

United Brotherhood of Carpenters and Joiners of America, Local 743, et al. and Longs Drug Stores, Inc. Case 31-CE-180

31 January 1986

DECISION AND ORDER

**BY CHAIRMAN DOTSON AND MEMBERS
JOHANSEN AND STEPHENS**

On 27 September 1985 Administrative Law Judge Gerald A. Wacknov issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a limited exception. The Charging Party filed an answering brief in opposition to the exceptions of the Respondent.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, United Brotherhood of Carpenters and Joiners of America, Local 743, et al., Los Angeles, California, its officers, agents, and representatives, shall take the action set forth in the Order.

Donald P. Cole, Esq., for the General Counsel.
Gordon K. Hubel, Esq. (Levy, Ansell & Goldman), of Los Angeles, California, for certain Respondents.
Paul Posner, Esq., of Marina Del Rey, California, for Respondent Local 25.
John T. DeCarlo, Esq. (DeCarlo and Connor), for Respondent Local 743 and 22 additional Respondents.
Michael L. Wolfram, Esq. (Morgan, Lewis & Bockius), for the Charging Party.

DECISION

STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge, Pursuant to notice, a hearing with respect to this matter was held before me in Los Angeles, California, on 11 July 1985. The initial charge was filed on 5 August 1983, by Longs Drug Stores, Inc. (Employer). Thereafter, on 31 October 1983, the Regional Director for Region 31 of the National Labor Relations Board issued a complaint and notice of hearing alleging a violation by United Brotherhood of Carpenters and Joiners of America, Local 743 (Respondent Local 743) of Section 8(e) of the National Labor Relations Act.

Thereafter, on 21 November 1983 an amended charge was filed and on 16 January 1984 an amended complaint and notice of hearing was issued alleging a violation by all the named Respondents of Section 8(e) of the Act.

At the hearing in lieu of any testimonial evidence, the parties entered into a stipulation of facts, with supporting documentary evidence. Since the close of the hearing, briefs have been received from the General Counsel and from John T. DeCarlo, attorney for Respondent Local 743, and 22 additional Respondents.

On the entire stipulated record and consideration of the briefs submitted, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Employer, a California corporation with general offices located in Walnut Creek, California, owns or leases and operates retail drugstores. In the course and conduct of its business operations, the Employer annually purchases and receives goods and services valued in excess of \$50,000 directly from suppliers located outside the State of California, and annually derives gross revenues in excess of \$500,000.

It has been stipulated and I find that the Employer is now, and has been at all times material, an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATIONS INVOLVED

It has been stipulated, and I find that, the Respondents are, and have been at all times material, labor organizations within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Issue

The principal issue raised by the pleadings is whether the Employer, under the circumstances, is "an employer within the construction industry" within the meaning of the first proviso of Section 8(e) of the Act, thus permitting the Respondents to enforce certain contract or sub-contract provisions embodied in a collective-bargaining agreement between the Employer and the Respondents.

B. The Facts

Since 1971 the Employer has entered into various memorandum agreements whereby it agreed to adopt and be bound by the terms and conditions of succeeding Carpenters Master Labor Agreements. On 20 July 1983 the Employer entered into a similar memorandum agreement effective from 1 July 1983 until 1 July 1984, and from year to year thereafter. The memorandum agreement specifically contains the following language which is similar in effect to certain language contained in the prior Carpenters Master Labor Agreements:

The Contractor agrees that he or any of his subcontractors on the job site, will not contract or subcontract work to be done at the site of construction, al-

teration, painting, repair of the building, structure or other work, except to a person, firm or corporation party to an appropriate, current labor agreement with the appropriate Union, or subordinate body, associated with the Building and Construction Trades Department AFL-CIO or with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or an affiliate thereof.

The Employer owns or leases and operates approximately 27 drugstores in the geographic area covered by the collective-bargaining agreement with Respondents. The Employer does not have, and is not required to have, a general contractor's license by virtue of California Business and Professions Code Sec. 7044.

When the Employer has a new facility built or an existing facility renovated or remodeled, it contracts with and engages a general contractor to perform the onsite construction work, including rough and finish carpentry work. However, the Employer employs finish carpenters to perform the onsite construction work of installing fixtures. Installation of fixtures is covered by the aforementioned Carpenters Master Labor Agreement, and whenever the Employer has employed carpenters it has paid wages and benefits pursuant to the applicable agreements referred to above and has secured carpenter employees who were dispatched from Respondent unions in accordance with the requirements of such agreement.

About 3 May 1983 the Employer entered into a contract with Westerly Wood Construction (Wood) whereby Wood was engaged by the Employer as general contractor for the construction of a drugstore (the Project) located in a shopping center development in Bakersfield, California. Consistent with that contract, the Employer did not select or contract with any of the subcontractors on the project. The Employer, however, contracted directly with an architect and the architect retained consulting engineers for the project. At all times up to the present, the Employer has been the owner of the drugstore building and all improvements thereon. The project is now completed. The drugstore is a one-story facility with an area of 28,250 square feet. At all times while Wood was engaged on the project, Wood was not a signatory to any collective-bargaining agreement with any of Respondents or any other labor organization. Wood subcontracted the electrical, sheet metal, drywall and taping, insulation, concrete, and painting work to six separate nonunion subcontractors.

About 8 June 1983, Respondent Local 743 filed a grievance with the Independent Contractors Joint Adjustment Board (the Joint Board) charging that the Employer violated the 1980-1983 collective-bargaining agreement, by "contracting bargaining unit work to non-signators" and "further violating the work preservation and area standards provisions of the agreement." The Employer is bound by the grievance and arbitration provisions of the contract. The grievance was scheduled for hearing and determination by an arbitrator and was to be held on 10 August 1983. That hearing has been postponed indefinitely pending the final resolution or judgment in the case herein.

The Employer employs, at and out of its Walnut Creek, California place of business, Project Manager Al Arrigoni and Project Coordinator Steve Chandler, whose responsibilities included overseeing the Project on behalf of the Employer. The construction work apparently began about 2 June 1983 and was apparently completed about 2 February 1984. Chandler was designated as the Employer's construction manager and visited the project on 25 days during this period, for the purposes of confirming that construction and development of the project were consistent with the Employer's architectural plans and specifications. Arrigoni visited the project on 3 days for the purpose of reviewing Chandler's job performance. A superintendent employed by Wood was responsible for the day-to-day supervision of the construction of the project.

Between 19 January and 2 February 1984, the Employer hired 14 carpenters referred by Respondent Local 743's hiring hall for the purpose of installing fixtures at the Project. Some or all these carpenters worked for the Employer on the Project on each and every day (except for Saturdays and Sundays) during the approximately 14-day period. None worked after 2 February 1984. On about 11 days during this period union carpenters employed by the Employer and nonunion electricians employed by Anderson Electric worked at the site simultaneously, and about 4 of these days certain of the individuals worked in close proximity on the installation and wiring of fixtures. In addition, one union carpenter foreman employed by the Employer also worked on the project during the 14-day period in question.

The maximum number of employees engaged in the building and construction industry employed by the Employer on any given month in 1983 in the geographic area covered by the collective-bargaining agreement was 27, and no such employees were employed during 7 months of that year. In contrast, the Employer employed over 800 employees during each of the months in 1983 who were not engaged in the building and construction industry—for example, those engaged in operating the retail drugstores. The corresponding figures for January and February 1984 show 22 and 21 construction employees, respectively, and 761 and 821 other employees, respectively.

At no time since 1 January 1983 have Respondents picketed or threatened to picket the Employer or picketed at any of the Employer's stores, construction sites, or stores under construction. To date Respondents have continued to supply the Employer with carpenters when requested.

Since 1971 the Employer has filed with the Carpenters Trust Funds monthly fringe benefit reports entitled "Employer's Monthly Reports to Trustees," and made fringe benefit contributions on behalf of the construction employees it has employed.

C. Analysis and Conclusions

As noted above, the principal issue in this stipulated proceeding is whether the Employer is "an employer in

the construction industry" within the meaning of the first proviso of Section 8(e) of the Act.¹

The Board has made it clear that whether an employer is "an employer in the construction industry" within the meaning of the first proviso of Section 8(e) of the Act is dependent on the circumstances of each situation, rather than on the principal business of the employer. Thus, in *Los Angeles Building & Construction Trades Council (Church's Fried Chicken)*, 183 NLRB 1037 (1970), the Board found that an employer engaged primarily in the retail food business was engaged in the construction industry because it acted as its own general contractor in the construction of its own retail stores and thereby necessarily retained control over its subcontractor's labor relations.

In contrast, in *Columbus Building & Construction Trades Council (Kroger Co.)*, 149 NLRB 1224 (1964), Kroger entered into an arrangement with a prospective lessor who purchased property selected by Kroger and thereafter contracted with a nonunion general contractor for the construction of a shopping center, most of which was to be leased by Kroger and another tenant, a subsidiary of Kroger. When the keys to the store were turned over to Kroger by the contractors, Kroger completed the work with union carpenters, hired through the union, and engaged a number of union contractors, to perform sheet metal work, insulation work, and electrical work. Under these circumstances the Board concluded that Kroger "is an operator of a chain of retail stores and is not in the circumstances of this case 'an employer engaged in the construction industry' but was merely the prospective lessee of Schottenstein, the owner of the land on which the shopping center was to be built."

Similarly, in a later *Kroger* case² the Board, placing its reliance on the factual circumstances of the case and its prior finding in the aforementioned *Kroger* decision, again determined that Kroger was not an employer in the construction industry within the meaning of the first proviso to Section 8(e) of the Act.

The General Counsel maintains that an employer must act as its own general contractor to fall within the proviso, while the Respondents, distinguishing the *Kroger* cases, maintain that the Employer herein, as the owner of the building, has retained effective control of all phases of the construction project and that, therefore, the Respondents should lawfully be permitted to require the Employer to abide by the contractual arrangement it

agreed to, namely, to refrain from hiring nonunion contractors on the project.

From the foregoing cases it appears that whether an employer not primarily in the construction business may be deemed to be an employer in the construction industry for purposes of the first proviso to Section 8(e) is dependent on the degree of control over the construction-site labor relations it elects to retain. As its own general contractor, an employer retains absolute control. Thus, as stated in *Church's Fried Chicken*, supra, quoting from the legislative history of the proviso (2 Leg. Hist. 1425(1) (NLRA 1959)):

The case of the building and construction industry represented probably the most flagrant injustice, where a general contractor is, in effect, entirely in control of the kind of labor relations taking place on a jobsite which he runs. He lets subcontracts based upon price, responsibility, and the ability to handle labor relations.

He lets those contracts, very well knowing the kind of labor relations which may exist within any of the subcontractor companies. . . . He is not innocent of any unfair labor policies on the part of a subcontractor.

Similarly, in situations where an employer hires a general contractor but nonetheless regularly makes decisions, including the selection of subcontractors, normally within the scope of a general contractor's duties and authority, it would appear that the employer retaining such authority is tantamount to a general contractor. And this reasoning would appear to hold true regardless of whether the employer is the owner of the premises under construction, or a prospective lessee.

While the aforementioned cases are readily distinguishable from the instant factual situation, I conclude that the actual construction work the Employer elected to reserve to itself was of such limited scope that the Employer did not thereby become engaged in the construction industry within the meaning of the proviso. Thus the Employer utilized its own construction employees for a very limited purpose during the final 14 days of an 8-month construction project, and there is no evidence that it became directly involved with the labor relations on the Project until that time. Rather, the sporadic visits to the jobsite by the Employer's project manager and coordinator were simply for the purpose of insuring that the work was being performed in compliance with the plans and specifications. Contrary to the Respondents' assertions, and in the absence of any persuasive authority, I find that, although the Employer owns the building and could have elected to become its own general contractor, it does not thereby become an "employer in the construction industry" within the meaning of the proviso.

Nevertheless, the Respondents assert that the Employer, having entered into an agreement that it would hire only union contractors, should not be permitted to absolve itself of this contractual duty, and should be estopped from contesting its status as an employer in the

¹ Sec. 8(e) provides, in pertinent part, as follows:

It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void, *Provided*, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work.

² *Columbus Building & Construction Trades Council (Kroger Co.)*, 164 NLRB 516 (1967)

construction industry; and that this is particularly as the Respondents, in reliance on the Employer's contractual commitments over the years, have furnished carpenters, on request, through their various hiring halls. I similarly find this argument of Respondents to be without merit, particularly as there is no showing that the current or prior contracts were entered into with the mutual understanding that the Employer would act as its own general contractor or would hire only union general contractors.

On the basis of the foregoing, I find that the Respondents, by seeking to enforce the applicable provisions of the contract through the grievance procedure embodied therein, have violated Section 8(e) of the Act, as alleged. See *Cooks & Bartenders Local 42 (Clubmen, Inc.)*, 248 NLRB 604 (1980); *Bricklayers Local 2 (Johnson & Son)*, 224 NLRB 1021, 1024-1025 (1976).

CONCLUSIONS OF LAW

1. Longs Drug Store, Inc. is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The various named Respondents are labor organizations within the meaning of Section 2(5) of the Act.

3. The Respondents have violated Section 8(e) of the Act by entering into and enforcing an agreement requiring Longs Drugs, Inc. to hire only union contractors or union subcontractors for its construction projects, and by applying those contractual provisions to a construction-site where Longs Drug Stores, Inc. is not an employer in the construction industry within the meaning of the first proviso to Section 8(e) of the Act.

4. The aforesaid unfair labor practice affects commerce as defined in Section 2 of the Act.

THE REMEDY

Having found that the Respondents violated the Act, I recommend they be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³

ORDER

The Respondent, United Brotherhood of Carpenters and Joiners of America, Local 743, et al., Los Angeles, California, their officers, agents, and representatives, shall

³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

1. Cease and desist from entering into, maintaining, giving effect to or enforcing those provisions of their collective-bargaining agreement with Longs Drugs Store, Inc. to the extent found unlawful herein.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) The various named Respondents shall post at their offices, meeting halls, and locations where notices to their members are customarily posted, copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by authorized representatives shall be posted by the Respondents immediately after receipt and maintained for 60 consecutive days thereafter, in conspicuous places, including all places where notices to their employees are customarily posted. Reasonable steps shall be taken to ensure those notices are not altered, defaced, or covered by any other material.

(b) Respondents shall notify Longs Drug Store, Inc. that they shall not seek to apply the provisions of the collective-bargaining agreement to construction sites at which Longs Drug Store is not "an employer in the construction industry" within the meaning of the first proviso to Section 8(e) of the Act.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

⁴ If this Order is enforced by a judgment of a 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 States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

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

WE WILL NOT enter into, maintain, give effect to, or enforce clauses in our agreement with Longs Drug Store, Inc., requiring it to hire only union contractors or union subcontractors on its construction projects where it is not "an employer in the construction industry" within the meaning of the first proviso to Section 8(e) of the Act.

UNITED BROTHERHOOD OF CARPENTERS
AND JOINERS OF AMERICA, LOCAL 743, ET
AL.