he operate in this manner and they are now his supervisors in a drastically changed open shop.

² As noted Mundy's ostensible membership in Springs is clouded by the absence of dues payments for a number of years.

signed firm or the Association, upon written notice at least ninety (90) days prior to the anniversary date of the working agreement with the Union, or (ii) the undersigned firm discontinues active operations in the business of sheet metal and air conditioning contracting

5 I am presently a member of the following sheet metal contractors association

Sheet Metal and Air Conditioning Contractors, Assoc of Colorado Springs

In evidence of this agreement, I hereby affix my signature

Dated this 30 day of March, 1971

Firm S & M Sheet Metal

By /s/ Van A Mundy, Jr, Pres

COLORADO ASSOCIATION OF SHEET METAL AND AIR CONDITIONING CONTRACTORS

By /s/ R G Steward

Authorized Agent³

On Respondent's version, Mundy was hard at work preparing a bid due that day and was pressured to sign by Peacore. Mundy is corroborated herein by his secretary at the time. According to Peacore, he persisted in overcoming Mundy's admitted reluctance to sign and was present in Mundy's office for approximately one-half hour. Mundy placed the time as 15 to 25 minutes and his secretary, Patricia Ballensky, estimated that 15 or 20 minutes was the length of the visit.

While Respondent's testimony is to the general effect that Mundy yielded to the solicitation in order to get rid of Peacore and was uncertain what he was signing, I find that he knew what was going on. This is particularly so as Mundy had been present during the formative steps in Colorado Springs directed toward bargaining through Colorado and had been appointed to a committee to go to Denver for this purpose. Moreover, Mundy was manifestly not an unintelligent witness.

According to Peacore, he stressed the desirability of a statewide association and Mundy again stated his reluctance to do so because he might be going open shop. Peacore admittedly knew of Mundy's reluctance to join a statewide association. He denied telling Mundy that he could sign and get out at any time.

Mundy testified that Peacore said he wanted his signature as a favor to strengthen agreements with the Union and Mundy responded that he did not belong to the "Association." Peacore assured him that he could withdraw later if he changed his mind. To Mundy, his reference to the association was to Springs. According to Mundy's secretary, Peacore had told Mundy that his signature was needed, that the forms were not binding, and that he could later reverse his decision. She did endeavor to portray Mundy as not reading the form, but a consideration of her testimony reveals that she, although close by, was not in

³ Mundy was uncertain whether the name of Springs was on the form at the time he signed although Peacore thought that it was. Steward's signature was affixed at a later date apparently as an agent for Colorado. It should also be noted that the printed form is in blue type and that the name of Springs is an insertion by typewriter.

⁴ This is deemed not unlike the reluctant signature of a union

too good a position, physically, to observe what was going on.

I find that Mundy was preoccupied with the preparation of his bid, but did give general attention to and read what was being presented to him, doing more than merely signing the form to get rid of Peacore. Stated otherwise, I find that the truth runs between both versions.⁴

D The April 7 Resignation

As found, Peacore had been aware of Mundy's desire to go open shop for some time and, in fact, Mundy had so expressed himself on March 30 before signing the membership application for Colorado. Mundy and then employee and now Supervisor Ogden agree that around the first of April Ogden spoke with Mundy. Ogden stated that he was aware of the precarious financial position of Respondent, that he had spoken with his two coworkers, and that they all suggested going open shop. According to Mundy's uncontroverted testimony, the other two employees, Finch and Brant, approached him later that day to the same effect. Mundy agreed to operate on this basis in the future but only if the men became partners and financially involved. This was tailored to action after June 30 when the Springs contract expired. It is clear, and I find, that this led to the step Mundy next took.

Mundy and his then secretary, Ballensky, agreed that shortly after March 30 Mundy directed Ballensky to prepare a letter wherein he resigned from the "association." Ballensky then drafted the following letter on Respondent's letterhead, a carbon copy of which is in evidence.

April 7, 1971

Sheet Metal Contractors Association Colorado Springs,
Colorado

Attention Mr George Peacore

Dear Sir

I Van A Mundy Jr am sending this letter informing you that I am resigning from the Sheet Metal Contractors Association. This is your official notice and will take effect as of the date of this letter.

Sincerely yours,

/s/ Van A Mundy, Jr

Later that day, Ballensky asked Mundy where to send the letter and she complied with his instructions to send it to Peacore at Weather Engineers, the firm Peacore headed. Ballensky duly mailed the letter to the address of the latter firm, directed to the attention of Peacore. Receiving no reply to the letter Mundy, as he testified, telephoned Peacore approximately 1 week or 10 days later.⁵

It is obvious that the contact by his employees triggered this move by Mundy. Indeed Mundy told Peacore that he

authorization card.

⁵ Mundy also testified at one point that this call was placed on April 8 a manifest inconsistency. On the other hand Peacore was very vague in this area. He recalled only a call from Mundy that he had resigned. But he admitted herein that he contacted Secretary Steward of Springs to ascertain whether the latter had received the letter. Steward had not

had thought the matter over and that the men had approached him with the concept of leaving the Union⁶ Mundy told Peacore he had sent him a letter about resigning and Peacore stated he had not received it Mundy asked Peacore to check and the latter said he would check with Secretary Steward Mundy told Peacore that in the letter he had said he was "resigning any obligation" or that "I want out" Peacore again agreed to contact Steward and said there would be no problem

Not having heard from Peacore, Mundy telephoned Steward and told him that he had written a resignation letter Steward said he was unaware of any letter and told him not to worry, but did say there was a "time limit" in getting out of the association Steward agreed to contact Mundy but never did Mundy telephoned Steward a second time around the first of May or May 5 and inquired as to any developments Steward replied that Mundy was in trouble because there was a 90-day notice clause in the agreement⁷

Steward recalled that Peacore called him sometime in May and asked if he had received a letter from Mundy resigning from Springs Steward replied that he had not and said that negotiations had commenced (on April 28) I credit Mundy herein as to the dates The situation is a close one because, on Steward's testimony, Mundy may have been a little late in the day On the other hand, Peacore's vague testimony leads me to credit Mundy as to the time of his contacts of the former A manufactured carbon copy of the letter is readily capable of production, but it is uncontroverted that Mundy put Peacore on notice as to his action and, on this record, timely so

Mundy was asked if by this letter he intended to get out of Springs He replied only that he wanted to tell Peacore that he wanted out of whatever he was bound to and he assumed it was the local association This was not an unreasonable procedure President Peacore of Springs had been the basic contact of Mundy in connection with the formation of Colorado and Secretary Steward of Springs, together with Peacore, were the primary local motivating factors Also, Mundy knew no Colorado officials Stated otherwise, Mundy attempted to and ultimately did contact the only two persons he knew to be involved in the new bargaining group which was in the formative stages

E Subsequent Developments

On May 5, Steward, as chairman of the negotiating committee for Colorado, sent the Union a list of the contractors who had authorized Colorado to bargain for them, the list included Respondent

On June 28, documents were prepared setting up a new business format at Respondent These made each of the three employees a supervisor with the right to hire and fire and were executed early in July by each employee and Mundy Each of the three was given a small stock interest

⁶ Although the three men did hedge their bets by continuing union membership through the end of the year

⁷ This would seem to be item 4 which maintains membership in Colorado from year to year absent a 90-day written notice prior to the anniversary date of the union contract or the employer discontinuance of business I deem this not pertinent herein

⁸ On July 15 the three employees of Respondent had written to the

and, at the end of the year, 10 percent of net profits was to be assigned for the purpose of purchasing each an interest in the business Each of the three now has a staff of employees varying in number, and is assigned to a segment of the business Mundy also advised Business Agent Easom of the Union at this time that he was going open shop

Mundy was still uncertain of his legal position Being invited by Peacore to attend a meeting of Springs on July 22, he did so after contacting counsel He delivered the following letter to the meeting on this occasion and promptly departed

July 22, 1971

Colorado Association of Sheet Metal and Air Conditioning Contractors

Gentlemen,

I Van A Mundy Jr of S & M Sheet Metal Inc 3608 North Stone Ave Colorado Springs, Colorado, do hereby respectfully submit my resignation to the Colorado Association of Sheet Metal and air conditioning contractors

Due to the fact that all union personell of S & M Sheet Metal have requested withdrawall card from the local union

Thus it is apperant that I shall not be able to abide by the conditions set forth in the membership agreement [Sic]

Sincerely yours,⁸

After the execution of the Colorado contract in September, Respondent was asked to sign, and refused on the basis that he did not recognize that contract He has since refused to honor or comply with it

F Analysis and Conclusions

As stated, Respondent did attempt to get out of the Colorado bargaining picture prior to April 28 when bargaining commenced On this record, his April 7 letter went astray, but I find that the local representatives of Colorado, namely Peacore and Steward, were on notice of the content of the letter and timely so prior to the start of bargaining To ignore this letter and the ensuing telephone communications, the latter not disputed, and to thus fault Respondent on the basis of lack of timely withdrawal would, in my view, elevate form over substance

While Respondent was not an innocent babe-in-the-woods, the fact is that he had long expressed himself to Peacore in favor of going open shop and, indeed, had done so on March 30, at the time he had reluctantly signed the authorization form I find, therefore, that Respondent withdrew from Colorado prior to the start of bargaining and shall recommend dismissal of this allegation of the complaint⁹

As for the allegation that Respondent negotiated directly

Union pointing out that they had become financially involved in business and requested withdrawal cards as well as vacation fund payments As noted they did hedge and later in the year made dues payments to cover them through the calendar year

⁹ Respondent's answer disputes majority representation of the Union among the members of Colorado I doubt that the May 5 notification to the Union by Colorado of the firms it represented constitutes adequate proof of

(Continued)

with his employees on June 28, this, too, must fall. The contract was executed after the expiration of the Springs contract on June 30 with employees who had been made supervisors. The record is silent as to the union affiliation, if any, of new hires. Stated otherwise, the presumption of continuing majority would not seem to exist under the circumstances of this case.

Assuming it did apply here, it could support a refusal to bargain allegation for the Union based on a unit of Respondent's employees only. But the complaint is phrased solely in terms of a refusal to bargain as part of the statewide unit, and there was not an attempt by the Union to seek bargaining on a local basis only.

Stated differently, I do not have before me an allegation that the Union attempted to bargain with Respondent *individually* which conceivably it might have done by seeking a contract similar to the Colorado contract. I find therefore that Respondent has not engaged in unfair labor

majority representation of the employees of the members of Colorado for the purposes of Section 9(a) of the Act. This record discloses only the union membership of Respondent's employees. In any event, in view of the above disposition, I deem it unnecessary to treat with this point.

¹⁰ In view of this disposition, I deem it unnecessary to treat with Respondent's contention that the Colorado contract is invalid under the Colorado Labor Peace Act because a referendum for a union-security

practices within the meaning of Section 8(a)(5) and (1) of the Act.¹⁰

CONCLUSIONS OF LAW

1 S & M Sheet Metal, Inc., is an employer whose operations affect commerce within the meaning of Section 2(6) and (7) of the Act.

2 Sheet Metal Workers, Local 9, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3 Respondent has not engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(e) of the Act, I hereby issue the following recommended.¹¹

ORDER

The complaint is dismissed in its entirety.

agreement had not been conducted.

¹¹ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.