A.B.C. Florida State Theatres, Inc. *and* Local 646, International Alliance of Theatrical Stage Employees & Motion Picture Machine Operators of the U.S. & Canada, AFL–CIO. Case 12–CA–6678

November 26, 1975

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND PENELLO

On September 19, 1975, Administrative Law Judge Robert Cohn issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and 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.[1]

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] In its cross-exceptions, Respondent excepts to the Administrative Law Judge's denial of its motion to compel the General Counsel to reimburse Respondent for litigation costs. Respondent argues that the complaint was frivolous and unfounded, and was issued only because of inadequate investigation. We do not think the General Counsel's case is so clearly lacking in merit that its prosecution could fairly be characterized as frivolous.

DECISION

STATEMENT OF THE CASE

ROBERT COHN, Administrative Law Judge: This case, heard at Miami, Florida, on June 24 and 25, 1975,[1] pursuant to a complaint and notice of hearing issued May 9 (based upon an original charge filed February 27), presents the question whether A.B.C. Florida State Theatres, Inc. (herein the Respondent or Company) violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended (herein the Act), when it refused to bargain with Local 646, International Alliance of Theatrical Stage Employees & Motion Picture Machine Operators of the U. S. & Canada, AFL–CIO (herein the Union), as collective-bargaining representative of a part-time projectionist employed by the Company at a newly acquired theatre.

At the hearing, I granted the Respondent's motion to dismiss the complaint at the close of the presentation of the General Counsel's case-in-chief. Such ruling was grounded upon the failure of the General Counsel's proof that there were any employees in the facility (theatre) sought to be accreted who would properly fall within the appropriate bargaining unit.

Pursuant to Section 102.45(a) of the Board's Rules and Regulations, I make the following:

FINDINGS AND CONCLUSIONS

I. THE BUSINESS OF THE RESPONDENT

The complaint alleges, and Respondent's answer, as amended, admits that at all times material Respondent has been a Florida corporation engaged in the business of providing management and/or operational services for certain neighborhood theatres located in the State of Florida which are owned by various separate but related corporations; that Respondent and the said related corporations constitute a single-employer for jurisdictional purposes; that said related corporations annually derive in excess of $500,000 gross revenue from retail sales; and that Respondent annually derives in excess of $50,000 in gross revenues for supplying the services above stated.

Based upon all of the foregoing, I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, the answer admits, and I find that at all times material the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

The record shows that for some years prior to the events giving rise to the issue in this case, the Respondent has recognized the Union as the collective-bargaining representative of its nonsupervisory employees employed as projectionists in the four theatres which it operates in Broward County, Florida.[2] The latest collective-bargaining agreement entered into between the parties was effective as of September 17, 1972, to run until September 17, 1975, according to its terms. The aforesaid contract contains a so-called "accretion" clause which provides as follows:

> 23) Any theatres opened or acquired by Florida State Theatres during the term of this agreement shall be automatically covered thereunder. The rate of pay shall not exceed the rate of comparable

[1] All dates hereinafter refer to the calendar year 1975, unless otherwise indicated.

[2] The four theatres are Florida I and II (Twin) Theatres located in Hollywood, Florida; Coral Ridge and Plantation Theatre located in Fort Lauderdale, Florida; and Ultra-Vision I and II (Twin) Theatres located in Deerfield Beach, Florida.

> Florida State Theatres under contract to the Local desiring to represent the operator of the additional theatre. In no event, shall the rate of pay exceed the maximum rate provided for under the agreement between Florida State Theatres and the Local desiring to represent the theatre.

On or about December 20, 1974, Respondent formally acquired the Reef Theatre located in Lauderdale Lakes (Broward County), Florida. At all times material there were five classifications of employees who worked at this theatre: a manager — projectionist, a relief manager — projectionist, a boxoffice clerk, a concessionaire, and a ticket taker who doubled as an usher. It appears that the employees who comprised the latter three categories are teenagers, none of whom are over 18 years of age. It is conceded that none of the teenagers performed duties which would properly include them within the bargaining unit described above, and it is further conceded in the complaint that the manager — projectionist, Warren Johnson, is a supervisor within the meaning of the Act, and therefore excluded from the unit. However, as noted above, the complaint proceeded on the theory that the relief manager — projectionist was a nonsupervisory position and therefore properly fell within the unit sought to be accreted to the existing collective-bargaining unit.

In December, and again in January, the Union, by letter, demanded recognition as the collective-bargaining representative of the aforesaid nonsupervisory projectionist employed at the Reef Theatre by virtue of the accretion to the bargaining unit. By letter dated February 10, Respondent refused to recognize the Union as the collective-bargaining representative of said projectionist.

The record reflects that the projection equipment utilized by the Respondent at the Reef Theatre is quite sophisticated and highly automated. Thus when the film to be shown first arrives at the theatre, the manager — projectionist, Johnson, and the relief manager — projectionist, Caneen, prepare the program to be projected. This might take several hours, but after the work is completed the equipment takes over and no further manual work (other than maintenance) is ordinarily required of either of the two men. That is to say, the equipment turns down the house lights, opens the curtain, and operates the machine which projects the image upon the screen; at the close of the show the equipment closes the screen and turns on the house lights, all automatically. The record further shows that although Johnson is denominated the manager and is salaried while Caneen is denominated the relief manager and is paid on an hourly basis, the two men divide their time at the theatre. That is to say, one of them is rarely present at the theatre while the other is on duty since, following the preparation of the program to be projected, as aforesaid, most of their duties are confined to making sure that the theatre personnel perform their respective duties and that the operation runs smoothly. Thus, it is clear that during most of the time he spends at work, Caneen is in charge of the theatre and directs the work of the teenagers who perform their duties as aforesaid. He has authority to allow them to go home if ill or otherwise direct them in their work, and he has, in the past, effectively recommended the hiring of several employees. Thus the record shows that he initially interviews the employees and makes notes on their application as to his impressions of their ability and appearances. These notes are given great weight in hiring by Manager Johnson and, as he testified, he relies almost solely on Caneen in this area.

Accordingly, following the testimony of Caneen and Johnson who were witnesses for the General Counsel, it was apparent, and Counsel for the General Counsel acknowledged, that the proof indicated that the duties of Caneen placed him within the category of a supervisor within the meaning of Section 2(11) of the Act, and not a part-time, nonsupervisory projectionist as alleged in the complaint. Accordingly, as hereinabove noted, at the close of the General Counsel's case-in-chief, I granted the motion of Respondent to dismiss the complaint on the ground that, as alleged in Respondent's second affirmative defense in its answer to the complaint, "all persons over whom the Charging Party claims to be part of an alleged bargaining unit are supervisors within the meaning of Section 2(11) of the Act."

B. *Conclusions*

It is well established that the scheme of Sections 7 and 8 of the Act is to protect *employees* from the unfair labor practices of employers and labor organizations set forth in Section 8. As applied to the facts in the instant case, Section 8(a)(5) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representative of his employees, . . . ," The theory of the complaint in this case is that the Respondent unlawfully refused to bargain with the Charging Union concerning an employee within the bargaining unit in a facility which was accreted to the existing bargaining unit. However, the proof shows that there is not a nonsupervisory employee within such unit in the accreted facility (nor does the evidence establish that there is likely to be in the future any such nonsupervisory employee), and therefore there would seem to be no duty imposed by the Act upon an employer to bargain with a labor organization of its employees "with respect to wages, hours, and other terms and conditions of employment, ..."[3]

I shall therefore recommend that the complaint be dismissed in its entirety.[4]

[3] Sec. 8(d) of the Act In oral argument, counsel for the General Counsel indicated that the employees within the bargaining unit might be affected by the Employer's refusal to bargain with the Union pursuant to its contractual obligation However, the complaint was not bottomed upon such a theory, and there is no evidence in the record to support it

[4] In view of the foregoing findings and conclusions, I need not and do not reach the Respondent's other affirmative defenses, including one which states that "none of the employees at the Reef Theatre . have designated or selected the Charging Party to be their representative for purposes of collective bargaining, as required by Section 9 of the Act." But see discussion in *Houston Division of the Kroger Co*, 208 NLRB 928 (1974), and cases cited, see also *Penn Traffic Company, Riverside Division,* 219 NLRB No. 35 (1975), where it is stated: "The one factor most commonly relied on by the Board in finding accretion, interchange and transfer of employees from the existing unit to the newly acquired operation, appears to be singularly lacking"

CONCLUSIONS OF LAW

1. A.B.C. Florida State Theatres, Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has not, as alleged in the complaint, 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(c) of the Act, I hereby issue the following:

ORDER[5]

The complaint is dismissed in its entirety.[6]

[5] 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.

[6] Respondent's motion for an extraordinary remedy, i.e., to order General Counsel to reimburse it for expenses in defending a frivolous complaint is denied as lacking in merit.