Scott Corporation, d/b/a Union Plaza Hotel & Casino *and* International Union of Operating Engineers, Local 501. Case 31–CA–4062

July 23, 1974

DECISION AND ORDER

BY CHAIRMAN MILLER AND MEMBERS FANNING AND PENELLO

On April 24, 1974, Administrative Law Judge Martin S. Bennett issued the attached Decision in this proceeding. Thereafter, the Charging Party 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[1] of the Administrative Law Judge 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 Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

[1] We find it necessary to pass upon the Administrative Law Judge's finding that even if Respondent discharged Forrester in order to preclude the Union from pursuing a grievance, such discharge did not violate Section 8(a)(3) or (1) of the Act, inasmuch as we find, in agreement with the Administrative Law Judge, that the discharge was motivated by economic considerations.

DECISION

STATEMENT OF THE CASE

MARTIN S. BENNETT, Administrative Law Judge: This matter was heard at Las Vegas, Nevada, on March 4, 1974. The complaint, issued January 16, 1974, and based upon a charge filed October 23, 1973, by International Union of Operating Engineers, Local 501, herein the Union, alleges that Respondent, Scott Corporation, d/b/a/ Union Plaza Hotel & Casino, has engaged in unfair labor practices within the meaning of Section 8(a)(3) 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

Scott Corporation d/b/a Union Plaza Hotel & Casino is a Nevada corporation which is engaged in the operation of a hotel and gaming facilities at Las Vegas, Nevada. It annually enjoys gross revenues in excess of $500,000 and purchases and receives goods valued in excess of $50,000 directly from points outside the State of Nevada. 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

International Union of Operating Engineers, Local 501, is a labor organization within the meaning of Section 2(11) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Introduction; the Issue*

At the time material herein, August 1973, Respondent and the Union had been parties to a contract covering Respondent's operating engineers since July 1971, when Respondent commenced operations. These were then 10 in number, consisting of a chief engineer and 9 others. John Forrester, an operating engineer, was terminated on August 16, 1973, on which date he had the least seniority in the unit.

According to the General Counsel, this was perpetrated to preclude the Union from filing or winning a grievance concerning the interpretation of the contract, or because of Forrester's union or concerted activities; there is no evidence of any union activity on his part and any concerted activity perforce stems from an application of the contract. The evidence reveals that the contract has a clause requiring the designation of an assistant chief engineer if there are 10 engineers employed in the unit. The parties differ as to whether the chief engineer is to be included in the count, the Union urging his inclusion and Respondent resisting this. The contract does not require the employment of any fixed number of engineers.

Respondent contends that Forrester was terminated due to a reduction in force throughout the installation because of economic conditions, present and anticipated. It also urges in its brief that there is nothing in the contract to prevent it, for economic reasons, from operating with one less man so as to avoid the designation of an assistant chief engineer who receives a higher rate of pay than a rank-and-file engineer, some $1,500 more annually. Significantly, by eliminating one engineer, Respondent saves some $18,000 a year in salary and fringe benefits.

The record also discloses that an arbitration case concerning this precise matter is pending and was due to be heard after the close of the instant hearing; that result, if arrived at, is not before me. Respondent has urged deferral to arbitration, but the General Counsel issued the complaint on the premise that deferral should not be entertained because Respondent has refused, and this is not in conflict, to waive raising before the arbitrator the alleged noncompli-

ance of the Union with the prescribed timetables in the contract for filing grievances.

B. *Sequence of Events*

Initially, it is noted that the contract, in article 12, section 12.01, gives Respondent, *inter alia*, "The right . . . to determine the number of employees to be employed . . ." and, article 11, section 11.01, states seniority is to control reduction in force. It is undisputed that two operating engineers were laid off in 1971 pursuant to these provisions without incident.[1] Forrester was hired on April 26, 1973, this making a complement of one chief engineer, one assistant chief engineer, and nine engineers. The chief engineer died in June and was replaced as chief by the then assistant chief, Robert Mack; the post of assistant chief engineer was not filled. Thus, as noted, as of August 15 and 16, 1973, the time material herein, there was one chief engineer and nine engineers.

Engineers Forrester and Larry Kalkowski together with Business Representative Richard Thomas of the Union testified that Thomas met with Chief Engineer Mack in their presence on or about July 18. All in essence testified, and I find, that, relying upon article 16.01 (c) of the contract which provides that when there are 10 or more operating engineers, excluding apprentices, an assistant chief engineer should be designated, Thomas brought up this topic.

According to Forrester, Mack replied that he did not need an assistant chief engineer because there were only 10, including himself. Someone, not identified, stated that if Respondent were pushed to install an assistant chief, the problem could be solved by laying off one engineer and reducing the number below 10. According to Kalkowski, Mack commented on the cost of appointing an assistant chief engineer and that it was his belief that a move in this direction would result in the loss of a man. Thomas testified in essence to the same effect. Mack did not testify herein.

Later that day, as Thomas testified, he met with Controller James West of Respondent concerning this topic as well as others. West took two positions: (1) the chief should not be counted as one of the 10 and (2) the problem could be simply resolved by laying off one engineer, this clearly reducing the crew below 10. Thomas responded that this would violate the contract and they left it that the inclusion of the chief engineer would be taken up with William Campbell, director of labor relations for the Nevada resort association to which Respondent belongs. West, although present in the courtroom, was not called to testify.

There is some conflict as to dates of subsequent meetings between Business Manager Robert Fox and Thomas of the Union, with Campbell and perhaps West as to who was present and, as to what was said, but this is not deemed to be of great significance herein. In essence, West again gave his proposed solution of reducing the staff by one and Campbell asked for time to check the area practice as to inclusion in the count of the chief engineer.

At a meeting in August, according to Fox and Thomas, Campbell allegedly stated that the other hotels were including the chief in the 10. Campbell testified that he spoke with Fox around August 1 and took the position that the chief was not to be counted. He did not recall that West, who was present part of the time, again gave his solution of the layoff of one man.

On August 15, President Sam Boyd of Respondent issued the following memo to all department heads, at least 13 in number, and it was distributed to them that day. It states as follows:

> Business is not coming up to our expectations for this time of the year. Inasmuch as we can foresee a further drop in September, I want you to curtail purchases wherever possible and to reduce your staff by at least 10 percent.
>
> Please consult with me before replacing anyone that leaves our employ.

As Boyd testified, this was caused by the failure of business to increase as rapidly as anticipated. Reductions were duly made in most departments, but exceptions were made when none was possible such as in the payroll and personnel department as explained by Carmen Secrist, paymaster and personnel director.

The record discloses that personnel dropped from 1,007 to 1,000 between August 14 and 31 and that as of January 1, 1974, following a pattern of gradual reduction, with two small exceptions, computed on a semi-monthly basis, the staff was down to 824. This resulted in great savings in labor costs, yet in January 1974, Respondent as a whole lost $77,000.[2]

According to Boyd, Chief Engineer Mack came to him directly upon receipt of the August 15 memorandum, and he told Mack that he would have to terminate one man. He denied that he had any knowledge of an existing, or potential, grievance as to the designation of an assistant chief engineer. Forrester, with the lowest seniority, was terminated accordingly on August 16; a grievance concerning his termination was filed on September 24 and, as noted, it is currently pending.

According to Forrester, Mack told him that because of economic reasons, he, as the one lowest in seniority, was to be laid off. He was subsequently offered temporary employment in October which I find was not fully equivalent in nature and, then being employed elsewhere, Forrester declined the offer. Respondent has not filled the post although on September 6, it hired an apprentice engineer. West was chairman of the local apprenticeship committee, and he and Boyd were strong believers in the program, according to Boyd.

I note that article 16 of the contract contains the customary wage progression scale for apprentice engineers with designated percentages of the scale of the regular engineer.

[1] The engineers are responsible for maintenance of the physical plant. They service the electrical and plumbing systems, as well as hotel room calls for repair of television and plumbing.

[2] The figures do not include persons who are hired from time to time when the showroom is open for a traveling show It is also to be noted that these figures show the net reduction in force For example, in the period between August 14 and 31, due to attrition, 18 persons left and 11 were hired, this giving the net reduction of 7

It states also that this is strictly a trainee classification and that he is in no way to be responsible for operating conditions in the plant.

C. *Analysis and Conclusions*

The evidence preponderates that that the layoff of Forrester stemmed from a general reduction in force in the hotel; although directed at all departments, it perforce could not affect several. As found, the day prior to Forrester's layoff, President Boyd had directed all departments to reduce their staffs by 10 percent because of economic factors.

The record discloses a reduction in force of relative magnitude in ensuing weeks and months. If the General Counsel is correct in his position, this was indeed a Machiavellian plot to avoid paying out $1,500 a year to an assistant chief engineer, as contrasted with savings of many thousands of dollars by reduction in force in most departments.

I have previously indicated that Forrester was not involved in any union or concerted activities. As for the allegation that his termination resulted from an effort to preclude the Union from filing or winning a grievance concerning an interpretation of the contract, I am unaware of anything in the Act that imposes upon an employer an obligation in this area. Nor is there anything in the Act that precludes an employer from attempting to minimize his contractual obligation and employ less employees, absent an attempt to subvert the contract; and there was no contractual requirement that Respondent employ 10 operating engineers.

Moreover, I fail to see, on the basis of the testimony adduced by the General Counsel, how there is a violation if Forrester was laid off, independently of layoffs in the other departments, solely to avoid the appointment of an assistant chief engineer because of economic factors. Stated otherwise, an employer is free to operate with less employees for economic reasons to reduce costs. This appears at best as an ordinary act of business management, based purely on economic and nondiscriminatory factors.

Manifestly, this is not a case of retaliation for the act of filing a grievance, which I might view differently. The simple answer is that the Union and not Forrester grieved about his termination much later than the day. And there is evidence by Secrist of the personnel department that reduction in force at this time of the year are common.

In view of the foregoing factors, I deem it unnecessary to treat with Respondent's motion for dismissal of the complaint because an agent of the Board allegedly interviewed Chief Engineer Mack without affording Respondent's counsel an opportunity to be present, or with the efforts of the General Counsel to compensate for this.

Similarly, in view of the result reached, I deem it unnecessary to pass upon Respondent's request that the dispute be deferred to arbitration under the doctrine of *Collyer Insulated Wire*, 192 NLRB 837 (1971). As noted, the instant complaint issued because Respondent refused to waive its right to plead before the arbitrator failure of the Union to comply with the timetable requirements of the grievance and arbitration clause of the contract. See *Bunker Hill Co.*, 208 NLRB No. 17.

True, the hiring of an apprentice engineer on September 6 places a cloud upon the foregoing. But I deem this insufficient to refute the evidence that Respondent reduced in force on a very substantial basis. This is particularly true in view of the uncontroverted testimony that both West and Boyd of Respondent were strong adherents and supports of the apprenticeship program which indeed is set forth in the contract. I find, therefore, on a preponderance of the evidence, that Respondent has not engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act, and recommend that the complaint be dismissed in its entirety. See *D. J. Eshom Meat Co., Inc.*, 208 NLRB No. 29.

Conclusions of Law

1. Scott Corporation, d/b/a Union Plaza Hotel & Casino, is an employer whose operations affect commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Union of Operating Engineers, Local No. 501, is a labor organization within the meaning of Section 2(11) of the Act.

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

Upon the foregoing 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:

ORDER [3]

The complaint is dismissed in its entirety.

[3] 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