

Newport Division of Wintex Knitting Mill, Inc. and United Textile Workers of America, AFL-CIO and International Ladies Garment Workers Union, Party to the Contract. Case 10-CA-11040

May 5, 1976

DECISION AND ORDER

BY MEMBERS JENKINS, PENELLO, AND WALTHER

On December 22, 1975, Administrative Law Judge Eugene E. Dixon issued the attached Decision in this proceeding. Thereafter, Respondent and Party to the Contract filed exceptions and supporting briefs, and the General Counsel filed cross-exceptions to the Administrative Law Judge's Decision.

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,¹ and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.²

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, as modified below, and hereby orders that Respondent Newport Division of Wintex Knitting Mill, Inc., Newport, Tennessee, its officers, agents, successors, and assigns, shall take the action set forth in the recommended Order, as so modified:

¹ The Administrative Law Judge inadvertently stated that the representation petition was filed on July 26, 1974, whereas the record shows that the petition was filed on July 26, 1973.

² In par. 2(b) of the recommended Order, the Administrative Law Judge ordered Respondent to reimburse employees for all initiation fees and dues deducted from their pay pursuant to the collective-bargaining agreement with the International Ladies Garment Workers Union. We note, however, that the contract between Respondent and the International Ladies Garment Workers Union did not contain a union-security agreement but did contain a voluntary union checkoff clause. We also note that there is no evidence in the record that any employee was coerced or compelled to join the Union or sign the checkoff authorization. Accordingly, where there is no evidence that employees have been coerced into joining a union, we will not order the reimbursement of initiation fees and dues that have been voluntarily paid by employees. See *Lowell Corrugated Container Corporation*, 177 NLRB 169, 173 (1969), enfd. 431 F.2d 1196 (C.A. 1, 1970). Where, however, in other circumstances not present here, there is an affirmative showing that employees are coerced into paying dues and joining a union, we will order reimbursement of those moneys. See *Baggett Industrial Construction Incorporated*, 219 NLRB 171 (1975); *R. L. Sweet Lumber Company*, 207 NLRB 529, 540 (1973); *Scottex Corporation*, 200 NLRB 446, 452 (1972).

1. Delete paragraph 2(b) and reletter the subsequent paragraphs accordingly.
2. Substitute the attached notice for that of the Administrative Law Judge.

MEMBER WALTHER, concurring:

I concur in the finding of the majority that Respondent violated Section 8(a)(2) and (1) of the Act by recognizing and executing a contract with the International Ladies Garment Workers Union. I do so, however, because I find that Respondent has actively aided and assisted the Garment Workers, and has failed to accord equal treatment to United Textile Workers. Accordingly, I concur in the result in this case for the reasons set forth in my separate opinion in *Buck Knives, Inc.*, 223 NLRB 983 (1976), and therefore find it unnecessary to consider the applicability of *Midwest Piping and Supply Co.*, 63 NLRB 1060 (1945).

The essential facts are few. The United Textile Workers filed a representation petition for the production and maintenance employees at Respondent's Newport, Tennessee, plant on July 26, 1973. The hearing in the representation proceeding was blocked by 8(a)(1) and (3) unfair labor practice charges filed by both the Textile Workers and the Garment Workers in Case 10-CA-10459. The Textile Workers requested the Regional Director to proceed with the representation case, but the Garment Workers did not make a similar request. On March 14, 1975, the Board affirmed the Administrative Law Judge's Decision, finding the unfair labor practices as alleged.³ In the meantime, on November 26 and 27, 1974, the production and maintenance employees had erected a picket line at the Wintex plant. The picketers demanded that Respondent recognize the Garment Workers. On November 27, the Textile Workers sent a telegram to Respondent advising Respondent that the Textile Workers maintained a continuing interest in representing the employees. On the same day, the Garment Workers demanded a card check and recognition as representative of the employees, and threatened to strike the "45-60" other plants of Respondent then represented by the Garment Workers. Respondent consented to the card check, which was conducted forthwith by a neutral third party. The results of the card check demonstrated that a majority of the employees had executed cards designating the Garment Workers as their representative. Respondent recognized the Garment Workers on this basis and entered into negotiations with the Garment Workers on December 3, 1974, which eventuated in the execution of a contract on December 11, 1974.

Respondent's conduct clearly discriminated in fa-

³ 216 NLRB 1058 (1975).

vor of the Garment Workers. Here, as in *Buck Knives, supra*, the Respondent has recognized, bargained with, and contracted with one of two competing labor organizations without giving notice to one that it intended to determine the representation question by means of a private card check. This distortion of the selection process, by which the employees exercise their guaranteed right to choose freely their collective-bargaining representative, is in clear contravention of the Act. Respondent's defense that it was unaware of any active organizing efforts by the Textile Workers for some period prior to its recognition of the Garment Workers falls in the face of the Textile Workers November 27 telegram expressing its continuing interest and in the face of the Company's complete disregard of the Textile Workers support among the employees. The fact that none of the production and maintenance employees crossed the Garment Workers picket line during a 1-day strike is no basis for inferring that the employees prefer one union to the other. It is equally inferable that the employees were protesting the lack of any resolution of the aged outstanding representation issue. Further, the cards submitted by the Garment Workers cannot be accorded controlling weight where Respondent has not examined those cards in light of the cards of the Textile Workers. Inasmuch as the Textile Workers clearly had a colorable claim to support among the employees, Respondent's refusal to accord the same treatment to the Textile Workers as it granted the Garment Workers is preferred treatment in violation of Section 8(a)(2) of the Act.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL withdraw and withhold all recognition of International Ladies Garment Workers Union as collective-bargaining representative of our Newport Division of Wintex Knitting Mill, Inc., employees unless and until that Union shall have been certified by the National Labor Relations Board as such representative.

WE WILL cease performing and giving effect to our current collective-bargaining agreement with International Ladies Garment Workers Union assuring you, however, that we will not vary or alter any of the substantive rights provided by such agreement or prevent your assertion of them.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights to self-organization, to bargain collectively through representatives of their choosing, or to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities.

All our employees are free to belong or not to belong to United Textile Workers of America, AFL-CIO, International Ladies Garment Workers Union; or any other union of their free choice.

NEWPORT DIVISION OF WINTEX KNITTING
MILL, INC.

DECISION

STATEMENT OF THE CASE

EUGENE E. DIXON, Administrative Law Judge: This proceeding, brought under Section 10(b) of the National Labor Relations Act, as amended, (61 Stat. 136), herein called the Act, was heard at Newport, Tennessee, on July 1, 1975. The complaint, dated January 2, 1975, was based upon charges filed by United Textile Workers of America, AFL-CIO (UTW) and served December 11, 1974, on Respondent and on January 7, 1975, on International Ladies Garment Workers Union (ILGWU), Party to the Contract. The complaint was issued by the Regional Director for Region 10 (Atlanta, Georgia) of the National Labor Relations Board on behalf of its General Counsel, herein called the Board and the General Counsel.

The complaint alleges that Respondent had engaged in and was engaging in unfair labor practices by granting recognition to the ILGWU on November 27, 1974, as exclusive collective-bargaining agent for its production and maintenance employees and entering into a collective-bargaining agreement on December 12, 1974, with that union, thus assisting and supporting it in violation of Section 8(a)(2) and (1) of the Act.

In its duly filed answer, Respondent denied the commission of any unfair labor practices.

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

FINDINGS OF FACT

I. RESPONDENT'S BUSINESS

At all times material Respondent has been a Delaware corporation with an office and place of business located at Newport, Tennessee, where it is engaged in the manufacture and sale of double knit fabrics. During the past calendar year, a representative period, Respondent sold and shipped finished products valued in excess of \$50,000 directly to customers located outside the State of Tennessee. At all times material Respondent has been engaged in

commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATIONS

United Textile Workers of America, AFL-CIO and International Ladies Garment Workers Union at all times material have been labor organizations within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

The facts are not in dispute. On July 26, 1974, United Textile Workers of America, AFL-CIO (UTW) filed a representation petition on behalf of the Wintex Production and Maintenance Employees at Newport, Tennessee. Thereafter, a notice of hearing in the representation case was issued and a hearing was held at which the International Ladies Garment Workers Union (ILGWU) was allowed to intervene, but no evidence was taken due to the absence of Respondent's attorney and the hearing was continued to a future date. The hearing was never resumed due to intervening unfair labor practice charges filed by both the UTW in Case 10-CA-10435 and the ILGWU in Case 10-CA-10459. In the meantime, notwithstanding the pending unfair labor practice charges, the UTW filed a request to proceed with the representation case but the ILGWU did not and the R case hearing has not been resumed to date.

The unfair labor practice charges were consolidated for hearing which was held in January 1974. On June 27, 1974, Administrative Law Judge Wellington Gillis issued his decision finding violations of Section 8(a)(1) and (3) of the Act. On March 14, 1975, his decision was affirmed by the Board. On November 26 and 27, 1974, while the case was still pending before the Board a work stoppage occurred at the Wintex plant. None of the production and maintenance employees crossed the picket line. The picketing employees carried makeshift picket signs asking Wintex to recognize the ILGWU.

At 11:30 a.m. on November 27, 1974, the UTW sent a wire to Wintex (copy to the Board) addressed to Benjamin West, plant manager¹ as follows:

We are advised ILGWU has struck Wintex for recognition. As counsel for UTWA this will advise you of UTWA's continuing interest in the question concerning representation of Wintex employees.

Copy of this wire being sent to National Labor Relations Board, Region 10, Attention Doug Marshall, Board Agent.

The Regional Director for the ILGWU, Harry Berger, was on the picket line both dates. On November 27, pursuant to a demand by ILGWU for a card check and recognition and a threat to strike the "45 to 60" other Wintex plants represented by the ILGWU, a card check was agreed upon and the picketing was discontinued. The card

¹ According to Joseph Wolfer, Wintex vice president, West had left Wintex some 6 or 7 months previously. Wolfer also testified that UTW's wire did not come to his attention "at any time during the day of November 27.

check was conducted forthwith by a Reverend Bush who found 96 valid cards (all claimed by Berger to have been signed during the previous 6 months) out of 135 names on the payroll. On the basis of the card check Respondent recognized the ILGWU and a negotiation meeting was held on December 3 at Newport. A second meeting was held in Atlanta on December 11 at which time a contract (effective November 25, 1974, to May 30, 1977) was agreed upon and executed the following day.

In addition to the foregoing evidence, Berger testified that during the 6 months preceding the recognition of the ILGWU, there was no sign of the UTW on the scene while the ILGWU had permanent organizers stationed in Newport. On his part, Vice President Wolfer testified that during the same period he heard "absolutely nothing" about the UTW while hearing a great deal about the ILGWU's organizational activity.² He also admitted that he had never been advised by the Board that the R Petition filed by the UTW had been withdrawn.

Conclusions

Under Board law established in 1945 in *Midwest Piping and Supply Co., Inc.*, 63 NLRB 1060 (1945) and followed for three decades, *Novak Logging Company*, 119 NLRB 1573 (1958); *Swift and Company*, 128 NLRB 732 (1960); *Sweater Bee by Banff, Ltd.*, 197 NLRB 805 (1972); *Inter-Island Resorts, Ltd., d/b/a Kona Surf Hotel*, 201 NLRB 139 (1973), it is an unfair labor practice for an employer to recognize one of two or more competing unions while a question of representation is pending before the Board by virtue of the filing of a representation petition with the Board.

Respondent, recognizing "that the Board has thus far, adhered to its basic position with respect to *Midwest Piping*" nevertheless argues for a favorable decision contending that the instant case can be distinguished from the decided cases chiefly on the grounds that here the R Petition is 1-1/2 years old and that the UTW "may not have been supported" by the card of one single employee in the bargaining unit as of November 27, 1974. No mention is made however of the intervening unfair labor practice case pending against Respondent during this period.

On its part, the ILGWU, referring to the rejection of the *Midwest Piping* doctrine by some of the courts, *Suburban Transit Corp. v. N.L.R.B.*, 499 F.2d 78 (C.A. 3, 1974), cert. denied, 419 U.S. 1089 (1974); *N.L.R.B. v. Inter-Island Resorts, Ltd., (Kona Surf Hotel)*, 507 F.2d 411 (C.A. 9, 1974); *American Bread Company v. N.L.R.B.*, 411 F.2d 147 (C.A. 6, 1969); *Playskool, Inc. v. N.L.R.B.*, 477 F.2d 66, (C.A. 7, 1973), by implication expects an adverse decision noting that the Board had stated in the *Kona Surf Hotel* case, *supra*, that it would continue to adhere to the *Midwest Piping* doctrine until the Supreme Court settled the issue, adding that "it may well be that in the instant case, the Board

² On September 17, 1975, after the close of the hearing and briefs had been filed a motion was made by the UTW to "reopen (the) case exclusively to hear testimony and/or receive affidavits as the UTWA organizational activities prior to employer recognition of ILGWU." The motion was denied on the grounds that there was no representation that such evidence was newly discovered or was unavailable prior to the hearing.

will once more seek certiorari which was denied to it on December 23, 1974, in a case which came up from the third circuit," i.e., *Suburban Transit Corp. v. N.L.R.B.*, *supra*.

I see nothing in this record that would permit or require me to hold for Respondent. Under the Board's decisions, I find that Respondent had no right to recognize the ILGWU while the R Petition was pending before the Board and that by so doing it showed its approval of the ILGWU giving that union unwarranted prestige and encouraging membership in it and thus rendering it unlawful assistance within the meaning of Section 8(a)(2) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with the operations of the Respondent described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. REMEDY

Having found that Respondent has engaged in unfair labor practices in violation of Section 8(a)(2) and (1) of the Act I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. In this connection I shall recommend that Respondent withdraw and withhold recognition from International Ladies Garment Workers Union and cease giving effect to the collective-bargaining contract which that organization entered into on December 12, 1974, or to any modification, extension or renewal of that contract unless and until the International Ladies Garment Workers Union has been certified by the Board as bargaining representative of the employees covered by such contract.

Nothing in this recommended Order, however, shall be deemed to permit Respondent to vary or abandon any of the substantive features provided for in said contract or to prejudice their assertion by the employees. I shall also recommend that Respondent reimburse employees for all the initiation fees and dues deducted from their pay on behalf of International Ladies Garment Workers Union under the terms of the aforesaid agreement or any modification, extension or renewal of it.

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

CONCLUSIONS OF LAW

1. United Textile Workers of America, AFL-CIO and International Ladies Garment Workers Union are labor organizations within the meaning of Section 2(5) of the Act.

2. By recognizing International Ladies Garment Workers Union as the exclusive bargaining representative of Respondent's production and maintenance employees in its Newport, Tennessee, plant and entering into a collec-

tive-bargaining agreement with that Union pertaining to those employees while a representation petition was pending and a question concerning the representation of said employees existed, Respondent has violated and continues to violate Section 8(a)(2) and (1) of the Act.

3. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) 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:

ORDER³

Respondent, Newport Division of Wintex Knitting Mill, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Recognizing International Ladies Garment Workers Union as a collective-bargaining representative of Respondent's employees as covered by the December 12, 1974, collective-bargaining contract between Respondent and that union or any extension, modification, or renewal thereof unless and until such labor organization shall have been certified by the National Labor Relations Board as such representative.

(b) Performing or giving effect to its December 12, 1974, collective-bargaining agreement with said labor organization or to any modification, extension, supplement or renewal thereof, unless and until said organization shall have been certified by the National Labor Relations Board as such bargaining agent, provided that nothing herein be construed as permitting Respondent to vary or alter any of the substantive terms and conditions of employment provided for in the foregoing or to prejudice the assertion of such by the employees.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities.

2. Take the following affirmative action which I find will effectuate the policies of the Act:

(a) Subject to the limitations and exceptions set forth above in the Remedy section, withdraw and withhold all recognition from International Ladies Garment Workers Union or any successor thereto as the representative of any of the employees covered by the December 12, 1974, contract unless and until said organization shall have been certified by the National Labor Relations Board as the representative of the employees concerned.

(b) Reimburse employees for all initiation fees and dues deducted from their pay pursuant to the collective-bargain-

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.

ing agreement of December 12, 1974, or any subsequent agreement on behalf of International Ladies Garment Workers Union.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of initiation fees and dues to be paid back to the employees under the terms of this recommended Order.

(d) Post at its plant in Newport, Tennessee copies of the attached notice marked "Appendix."⁴ Copies of said no-

⁴ In the event the Board's Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United State Court of Appeals Enforcing an Order of the National Labor Relations Board."

tice, on forms provided by the Regional Director for Region 10, after being duly signed by an authorized representative of Respondent, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for a period of 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 10, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

IT IS FURTHER RECOMMENDED that unless on or before 20 days from the date of this Order the Respondent notify said Regional Director, in writing, that it will comply with the foregoing recommended Order, the National Labor Relations Board issue an Order requiring it to take such action.