

Sheet Metal Workers International Association, Local No. 16 and Brod & McClung-Pace Co. and Grand Metal Products Corp. Cases 36-CB-1045 and 36-CB-1046

30 April 1984

DECISION AND ORDER

BY MEMBERS ZIMMERMAN, HUNTER, AND DENNIS

On 23 December 1983 Administrative Law Judge Russell L. Stevens issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Charging Parties filed an answering brief.

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 as modified.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Sheet Metal Workers International Association, Local No. 16, Portland, Oregon, its officers, agents, and representatives, shall take the action set forth in the Order.

¹ In response to exceptions, we note two factual errors in the judge's decision which do not affect the ultimate disposition of the case. First, the record shows that in 1952 Local 544 was created to represent employees primarily in the industrial and production industry, and that Local 16 represented employees primarily in the construction industry. Second, Brod's July 1982 proposal to Local 16 provided that Brod's unionized employees would receive hourly compensation equaling hourly wages in the building trades only during time spent on projects where Sheet Building Trades contractors were still providing installation labor, and that various pension and benefit fund contributions would not be used in determining compensation.

DECISION

STATEMENT OF THE CASE

RUSSELL L. STEVENS, Administrative Law Judge. This case was tried in Portland, Oregon, on October 12, 1983.¹ The complaint in Case 36-CB-1045 is based on a charge filed March 21 by Brod & McClung-Pace Co. (Brod). The complaint in Case 36-CB-1046 is based on a charge filed March 21 by Grand Metal Products Corp. (Grand Metal). By order dated April 26 the Regional Director for Region 19, National Labor Relations Board (NLRB), consolidated the two cases for trial and issued

¹ All dates hereinafter are within 1983 unless otherwise stated.

the complaint, which alleges that Sheet Metal Workers International Association, Local No. 16 (Respondent or Union), violated Section 8(b)(3) and (1)(A) of the National Labor Relations Act (Act).

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of Respondent and the Charging Parties. The General Counsel made a closing oral argument at trial, but did not file a written brief.

On the entire record, and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

Brod & McClung-Pace Co. is an Oregon corporation engaged in the manufacture of commercial and industrial heating, ventilation, and air-conditioning equipment in Portland, Oregon. During the past year it did a gross volume of business in excess of \$50,000 and purchased goods and services from outside the State of Oregon valued in excess of \$50,000, which were transported to its Portland location directly from points outside the State of Oregon.

Grand Metal Products Corp. is an Oregon corporation engaged in the manufacture of hollow metal doors, metal door frames, and other metal products in Portland, Oregon. During the past year Grand Metal Products Corp. did a gross volume of business in excess of \$500,000, and purchased goods and services from outside the State of Oregon in an amount in excess of \$50,000, which were transported to its Portland location directly from points outside the State of Oregon.

I find that Brod & McClung-Pace Co. and Grand Metal Products Corp. are employers within the meaning of Section 2(2) of the Act, and are engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

Sheet Metal Workers International Association, Local No. 16 is, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background²

Respondent is an old union, having been chartered by its International Union in 1888 to represent employees in construction and production industries. In 1952 Local 544 "carved out" of Respondent, and chartered by the International Union primarily to represent employees in the construction industry. Respondent remained after the separation of construction employees from its jurisdiction, primarily as a union to represent employees in the production industry. On May 1, 1982, Local 544 was merged back into Respondent and, on merger, Respondent succeeded to all bargaining agreements to which

² This background summary is based on stipulations of counsel, and on credited testimony and evidence not in dispute.

Local 544 was a party. Thereafter, all employees of Local 544 became members of Respondent.

Brod manufactures heating, ventilating, and air-conditioning equipment which it delivers to, and has installed at, various projects principally in the Portland, Oregon area but throughout the United States Brod's manufacturing facility is located in Portland, where it employs approximately 190 union employees and approximately 55 nonunion office employees. Brod's equipment, which is installed by plumbing and heating and cooling contractors and sheet metal employees, is guaranteed for 1 year from the first beneficial use by buyers of the equipment. Because the first beneficial use often occurs only after a lengthy construction period of large buildings or facilities, the warranty time may extend over a period of 2 or 3 years. Some installers of Brod's equipment may be non-union contractors, but sheet metal work done on that equipment within Respondent's jurisdiction is performed by members of Respondent.

Grand Metal manufactures metal doors, door frames, and hospital surgical cabinets and partitions, which it delivers to, and has installed at, various projects principally in the Portland area. Grand Metal guarantees its products, usually for 1 year. However, that period of time may be longer if so required by architectural specifications. Prior to March 1979 Grand Metal installed the products it sold, but on that date it sold its installation business to one of its employees, Buster Hoagland, who established his own business called H & H Metal Products. Thereafter, and to the present time, Grand Metal has done no installing of the products it manufactures.

Brod has been in business since the 1940s, and has had collective-bargaining agreements with Local 544 since it was organized in 1952. Brod's union employees are paid in accordance with its agreement with Local 544, the most recent agreement³ having been signed effective April 1, 1982, just prior to Local 544's merger with Respondent on May 1 of that year. Prior to May 1, 1982, Brod had no agreement with Respondent, but since that date its union employees have been represented by Respondent. Brod's most recent agreement with Local 544, as well as its predecessor agreements, includes a schedule of employee classifications and pay. No separate classification or pay rate is given for work performed pursuant to Brod's equipment warranty, which is the type of work principally involved in this controversy. Pay rates for employees engaged in shopwork for Brod generally are less than rates for outside sheet metal construction work performed at jobsites.

Grand Metal had collective-bargaining agreements with Local 544 from 1952 until that local was merged with Respondent May 1, 1982. The last agreement⁴ is effective from April 15, 1982, through March 31, 1985. That agreement includes an employee classification and pay schedule, but no separate category is provided for employees engaged in warranty work.

Over the past years, since the late 1940s, Brod commonly has received customer complaints within its product warranty period, concerning product deficiencies. On

receiving such complaints, Brod dispatches shop employees to the jobsite to inspect the equipment and make necessary adjustments or repairs. For the past couple of years Brod's chief warranty serviceman has been Leroy Manley, whose predecessor in that capacity was Don Pottratz. Both employees were members of Local 544 prior to the 1982 merger, as was their helper, John Wakefield. Manley works in the shop, and goes into the field only on special detail. He is paid pursuant to Brod's bargaining agreement, and does no outside sheet metal work. When he works at outside jobsites, such as when he does onsite warranty work, his pay under the bargaining agreement is less than that of sheet metal workers on the job pursuant to union dispatch.

In 1980, when Brod had a collective-bargaining agreement with Local 544, Pottratz was accosted in the field by a representative of Local 16 while making repairs in the nature of warranty work, and was told that he was not permitted by Respondent to do that work. Pottratz later was subjected to a union fine, and Brod filed an unfair labor practice charge with the Board. Ultimately, the fine was rescinded, and the charge was dropped. That incident resulted in an exchange of letters between Brod and Respondent, wherein Respondent contended that Brod's employees had been doing field construction work at substandard wages. On October 9, 1980, Brod wrote a long letter to Local 544, explained its warranty policy, and listed work and parts involved in warranty work. On May 13, 1981, and again on August 7, 1981, Local 544 wrote to Brod. The latter correspondence stated:

Dear Mr. Brod:

It has been brought to the attention of this local union that there is a question regarding the scope of work performed by your company as outlines in your letter of October 9, 1980 pertaining to field installation work (copy enclosed).

Please be advised that this Local Unuon [sic] wants to make our position clear, that the Local No. 544 contract signed with your company does not cover the jurisdiction of any field installation, and/or service work being performed by the employees covered under our agreement with your company.

Field installation, and/or service work mentioned above comes under the jurisdiction of our sister construction local unions in the construction industry.

Warranty work should not be construed as field installation or service work.

It is our opinion that a warranty is a written statement, or guarantee, made by the manufacturer of a product assuring the purchaser that repairs or replacement of defective parts will be made, without charge, for a specified period of time.

If you desire, a representative of this local union will contact you in the very near future regarding clarification of this matter.

³ This agreement is J. Exh. 2.

⁴ J. Exh. 1.

Following the above events, Brod continued to do warranty work in the field, as it had in the past.

Representatives of Local 544 and Brod informally discussed the problem on several occasions, but no agreement was reached. The matter was not discussed during negotiations for the 1982 agreement, although Brod proposed to add "Factory Warranty Technician" to the journeyman classifications. No action was taken on the proposal.

On July 23, 1982, after the merger of Local 544 and Respondent, Brod wrote to Local 16 and submitted a proposal which, *inter alia*, provided that Brod's employees, when engaged in warranty work, would receive pay and benefits equal to those of the sheet metal building trades in the area where the work was performed.⁸ On August 17, 1982, Respondent replied to Brod, rejected the proposal, and offered a counterproposal which, *inter alia*, would require that Brod use union-dispatched building trades employees for warranty work, rather than Brod using its own employees. By letter dated August 31, 1982, Brod rejected Respondent's counterproposal. By letter dated September 14, 1982, Respondent advised Brod's, *inter alia*, "we will be notifying the various locals that your firm does not have a field agreement, and your employees are not to be working in the field." On September 30, 1982, Brod replied and stated, *inter alia*:

We should make it perfectly clear that, in our judgment, it is in the best interests of Brod & McClung and the members of your local employed in our shop that we do exactly what we have been doing in the past. This includes certain limited work in the field which is well defined by years and years of past practice under our agreement with you. Our agreement has *always* governed the terms, pay and other conditions under which that work has been performed. We will continue to honor our contract and expect you to do likewise. Continued attempts on your part to unilaterally force changes in those conditions are improper, if not illegal. To the extent your actions in any way breach our agreement or otherwise interfere with or damage our business, we will, of course, have no alternative but to hold you and the union responsible.

By letter dated September 14, 1982, Local 16 advised Manley:

Dear Sir and Brother:

The agreement under which you are employed does not cover job site labor, furthermore the delegates at the convention voted to include the following language in the constitution: "employees of employers engaged in the production or manufacturing field in this industry who *are not* permitted to work or be sent outside of shops or plants in which they are employed to perform work except to inspect

warranty failure and to supervise the correction of faulty products."

Should you have any questions, please give me a call.

On October 7, 1982, Respondent's shop steward posted a notice on Brod's bulletin board which stated, *inter alia*:

Anyone who works in the field but isn't covered by a field agreement could be charged and fined. If you are asked to work out of the shop it is recommended that you tell the employer you don't want to violate the Rules of the union, and to call the Union to see if it is O.K.

In October 1982 Manley and Wakefield were sent by Brod to do some work on equipment Brod had sold for use at the Rossman landfill site in Oregon City. While they were at work John Smith, who represented Respondent, approached them, said they were doing unauthorized work, threatened them with fines and expulsion from the Union, and handed them a copy of a recently enacted amendment to the International's constitution which covered the situation. Smith said the two employees could supervise the work if it were done by union-dispatched employees, but that they could not work with tools on the job.

On October 28, 1982, Brod posted the following notice on its bulletin board, addressed to hourly employees:

In the recent past we have had a dispute with Union Local 16 Buildings and Trades Division concerning our past practices of warranty repair and service work on heating, ventilating and air-conditioning equipment of our manufacture and other allied manufacturers. Under all the contracts and agreements since this plant was unionized we have provided warranty/service work for our customers. This practice will continue! It is mandatory for the long-range health of our business and the company to maintain a cost-effective warranty/service program.

In answer to the Union's warning that any employee working in the field may be charged and fined, we will file an unfair labor practice case through the NLRB. The Union cannot unilaterally change the contract and the rules of our past practices without first negotiating those changes.

Remember, we all work for Brod & McClung-Pace Co., not the Union, and the Company pays *all* the wages, salaries and benefits.

February 25, 1983, Manley was replacing a bearing on equipment Brod sold to the Shriners' Hospital in Portland, when he was approached by Smith and Leo Lyman, another representative of Respondent. Lyman told Manley that he could inspect the equipment, but that he could not work on it, since that was building trades work. Lyman referred to the International's constitution and stated that, if Manley worked on the equipment, he would have to file union charges against Manley. In order that the job, which was in the nature

⁸ William Brod, treasurer and a stockholder of Brod, credibly testified that this type of arrangement was made on one of Brod's jobs in Phoenix, Arizona, in 1982. R. Exh. 2 is a copy of the arrangement made with Local 359.

of an emergency, could be completed, Manley supervised a steamfitter who did the work.

Grand Metal has done warranty work since 1952, and for the past 5 years that work principally has been done by employee Fred Elgin, a member of Local 544 prior to the 1982 union merger. In 1980, Elgin was confronted on a warranty job by a representative of Respondent, who said Elgin was not supposed to be working on the job.⁶ Subsequently, union charges were filed against Elgin because of the incident, and he was fined by Respondent. Grand metal filed a charge with NLRB because of the fine. The fine later was rescinded. Elgin's money was returned to him, and Grand Metal withdrew the NLRB charge. In February 1983 Lyman and Charles Strayer, another representative of Respondent, confronted Elgin on a warranty job at Northwest Bell, and stated that Elgin was not supposed to be doing that work. They stated that, if Elgin continued to work on that job, he would receive union charges and be fined. Elgin left the job unfinished. The charges in this case resulted from this incident.⁷

B. Discussion

There is no dispute concerning the fact that, historically, Brod and Grand Metal have performed warranty work without challenge by Respondent. There is no evidence that, prior to 1980, the subject was of concern to the parties, or that the definition of warranty work was in doubt. Such work was not defined in any contract, yet Brod and Grand Metal consistently performed such work year after year, clearly with Respondent's knowledge. Brod proposed in 1982 that the new contract include a classification for warranty work, which proposal was rejected, but that proposal was precipitated by the recent objections of Respondent. Clearly, past practice was that Brod and Grand Metal dispatched shop employees to do warranty work in the field, whatever may have been set out as work classifications of the contracts. Brod's proposal did not alter the fact that the parties for many years had agreed to contracts that embodied their past practice.

It is clear that the work involved in this dispute is warranty work, i.e., work for which Brod and Grand Metal remained liable following delivery of their products to worksites.

Respondent argues that its International's constitution, as amended in 1983, precludes warranty work such as that performed by shop employees of Brod and McClung. That argument has no merit. Brod and Grand Metal had a long bargaining relationship with Local 544 which resulted in contracts that, through practice, embodied performance of warranty work in the field by shop employees of the two companies. Starting in 1980, Respondent unilaterally sought to change the past prac-

⁶ Elgin credibly testified that he never had done installation work for Grand Metal; that his work is limited to shop and warranty work. As noted above, Grand Metal has contracted out all of its installation work since March 1979.

⁷ Elgin and Richard Koessel, Grand Metal's vice president, credibly testified that a similar incident occurred earlier in 1982, on a warranty job at Kaiser Hospital. After some discussion between Grand Metal and Respondent, Elgin was permitted to finish the job.

tice of the parties and their bargaining agreements, through fines levied against, and personal pressure on, employees of Brod and McClung. Such action constitutes a violation of the Act, as alleged by the General Counsel.⁸

Respondent argues that the International's constitution prohibits the companies' shop employees from doing warranty work in the field, but that fact is immaterial. It appears possible that the constitution was amended, partially or entirely, in response to Respondent's problem with Brod and Grand Metal, but whether or not such was the case, Respondent legally cannot use the constitution as a basis for its actions herein, any more than it can attempt to achieve its goal by fining and pressuring the Companies' employees. As discussed above, the past practice of the parties established the right of the two Companies to assign warranty work under the collective-bargaining agreement to shop employees, and Respondent's only legal avenue of relief would be through further bargaining.

Respondent argues that the past practice is widespread and well known, wherein shop employees are precluded from doing work in the field. Elgin and Lyman so testified, and Lyman testified that "I have chased a lot of production workers off of union jobs." Such may well be the case, but that is beside the point. A contractual matter is involved herein—not a matter of intraunion practice or union rules.

Finally, Respondent argues that *Scofield*⁹ controls the issue herein, because Brod and Grand Metal "sought to create a new classification of factory warranty technician" in the face of Respondent's right to enforce a properly adopted rule relative to field work. *Scofield* is not applicable herein, since a "new classification" is not in issue. The field warranty work of Brod and Grand Metal, with Respondent's past occurrence, is far from new—it has been going on for more than 30 years. Brod's attempt to negotiate a specific contractual modification was made solely to keep the peace with Respondent, after Respondent already had embarked on its course of unlawful pressure on the employees of Brod and Grand Metal. Respondent not only refused to negotiate the matter—it continued its pressure against the two Companies and their employees.

It is found that Respondent violated the Act as alleged.

CONCLUSIONS OF LAW

1. Respondent is a labor organization within the meaning of Section 2(5) of the Act.
2. Brod & McClung-Pace Co. and Grand Metal Products Corp. are employers within the meaning of Section 2(2), (6), and (7) of the Act.
3. By threatening Brod's employee Keith Manley and Grand Metal's employee Fred Elgin and others with union disciplinary action, including court collectible fines, if they continued to perform warranty work with

⁸ *Painters District Council 9*, 186 NLRB 964 (1970). See also *Teamsters Local 100 (Marine Materials)*, 214 NLRB 1094 (1974), and *Operating Engineers Local 39 (San Jose Hospital)*, 240 NLRB 1122 (1979).

⁹ *Scofield v. NLRB*, 394 U.S. 423 (1969).

the object of attempting to achieve a unilateral, midterm modification of collective-bargaining agreements with Brod and Grand Metal, Respondent violated Section 8(b)(3) and (1)(A) of the Act.

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

THE REMEDY

Having found that Respondent has engaged in unfair labor practices in violation of Section 8(b)(3) and (1)(A) of the Act, I shall recommend that Respondent be ordered to cease and desist therefrom, and to take certain affirmative action designed to effectuate the policies of the Act.

On the foregoing findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁰

ORDER

The Respondent, Sheet Metal Workers International Association, Local No. 16, shall

1. Cease and desist from threatening employees of Brod & McClung-Pace Co. and Grand Metal Products Corp. with disciplinary action, including court collectible fines, if they continue to perform warranty work, with the object of attempting to achieve a unilateral, midterm modification of collective-bargaining agreements with Brod and Grand Metal.

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

(a) Post at its meeting halls copies of the attached notice marked "Appendix."¹¹ Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in con-

¹⁰ 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.

spicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Furnish to the Regional Director for Region 19 sufficient signed copies of the aforesaid notice for posting by Brod & McClung-Pace Co. and Grand Metal Products Corp., if they are willing to do so, in places where notices to employees customarily are posted.

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

¹¹ 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 threaten employees of Brod & McClung-Pace Co. and Grand Metal Products Corp. with disciplinary action, including court collectible fines, if they continue to perform warranty work, with the object of attempting to achieve a unilateral, midterm modification of collective-bargaining agreements with Brod and Grand Metal.

SHEET METAL WORKERS INTERNATIONAL
ASSOCIATION, LOCAL NO. 16