Wheeler Construction Company *and* Southern California District Council of Laborers and its Affiliated Local 1464. Case 13–CA–4880

July 25, 1975

DECISION AND ORDER

BY MEMBERS JENKINS, KENNEDY, AND PENELLO

On April 14, 1975, Administrative Law Judge Jerrold H. Shapiro issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, the Charging Party filed exceptions and a supporting brief, and the Respondent filed cross-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 briefs and has decided to affirm the rulings, findings, and conclusions 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.

DECISION

STATEMENT OF THE CASE

JERROLD H. SHAPIRO, Administrative Law Judge: The hearing in this case, held on March 7, 1975, is based on unfair labor practice charges filed by Southern California District Council of Laborers and its affiliated Local 1464 on November 13, 1974, and a complaint issued on December 30, 1974, on behalf of the General Counsel of the National Labor Relations Board, herein called the Board, by the Acting Regional Director of the Board, Region 31, alleging that Wheeler Construction Company, herein called the Respondent, has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the National Labor Relations Act, as amended, herein called the Act. Respondent filed an answer denying the commission of the alleged unfair labor practices.

Upon the entire record, from my observation of the demeanor of the witnesses, and having considered the posthearing briefs, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

Wheeler Construction Company, the Respondent, is a California corporation with an office and principal place of business located in San Luis Obispo, California, where it is engaged in the construction, remodeling, and sale of commercial and industrial buildings. In the course and conduct of its business, Respondent annually purchases and receives goods valued in excess of $50,000 directly from suppliers located outside the State of California. Based on the foregoing, I find Respondent is 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.

II. THE LABOR ORGANIZATIONS INVOLVED

The record establishes that Southern California District Council of Laborers, herein called the District Council, and its affiliated Local 1464, herein called Local 1464, and together called the Union, are organizations in which employees participate. They exist for the purpose of representing employees and have collective-bargaining agreements with employers. Based on the foregoing, I find that the District Council and Local 1464 each is a labor organization within the meaning of Section 2(6) and (7) of the Act.

III. THE QUESTION FOR DECISION

Respondent during the term of its collective-bargaining agreement with the Union repudiated the agreement and thereafter refused to honor or be bound by the terms of the agreement. The question to be decided is whether, under the circumstances of this case, Respondent was privileged to repudiate the agreement.

IV. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

Respondent, a construction contractor, employs carpenters, cement finishers, steel workers, and laborers. The carpenters and cement finishers are represented by unions who have collective-bargaining agreements with Respondent. On July 1, 1974,[1] Respondent and the Union entered into an agreement covering the laborers wherein Respondent, in substance, agreed to be bound by the industry contract—the Southern California Master Labor Agreement—currently being negotiated. Respondent contends the July 1 agreement was its first agreement with the Union whereas the General Counsel and Union urge that Respondent was signatory to the Union's laborers' short-form agreement effective May 1, 1970, through June 15, 1974. I have not resolved this dispute since I do not believe it is relevant to the crucial question involved in this case; name-

[1] All dates herein, unless otherwise specified, refer to 1974

ly, whether Respondent impermissibly repudiated the July 1 agreement.[2] Regardless of whether there has been a history of collective bargaining, it is undisputed that when Respondent entered into the July 1 agreement that the Union represented a majority of the Respondent's laborers and that Respondent knew this. Thus, during July the four laborers employed by Respondent were union members each one of whom had been referred to Respondent by the Union. Respondent knew they were union members and made monthly contributions for their fringe benefits (health and welfare, vacations, pensions, etc.) to the various trust funds provided for in the Union's collective-bargaining agreement and paid them the rate of pay provided in the Union's collective-bargaining agreement. In other words, the record demonstrates that, when Respondent signed the July 1 agreement or shortly thereafter, the Union represented a majority of the Respondent's laborers who admittedly constitute an appropriate unit for the purposes of collective bargaining.[3] Accordingly, Respondent had an obligation to bargain with the Union as provided in Section 8(a)(5) and 8(d) of the Act. The essential facts pertinent to whether Respondent failed to satisfy its statutory obligation to bargain are set out herein.

During the last week in June, the business manager of Local 1464, Boyle, told the president and general manager of Respondent, Wheeler, that the industrywide collective-bargaining negotiations for Southern California were in process between the Union and the three separate employer associations,[4] herein called the Associations. Boyle requested that Respondent enter into an agreement, described in detail below, which in substance provides for the adoption by Respondent of the terms of the industry agreement reached between the Union and the Associations. If Wheeler refused to sign such an agreement, Boyle warned that Respondent's laborers, who were union members, would engage in a work stoppage. Wheeler considered the matter and on July 1 affixed his signature to an agreement, herein called the July 1 agreement, which was also signed by representatives of the Union and which reads as follows:

INTERIM AGREEMENT

THIS AGREEMENT, made and entered into by and between the [Respondent and Union]:

(1) [Respondent] acknowledges that he is aware that the Union is presently in negotiations with the [Associations] for the negotiation of a successor to that contract commonly known as the Southern California Master Labor Agreement.

(2) [Respondent] agrees to be bound by each and every term of the Agreement ultimately entered into between the aforesaid Associations and the [Union] with the same force and effect as if the [Respondent] were a party thereto except that by the execution hereof, the [Respondent] excludes any reference to such Associations in his agreement and substitutes his own name. In the event the aforesaid Master Labor Agreement provides for any form of retroactivity, that Agreement shall likewise be binding upon the [Respondent and Union]. *This Interim Agreement may be canceled by either party on fifteen (15) days' written notice, either before or after the negotiations described above are concluded.* [Emphasis supplied.]

The Southern California Master Labor Agreement referred to in the July 1 agreement had terminated on July 1 and the negotiations between the Union and the Associations for a successor agreement resulted in the execution of a "Memorandum of Agreement" on July 30 wherein the Union and the Associations agreed to amend, in certain respects, the recently terminated master labor agreement. The July 30 "Memorandum of Agreement" which was "subject to ratification" by the membership of the Union and the Associations provided that the amended Southern California Master Labor Agreement was to be effective from July 30, 1974, to June 15, 1977. On or about August 4, the membership of the Union and the Associations ratified the amendments to the master labor agreement as embodied in the July 30 "Memorandum of Agreement."

On October 21 Respondent, by letter, notified the Union it was canceling the July 1 agreement. The letter, in pertinent part, reads:

> . . . pursuant to the provisions of the interim agreement between [Respondent] and the [Union], we hereby cancel said agreement. This letter is written notice as provided for in paragraph (2) of the Agreement.

Wheeler, the president of Respondent, testified he canceled the July 1 agreement because business had not been good and he wanted to negotiate his own contract with the Union and believed that, under the terms of the July 1 agreement, he had the option to cancel it at any time on 15 days' notice.

Upon receipt of the October 21 notice of cancellation, the Union did not request Respondent to bargain over its laborers' terms and conditions of employment, rather it filed the instant unfair labor practice charges taking the position that Respondent was still bound to honor the July 1 agreement.

B. *Analysis and Conclusions*

This controversy arises over the interpretation of the cancellation provision in the July 1 agreement. First, however, I shall evaluate the Respondent's contentions that the complaint lacks merit because of a lack of evidence that the "Union represented an uncoerced majority of employees in an appropriate unit" and because "the dispute in-

[2] There is no contention that Respondent repudiated the 1970–74 short-form agreement or, without bargaining with the Union, unilaterally changed its laborers' terms and conditions of employment when the agreement terminated on June 15.

[3] Under these circumstances, the Board's holding in *R J Smith Construction Co., Inc*, 191 NLRB 693 (1971), reversed on review *Local No 150 International Union of Operating Engineers, AFL–CIO*, v *N L R B*, 480 F 2d 1186 (C.A.D.C., 1973), is not applicable to the instant situation. There the Board held that an employer may not be found guilty of a refusal to bargain with respect to a union which has executed a valid 8(f) prehire contract but which has failed to achieve majority status. Here, the Union achieved such status.

[4] The employer associations are: Associated General Contractors of California, Inc., Engineering and Grading Contractors Association, Inc ; and Underground Engineering Contractors Association

volves strictly an interpretation of a collective-bargaining agreement and, consequently, the Board should decline jurisdiction."[5] As I have found above, the Union, during the time material to this case, was the collective-bargaining representative of a majority of Respondent's laborers who admittedly constitute an appropriate bargaining unit, and I am also convinced that the entire record establishes that the applicable collective-bargaining agreement covered the Respondent's laborers. Regarding the fact that this case involves a contract dispute, the law is settled that the Board has the power to "proscribe conduct which is an unfair labor practice even though it is also a breach of contract remediable as such by arbitration and in the Courts." *N.L.R.B.* v. *Joseph T. Strong, d/b/a Strong Roofing & Insulating Co.,* 393 U.S. 357, 360–361 (1969); *N.L.R.B.* v. *C & C Plywood Corporation,* 385 U.S. 421 (1967). The Board has specifically held that the repudiation by an employer of a collective-bargaining agreement, in whole or in significant part, constitutes a violation of Section 8(a)(5) and (1) of the Act. *Nedco Construction Corp.,* 206 NLRB 150 (1973), and cases cited therein.[6]

The cancellation provision in the July 1 agreement provides that it "may be canceled by either party on fifteen (15) days' written notice, either before or after the negotiations described above [referring to the negotiations between the Union and the Associations over the master labor agreement] are concluded." The negotiations referred to concluded on August 4 with the ratification of the master labor agreement. The general counsel in his posthearing brief contends:

> Respondent's cancellation of October 21 came 74 days after the conclusion of negotiations, which was marked by the ratification of the Memorandum of Agreement on August 4, 1974. According to the [option to cancel in the July 1 agreement] Respondent could only cancel the [July 1 agreement] *within* 15 days of the conclusion of the negotiation.

On the other hand, Respondent's counsel argues:

> . . . the correct interpretation of [the option to cancel] permits Respondent to cancel the Agreement *at any time,* provided fifteen days written notice is given. There is no time limitation set forth in the clause, "either before or after the negotiations are concluded." The clause, "may be canceled by either party on fifteen (15) days' written notice," is a separate independent clause and is not modified, nor does it modify the rest of the sentence.

In agreement with Respondent, I find that its written notice of cancellation complied with the terms of the July 1 agreement. The agreement contains an option to cancel and also specifies the manner in which said option must be exercised, in writing "on fifteen (15) days' notice." It does not provide that notice of cancellation be given 15 days before a certain date or time period, or within 15 days after a certain date or time period, rather it provides that the notice be given "either before or after the [Union's negotiations with the associations] are concluded." It does not state expressly or by implication, as General Counsel contends, that the notice shall be given *within* 15 days after the conclusion of the master labor agreement negotiations, rather it provides for such cancellation without any time limitation, "on 15 days notice" in writing. This is one of the reasons that the Respondent entered into the July 1 agreement. In this regard, Wheeler, its president and general manager, and the person who signed the agreement testified:

> I further noted in this interim agreement the statement that it says it may be cancelled by either party on 15 days written notice. So in signing this agreement . . . you don't know what is being negotiated; what the final agreement is going to be. It looked to me like I was in a position to cancel this agreement because of this statement should I not like the agreement that was subsequently negotiated by other parties.

The fact that the option to cancel in the July 1 agreement is at odds with the termination provisions of the master labor agreement and is not conducive to a stable collective-bargaining relationship does not mitigate against the conclusion that the parties intended to create an option to cancel their agreement without any time limitation. Since the July 1 agreement contained a specific provision dealing with the parties' right to cancel the agreement, it is just as fair to infer that the parties intended that this provision should govern the duration of their contractual relationship rather than the cancellation provisions of the yet to be negotiated master labor agreement. This makes good sense in the instant situation involving, as it does, an agreement to agree to the terms of a contract which the Respondent had no part in negotiating and which by its terms could bind the Respondent for a duration of several years. Likewise, the fact that the option to cancel lends itself to an unstable bargaining relationship does not indicate that the parties intended to limit their ability to cancel to a fixed period of 15 days, or for a reasonable period after the conclusion of the negotiation of the master labor agreement. The July 1 agreement is not a conventional collective-bargaining agreement, nor does this case involve the usual collective-bargaining situation where a union and an employer agree to sit down and negotiate the terms of a collective-bargaining agreement. The normal inference that parties to collective-bargaining agreements do not intend to allow either one to terminate the agreement at will does not apply in the unusual circumstances of this case. Here, it is just as reasonable to conclude, because of the unique nature of the bargaining relationship, that it was the intent of the July 1 agreement to allow either party to cancel the contractual relationship created by this agreement at any time by giving 15 days' written notice.

[5] It is not entirely clear from Respondent's posthearing brief whether it is also asking the Board to defer this dispute to arbitration in the manner prescribed by *Collyer Insulated Wire, A Gulf and Western Systems Co.,* 192 NLRB 837 (1971). In any event, I do not believe deferral is appropriate in this case because there is no evidence that the applicable collective-bargaining agreement contains a binding grievance-arbitration procedure which encompasses the instant dispute and Respondent at all times has in effect taken the position that it was not bound by any collective-bargaining agreement.

[6] Member Kennedy dissented in *Nedco* for the reason that the respondent employer breached only a single provision of its contract whereas the instant case involves an alleged repudiation of an entire agreement

In construing the language of the option to cancel contained in the July 1 agreement, I have assumed, as contended by the General Counsel and Union, that Respondent was a signatory to the Union's short-form agreement which terminated on June 15. The July 1 agreement, however, is an entirely different kind of arrangement than the short-form agreement which is a complete collective-bargaining agreement negotiated between representatives of the Union and Respondent. Under the circumstances, any prior collective-bargaining relationship between Respondent and the Union sheds no light upon the meaning of the option to cancel contained in the July 1 agreement.

To sum up, I am of the opinion that the option to cancel included in the July 1 agreement does not, by its terms, specify any definite time period or date for such action and, in effect, allows either party to exercise the option to cancel at any time. In so concluding, although not contended by the General Counsel or Union, I have considered whether a reasonable time period can be implied in connection with the exercise of the right to cancel. In other words, can the option to cancel be construed as obligating a party to exercise it within a reasonable time after the conclusion of the negotiation of the master labor agreement. I think not, for "[b]efore an obligation will be implied it must appear from the contract itself that it was so clearly in the contemplation of the parties that they deemed it unnecessary to express it, and therefore omitted to do so, or that it is necessary to give effect to and effectuate the purpose of the contract as a whole." *Kellogg Company* v. *N.L.R.B.*, 457 F.2d 519, 524 (C.A. 6, 1972). In the instant case, for the reasons already given, including the unusual nature of the collective-bargaining relationship established by the July 1 agreement, the circumstances do not warrant the implication that the parties intended that the option to cancel must be exercised within a reasonable period of time. In any event, assuming there was this intent, I am convinced that Respondent exercised its option within a reasonable period. Thus there is no evidence that Respondent waited for an unreasonable period of time after learning of the terms of the master labor agreement before exercising its right to cancel the agreement. In addition, it is undenied that Respondent was not advised by the Union or otherwise, as to when the Union and the Associations concluded their negotiations and reached a final agreement.

Based on the foregoing, I find that Respondent's interpretation of the July 1 agreement was correct and that its October 21 written notice of cancellation effectively terminated its contractual relationship with the Union 15 days thereafter. There is no evidence that the Respondent following its cancellation of the agreement refused to negotiate a new contract with the Union or refused to recognize the Union as its laborers' representative. Under the circumstances, Respondent did not violate Section 8(a)(5) and (1) as alleged in the complaint.

One final matter which involves a contention raised by the Union. The complaint in this proceeding alleges that Respondent's bargaining obligation is rooted in its execution of the July 1 agreement. The union contends that, even if the July 1 agreement allowed Respondent to cancel its contractual relationship with the Union, when it did, Respondent was still bound to honor the Union's current short-form agreement. The pertinent facts upon which this argument rests can be briefly stated. The Union's short-form agreement and master labor agreement require signatory employers to contribute to the laborers' trust fund for fringe benefits (health and welfare, pension, holidays, etc.) for covered employees. Respondent since 1970, and particularly in July and August, made these contributions for its laborers who were union members. In the process, Respondent filled out and executed monthly reports itemizing the amount of its contributions which reports were transmitted by Respondent to the trust funds. The monthly reports, signed by Wheeler, the Respondent's president, contain, *inter alia,* the following provision: "I hereby agree to abide by all of the terms and conditions of . . . the Southern California District Council of Laborers Short Form collective bargaining agreement as same now exists and as the same may be amended from time to time unless I am party to the master labor agreement or some other collective bargaining agreement requiring contributions to these trusts." Based on this language, the Union urges that even if Respondent's cancellation was permitted by the terms of the July 1 agreement, it was insufficient to terminate the Respondent's obligation to honor the short form agreement, an obligation which was created by Respondent's execution of the monthly report forms. I do not agree. The signing of the monthly reports did not as a matter of law obligate Respondent to honor the short-form agreement. The Union never executed any such agreement with Respondent. Thus, any contractual obligation created by Respondent's unilateral execution of the monthly reports was not a mutual one, it was an illusory obligation having no legal effect. Also, the very language of the reports indicate that the execution of the July 1 agreement effectively superseded or extinguished any collective-bargaining obligation created by the reports. Surely, it was the intent of the Union that its collective-bargaining relationship with Respondent be governed by the July 1 agreement rather than by the proviso in the monthly reports, for if the Union had intended otherwise, there would have been no need to solicit Respondent to sign the July 1 agreement. Finally, the Union's contention is not within the scope of the complaint which alleges that Respondent's contractual obligation was based upon the execution of the July 1 agreement which obligated it to honor the master labor agreement.

Respondent was not afforded adequate notice that it was defending against a repudiation of the master labor agreement based on its execution of the monthly trust fund reports. For all of these reasons, I reject the contention of the Union that Respondent during the time material herein was bound to honor the Union's short form agreement and by repudiating this agreement violated 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 [7]

The complaint is dismissed in its entirety.

[7] 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.