

Sheet Metal Workers International Association Local No. 2, AFL-CIO and Farmer & Sipes, Inc. d/b/a Rain-Flow of Kansas City. Case 17-CP-131

February 1, 1973

DECISION AND ORDER

BY MEMBERS FANNING, KENNEDY, AND PENELLO

On October 3, 1972, Administrative Law Judge Jerry B. Stone issued the attached Decision in this proceeding. Thereafter, General Counsel filed exceptions and a supporting 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 brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge as modified herein and to dismiss the complaint in its entirety.

We agree with the ultimate conclusion of the Administrative Law Judge that the General Counsel has not established that Respondent has violated Section 8(b)(7)(A) of the Act, but for the reasons here recited.

The complaint alleges that the Respondent in May 1972 engaged in recognitional picketing at a construction project where the Employer, Charging Party here, had lawfully recognized District 50, United Allied Technical Workers of America and Canada as the representative of its employees, and "a question concerning the representation of said employees under Section 9(c) of the Act could not appropriately be raised" within the meaning of Section 8(b)(7)(A).

To support the allegation the General Counsel introduced into evidence an agreement between Rain-Flow and District 50. This is a one-page document dated October 1, 1971, with an Appendix "A" specifying hourly wage rates as of "10/1/71" for gutter journeymen, gutter helpers, and apprentices. It adopts the terms of an existing contract—effective November 3, 1970, to November 2, 1972—between District 50 and the United Contractors Council.¹

The Administrative Law Judge dismissed on the

¹ Rain-Flow became a member of the Council in October 1971. Appendix B, entitled "Supplemental Agreement," also executed October 1, 1971, lists certain exceptions from the existing contract with the Council, including the definition of the workday as starting and ending an hour earlier, deletion of various apprenticeship obligations, elimination of a provision to deduct part of the health and welfare payments from employee holiday and vacation benefits, etc. The 8-day union-security provision for newly hired employees and the exclusion of "office and clerical employees, professional employees and guards and supervisors" from the bargaining

theory that in the construction industry a contract creates no presumption of majority such as would bar a rival petition or satisfy the final clause of Section 8(b)(7)(A). We do not reach that issue in this case inasmuch as the contract, as administered, shows a lack of stability in the bargaining relationship and would not, in our view, prevent a question concerning representation being raised under Section 9(c) of the Act. Accordingly, we shall dismiss on this ground alone.²

The manner of applying the contract with District 50 was described by the testimony of Rain-Flow's president, Farmer. Though served, District 50 did not appear at the hearing. Farmer testified that at the time of hearing there were eight employees, of whom "four or five" were members. Concerning their compensation he testified that all full-time employees work on a piecework basis except for hanging downspouts, but that part-time employees—"most of them college personnel"—are hourly paid, at less than contract scale. He stated that the contract rate would be paid "if they were in the Union. Part are and part are not."³ Farmer admitted that part-time employees do some guttering work and that the contract by its terms applies to all employees listed in Appendix A, but in his view part-time employees are casuals rather than gutter helpers or gutter journeymen. He explained the piecework rate as based on a specific sum per lineal foot of gutter produced from a mobile fabricating unit, a pay basis that means no overtime is paid; also that District 50 has no objection to how employees are paid "as long as they are paid what the union contract calls for per hour on a weekly basis." No signed memorandum regarding this arrangement was offered. Farmer also testified that employees receive no compensation from the time of reporting to the warehouse until they get to the job, or for the time after they leave a job until they arrive at the warehouse. A former employee testified that he averaged 10 hours a day under the piecework system; the other employee witness testified that he averaged more than 8 hours a day.

Thus, the contract has not been applied at all to nonmembers and, as to members, significant contractual provisions have not been implemented, without objection by District 50. These include the hourly rates of pay set out in Appendix A, which

unit are among the provisions of the contract not excepted

² See *Local Union No. 42, Laborers International Union of North America, AFL-CIO (R & E Asphalt Service, Inc.)*, 185 NLRB No. 34; *Emanuel Birnbaum and John W. Jones d/b/a Silver Lake Nursing Home*, 178 NLRB 478.

³ Rain-Flow is located in Kansas City, Kansas, a right-to-work State. The picketing occurred at a Missouri jobsite. Employee Loomis testified that he was told by the Company that he could join the Union but did not have to "in Kansas."

have been supplanted by piecework rates for fabricating and installing guttering; the provisions for compensation for overtime after an 8-hour day and/or a 40-hour week; the provision that all time spent driving the company truck from the shop to the job will be done within the working day and paid for; and the provision specifying that "All wage rates not herein provided for shall be determined and established by collective bargaining Schedule of wage rates shall be attached hereto and made part of this agreement." We conclude that at the time of Respondent's picketing a question concerning representation could appropriately have been raised under Section 9(c) of the Act, hence under Section 8(b)(7)(A) the Respondent was not prohibited from engaging in this concerted activity.⁴

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.

⁴ The picketing was stopped when Respondent received notice of the filing of the charge

DECISION

STATEMENT OF THE CASE

JERRY B. STONE, Administrative Law Judge: This proceeding, under Section 10(b) of the National Labor Relations Act, as amended, was tried pursuant to due notice on July 20, 1971, at Kansas City, Missouri.

The original charge was filed on May 19, 1972. The amended charge was filed on June 7, 1972. The complaint in this matter was issued on June 9, 1972. The issues concern whether or not Respondent has violated Section 8(b)(7)(A) of the Act.

All parties were afforded full opportunity to participate in the proceeding. Briefs have been filed by the General Counsel and the Respondent and have been considered.

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

FINDINGS OF FACT

I. THE BUSINESS OF THE EMPLOYER

The facts are based on the credited testimony of Fred Farmer, Jr. Farmer & Sipes, Inc., d/b/a Rain-Flow of Kansas City, the Employer herein, is a Kansas corporation engaged in the building and construction industry, fabricating and installing guttering, with its principal place of business at Kansas City, Kansas. The Employer in the course and conduct of its business annually purchases materials and supplies valued in excess of \$50,000 directly from outside the State of Kansas. Based on the foregoing,

it is concluded and found that the Employer is now, and at all times material herein has been, an employer engaged in commerce within the meaning of Section 2(6) and 2(7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The facts are based on the pleadings and admissions therein. Sheet Metal Workers International Association Local No. 2, AFL-CIO, the Respondent, is now, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act. It is so concluded and found.

III. THE ALLEGED UNFAIR LABOR PRACTICES

The question presented in this case is whether the Respondent, Sheet Metal Workers International Association Local No. 2, AFL-CIO, violated Section 8(b)(7)(A) of the Act, by picketing the Employer, Farmer & Sipes, Inc., d/b/a Rain-Flow of Kansas City, on May 4, 5, 8, and 9, 1972.

The facts are undisputed that (1) the Employer is engaged in the building and construction industry in the fabrication and installation of guttering, (2) the Employer since on or about May 3, 1972, and continuing to date, has been engaged in fabricating and installing metal guttering at a project at the Tiffany Manor Construction site located on NW. 80th Terrace, Kansas City, Missouri, (3) the Employer, at all times material herein, employed certain employees performing fabrication and installation of metal guttering at the aforesaid project, (4) the Respondent on May 4, 5, 8, and 9, 1972, picketed the Employer and caused said Employer to be picketed at said project; and (5) the Respondent, at the time of such picketing, was not the certified or recognized collective-bargaining representative of the employees of the Employer.

The facts are undisputed that at the time of said picketing Respondent's pickets carried signs bearing the following legend:

NOTICE TO THE PUBLIC

THIS NOTICE IS ADDRESSED ONLY TO THE GENERAL PUBLIC AND NOT TO ANY EMPLOYER OR EMPLOYEES SHEET METAL WORK BEING PERFORMED ON THIS JOB BY

RAIN-FLOW of Kansas City

IS NOT BEING DONE BY BUILDING TRADES SHEET METAL WORKERS THE SAID EMPLOYER DOES NOT HAVE A BARGAINING CONTRACT WITH THE BELOW NAMED LABOR ORGANIZATION AND AS A RESULT THEREOF, THE PREVAILING RATES OF PAY & CONDITIONS FOR SHEET METAL WORKERS ARE NOT BEING MET BY SAID EMPLOYER!

**SHEET METAL WORKERS LOCAL NO. 2,
of Kansas City and Vicinity A.F.L.-C.I.O.**

The facts also reveal that the Respondent had sent a

registered letter to the Employer on January 21, 1972, to the following effect:

January 21, 1972

Mr. Fred Farmer, Jr. Rain Flow of Kansas City 8004
1/2 Leavenworth Road Kansas City, Ks. 66109
CERTIFIED MAIL NO. 633911

Dear Sir:

The undersigned Sheet Metal Workers' Local No. 2 of Kansas City and Vicinity, AFL-CIO, claims jurisdiction of sheet metal work in Wyandotte and Johnson Counties in Kansas. Also Jackson, Cass, Platte and Clay Counties in Missouri. You are presently performing such gutter work in these counties.

The members of this organization, who are employed in sheet metal work in the Greater Kansas City area presently receive a \$8.22 1/2 per hour basic wage rate plus other fringe benefits. We have been investigating the wage rates of your employees who are performing sheet metal work in the aforesaid Counties. We find that your said employees are being paid rates below union scale for sheet metal workers and that they have less favorable working conditions.

We, herewith, advise you that this Labor Organization intends to use picket signs and otherwise publicize to the general public that your company does not have a contract with this union, for the sole purpose of letting the general public know that your company is maintaining substandard wage rates and working conditions for the persons performing sheet metal work on this aforesaid project.

We wish to make it entirely clear to your company that this Labor Organization is not making any demands on your company. This Union is not claiming to represent any of your employees. We are not, in any way, requesting or demanding that they join our Union or that you, in any way, seek to interfere with the rights of your employees to decide upon what Union, if any, they desire to have represent them.

Our picketing is in now way intended, nor is it an attempt, to induce or encourage any of your employees, or employees of any other employer, to engage in refusal to work, transport or otherwise handle or work on any goods, materials, etc. We are not requesting or encouraging any employees to cease performing, or to refuse to perform any services. The said picketing is not intended to interfere with any of the work, deliveries or any other activity at your project.

We again state that we desire only to exercise the right of this labor organization to publicize the fact that your company does not have a collective bargaining agreement with this Union, covering the wages, hours and other conditions of employment of the persons performing sheet metal work on your project and for the sole purpose of letting the general public know that as a result thereof, your company is maintaining substandard wage rates and working conditions for the persons performing sheet metal work on your said project.

Very truly yours,

Robert J. Dye
Business Manager
Sheet Metal Workers' Union No. 2
RJD:dh
Certified Mail No. 633911

In addition to the foregoing there is disputed evidence as to whether Respondent, by its agents, had written other letters to the Employer and had had oral conversations with officials of the Employer and employees of the Employer bearing upon its motivation for said picketing. Further, there is dispute as to a conversation that occurred between one of Respondent's agents and an official of another Employer, and as to the bearing such conversation might have as to revealing the motive and object of such picketing.

The General Counsel alleges and contends that the picketing involved in this proceeding was for unlawful objects. Thus the General Counsel's complaint alleged in effect that Respondent's picketing was with the object thereof being (1) to force or require the Employer to recognize and bargain with the Respondent as collective-bargaining representative of the employees of the Employer, or (2) to force or require said employees to accept or select the Respondent as their collective-bargaining representative.

I do not find it necessary to determine whether or not Respondent's picketing was for the objects contended by the General Counsel. Essential to the General Counsel's contention of conduct violative of Section 8(b)(7)(A) is the establishment that such picketing occurred "where the employer has lawfully recognized in accordance with this Act any other labor organization and a question concerning representation may not appropriately be raised under Section 9(c) of the Act."¹

The General Counsel has not sustained his burden of proof with respect to this essential part of the elements of proof. It is, therefore, not necessary to determine the "objects" of the picketing otherwise.

The General Counsel's complaint alleges that "The Respondent engaged in the activity described in paragraph 5 above, where the Employer has, in accordance with the Act, lawfully recognized District 50, United Allied and Technical Workers of America and Canada as the representative of certain employees of the Employer (including those referred to above in paragraph 4(b)) for collective bargaining purposes, and a question concerning the representation of such employees under Section 9(c) of the Act could not appropriately be raised at the time of such activity."

The facts reveal that the Employer and District 50, United Allied and Technical Workers of America and Canada, entered into a collective-bargaining agreement on October 1, 1971. Such collective-bargaining agreement (1) provided in effect that the Employer recognized District 50 as the exclusive collective-bargaining representative of the employees involved in the work picketed in this proceeding and (2) consisted of a written agreement as to terms and

¹ Quoted from Sec. 8(b)(7)(A) of the Act.

conditions of employment of such employees. The facts submitted (1) raise a question as to whether in practice the parties have construed the contract to cover all employees properly in the appropriate bargaining unit and (2) raise a question as to whether in real effect said contract has been construed as a "members only" contract. As indicated, it is not necessary to resolve such issue in this case.

The facts reveal that the Employer herein is engaged in the building and construction industry. Such an employer is permitted by law (Sec. 8(f) of the Act) to enter into a collective-bargaining agreement with a labor organization even though "the majority status of such labor organization has not been established under the provisions of Section 9 of this Act prior to the making of such agreement." For such reason, there is no presumption that the collective-bargaining agreement entered into on October 1, 1971, by the Employer and District 50 was an agreement entered into at such time as District 50 had an established majority status within the meaning of Section 9 of the Act. No evidence has been offered otherwise to establish that District 50 was in fact the representative of the majority of the employees in the appropriate collective-bargaining unit at the time the October 1, 1971, contract was executed. Section 8(f) of the Act further provides "that any agreement which would be invalid, but for clause (1) of this subsection,² shall not be a bar to a petition filed pursuant to Section 9(c) or 9(e)."

The General Counsel cites *Local No. 8280 United Mine Workers of America Leatherwood No. 1 Mine of Blue Diamond Coal Company, et al.*, 166 NLRB 271, and *Laborers 1298, AFL-CIO (Roman Stone Construction Co.)*, 153 NLRB 659, as supporting his contention that the validity of the recognition of District 50 and the collective-bargaining agreement between Rain-Flow and District 50 cannot be attacked because of Section 10(b) and the absence of a timely charge. The *Leatherwood* case is distinguishable from the instant case in that the *Leatherwood* case does not involve the building and construction industry. The Board in the *Leatherwood* case does use language to the effect that it considered itself controlled by its decision in the *Roman Stone* case that the term "lawfully recognized" in Section 8(b)(7)(A) was meant to include all bargaining relationships immune from attack under Section 8(b)(7)(A) of the Act.

² Such clause refers to the fact that the failure of establishment of majority status of the labor organization under Sec. 9 of the Act does not make unlawful such building and construction industry collective-bargaining agreements.

³ Considering the facts of *Roman Stone* and the Board's language in *Roman Stone* and *Leatherwood*, I do not interpret those cases as meaning that the Board contemplated that an 8(f) collective-bargaining agreement wherein a union was lawfully recognized is immune from attack. Assuming General Counsel's interpretation of such cases, it is clear that the clear

The *Roman Stone* case is distinguishable from the instant case in that the pleadings revealed no denial of lawful recognition of the union involved in the bargaining relationship with the Employer. Further, it is noted that the bargaining relationship in *Roman Stone* commenced in 1950 before the event of the permissive 8(f) Building and Construction prehire agreements. Thus, the presumption existed of a valid majority designated union being accorded recognition.

I am persuaded that the Board's decisions in *R. J. Smith Construction Co., Inc.*, 191 NLRB No. 135, and *Ruttman Construction Company*, 191 NLRB No. 136, are controlling in the instant case and that in the Building and Construction Industry there is no presumption that a contract in and of itself creates a presumption that the Union is the majority designated exclusive bargaining representative.³

Considering the foregoing, it is clear, and I conclude and find that the General Counsel has not established that a question concerning representation could not appropriately have been raised under Section 9(c) of the Act at the time of the complained of picketing. It follows that the General Counsel has not established that Respondent has violated Section 8(b)(7)(A) of the Act.

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

CONCLUSIONS OF LAW

1. Farmer & Sipes, Inc., d/b/a Rain-Flow of Kansas City, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Sheet Metal Workers International Association Local No. 2, AFL-CIO, is and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

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

ORDER⁴

The complaint in this proceeding is dismissed in its entirety.

language of the *R. J. Smith* and *Ruttman* cases would constitute an overruling thereof, at least *sub silentio*.

⁴ 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.