Abbott House, Inc. *and* District Council 1707, Community and Social Agency Employees Union, AFSCME, AFL-CIO. Case 2-CA-19743

18 September 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND DENNIS

On 9 April 1984 Administrative Law Judge Steven Davis issued the attached decision The General Counsel filed exceptions and a supporting brief, and the Respondent filed limited cross-exceptions and a supporting brief The Respondent also filed an answering brief to the General Counsel's exceptions

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,[1] and conclusions and to adopt the recommended Order

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed

[1] In sec III par 2, of his decision, the judge incorrectly found that 29 June 1983 rather than 30 June 1983 was the day preceding the first day of the new contract term but he correctly concluded that 1 May 1983 was the last day on which notice would forestall automatic renewal of the contract

DECISION

STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge Pursuant to a charge filed on June 30, 1983, by District Council 1707, Community and Social Agency Employees Union, AFSCME, AFL-CIO (Union), a complaint was issued by Region 2 of the Nation Labor Relations Board on August 31, 1983, against Abbott House, Inc (Respondent) The complaint alleges that Respondent refused to bargain with the Union regarding a renewal collective-bargaining agreement in violation of Section 8(a)(5) and (1) and Section 8(d) of the Act

Respondent's answer denied the material allegations of the complaint and a hearing was held before me in New York City on January 10 and 14, 1984

On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by all parties, I make the following

FINDINGS OF FACT

I JURISDICTION

Respondent, a New York not-for-profit corporation, having an office and place of business in Irvington, New York, has been engaged as an agency providing social services including child-care services and placement Respondent annually derives gross revenues in excess of $500,000 from its operations, and also annually purchases and receives supplies including food, clothing, automobiles, and medical supplies valued in excess of $50,000 directly from suppliers located outside New York State

Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act

II THE ALLEGED UNFAIR LABOR PRACTICES

A *The Facts*

In 1971, the Union was certified as the exclusive collective-bargaining representative of the Respondent's technical employees

The parties' first collective-bargaining agreement, executed in September 1972, ran for 2 years, from January 1, 1972, to December 31, 1973 The contract contained the following language in article XXIV "duration of agreement and renewal"

> This Agreement shall become effective on January 1, 1972, and shall continue in effect until December 31, 1973 Thereafter, this Agreement shall be automatically renewed from year to year for one (1) year periods unless either party gives written notice to the other party by registered mail at least sixty (60) days prior to December 31, 1973, or any annual renewal period thereafter, of its desire to amend or terminate this Agreement In the event that the notice of desire to amend is so given, the Agreement shall not be terminated on the 31st day of December 1973 immediately following the giving of such notice, but shall continue in effect until such time as Agreement is reached between the parties as to an amended Agreement, or either party gives notice to the other party that it desires to terminate this Agreement

Thereafter, the parties executed another 2-year collective-bargaining agreement in May 1974, effective from January 1, 1974, to December 31, 1975 The "duration of agreement and renewal" clause was identical to that contained in the prior agreement except that it set forth the new effective and termination dates

After the expiration of that agreement, the parties continued to honor its terms, with minor amendments in 1976 and 1977

In the summer of 1981, Union Representative James Kennedy was assigned to represent the employees of the Employer Inasmuch as there had been no written contract since 1975, Kennedy examined the Union's file containing various documents including letters and corre-

spondence and wrote and prepared a document which the parties agreed represented their collective-bargaining relationship from July 1, 1978, to June 30, 1979 This document, prepared in 1981, is a complete collective-bargaining agreement It was never signed but it represents the agreement of the parties, which terms and conditions were maintained, notwithstanding that certain grievances were filed

The "duration of agreement and renewal" clause—article XXII states

> This Agreement shall become effective on July 1, 1978, and shall continue in effect unti June 30, 1979 Thereafter, this Agreement shall be automatically renewed from year to year for one (1) year periods unless either party gives written notice to the other party by registered mail at least sixty (60) days prior to June 30, 1979, or any annual renewal period thereafter, of its desire to amend or terminate this Agreement In the event that the notice of desire to amend is so given, the Agreement shall not be terminated on the 30th day of June 1979, immediately following the giving of such notice, but shall continue in effect until such time as agreement is reached between the parties as to an amended Agreement, or either party gives ten (10) days notice to the other party that it desires to terminate this Agreement

On October 14, 1981, Union Representative Kennedy sent Respondent's executive director Geoffrey Weiner proposed modifications to the agreement

At a negotiation session on January 20, 1982, agreement was reached on the terms of a new contract, subject to ratification by the employees Kennedy drafted a "Stipulaton of Settlement" and submitted it to Respondent in March

On March 19 the employees rejected the proposed agreement reached by Respondent and the Union and, on March 30, Kennedy sent a letter to Respondent informing him of the rejection The letter also stated

> The membership further unanimously voted to terminate the Collective Bargaining Agreement
>
> Therefore, in accordance with Article XXII Duration of Agreement and Renewal, we are serving notice to Abbott House, Inc that this Union will terminate the Collective Bargaining Agreement ten (10) days after receipt of this notice

On April 16, Kennedy recieved a letter at Respondent's premises which stated, inter alia

> In view of your recent indication to us that your Union is considering a strike in the immediate future at the Abbott House, please be advised that under the terms of the parties' collective bargaining agreement, the required notice of your Unions' intent to amend or terminate the Agreement was not provided to the Abbott House sixty (60) days prior to June 30, 1981 Therefore, under the terms of the contract, the Agreement is renewed and the no strike obligation of the contract remains in effect
>
> Consequently, any work stoppage instituted by your Union would be in violation of the contracts' no strike agreements and would be illegal [1]

Thereafter, negotiations were continued which resulted in the execution of the stipulation of settlement on September 29, 1982

Because this case turns upon the interpretation to be given to the stipulation of settlement, I have set forth in full the terms contained on the first page

> Stipulation of Settlement made this 29 day of Sept 1982, by and between ABBOTT HOUSE, INC and DISTRICT COUNCIL 1707, AFSCME, AFL-CIO and LOCAL 215 thereof (The Union) subject to ratification by the bargaining unit employees and approval by the Abbott House Board of Directors
>
> WHEREAS, Abbott House, Inc and the Union are parties to an existing collective bargaining agreement, and
>
> WHEREAS, they have engaged in good faith negotiations for a successor collective bargaining agreement ("successor agreement"),
>
> NOW, THEREFORE, in consideration of the mutual promises and obligations herein contained Abbott House, Inc and the Union hereby agree as follows The existing collective bargaining agreement shall be extended for an additional term as expressly hereinafter modified
>
> 1 The term of the successor agreement is for two (2) years, from July 1, 1981 to June 30, 1983, with a wage and mileage reopener on July 1, 1982
>
> 2 Abbott House, Inc shall grant a five (5%) percent salary increase effective October 1, 1981 for all bargaining unit employees, employed prior to July 1, 1981
>
> 3 *Article XX Health and Welfare Benefits* shall be amended to provide that Life Insurance shall be one (1) time the employees annual salary
>
> 4 *Article X Section 3* shall be amended to provide additional severance pay to employees employed seven to ten (7-10) years 8 weeks salary, more than ten (10) years 10 weeks salary
>
> 5 *Article VIII Section 2* - Delete the word "incapacitating"
>
> 6 *Article VIII Section 4* - Employees shall accrue on a prorata basis four (4) days with pay per fiscal year for personal business Time required for medical and dental appointments is to be charged against personal business days Time will not accrue beyond four (4) days or be carried over from year to year
>
> 7 Abbott House, Inc agrees that bargaining unit staff will be permitted to use the "Family Room", for relief, breaks, etc
>
> 8 Minimum wages shall be revised in accordance with the schedule which is attached hereto as Schedule "A" (Article VI Wages)

[1] I need not resolve the dispute as to whether Kennedy told Respondent that 60 days notice was not required

9 Prior to the opening of negotiation, Abbott House Board of Directors voted for certain changes in *Vacation, Leaves of Absences*, and *Holidays* These proposals are attached hereto as "Abbott House Proposals"

The remaining pages include provisions for a salary increase effective July 1, 1982, changes in vacation, leaves of absence and holidays, and the current salary schedules and salary schedules effective July 1, 1981, and July 1, 1982

There was no discussion concerning an automatic renewal clause in the negotiations leading to the signing of the stipulation

No formal collective-bargaining agreement was prepared subsequent to the execution of the stipulation of settlement although the parties agreed that one should be prepared [2]

On April 29, 1983, Kennedy sent a letter to Respondent in which he proposed negotiations for a contact to replace the agreement which was due to expire on June 30 The letter stated

> As you know the present Collective Bargaining Agreement between our Union and your Agency covering your employees will expire on June 30, 1983
>
> Effective as of such time, we propose that the contract be modified in numerous respects, and that a new agreement be entered into containing the proposed modification which will follow under separate cover shortly
>
> We offer to meet and confer with you for the purpose of negotiating a new contract containing such modifications We would appreciate hearing from you as to a convenient time and place for such a meeting
>
> We are notifying the Federal Mediation and Conciliation Services and the New York State Board of Mediation by mailing them a copy hereof

The letter was received by Respondent on May 2

On May 26, Respondent Official Weiner sent a letter to the Union which stated

> On May 2, 1983 Abbott House received your letter of April 29, 1983 which set forth your union's desire to amend or terminate the existing collective bargaining agreement between Abbott House and your union
>
> Please be advised that our counsel has advised us that your April 29th letter fails to meet the requisite sixty (60) day notice provision which is clearly spelled out in our contract
>
> As you know, our existing collective bargaining contract with your union extends through and terminates on June 30, 1983, unless the proper sixty (60) day notice of intent to amend or terminate is provided As noted, your letter of April 29th was received by Abbott House on May 2, 1983, which is fifty-nine (59) days prior to the expiration of our collective bargaining agreement and thus does not constitute timely notice as required by Article XXII of our contract Consequently, because of your union's failure to give timely notice of its desire to amend or terminate the agreement, the contract has automatically renewed itself for another year, until June 30, 1984
>
> I remain available should you wish to discuss the subject further

Thereafter, Respondent refused to bargain with the Union, relying on its position as set forth in its May 26 letter that the required 60 days notice was not timely sent by the Union and therefore Respondent regarded the contract as being automatically renewed for 1 year

Analysis and Discussion

1 Positions of the parties

The General Counsel and the Union argue that (a) the stipulation of settlement does not contain an automatic renewal clause, (b) the stipulation's paragraph 1 providing for a term of 2 years, with a wage and mileage reopener replaces the duration of agreement and renewal provision of the prior collective-bargaining agreement, (c) an automatic renewal clause may not be inferred where it does not exist and where the language of the contract is clear and unambiguous, and (d) past practice of the parties establishes that 60 days' notice had not been given and that Respondent, by continuing to negotiate with the Union, has waived the Union's failure to give such notice

In addition, the Union argues that the Board has no authority to interpret collective-bargaining agreements in a manner which would add an automatic renewal clause to the contract Respondent's remedy, according to the Union, should have been to grieve the Union's failure to provide the proper 60 day notice The Union asserts that by not timely grieving the alleged violation of the contract, Respondent may not now assert it as a defense The Union alternatively argues that if the contract required 60 days' notice, such notice was given to Respondent

Respondent argues that the stipulations of settlement incorporated the automatic renewal clause contained in the parties' prior collective-bargaining contract, and therefore since the agreed upon 60 days' notice was not given pursuant to such clause, the contract was automatically renewed for 1 year, and Respondent has not unlawfully refused to bargain with the Union

I agree with Respondent's position

2 The inclusion of the automatic renewal clause in the stipulation of settlement

A *The collective-bargaining agreements*

The evidence is clear that the automatic renewal clause contained in the 1978–1979 agreement was incorporated in the stipulation of settlement The Stipulation provides that "the existing collective bargaining agree-

[2] There was conflicting evidence which I need not resolve, as to whether Respondent or the Union agreed to prepare the document

ment shall be extended for an additional term as expressly hereinafter modified." Moreover, Union representative Kennedy conceded that the 1978–1979 agreement would be continued to be honored, subject to the changes contained in the stipulation.

The General Counsel's and the Union's argument is, however, that one of the changes effected was the replacement of the duration and renewal clause (art. XXII) of the 1978–1979 contract, which contained the automatic renewal clause, with paragraph 1 of the stipulation. I cannot agree. Paragraph 1 only changed the term of the agreement—its effective and terminaton dates. No other change was made in article XXII of the prior contract.

In addition, it is apparent that the stipulation of settlement contained specific, express modifications to certain named articles of the prior contract. Article XXII was not one of the listed sections which was changed. By its terms, the Stipulation is not a complete, self-contained document which enables the reader to discern all of its provisions. Rather, it requires reference to another agreement, the 1978–1979 contract, which is continued, subject to the modifications set forth in the Stipulation.

It is accordingly apparent, and I find, that the stipulation of settlement incorporated the automatic renewal clause provisions, with its 60-day notice requirements, contained in article XXII of the 1978–1979 collective-bargaining agreement.[3]

B. *Other Evidence*[4]

The Union asserts that consideration of parol evidence is unwarranted inasmuch as the terms of the stipulation of settlement are clear and unambiguous. I agree, but find, as set forth above, that the stipulation clearly incorporates all of the 1978–1979 contract as modified by the stipulation.

For the sake of completion, I will consider other evidence to determine the correct interpretation to be given to the documents. The Union claims that the interpretation of collective-bargaining agreements is the role of the arbitrator—not the Board—and further asserts that Respondent's remedy should have been the filing of a grievance to protest the untimely notification I disagree with both issues.

The Board has long held that it has "jurisdiction to interpret collective-bargaining contracts where it is necessary to the resolution of unfair labor practice charges under the Act."[5] Although evidence "outside the agreement cannot be introduced to vary its terms . . evidence may be introduced for the purpose of ascertaining the correct interpretation of an agreement."[6]

> Thus the existence of ambiguous contractual language warrants inquiry into relevant bargaining history in order to resolve latent ambiguities, and accordingly, extrinsic evidence regarding full circumstances of negotiations is properly considered to resolve ambiguity.[7]

In arguing that Respondent could have filed a grievance as to the untimely notification, the Union overlooks the fact that it too could have filed a grievance [8] Moreover, it was the Union which initiated this proceeding by filing its charge.

The other evidence establishes that it was the intent of the parties that automatic renewal clause be included in the Stipulation of Settlement:

(a) Each of the collective-bargaining agreements contained an automatic renewal clause which provided that the contract would be renewed for one year if at least 60 days' notice was not given to amend or terminate the agreement.

(b) On March 30, 1982, the Union relied on the duration of agreement and renewal clause of the 1978–1979 contract when it sent a letter to Respondent rejecting the proposed contract and informing it that "in accordance with article XXII duration of agreement and renewal, we are serving notice . . . [to] terminate the collective bargaining agreement ten (10) days after receipt of this notice." Thus, the Union at least on March 30, 1982, believed that that clause was operative.

It is readily apparent that the Union intended that article XXII of the 1978–1979 contract apply to its relations with Respondent thereafter [9]

Respondent's April 16 reply to the Union's March 30 letter informed the Union that 60 days' notice of an intent to amend or terminate the contract was not provided and that therefore the agreement was automatically renewed. Although Kennedy testified that he told Respondent Official Weiner that 60 days' notice was not required,[10] which testimony Weiner denied,[11] it is undisputed that thereafter during the negotiations which led to the execution of the Stipulation of Settlement on September 29, 1982, the subject of the automatic renewal clause was not raised or discussed at all, nor did the Union seek its modification or elimination from article XXII.

Respondent may have waived its right to assert article XXII by continuing to bargain with the Union after reciept of the untimely March 30, 1982 letter. However, Respondent did not thereafter waive its right to insist upon timely 60-day notice. Thus, as discussed infra, Respondent properly did not bargain with the Union after receipt of the untimely notice received on May 2, 1983.

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[3] *Ted Hicks & Associates*, 232 NLRB 712, 714 fn 5 (1977), enfd 572 F 2d 1024 (5th Cir 1978)

[4] I do not rely on Respondent witnesses' testimony of what the understanding of the parties was regarding the inclusion of the automatic renewal clause in the stipulation of settlement

[5] *General Maintenance Service Co*, 182 NLRB 819, 822 (1970), citing *NLRB v C & C Plywood Corp*, 385 U S 421 (1967) and *NLRB v Acme Industrial Products Co.*, 385 U S 432 (1967)

[6] *Inter-Lakes Engineering Co*, 217 NLRB 148, 149 (1975)

[7] *Timberland Packing Corp*, 261 NLRB 174, 176 (1982)

[8] *Dixie Sand & Gravel Co*, 231 NLRB 6, 7 (1977)

[9] I cannot believe Kennedy's testimony that the 10 day notice was included in the March 30 letter of some statutory notice requirement or because of some general concern for the welfare of Respondent's clients The clear purpose of providing 10 days' notice as expressly stated in the letter was to conform with the requirements of art XXII of the parties' contract

[10] Kennedy's testimony was corroborated by Union chairperson Robert Felton.

[11] I need not resolve that dispute

3. The Union's failure to provide 60 days' notice

The plain language of article XXII of the 1978–1979 agreement provides that "this agreement shall continue in effect until June 30, 1979. Thereafter, this agreement shall be automatically renewed from year to year for one (1) year periods unless either party gives written notice to the other party . . . at least sixty (60) days prior to June 30, 1979, or any annual renewal period . . . of its desire to amend or terminate this Agreement."

The parties' Stipulation of Settlement was therefore effective until June 30, 1983. Following the analysis in *Koenig Bros.*,[12] in which the contract's language was virtually identical to this case, the termination date—the day preceding the first day of the new contract term, was June 29, 1983. Including that day on which the automatic renewal clause became operative was May 1, 1983. The last day on which notice to forestall automatic renewal could be effective was May 1, 1983.[13] As notice was not recieved on or before May 1, 1983, the contract was automatically renewed.

I reject the Union's reliance on *Ohio Oil Co.*,[14] that notice received on the 60th day is sufficient, and that a given day should be included rather than excluded in the computation of the time period. That case involved the interpretation of Section 8(d) of the Act and not the provisions of an automatic renewal clause. Moreover, the inclusion by the parties here of a requirement that *at least* 60 days' notice must be given, according to the analysis followed in *Koenig Bros.*, and most recently in *Taft Broadcasting Co.*,[15] the full 60-day notice is necessary in order to forestall the operation of the contract's automatic renewal clause

I find no mitigating circumstances which would warrant disregarding the untimely notice. Thus, there was no evidence of delay in postal delivery time or other factors which were outisde the control fo the Union, causing late delivery of the notice.

Accordingly, inasmuch as the Board has strictly construed provisions which forestall automatic renewal clauses,[16] I find and conclude that the Union has failed to provide Respondent with the required 60 days' notice, and that therefore the parties' collective-bargaining agreement, specifically the 1978–1979 agreement as modified by the stipulation of settlement was automatically renewed for 1 year.

I therefore conclude that Respondent has not unlawfully refused to bargain with the Union.

Conclusions of Law

1. Abbott House, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2 District Council 1707, Community and Social Agency Emloyees Union, AFSCME, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. The collective-bargaining agreement between Respondent and the Union executed on September 29, 1982, automatically renewed itself on June 30, 1983, the Union having failed to give timely 60-day notice of its desire to amend or terminate as required by the contract.

4. Respondent has not engaged in an unfair labor practice by its refusal to meet and bargain with the Union concerning the terms of a new collective bargaining agreement.

5. Respondent has not engaged in the violations of the Act as alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[17]

ORDER

The complaint herein is dismissed in its entirety.

[12] 108 NLRB 304 (1954)

[13] The date of receipt of the notice and not the date of mailing controls the determination of whether the notice was timely *Koenig Bros.*, supra

[14] 91 NLRB 759 (1950)

[15] 264 NLRB 185, 198 (1982)

[16] *Sawyer Stores*, 190 NLRB 651, 652 (1971)

[17] 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