

**Makins Hats, LTD and Millinery Workers Union Local 24-42H, New York-New Jersey Regional Joint Board, UNITE, AFL-CIO. Case 2-CA-29591**

September 13, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX  
AND HURTGEN

On December 22, 1997, Administrative Law Judge D. Barry Morris issued the attached decision. The General Counsel filed exceptions and a supporting brief, the Respondent filed cross-exceptions with a brief supporting its cross-exceptions and opposing the General Counsel's exceptions. The General Counsel filed a brief in response to the Respondent's cross-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, and conclusions only to the extent consistent with this Decision and Order.

Facts

The facts, as set forth more fully in the judge's decision, are as follows.

In 1980, Marcia Akins, president of the Respondent (Makins), signed a contract with the Union recognizing it as the exclusive bargaining representative for its workers. When that contract expired, the Respondent signed no further contracts with the Union.

Akins testified that in 1983, she was being harassed by a union representative. She called David Stein, the president of the American Millinery Manufacturers Association (the Association). Stein told Akins to send him a check for \$300 and that by doing so she "would be a member of the American Millinery Manufacturers Association, Inc. and that he would stop the harassment." He did not tell Akins that by joining the Association the Respondent would be bound to the Association contracts with the Union and Akins did not request that the Association represent Makins in collective bargaining. There is no evidence that Makins signed any document with the Association conferring any authority on it or memorializing any type of relationship. Finally, when the Association wrote to the Union, on Makins' behalf, it merely complained that the Union was harassing Makins and stated that "we represent Marcia Akins and Makins Hats, Ltd., a member of the American Millinery Manufacturers Association, Inc." Thereafter, there was no further dealing between Makins and the Association until the instant dispute.

From the time Akins signed the 1980 contract until at least 1996, the Respondent paid union rates, made contributions to the union funds, and complied with the terms of the contract with respect to those employees who were members of the Union. There is additional evidence that the Respondent participated in arbitrations with representatives of contractual benefit funds over disputes as to fund contributions pertaining to employees acknowledged by the Respondent to be full members of the Union. During various periods between 1983 and 1996, nonunion members performed unit work without receiving contractual wages or benefits. A union representative made frequent visits to the plant and there was a shop steward on the premises.

Judge's Findings

The judge concluded that in 1983, when the Respondent remitted \$300 to Stein, it had joined the Association. The judge further found that a 1983 letter from the Respondent's attorney to the Union stating, *inter alia*, that the Respondent was "a member of the American Millinery Manufacturers Association, Inc.," and the fact that the Respondent continuously applied the terms of the collective-bargaining agreement to the unit employees who were union members was sufficient to establish that the Respondent had made "objective manifestations of intent to be bound by group action."<sup>1</sup> The judge concluded that, based on *Scandia Stucco Co.*, 319 NLRB 850, 856 (1995), the Respondent remained a member of the Association from 1983 until February 1997 when the Respondent's attorney wrote to both the Union and the Association affirmatively withdrawing its membership.

Notwithstanding its Association membership, the judge concluded that the Respondent operated under a "members-only" arrangement. Thus, the judge credited the testimony of Akins, that the Respondent consistently applied the contracts only to employees known to it as members of the Union, and did not pay contractual benefits or otherwise apply the contracts to unit employees whom it believed did not belong to the Union. He further found, based on testimony of both Akins and the Union's district director, Sandra Bermejo, that Bermejo had visited the Respondent's shop on a frequent and regular basis since 1983 and that one of the employees served as a union steward during much of that time. All the unit employees worked in a large open room and were visible to anyone who entered. Crediting Akins over Bermejo, the judge found that Bermejo knew of the presence of unit employees to whom the contract was not

<sup>1</sup> *Kroger Co.*, 148 NLRB 569, 573-574 (1964). See also *Custom Contractors*, 226 NLRB 851 (1976), *enfd.* 564 F.2d 190 (5th Cir. 1977).

being applied and acquiesced in that arrangement. The judge further determined that because the Board will not issue bargaining orders in “member-only” units, the complaint should be dismissed. See, e.g., *Don Mendenhall, Inc.*, 194 NLRB 1109 (1972). We agree that the complaint should be dismissed, but do so for the following reasons.

#### Discussion

We disagree with the judge’s conclusion that the Respondent manifested an intent to be bound by group bargaining after its individual 1980 agreement expired, but in doing so we rely on his finding that the Respondent had never followed the Association agreements except on a “members-only” basis. We find it unnecessary to decide whether, in the absence of that evidence, the Respondent’s conduct should be deemed to manifest such an intent.

Having determined that the evidence fails to show that the Respondent was part of the multiemployer Association for bargaining purposes, we must then decide whether the Respondent, as an individual employer, nonetheless violated Section 8(a)(5) by withdrawing recognition from the Union and repudiating the Union-Association agreement. We find that it did not. It is clear from the evidence summarized in the fact statement above, that the Respondent at all relevant times applied the contract terms on a members-only basis and that the Union must reasonably have been aware of this fact. The Board will not issue a bargaining order under those circumstances. See *Arthur Sarnow Candy Co.*, 306 NLRB 213 (1992); *Goski Trucking Corp.*, 325 NLRB 1032 (1998).

#### ORDER

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

*Susannah Z. Ringel, Esq.*, for the General Counsel.

*Ira A. Sturm, Esq.*, of New York, New York, for the Respondent.

*Larry Magarik, Esq.*, of New York, New York, for the Charging Party.

#### DECISION

##### STATEMENT OF THE CASE

D. BARRY MORRIS, Administrative Law Judge. This case was heard before me in New York City on June 25 and July 21 and 22, 1997. Upon a charge filed on July 29, 1996, an amended complaint was issued on April 29, 1997, alleging that Makins Hats Ltd. (Respondent) violated Section 8(a)(1) and (5) of the National Labor Relations Act, (the Act). Respondent filed an answer denying the commission of the alleged unfair labor practices.

The parties were given full opportunity to participate, produce evidence, examine and cross-examine witnesses, argue orally, and file briefs. Briefs were filed by all of the parties.

On the entire record of the case, including my observation of the demeanor of the witnesses, I make the following

#### FINDINGS OF FACT

##### I. JURISDICTION

Respondent, a New York corporation, with an office and place of business in New York City, has been engaged in the manufacture of men’s and women’s hats. Respondent has admitted, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. In addition, it has been admitted, and I find, that Millinery Workers Union Local 24–42H, New York-New Jersey Regional Joint Board, UNITE, AFL–CIO (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

###### 1. Millinery Manufacturers Association

On February 26, 1980, Marcia Akins, president of Respondent, signed a contract with the Union recognizing it as the exclusive bargaining agent for its workers, excluding bookkeepers, office clerical employees, designers, foremen, foreladies, models, and sales personnel. Akins admitted that from the time she signed this contract she has complied with the contract’s provisions for union members.

The American Millinery Manufacturers Association (the Association) is an association of millinery shops, which negotiates contracts with the Union on behalf of its members. David Stein served as president of the Association in the 1980s and Elliott Taradash has served as Association president since 1991. Akins testified that during 1983 she was being harassed by the union representative, Joseph Innocent. She testified that she called Stein, who told her to send him a check for \$300 and that she “would be a member of the American Millinery Manufacturers Association, Inc. and that he would stop the harassment.” Soon thereafter Akins remitted \$300 to Stein. On October 31, 1983, Neil S. Goldstein, Esq., attorney for Respondent, wrote to the Union complaining about the alleged harassment by Innocent. The letter stated, “[W]e represent Marcia Akins and Makins Hats Ltd., a member of the American Millinery Manufacturers Association, Inc.” Akins testified that through 1995 Respondent received a bill every month from the benefit funds. She filled in the payroll amount for union members on the appropriate form and then returned the form with the required payment. In a letter dated August 24, 1992, to Sandra Bermejo, the union representative, Akins stated that her employees were given their vacation pay “in accordance with the union contract.”

In May 1996, Bermejo contacted Akins concerning vacation money owed to unit employee, Altigracia Santos. Bermejo testified that during their phone call Akins stated that she refused to pay Santos the vacation check because the funds owed money to Respondent. On June 14, 1996, Akins wrote to Bermejo stating, “I am no longer a member of the Union, nor have

I been for quite some time. I have no signed contract with you nor have I ever signed any agreement with any manufacturers association.” Akins admitted that prior to this letter she had never informed the Union that she was withdrawing recognition from the Union as representative of her employees. On July 16, 1996, Taradash wrote to Marilyn Levine, impartial chair for the Millinery Industry, that “at no time did Makins Hats, Ltd. ever advise the Association that it was withdrawing from the Association or refusing to have the Association bargaining for it in these contract negotiations.” By letter dated February 6, 1997, from Ira Sturm, Esq., counsel for Respondent, to the Association and the Union, counsel stated:

In order to make it clear for the future to both the Association and the Union and without admitting any current liability, Makins Hats, Ltd. affirmatively withdraws membership in the Association; withdraws from multi-employer bargaining and withdraws any apparent authority of the Association to bargain a renewal agreement obligating Makins Hats, Ltd.

#### 2. Members-only arrangement

Akins testified that from the time she signed the collective-bargaining agreement in 1980 she paid union rates, made contributions to the funds, and complied with the terms of the contract, only with respect to those employees who were members of the Union. She further testified that Respondent employed workers doing unit work who were not union members. Using the Company’s payroll records, she identified 11 employees who did unit work in 1983. Of these 11 employees, Akins testified that 3 were union members and 8 were not members of the Union. The eight nonunion employees included Meldavsky, Febregas, Etienne, Shirley Austin, Henry Austin, Palmer, Faircloth, and Senior. Bermejo testified that Etienne and Palmer were union members. There was no evidence or testimony controverting Akins’ testimony that the six other employees were not members of the Union.

Again referring to the payroll records, Akins testified that in 1987 there were seven employees doing unit work. Five of the employees were union members, and two of the employees, Meldavsky and Serrano, were not members of the Union. With respect to 1996, Akins identified five employees doing unit work. One employee, Santos, the shop steward, was a union member. Akins testified that the other four employees were not union members. These included Jagernauth, a trimmer; Nina Archeval, also a trimmer; Carrol, an operator; and Joe Archeval, a blocker. Canniel Wattley, presently a foreman, testified that in 1990 and 1991 he was a blocker and packer and was not a member of the Union. He testified that during that time Bermejo came to the plant to speak to the union members and that he was standing approximately 4 feet away from Bermejo and was visible to Bermejo.

### B. Discussion and Conclusions

#### 1. Millinery Manufacturers Association

The record is clear that in 1983 Respondent joined the Association. Thus, Akins testified that she was told by Stein to remit \$300 and that Respondent would then be a member of the Association. She subsequently made the \$300 payment. On October 31, 1983, Respondent’s attorney wrote to the Union, stat-

ing, “[W]e represent Marsha Akins and Makins Hats, Ltd., a member of the American Millinery Manufacturers Association, Inc.” Akins testified that she continuously applied the terms of the collective-bargaining agreement to the unit employees who were union members. In a letter dated August 24, 1992, to Bermejo, Akins stated that the employees were given their vacation pay “in accordance with the Union contract.”

The Board looks to objective manifestations of intent to be bound by group action in determining whether an employer is governed by the collective bargaining of an association. *Kroger Co.*, 148 NLRB 569, 573–574 (1964). In *Custom Colors Contractors*, 226 NLRB 851, 853 (1976), enfd. 564 F.2d 190 (5th Cir. 1977), the Board stated, “An employer who, through a course of conduct or otherwise, signifies that it has authorized the group to act in its behalf will be bound by that apparent creation of authority.”

In *Retail Associates, Inc.*, 120 NLRB 388, 395 (1958), the Board set forth the rules governing withdrawal of an employer or union from multiemployer bargaining. The party’s withdrawal is only accomplished by adequate written notice given prior to a contractually established date for contract modification or the agreed-upon date for the beginning of multiemployer negotiations. It was not until February 6, 1997, that Respondent, through counsel, withdrew its membership in the Association. Accordingly, I find that Respondent joined the Association in 1983 and through its course of conduct continued to remain a member of the Association until it withdrew in February 1997. See *Scandia Stucco Co.*, 319 NLRB 850, 856 (1995).

Respondent maintains that even if it did join the Association, at the time it joined, the Association was incorporated and thereafter a new association was formed, which was no longer incorporated. I credit Stein’s testimony that the nonincorporated Association was formed in 1982, before Respondent joined in 1983. In addition, I find no legal support for the contention that such a change in corporate status would affect an association’s bargaining relationship with the Union or its status as agent for its members. Respondent also contends that the nature of the Association changed when it merged with UNITE on July 1, 1995. Akins testified that she was aware of the merger. No evidence was presented that Respondent objected to the Union concerning the merger. In addition, I credit the testimony of Taradash that the union’s affiliation with UNITE did not change the Association’s bargaining relationship with the Union. Furthermore, in *Sewell-Allen Big Star*, 294 NLRB 312, 313 (1989), the Board stated that a party may not attack, more than 6 months after the event, the “validity of the merger process through a defense of a later withdrawal of recognition.”

#### 2. Members-only arrangement

Akins testified that in practice the contract covered only unit employees who were members of the Union. She testified that in 1983, of 11 unit employees, 8 were not union members. While Bermejo testified that Etienne, a trimmer, and Palmer, a porter, were union members, there was no evidence or testimony rebutting Akins’ testimony with respect to the other six employees. I credit Akins’ testimony and find that during 1983, of 11 employees doing unit work, 6 of the employees were not

union members. I also credit Akins' testimony and find that in 1987, out of seven employees doing unit work, two were not union members. Similarly, I credit Akins' testimony and find that in 1996, out of the five employees doing unit work, four of them were not members of the Union.

While the Union contends that it was not aware of nonunion members doing unit work, I believe that the record indicates otherwise. I credit Akins' testimony that in 1983 Innocent, the union representative, spoke to Jonas, a trimmer doing unit work, who was not a union member. In addition, I credit the testimony of Wattley that in the early 1990s he was a blocker and packer doing unit work, but was not a union member. I credit his testimony that Bermejo came to the facility to speak with the union members and Wattley was standing approximately 4 feet from Bermejo. The work area was small and Bermejo testified that she made frequent visits to the plant. I find it inconceivable that she did not see the nonunion members working in the plant. In addition, Santos, who was the union steward, certainly had to have been aware that nonunion members were doing unit work.

As was stated in *Don Mendenhall, Inc.*, 194 NLRB 1109 (1972), "It is evident from these facts that, although recognized ostensibly as the exclusive bargaining agent for all of the Respondent's employees . . . the Union in fact represented only those who were its members." In *Manufacturing Woodworkers Assn.*, 194 NLRB 1122, 1123 (1972), it was stated that the "Board has held that a history of collective bargaining on a 'members only' basis does not provide an adequate basis for

representation nor the appropriateness of a bargaining unit such as the statute contemplates." The Board does not issue bargaining orders in "members only" units. See *Reebie Storage & Moving Co.*, 313 NLRB 510 (1993), *enfd.* 44 F.3d 605 (7th Cir. 1995). See also *Arthur Sarnow Candy Co.*, 306 NLRB 213, 216 (1992). Accordingly, I find that Respondent has not violated Section 8(a)(1) and (5) of the Act.

#### CONCLUSIONS OF LAW

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

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has not violated the Act in the manner alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended.<sup>1</sup>

#### ORDER

The complaint is dismissed.

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<sup>1</sup> 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.