

International Union of Operating Engineers, Local No. 3 (Kasler Corporation) and Rodney S. Butterfield. Case 27-CB-2309

April 12, 1990

DECISION AND ORDER

**BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND OVIATT**

On November 17, 1986, Administrative Law Judge Gerald A. Wacknov issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.¹

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 only to the extent consistent with this Decision and Order.

The facts, as set forth in the stipulated record, are as follows. Kasler Corporation (the Employer) is engaged in highway construction. Rodney Butterfield commenced working for the Employer on April 1, 1985.² Butterfield was a supervisor within the meaning of Section 2(11) of the National Labor Relations Act at all times while working for the Employer. About June 3, Butterfield, a member of the Respondent, requested and received a withdrawal card from the Respondent.³ On June 7, Butterfield began working at the Employer's project in Nephi, Utah.

Butterfield recollected only the following occasions in which he handled "personal" problems of employees while at the Nephi project: (1) approximately 3 weeks before the end of the Nephi project Butterfield granted an employee's request to leave the Nephi job before it ended so that the employee could take another job with the Employer; (2) an employee complained to Butterfield about fumes from the concrete-curing machine on which he worked, and Butterfield transferred him to another position; and (3) Butterfield granted an employee's request to leave work early for personal reasons.

When the Employer's Nephi project began, the Respondent asserted that the Employer was bound by an earlier project agreement, signed on June 28,

1984, that covered another project in Utah. When the Employer refused to extend this agreement to the Nephi project, the Respondent began picketing the Nephi jobsite about May 23, and continued to picket the jobsite until August 15. At all relevant times Butterfield continued to work at the Nephi project and performed only a minimal amount of struck work.

On May 28, the Employer filed an RM petition, and an election was held on August 16.⁴ The Respondent Union failed to receive a majority of the votes.

On July 26, a union member filed an internal union grievance against Butterfield for working at the craft while on withdrawal and for working contrary to a declared strike. By letter dated July 26, Butterfield was advised of the charges and was invited to answer them. On August 21, Butterfield received letters from the Respondent advising him of the procedural steps that had occurred regarding the charges. On October 16, Butterfield received a letter from the Respondent directing him to appear at a trial on December 4.

Butterfield informed the Respondent on November 9 that the charges against him should be dropped because he was a supervisor. On learning this, the Respondent decided to read both charges at the trial but then to withdraw the charge alleging that Butterfield worked behind the picket line, because of possible legal problems arising from his alleged supervisory status. Butterfield did not appear at the December 4 trial. Both charges were read at the trial and then the Respondent informed the membership that it was dropping the charge regarding Butterfield's working behind the picket line. The membership found Butterfield guilty of performing craft work while on a withdrawal card and fined him.

The Respondent sent Butterfield a form letter dated December 18 informing him that he was "found guilty as charged." Butterfield was not informed that the charge regarding his working behind the picket line had been dropped.

The Respondent had ceased picketing the Employer's Nephi project on August 15. The Employer did not have another project in Utah from November 1, 1985, when the Nephi project ended, until May 15, 1986, when it began the Lake Point project. On May 23, 1986, the Respondent began picketing the Lake Point project with signs stating "Kasler on Strike. Operating Engineers Local 3."

¹ The General Counsel has moved to strike certain factual assertions in the Respondent's brief. We grant the General Counsel's motion to the extent that the factual assertions are not supported in the stipulated record.

² All dates are in 1985 unless otherwise indicated.

³ A request for a withdrawal card is not a request to resign from the Respondent, but rather is a request to be excused from paying dues because an individual no longer is "working at the craft."

⁴ The Employer originally included Butterfield on the voter eligibility list, but immediately prior to the election the parties agreed to his exclusion. The Respondent contends, however, that it agreed to Butterfield's exclusion not because it believed that he was a supervisor, but because it believed that he would not vote in favor of the Respondent.

The judge found that the Respondent had violated Section 8(b)(1)(B) of the Act by processing internal union charges and levying a fine against Butterfield, a supervisor-member, on the basis that its conduct would tend to restrain and coerce the Employer in its selection of representatives "for the purpose of collective bargaining or the adjustment of grievances."⁵ The judge stated that the exact nature of an individual's authority to bargain with the Union or to adjust grievances is immaterial, provided that the individual is a supervisor within the meaning of Section 2(11) of the Act. The judge then concluded that because Butterfield's supervisory status was admitted, the Respondent's argument that he did not possess the requisite 8(b)(1)(B) authority was without merit, citing *Electrical Workers IBEW Local 340 (Hulse Electric)*, 273 NLRB 428, 438-439 (1984), and *Teamsters Local 296 (Northwest Publications)*, 263 NLRB 778, 779 fn. 6 (1982). Thus, in so concluding, the judge implicitly relied on the since-repudiated "reservoir doctrine."⁶

The Supreme Court in *NLRB v. Electrical Workers IBEW Local 340 (Royal Electric)*, 481 U.S. 573 (1987), which issued after the judge's decision, explicitly rejected the reservoir doctrine, finding that Section 8(b)(1)(B) protects only those individuals who actually perform grievance adjustment or collective-bargaining duties, rather than all supervisors. Thus, an examination of a supervisor's authority and conduct is necessary to determine whether the individual is an 8(b)(1)(B) representative.

In the instant case, Butterfield could recall only three examples, recited above, which could, even arguably, have demonstrated his authority to handle personnel problems. We find that the General Counsel has failed to establish on the evidence here that Butterfield possessed sufficient authority to adjust grievances within the meaning of Section 8(b)(1)(B). Thus, we note the limited nature of the examples and the sporadic exercise of what authority Butterfield had, and the absence of evidence that Butterfield regularly adjusted grievances. Further, it was not shown that Butterfield was the only employer representative available at the jobsite to adjust grievances if and when they arose.⁷

⁵ Sec 8(b)(1)(B) of the Act provides:

It shall be an unfair labor practice for a labor organization or its agents—(1) to restrain or coerce . . . (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances.

⁶ Under the "reservoir doctrine," the term "representative for the purposes of collective bargaining or the adjustment of grievances" was interpreted broadly to include all supervisors within the meaning of Sec. 2(11), on the ground that they form the logical "reservoir" from which the employer is likely to select representatives *Hulse Electric*, above at 439.

⁷ Cf. *St. Louis Bridge Construction Co.*, 297 NLRB 485, 487 (1989). Member Devaney here does not rely on this point. He notes that in *St.*

In concluding that the minimal authority exercised by Butterfield is not sufficient to establish that he was an 8(b)(1)(B) representative, we find this case distinguishable from cases in which there similarly was no collective-bargaining agreement, but the alleged 8(b)(1)(B) representative regularly resolved disputes, such as wage disputes, that would clearly be contractual grievances under any collective-bargaining agreement.⁸ Here, the possibility that the minimal power exercised by Butterfield would constitute grievance-adjustment authority if there were a collective-bargaining agreement is too tenuous to form the basis for a finding that Butterfield was an 8(b)(1)(B) representative.

Based on all the above, we conclude that Butterfield's limited and irregular exercise of any such authority is insufficient to make him an 8(b)(1)(B) representative.⁹ Accordingly, we reverse the judge and dismiss the allegation that the Respondent violated Section 8(b)(1)(B) of the Act by disciplining supervisor-member Butterfield.

ORDER

The complaint is dismissed.

Louis Bridge, unlike here, the employer, through the individual found to be an 8(b)(1)(B) representative, had actually resolved grievances at the jobsite which would have been contractual grievances had a contract been in effect.

⁸ See *St. Louis Bridge*, above; *Teamsters Local 379 (J. H. McNamara)*, 284 NLRB 1413 fn. 1 (1987).

⁹ Additionally, in light of our disposition of this case, we find it unnecessary to pass on the issue of whether the Respondent still desired to represent the Employer's employees subsequent to the August 16 election.

Michael T. Pennington, Esq., for the General Counsel.
Lawrence B. Miller, Esq., of San Francisco, California,
for the Respondent.

DECISION

STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge. The charge was filed on 4 March 1986 by Rodney Butterfield, an individual. Thereafter, on 16 April 1986, the Regional Director for Region 27 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing alleging a violation by International Union of Operating Engineers, Local No. 3 (Respondent) of Section 8(b)(1)(B) of the National Labor Relations Act (the Act). An amended charge was filed on 21 July 1986, and an amendment to complaint was issued by the Regional Director the same date. Respondent's answer to the complaint denies the commission of any unfair labor practice.

On 4 September 1986, the parties entered into a stipulation for submission this matter to the administrative law judge. Thereafter, the General Counsel and Respondent have filed briefs.

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

FINDINGS OF FACT

I. JURISDICTION

Kasler Corporation (Kasler or the Employer) is a California corporation engaged in highway construction. It maintains its principal office and place of business in California and also has a place of business located in Nephi, Utah. In the course and conduct of its Utah business operations the Employer annually purchases and receives goods, materials, and services valued in excess of \$50,000 directly from points outside the State of Utah.

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

II. THE LABOR ORGANIZATION INVOLVED

It is admitted that Respondent is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Issues*

The principal issue raised by the pleadings is whether the Respondent has violated Section 8(b)(1)(B) of the Act by processing an internal union charge against a supervisor-member, and by levying a fine against him for reasons proscribed by the Act.

B. *Statement of Facts*

Since 1 April 1985, when he went to work for the Employer, Rodney Butterfield has been a statutory supervisor within the meaning of Section 2(11) of the Act. His initial employment was at a project outside the State of Utah. Butterfield, a member of Respondent, requested and received a withdrawal card from the Union on about 3 June 1985. A request for a withdrawal card is not a request to resign from the Union. Rather it is a request to be excused from paying dues because an individual is no longer "working at the craft." On 7 June 1985 Butterfield began working at the Employer's project at Nephi, Utah.

His authority as a supervisor on the Nephi project allowed him to handle personnel problems of employees under his supervision as shown by the following examples, which are the only examples Butterfield is able to recollect:

(a) About 3 weeks before the end of the Nephi project an employee asked Butterfield for permission to leave that job before it ended for personal reasons so that the employee could take another job with Kasler Corporation which would keep him employed through the winter months. Butterfield granted this request.

(b) An employee at the Nephi job complained to Butterfield regarding the fumes from the concrete

curing machine on which he worked and Butterfield transferred him to another position.

(c) An employee at Nephi asked Butterfield for permission to leave work early for personal reasons and permission was granted.

When the Nephi project was starting, the Respondent took the position that the Employer was bound by the terms and conditions of a project agreement, signed on 28 June 1984, covering another project in Utah. When the Employer refused to extend the terms of the project agreement to the Nephi job, the Respondent caused pickets to be placed at the jobsite on or about 23 May 1985. The Respondent continued to picket the job until 15 August 1985. At all relevant times Butterfield continued to work on this project and has performed only a minimal amount of struck work.

On 28 May 1985, Kasler filed an RM petition with the Board. After a hearing, a Decision and Direction of Election was issued. The Employer originally included Butterfield on the *Excelsior* voter eligibility list, but the parties agreed to his exclusion immediately prior to the election.¹ The election was held on 16 August 1985, the ballots were counted on 23 August 1985, and the Respondent failed to receive a majority of votes.

On 26 July 1985 a union member filed an internal union grievance against Butterfield for working at the craft while on withdrawal, and for working contrary to a declared strike. Butterfield was so advised by letter dated 26 July 1985 and was invited to answer the charges. On 21 August 1985 he received letters from Respondent's representatives advising him of the procedural steps that had transpired regarding the Respondent's consideration of the matter. On 16 October he received a letter from Respondent notifying him of the charges filed against him by the president of Local 3, as instructed by the executive board, and directing him to appear at a trial on 4 December 1985.

On 9 November 1985 Butterfield wrote the Union and stated that the charges should be dropped because he was a supervisor. When Respondent's district representative, Don Strate, received a copy of Butterfield's letter he called Respondent's house counsel, Lawrence Miller, and requested legal advice regarding the matter. Strate and Miller decided that Strate should read both charges at the trial scheduled for 4 December 1985, but that Strate should then withdraw the charge regarding Butterfield working behind the picket line because of possible legal problems arising from Butterfield's alleged status as a statutory supervisor.

Butterfield elected not to appear at the 4 December 1985 trial. At the trial the full charges were read and then, as previously mentioned, Strate advised the membership that he was dropping the charge regarding Butterfield working behind the picket line because of possible legal problems if Butterfield was in fact a statutory supervisor. The members then found Butterfield guilty of

¹ However, the Respondent maintains that it agreed to his exclusion not because of its belief that Butterfield was a supervisor, but because it believed that Butterfield would not vote in favor of the Respondent.

performing the work of an engineer while on a withdrawal card and Butterfield was fined.

In a form letter from the Respondent dated 18 December 1985, Butterfield was informed that he was "found guilty as charged." He was not informed that the portion of the charge regarding his working behind a picket line had been dropped.

It is the intent and practice of the Union that an individual, even if a foreman or a superintendent above the rank of foreman, is not entitled to a withdrawal card as long as he is working on a job where operating engineers work is being performed and he is receiving fringe benefits or their equivalent, whether or not set forth in a union contract, on his check. In this regard, the stipulated record shows that Butterfield was receiving an hourly wage rate which was \$1 per hour higher than that of a paving operator in the Operating Engineers Local Union No. 12 "Master Agreement for Southern California," and was also receiving the equivalent of the contract fringe benefits in the amount of \$7.38 per hour.

C. Analysis and Conclusions

The complaint alleges that Respondent violated Section 8(b)(1)(B) of the Act by initiating and processing internal union charges against a supervisor-member for crossing a picket line in order to perform supervisory rather than rank-and-file duties. Such conduct is clearly violative of the Act. *Operating Engineers Local 501 (Peterson Mfg.)*, 269 NLRB 685 (1984), *Columbia Typographical Union 101 (Washington Post)*, 242 NLRB 1079 (1979).

The exact nature of an individual's authority to bargain with the union or adjust grievances is immaterial, provided that the individual is a supervisor within the meaning of Section 2(11) of the Act. Thus, as Butterfield's supervisory status is admitted, the Respondent's argument that he does not possess the requisite authority is without merit. *Electrical Workers Local 340 (Hulse Electric)*, 273 NLRB 428, 438-439 (1984); *Teamsters Local 296 (Northwest Publications)*, 263 NLRB 778, 779 fn. 6 (1982), enfd. 730 F.2d 768 (9th Cir. 1984).

The Respondent argues, however, that Butterfield was not fined for crossing and working behind the picket line, as this charge against him was withdrawn after the Union became aware that he was contending he was a supervisor. Rather, Butterfield was found guilty of violating the Respondent's prohibition against working in the trade and receiving union wages and benefits, whether as a supervisor or rank-and-file employee, when on a withdrawal card. The General Counsel maintains that, assuming arguendo, the Respondent's legitimate right to fine Butterfield for this reason, Butterfield was never so advised that the picket line charge against him had been dropped or that he had not been found guilty of such a charge. Thus, while working as a supervisor on the project from 26 July through 1 November 1985, the date when the Nephi project was completed, Butterfield was only aware that the Union was processing both charges against him, and that he was requested to appear at a trial on 4 December.

Obviously, the aforementioned conduct on the part of Respondent would tend to restrain or coerce the Em-

ployer within the meaning of Section 8(b)(1)(B) of the Act. Nor do the Respondent's beliefs, motive, or good faith operate as a defense to the foreseeable consequences of its affirmative conduct, namely the processing of charges against Butterfield for working behind a picket line. *Electrical Workers IBEW Local 46 (PAC, Inc.)*, 273 NLRB 1357 (1985); *Wisconsin River Valley Council (Skippy Enterprises)*, 211 NLRB 222, 227 (1974), enfd. 532 F.2d 47 (7th Cir. 1976).

Citing *NLRB v. Electrical Workers IBEW Local 73*, 714 F.2d 870 (9th Cir. 1980), and *NLRB v. Electrical Workers IBEW Local 340*, 780 F.2d 1489 (9th Cir. 1986), Respondent argues that after it lost the representation election on 16 August 1985 it was no longer interested in representing the Employer's employees, and that thereafter the processing of the charges against Butterfield could no longer be considered coercive. However, it appears that current Board law is to the contrary and the Board has specifically refrained from following the approach of the Ninth Circuit. *Musicians Local 655 (Royal Palm Theatre)*, 275 NLRB 677 (1985). Moreover, whether the Respondent has ceased to be interested in representing the Employer's employees is far from clear. Thus, the parties stipulated that the Employer did not have another paving project in Utah from 1 November 1985, the date the Nephi project ended, until 15 May 1986 when it started the Lake Point job; and on 23 May 1986 the Respondent began picketing the Lake Point project with picket signs stating, "Kasler on Strike. Operating Engineers Local 3."

The Respondent argues that even if certain of its conduct is violative of the Act, for the reasons discussed above, the fine imposed on Butterfield for "performing the work of an Engineer while on a withdrawal card" was lawful, and had nothing to do with his supervisory status while working at the Nephi project. Rather this was an internal union matter unrelated to Respondent's relationship with Kasler.

In *Carpenters Local 14 (Kaplan Properties)*, 217 NLRB 202 (1975), the Board stated:

We recognize that a union's discipline of a supervisor-member falls outside the proscription of Section 8(b)(1)(B) where the offense occasioning the discipline involves a matter purely of internal union administration, unrelated, either directly or indirectly, to any dispute between the union and the employer. [Footnote omitted.]

The two charges against Butterfield cannot be readily separated under the circumstances of this case. When the Respondent determined that the charge for working contrary to a declared strike should be dropped because of Butterfield's alleged supervisory status, it did not so inform him and request that he reply to the remaining charge. Moreover, the Respondent appears to have harbored serious doubts about Butterfield's supervisory status and it is significant that at the trial on 4 December both charges were read to the tribunal prior to the one charge being dropped because of Butterfield's alleged supervisory status. It is reasonable to assume that such a procedure could have a prejudicial effect upon the tribu-

nal's determination or at least upon the extent of the fine imposed. While under other circumstances the fine levied against Butterfield may have been proper, I conclude that the stipulated record warrants the finding that the fine imposed upon him was at least indirectly related to the dispute between the Respondent and Kasler, and that therefore it is violative of Section 8(b)(1)(B) of the Act, as alleged.

CONCLUSIONS OF LAW

1. Kasler Corporation is and has been at all times material herein an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

3. Rodney Butterfield has been at all times material herein a representative of an employer, Kasler Corporation, for the purposes of collective bargaining and the adjustment of grievances.

4. The Respondent has engaged in unfair labor practices within the meaning of Section 8(b)(1)(B) of the Act by restraining and coercing an employer in the selection

of his representatives for the purposes of collective bargaining and the adjustment of grievances.

5. The Respondent has engaged in unfair labor practices within the meaning of Section 8(b)(1)(B) of the Act by restraining and coercing an employer in the selection of his representatives for the purposes of collective bargaining and the adjustment of grievances by processing internal union charges against Rodney Butterfield, by holding a trial on such charges, and by levying a fine against him.

6. The unfair labor practices described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Since I have found that the Respondent has engaged in unfair labor practices within the meaning of Section 8(b)(1)(B) of the Act, I shall recommend to the Board that the Respondent be ordered to cease and desist from engaging in such unfair labor practices. I shall also recommend to the Board that the Respondent be ordered to take certain affirmative action in order to effectuate the policies of the Act.

[Recommended Order omitted from publication.]