FORM NLRB-5026
(4-80)

UNITED STATES GOVERNMENT
National Labor Relations Board

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Memorandum

A.R. 01754

TO : Glenn A. Zipp, Director
Region 33

DATE: July 18, 1986

RELEASE

FROM : Harold J. Datz, Associate General Counsel
Division of Advice

SUBJECT: Momence Packing
Case 33-CA-7602

712-5014-0120
712-5014-0140
712-5042-6767-5000

and

UFCW Local 546
Case 33-CB-2343

These cases were submitted for advice as to whether the Employer and the Local had an enforceable collective bargaining agreement, in light of the International's rejection of its terms.

FACTS

Momence Packing (the Employer) voluntarily recognized Local 546 (the Local) shortly after beginning operations in October, 1982. The Local and the Employer reached an initial contract in January, 1983. That contract expired on January 18, 1986. That contract did not mention the International, nor contain a place for the International to signify approval of its terms. There was no International representative present at any of the negotiations for that contract. It was only after that contract was ratified that the International approved its terms. During the term of the 1983 contract, the Local was the sole agent involved in the processing of grievances and other discussions with the Employer. In addition, the Local and the Employer negotiated mid-term contract modifications without International involvement.

The Local and the Employer began negotiations for their second contract in April 1985. 1/ No International Representative was present. When the Employer's initial contract package was rejected by the membership, the parties broke off negotiations until approximately December.

Meanwhile, on May 2, the International notified the Local and the Employer by telegram that it was invoking Article 23(A) of the International Constitution and, as a result, would have to approve any agreement reached between the Local and the

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1/ All dates hereinafter are in 1985, unless otherwise noted.

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Employer prior to ratification. The Employer concedes it received the telegram. The Local did not object to the requirement of International approval.

On December 4, the parties again began negotiations and met a total of eight times. The Local President had requested that the International have a representative present at the negotiations. At the fourth negotiating session, an International Representative was present, and played an active role in the negotiations. This International Representative was present at all subsequent bargaining sessions, with the exception of the last meeting held on January 17, 1986, when a tentative agreement was reached. At a negotiating session held on January 13 or 15, 1986, when the International Representative was present, the Employer offered its final contract package. The bargaining committee reluctantly agreed to take this package to the membership for a vote. On January 15, 1986, the membership, upon the bargaining committee's recommendation, voted not to accept the Employer's contract package, and also voted in favor of a strike. Also on this date, the International Representative left town.

The Local President subsequently called the Employer and requested further bargaining. The Local President informed the International Representative of the request, but noted that the Employer had not yet agreed to any meeting. On January 17, 1986, representatives of the bargaining committee, including Local Business Agent Gorman, and the Employer met for further negotiations. 2/ They reached a tentative agreement, and the bargaining committee agreed to take the proposal to the membership for a vote on January 19, 1986. According to Gorman, the Employer asked about International approval, and he responded that the International would have the final say but it had been his experience that the International had gone along with the will of the people. According to the Employer, the only mention of the International was that a Local committeeman asked if the International had to be present at the ratification meeting. Gorman responded that the International had to be made aware of the meeting, but that he would take care of it.

The membership ratified the agreement on January 19, 1986. On the same date, Gorman and the Employer signed a Memorandum of Agreement which encompassed the agreed-upon changes to the expiring contract. There was no discussion of the

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2/ Neither the Local President, who had been the chief negotiator, nor the International Representative was present at this meeting.

International at this meeting. On January 21, 1986, Gorman called the International Representative and informed him that a contract had been agreed to and ratified by the Local membership. The International Representative objected to the fact that the agreement had been ratified and signed prior to International approval. On January 22, 1986, Gorman signed a final copy of the contract, and the Employer immediately implemented the contract. Again there was no mention of the International. The Employer has continued to abide by the terms of the contract signed on January 22, 1986.

On January 29, 1986, the International informed the Local and the Employer by telegram that the contract was null and void because it had not been first submitted to the International for its review and approval. On May 9, 1986, the Local filed the Section 8(a)(5) charge in Case 33-CA-7602, alleging that there is no contract and that the Employer must bargain for a contract. The Employer has filed the Section 8(b)(3) charge in Case 33-CB-2343, alleging that there is a contract and that the Local has unlawfully renounced it.

ACTION

We concluded that complaint should issue, absent settlement, in Case No. 33-CB-2343, alleging that the Local violated Section 8(b)(3) of the Act by renouncing the January 19 and 22 agreement. The charge in Case 33-CA-7602 should be dismissed, absent withdrawal.

We concluded that the January 19 and 22 agreement was an enforceable contract even though the International never approved the contract. In this regard, it is clear, based on the facts set forth supra, that the Local, and not the International, was the sole exclusive bargaining representative of the Employer's employees. The Local, therefore, was the principal for purposes of negotiating a contract with the Employer on behalf of the unit. Thus, this case is unlike other cases where the International is either the sole 9(a) representative 3/ or a co-representative with the Local. 4/ Notwithstanding the Section

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3/ See, e.g., Rath Packing Company, 275 NLRB No. 42 (1985); Braeburn Alloy Steel Div., 202 NLRB 1127 (1978); General Transformer Co., 173 NLRB 360 (1968); Independent Stave Co., Inc., 148 NLRB 431 (1964), enfd. in rel. part 352 F.2d 553 (8th Cir. 1965).

4/ See, e.g., Industrial Union of Marine and Shipbuilding Workers of America (Bethlehem Steel Corp.), 277 NLRB No. 191 (1986).

9 status of the Local, it was within the power of the Local to agree that International approval would be secured prior to ratification.

It is clear that the Employer understood that International approval was to be secured prior to ratification. However, on January 19, when a Local official signed the agreement, the Employer could reasonably assume that the requisite clearance had been achieved. In this regard, we note that, two days earlier, the Employer asked the Local official whether International approval of the then-tentative agreement would be secured. The Local official responded that he was confident that the International would approve if that was the will of the employees. 5/ The membership then ratified the agreement on January 19. Consequently, when the Local official signed the agreement on January 19, the Employer could reasonably assume that the requisite approval had been secured. Indeed, it would have been improper for the Employer to ask if this internal step had been taken. The issue of whether internal steps have been taken is not an appropriate matter of employer concern. 6/ Hence, when the Local official signed the memorandum of agreement on January 19, and the Employer signed as well, there was an agreement. The contract signed on January 22 was the formal embodiment of this agreement.

We also note that the Local is now asserting that International approval was a condition precedent to the existence of a contract, and that the condition was not met. As a matter of contract law, a party can waive its right to assert the non-occurrence of a condition precedent to the validity of an agreement, by accepting performance by the other party with knowledge that the condition precedent has not occurred. See RESTATEMENT (SECOND) OF CONTRACTS Sections 84, 246, 247 (1981). In the instant case, the Local executed the agreement and permitted the Employer to implement it immediately with full knowledge that the condition precedent had not been met. Under these circumstances, we concluded that the Local waived its right to assert the non-occurrence of the condition precedent as a means of repudiating the contract.

Accordingly, complaint should issue in Case 33-CB-2343 alleging that the Local violated Section 8(b)(3) of the Act by

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5/ Respondent does not dispute this version of the conversation.

6/ See M & M Oldsmobile, 156 NLRB 903, 905 (1966).

repudiating the January 19 and 22 agreement, and the charge in Case 33-CA-7602 should be dismissed, absent withdrawal.

H. J. D.