

Mathews-Carlson Body Works, Inc. and Machinists and Aerospace Workers Local Lodge 1414, International Association of Machinists and Aerospace Workers, AFL-CIO. Cases 32-CA-15537 and 32-CA-15736

April 16, 1998

DECISION AND ORDER

BY MEMBERS FOX, HURTGEN, AND BRAME

On May 22, 1997, Administrative Law Judge Jay R. Pollack issued the attached decision granting the General Counsel's posttrial motion to withdraw the complaint. The Union filed exceptions and a supporting brief, the Respondent filed a brief in response, and the General Counsel filed a response to the Union'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 record in light of the exceptions, briefs, and response and has decided to affirm the judge's rulings, findings,¹ and conclusions² and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and remands the case to the Regional Director for withdrawal of the complaint.

Kenneth Ko, Esq., for the General Counsel.

Robert J. Bekken and Warren L. Nelson, Esqs. (Fisher & Phillips), of Newport Beach, California, for the Respondent-Employer.

David A. Rosenfeld, Esq. (Van Bourg, Weinberg, Roger & Rosenfeld), of Oakland, California, for the Charging Party-Union.

¹ The Charging Party has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. We also find that the judge's credibility findings are sufficiently specific to permit a ruling on the General Counsel's motion to withdraw the complaint.

² In deciding to move for withdrawal of the complaint, the General Counsel concluded that the Respondent had made contractually required benefit fund payments for only a portion of the employees in the bargaining unit, and that the Union knew or should have known of this prior to the beginning of the 10(b) period. We conclude that the General Counsel reasonably exercised his prosecutorial discretion in this regard and that the judge properly granted the motion. See *Moeller Bros. Body Shop*, 306 NLRB 191 (1992) (barring recovery on complaint allegations covering periods more than 6 months before filing of charge alleging failure to apply contract to certain unit employees on grounds of untimeliness, where union, in exercise of reasonable diligence, should have become aware of failure years before charge was filed).

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge. I heard these consolidated cases in trial on March 7 and 10, 1997. Thereafter, on March 19, 1997, the General Counsel filed a motion to withdraw the consolidated complaint based on his determination that continued pursuit of the complaint was not warranted. On April 30, 1997, the General Counsel filed a statement of reasons for its motion to withdraw the complaint. On May 7, 1997, the Union filed a brief in opposition to the General Counsel's motion. On May 13, the General Counsel and the Respondent filed answering briefs. On May 20, the Union filed a concluding reply brief.

I. THE GENERAL COUNSEL'S MOTION

The complaint in this matter alleges that Mathews-Carlson Body Works (the Respondent) violated Section 8(a)(1) and (5) of the National Labor Relations Act by failing to apply preexisting contractually based conditions to a substantial number of employees performing bargaining unit work and by unlawfully withdrawing recognition from the Union. In response to these allegations, the Employer contends that, with the Union's acquiescence, it has historically treated its various contracts with the Union as members only agreements and, therefore, since a members only bargaining unit is inappropriate, the legal basis for an 8(a)(5) violation is absent. See, e.g., *Arthur Sarnow Candy Co.*, 306 NLRB 213 (1992). After the hearing had closed, the General Counsel filed his motion seeking to withdraw the complaint based on the record evidence showing that the Respondent-Employer had treated its agreements with the Union as members only agreements and that if the Union had "exercised any sort of reasonable diligence in policy its contracts with the Employer it long ago would have discovered that situation."

All parties have been afforded full opportunity to appear, to introduce evidence, and to examine and cross-examine witnesses. Further all parties have filed written legal arguments regarding the motion to withdraw the complaint. On the entire record, from my observation of the demeanor of the witnesses,¹ and having considered the posthearing arguments of the parties, I grant the General Counsel's motion to withdraw the complaint.

II. FACTUAL FINDINGS

The Respondent and the Union were party to a series of collective-bargaining agreements covering the Respondent's employees at its body shop in Palo Alto, California. The evidence establishes that the Union knew that the Respondent hired "sleepers" (employees hired but not reported to the Union or the benefit trust funds) early in the bargaining rela-

¹ In order to decide this motion certain factual findings and credibility resolutions were necessary. The credibility resolutions have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction to the findings here, their testimony has been discredited, either as having been in conflict with credited documentary or testimonial evidence or because it was in and of itself incredible and unworthy of believe.

tionship. Lee Stafford, the union representative who serviced the Respondent's shop from 1974 to 1986, testified that he was aware that the Employer had "sleepers" from the day he took over the shop. Don Barbe, the current business representative, testified that when he took over the shop from Charles Netherby, Netherby told him that he found a "sleeper" in the shop and cautioned Barbe to "always keep an eye on that place." Glenn Gandolfo who negotiated with the Respondent during the time period at issue, testified that he had heard that "there was a problem with sleepers" at the Respondent's shop.

The credible evidence revealed that early in the relationship, the Respondent directed employees to hide from the Union so that it could have a longer time before having to pay the fringe benefit payments on behalf of new hires. However, for at least six, the Respondent did not do so. When the Respondent hired new employees, Marshall Mathews, managing partner, gave the employees the option of joining the Union and receiving union benefits or not joining and receiving health benefits pursuant to the Employer's plan. A majority of the employees chose not to join the Union. The employees did not hide from the union representatives. Two employees testified that they observed Barbe visiting the shop and talking to the union members. One employee testified that Barbe approached him about joining the Union and that he told Barbe that he was not going to join the Union. The employees worked in the shop and wore uniforms identifying themselves as employees of the Respondent. By the time of the hearing, Barbe had not visited the shop for 3 to 3-1/2 years. During the time period that Barbe visited the shop, the Respondent employed 12 employees but only reported 5 employees to the Union.

The Union contends that the Respondent actively concealed the "sleepers." The credible evidence reveals that the Respondent did conceal the sleepers in the 1970s and early 1980s. However, since at least 1989, the Respondent, apparently believing that it only had to make fringe benefit payments on behalf of union members, did not conceal employees from the Union. For example, in 1991 Mathews wrote the pension fund and Barbe seeking reimbursement for pension benefits paid for an employee who was not a union member. Barbe helped Mathews get that reimbursement by writing that the employee was employed by another business owned by Mathews. However, Mathews did not own another business and the employee was, in fact, employed under the Union's collective-bargaining agreement. Mathews did not in any way indicate that the employee was not employed in the bargaining unit. He clearly stated that the employee was not a union member and had not been a member during his employment with the Respondent. The employee had worked for the Respondent from 1989 to 1991.

The Union contends that it enforced the collective-bargaining agreement when it caught sleepers. The credible evidence reveals that Barbe visited the shop when a majority of the employees were not complying with the union-security clause and were not covered by the fringe benefit plans. However, Barbe did not take steps to require the Respondent to apply the contract to all the bargaining unit employees. Barbe not only permitted the Respondent to seek reimbursement for pension payments to a nonmember-employee, but assisted the Respondent in obtaining such reimbursement.

The Union argues that because the Employer was hiding employees, if had asked for a list of employees, the Respondent would have provided a list of only union members. I find that for at least 6 years the Respondent did not conceal employees from the Union. Employees wearing uniforms with the Respondent's logo were working in the shop when Barbe visited. The record indicates that nothing prevented Barbe from talking to the employees in the shop. Further, Mathews made it clear to Barbe that he did not believe he was required to make fringe benefit contributions on behalf of nonmembers.

The Union contends that it believed that the nonunion employees were employed by another business owned by Mathews. Mathews did not operate another business. He had a storage facility for his privately owned vintage cars. However, that storage area employed no employees. The body shop employees all wore uniforms identifying themselves as employees of the Respondent's body shop. Even if Barbe saw an employee entering the storage area, that employee would have been wearing a uniform bearing the Respondent's logo. Thus, I find that the Union could not reasonably believe that some of the employees were employed by another business entity.

III. CONCLUSIONS

In *Moeller Bros. Body Shop*, 306 NLRB 191 (1992), the Board held that a union is required to exercise "reasonable diligence" in policing a contract and monitoring an employer and that it will be charged with constructive knowledge of what it would have learned had it exercised such diligence. I find that in this case had the Union exercised reasonable diligence, the Union would have become aware that the Respondent had not made fringe benefit payments on behalf of a majority of the employees. Further, the union-security clause had not been applied to a majority of the employees. The Respondent was treating its collective-bargaining agreements as members only agreements. I find no evidence that the Respondent sought to hide its members only treatment of its contracts. Mathews' letters regarding the reimbursement of pension benefits were clearly based on the nonmembership of the employee.

In *Moeller Bros.*, supra at 193, the Board further stated:

While a union is not required to aggressively police its contracts aggressively in order to meet the reasonable diligence standard, it cannot with impunity ignore an employer or unit, as the Union in this case did, and then rely on its ignorance of events occurring at the shop to argue that it was not on notice of an employer's unilateral changes. This is not a case where information regarding [this contract] is only in the hands of the employer, where an employer has concealed its misconduct, or where the size of an employer's operation prevents ready discovery of the misconduct.

The Union argues that the Respondent concealed its misconduct. I find that the evidence does not support this argument. The Respondent did not conceal the number of employees that it employed. That should have been evident to Barbe on his visits. The size of the operation should have clearly indicated to Barbe that there were more than five employees. In fact there were 12. Mathews, apparently believing

that he did not have to pay fringe benefits for nonmembers, made no attempt to conceal the fact that he made benefit payments only on behalf of union members.

Accordingly, as the evidence revealed that *Moeller Bros.* and *Arthur Sarnow Candy* required dismissal of this case, the General Counsel properly sought to withdraw the complaint. Therefore, I grant the General Counsel's motion.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²

²All motions inconsistent with this recommended Order are denied. If no exceptions are filed as provided by Sec. 102.46 of the

ORDER

The case is remanded to the Regional Director for withdrawal of the complaint.

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.