

Walker's Midstream Fuel & Service Co. and Marine Officers Association, Local 54, an affiliate of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and Plant Bargaining Committee. Case 9-CA-7649

January 7, 1974

DECISION AND ORDER

BY MEMBERS JENKINS, KENNEDY, AND
PENELLO

On August 9, 1973, Administrative Law Judge Melvin J. Welles issued the attached Decision in this proceeding. Thereafter, the Respondent 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 the brief and has decided to affirm the rulings, findings, conclusions, and recommendations of the Administrative Law Judge to the extent consistent with this Decision.

The Administrative Law Judge found that Respondent violated Section 8(a)(2) and (1) by recognizing and signing a contract with the Plant Bargaining Committee. We disagree and find, contrary to the Administrative Law Judge, that the complaint should be dismissed in its entirety.

The pertinent facts are as follows. During October 1972, Respondent's president, Paul Walker, talked with some of his employees concerning a wage increase and other benefits. Due to the nature of Respondent's business, few employees were present at Respondent's facility at any given time. Consequently, Walker initiated the idea of an employee committee which, if selected by the employees, "could work out some kind of an agreement" with him. On or about November 1, 1972, one of Respondent's dispatchers, Richard Birch,¹ told employees Charles Amis, Candy Blair, and Frank Murphy that "We are getting up a committee to go up and talk to Mr. Walker about a raise." Although the record shows that initially the committee was to be made up of five employees including Birch, only the three above-named employees selected by Birch actually served as spokesmen. A meeting between Walker and the "Committee" had been prearranged by Birch.

¹ There is no probative evidence in the record to indicate that he was a supervisor

² The record shows that the employees had been talking about attempting to get a raise during the month of October, and before any

meeting with Walker took place.
³ The record shows that Murphy spoke to 15 or 20 of the approximately 33 employees about the contract

Shortly after their selection, the three employees went to Walker's office to discuss a raise.² According to Murphy, they also suggested "some things" with regard to working conditions at that meeting. Walker testified that "they said they represented the people and I negotiated with them." The record shows that Walker then drew up an agreement which was posted in the dispatch office for approximately 10 days. The three "Committee" members, as they were referred to by Birch, spoke with many of Respondent's employees during the posting period. Murphy stated that "some were for it and some weren't. . . . I thought the biggest majority was for it so I signed it."³ No objective evidence, however, was presented to show that the "Committee" represented a majority of the employees. The contract, which was signed by the three "Committee" members and by Respondent, was for a term expiring April 2, 1974.

Since the execution of that agreement, the Teamsters has filed a petition to represent the employees herein. No election has been directed, and whether one will be so directed is dependent upon whether this contract is a bar. Walker testified that while attempts by outside unions to organize his employees was "a continual thing and nothing unusual," he "had no knowledge that any concentrated effort was being made." Willard Massingell, a General Counsel witness, testified that, prior to November 1972, he spoke with a number of Respondent's employees to determine their feelings about a union coming into the plant. However, Massingell stated that he did not mention the name of the union until "they got this little old contract started. . . ." Murphy testified that at some point Walker told him that a union was trying to get in, and that he "would do anything in his power to keep [a union] out." The Administrative Law Judge, however, was unable to conclude from the record that this statement was made during the critical period.

While the Administrative Law Judge did not find that the General Counsel had proven that Respondent established or assisted the Plant Bargaining Committee on or about November 1, 1972, he did find that Respondent violated Section 8(a)(2) and (1) of the Act first by granting the "Committee" recognition, and then by executing and maintaining a collective-bargaining agreement with it. In so finding, the Administrative Law Judge noted that (1) President Walker "knew, or should have known, that the committee was only a spokesman" on the single

issue of a wage increase and not a functioning labor organization;⁴ (2) no real bargaining took place between the employees and Walker; and (3) Walker's desire "to keep any and all outside unions on the outside" represents the true motivation for his preparation and execution of the aforementioned agreement. Since there was "no actual proof" that the "Committee" did represent a majority of the employees, and "insufficient evidence from which to find, or infer, that it did not," the Administrative Law Judge did not rely on any lack of majority status in making his unfair labor practice findings.⁵

Contrary to the Administrative Law Judge, we believe that the complaint must be dismissed in its entirety because of the General Counsel's failure to meet his *prima facie* burden of establishing the Plant Bargaining Committee's lack of majority. In a recent case, *American Beef Packers, Inc.*,⁶ the Board held that it is General Counsel's burden to prove that the union did not in fact represent a majority at the relevant time. In the instant case, the General Counsel did not introduce any evidence to support his allegation that the Plant Bargaining Committee did not represent a majority of the Respondent's employees. Therefore, under the circumstances of this case, we can find no violation of Section 8(a)(2) in the recognition of the Union by Respondent. Accordingly, we shall dismiss the complaint in its entirety.

ORDER

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

⁴ The record shows that the "Committee" was an informal one without any structure in that it had no officers, no dues, no constitution or bylaws, and it never had an employee meeting or election.

⁵ It was alleged in the complaint that the "Committee did not represent the majority of Respondent's employees for collective bargaining purposes."

⁶ 187 NLRB 996.

DECISION

STATEMENT OF THE CASE

MELVIN J. WELLES, Administrative Law Judge: This case was heard at Paducah, Kentucky, on June 26, 1973, based on charges filed March 14, 1973, and an amended complaint issued June 5, 1973, alleging that Respondent violated Section 8(a)(1) and (2) of the Act. Respondent has filed a brief.

¹ This is Walker's testimony Willard Massingell, a General Counsel witness who was clearly hostile to Respondent, confirmed the fact that the employees had been talking about trying to get a raise in October, before any meeting took place with Walker.

² Other than the fact that he was a dispatcher, the only testimony

Upon the entire record in the case, including my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT AND THE LABOR ORGANIZATION INVOLVED

Respondent is a Kentucky corporation engaged in the service, repairing and fueling of river barges and other vessels at its facilities at Paducah, Kentucky. During the 12 months prior to the issuance of the amended complaint, Respondent furnished services valued in excess of \$50,000 to customers outside the State of Kentucky. I find, as Respondent admits, that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. The Charging Party and the Plant Bargaining Committee are labor organizations within the meaning of Section 2(5) of the Act.

II. THE UNFAIR LABOR PRACTICES

A. *The Facts*

Some time in October 1972, Paul Walker, president of Respondent, had talked with a number of his employees about "some of the benefits they were receiving and also they wanted to discuss a raise."¹ Because of the nature of Respondent's business, very few employees were present at the facility at any one time. Accordingly, Walker told them that if they selected a representative committee, "we could work out some kind of an agreement." About November 1, Richard Birch, one of Respondent's dispatchers,² spoke with Charles Amis, Candy Blair, and Frank Murphy.³ Birch told them, as Amis testified, "We were getting up a committee to go up and talk to Mr. Walker about a raise." Birch said there would be five on the committee to see Walker, including Birch himself, but only Amis, Blair, and Murphy agreed to go. Blair testified to the same general effect, that Birch said, following "all kind of talking about another raise," "we had a committee going up there to talk to Mr. Paul about a raise," and "we were the only three that would go up there and talk to the man." Murphy testified that the matter had been worked out in advance by Birch, after having been talked about down on the dock.

Amis, Blair, and Murphy then went to President Walker's office. They then talked about the raise, and about working conditions, to Walker. The three employees "suggested some things—what benefits," according to Murphy. Walker testified that "They said they represented the people and I negotiated with them." Walker then drew up an agreement, copies of which were apparently left in the dispatch office, or posted there for the next 10 days or so. The three committee members (Birch called them the "Committee" when he selected the three to see Walker), spoke to many of the employees during that period. As Murphy put it, "some were for it and some weren't . . . I

concerning Birch was that of employee Charles Amis, who testified that Birch "was supposed to be one of the bosses down there . . . he calls us on the radio and gives us orders."

³ Apparently, he spoke with Amis and Blair in the office, at the same time, but spoke with Murphy at the dock.

thought the biggest majority was for it so I signed it." Murphy had himself spoken to some 15 or 20 of the approximately 33 employees about the contract. Thereafter, about November 10, 1972, the contract was signed for the Company by Paul Walker and Charles Walker, Jr., and for the employees by Frank Murphy, Charles Amis, and Candy Blair.

General Counsel witness Willard Massingell testified that prior to November 1972 he talked to a number of employees to see how they felt about a union coming into the plant, but never mentioned the name of any union "up until they got this little old contract started." Murphy testified that at some point Walker told him that a union was trying to get in and he would do anything in his power to keep it out. Murphy's recollection as to this event and his placement of it in reference to the events of October and November 1972 were so vague that I am unable to conclude that Walker made any reference to a union trying to get in during the critical period, particularly in the light of Massingell's aforementioned testimony.

B. Discussion

The sole issue in this case is whether Respondent unlawfully aided, assisted, and supported the so-called Plant Bargaining Committee by the acts described above, including granting it recognition and executing and maintaining a collective-bargaining agreement with it. The General Counsel neither filed a brief with me nor did he express his theory of the case to me orally, so I must of necessity glean his theory from the complaint itself. The operative paragraphs thereof state that the unlawful aid, assistance and support consisted of "arbitrarily establishing and granting recognition to the Plant Bargaining Committee . . . notwithstanding the fact that the Plant Bargaining Committee did not represent a majority of Respondent's employees"; and "preparing, executing, and . . . maintaining a written collective bargaining agreement with the Plant Bargaining Committee . . . at a time when the . . . Committee did not represent the majority of Respondent's employees for collective bargaining purposes . . ." As I read these allegations, the questions to be decided are whether the committee was in fact established by Respondent, and whether the proof shows that the committee did not represent a majority when it was recognized and when the contract was executed.

The first question must be answered in the negative. The testimony of all the witnesses shows that the employees had been discussing a possible raise with Respondent's president, Paul Walker, and that a committee was selected to see Walker about a raise, with dispatcher Birch instrumental in the selection of Amis, Blair, and Murphy to serve on the committee. There is no probative evidence in the record that Birch was a supervisor. Amis' testimony that Birch "was supposed to be one of the bosses down there" hardly suffices to establish Birch as a statutory supervisor, nor does Amis' "he calls us on the radio and gives us orders" establish supervisory status, in the light of the fact that Birch was a dispatcher. And dispatchers, the Board has consistently held, are not, solely by virtue of dispatching functions, supervisors. *Vangas, Inc.*, 167 NLRB 805, 806. *Fresno Auto Auction, Inc.*, 167 NLRB 878,

879; *Norfolk, Baltimore, and Carolina Lines, Inc.*, 175 NLRB 209, 210.

Thus, there is no reason to assume that when Birch said "We were getting up a committee . . ." (emphasis supplied), he was referring to management rather than to the employees. Furthermore, the testimony shows that Birch and the other employees had been discussing the matter prior to Birch's "selection" of Amis, Blair, and Murphy as the committee to see President Paul Walker, and, indeed, Birch had originally contemplated being on the committee himself. As noted above, Massingell, plainly hostile to Respondent, nevertheless testified that he heard the men talking for some weeks prior to the committee's meeting with Walker about trying to "get one up." Thus, Paul Walker's testimony that he had talked to many of the employees about their desire for a raise, and that he told them to select a committee because of the difficulty of getting together with the full group, is not disputed, but rather confirmed, by the testimony of the General Counsel's witnesses. In all these circumstances, I find that the General Counsel has not proven that Respondent established or assisted the Plant Bargaining Committee on or about November 1, 1972.

On the other hand, although the suggestion to form a "committee" may have been only to facilitate discussion of the employees' desires as to a wage raise, with the nature of the operation precluding any sort of mass meeting of the employees with management, Walker's own testimony makes it clear that he knew, or should have known, that the committee was only a spokesman, and scarcely purported to be a functioning labor organization acting as the statutory exclusive bargaining representative of the employees. Indeed, the "Committee" had no officers, no dues, no constitution or bylaws, had never had an employee meeting or an election, had no minutes, and had no structure at all, formal or informal.

It is also clear from all the testimony that there was no real bargaining between the three employees and Walker at the November 1 meeting. Rather, Walker prepared a contract, and he told the committee at the next meeting, the contract already completed, to take the contract down to the men and let them read it. The contract was for a term expiring April 2, 1974. Walker's testimony indicates that the Teamsters filed a petition for his employees subsequent to the execution of that contract, and that no election has been directed, with whether one is to be held apparently depending on whether the contract is a bar.

It is a far cry from an informal committee acting as spokesman for the employees on the single issue of a wage increase to Respondent's preparing and executing a full collective-bargaining agreement for a fixed term, without any bargaining, and then utilizing that agreement to attempt to prevent any election being conducted by the Board on a representation petition by another labor organization. In this context, the fact that the labor organization in question had made no overt organizational moves prior to the signing of the contract is less significant than Walker's testimony that outside unions' attempts to organize his employees was "a continual thing and nothing unusual," although he "had no knowledge that any concentrated effort was being made."

When asked why he recognized and entered into an agreement with the Plant Bargaining Committee, Walker responded as follows:

Well, there are so many things other than hourly wages to bring before the employees—the fringe benefits, vacation, insurance benefits, other working conditions. The only way that they will—it's a guide book so to speak as any contract would be. That's my purpose for putting it together so they will have an understanding of what I intend to do for them. At the same token, I know that they know what they can do and can't do.

There is much to be said for reducing to writing existing wages, hours, working conditions, etc., so that employees understand them, and, indeed, putting them out in some sort of personnel manual or employee handbook. But to do that in a document called "Agreement," and one which contains a "Representation" provision, stating that the Plant Bargaining Committee shall represent the employees, goes far beyond the stated purpose. I am satisfied, in these circumstances, that Walker's motivation was to keep any and all outside unions on the outside, and that Murphy's testimony that Walker said he "would do anything in his power to keep [a union] out," whenever it was said,

⁴ Although there is no actual proof that the committee represented a majority of the employees, there is insufficient evidence from which to find,

represents the true reason for the preparation and execution of that agreement. I find, accordingly, that Respondent violated Section 8(a)(1) and (2) by recognizing the committee as the exclusive bargaining representative of the employees and executing a contract with the committee.⁴

CONCLUSIONS OF LAW

1. The Teamsters and the Plant Bargaining Committee are labor organizations within the meaning of Section 2(5) of the Act.
2. By recognizing and signing a contract with the Plant Bargaining Committee, Respondent has engaged in and is engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (2) and Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action to effectuate the policies of the Act.

[Recommended Order omitted from publication.]

or infer, that it did not, and I therefore do not rely on any lack of majority status in making my unfair labor practice findings herein