**Royal Components, Inc. *and* International Union of Operating Engineers, Local 150, AFL–CIO and Chicago and Northeast Illinois District Council of Carpenters, AFL–CIO, United Brotherhood of Carpenters and Joiners of America, Party to the Contract.** Case 13–CA–32429

June 26, 1995

## DECISION AND ORDER

BY MEMBERS BROWNING, COHEN, AND TRUESDALE

On March 9, 1995, Administrative Law Judge Wallace H. Nations issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Party to the Contract filed briefs in answer to the Respondent's exceptions, and the Respondent filed a reply brief to the General Counsel's and the Party to the Contract's answering briefs.[1]

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 and to adopt the recommended Order.

## ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Royal Components, Inc., Markham, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the Order.[2]

*Librado Arreola, Esq.*, for the General Counsel.
*Douglas A. Darch* and *Peter Andjelkovich, Esqs.*, of Chicago, Illinois, for the Respondent.
*Louis E. Sigman* and *Brian Hlavin, Esqs.*, of Chicago, Illinois, for the Charging Party.
*Daniel McAnally, Esq.*, of Chicago, Illinois, for the Party in Interest.

## DECISION

### STATEMENT OF THE CASE

WALLACE H. NATIONS, Administrative Law Judge. International Union of Operating Engineers, Local 150, AFL–CIO filed the instant charge on April 14, 1994.[1] The charge alleges that the Employer violated Section 8(a)(3) of the Act by maintaining an unlawful security clause in its collective-bargaining agreement with the Carpenters Union.[2] The Regional Director for Region 13 issued a complaint and notice of hearing on May 24, 1994.

Hearing was held in this matter in Chicago, Illinois, on January 20, 1995. Briefs were received from the General Counsel and the Carpenters Union on or about February 10, 1995. Based on the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs, I make the following

### FINDINGS OF FACT

#### I. JURISDICTION

Respondent is a corporation with an office and place of business in Markham, Illinois, where it engages in the manufacture and assembly of wall, deck, and roofing components used in the housing construction industry. It admits and I find that at all material times it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

#### II. THE LABOR ORGANIZATIONS INVOLVED

The Charging Party Operating Engineers and the Party in Interest Carpenters Union are both labor organizations within the meaning of Section 2(5) of the Act.

#### III. THE ALLEGED UNFAIR LABOR PRACTICES

##### A. *The Issue Presented by the Complaint and the Facts Relating to that Issue*

The complaint alleges that Respondent is a party to a collective-bargaining agreement with the Carpenters Union, which contract contains a union-security clause which is unlawful as it requires membership in the Carpenters Union

[1] The Respondent filed a motion to reopen the record and receive further evidence. The General Counsel filed a response opposing the motion. The Respondent's motion is granted to the extent that the documents sought to be introduced establish that, after the close of the hearing, copies of the Respondent's motion for special permission to appeal from a ruling of the administrative law judge with supporting memorandum, and a cover letter requesting that the judge consider these documents as the Respondent's posthearing brief, were delivered to the judge's Connecticut address. A copy of the Respondent's motion for special permission to appeal from a ruling of the administrative law judge and the supporting memorandum are being considered as part of the record and have been reviewed along with the Respondent's exceptions, supporting brief, and reply brief.

[2] In adopting the judge's recommended Order that the Respondent cease and desist from maintaining and giving effect to the union-security clause, which unlawfully requires employees to become union members prior to the end of the statutory grace period, we rely on *Wine & Liquor Store Employees Local 122 (Oz Liquor)*, 261 NLRB 1070 (1982).

[1] Hereinafter, the National Labor Relations Board will be referred to as the Board, the International Union of Operating Engineers, Local 150 Operating Engineers, the Chicago and Northeast Illinois District Council of Carpenters, AFL–CIO, United Brotherhood of Carpenters and Joiners of America, as Carpenters Union, the National Labor Relations Act as the Act, and Royal Components, Inc., as either Employer or Respondent.

[2] The Operating Engineers were initially complaining about the security clause because it alleged it was being applied to certain of Respondent's employees who operated a ''boom truck,'' and who were the subject of an organizing effort by the Operating Engineers. Prior to the filing of the charge, the Carpenters Union disclaimed any representation of these employees who were not performing carpenter's work. As the Respondent continued to maintain the involved security clause in its contract with the Carpenters Union, the Operating Engineers proceeded to file the involved charge.

within 7 days of becoming employed by Respondent.[3] Respondent is located in Markham, Illinois, and has been engaged in the manufacture of housing components, specifically portions of walls, decks, and roofs, which it delivers to construction sites.[4] Respondent is not engaged in the construction industry within the meaning of Section 8(f) of the Act. Moreover, Respondent's employees are not engaged in performing construction work. On March 14, 1990, Respondent entered into a collective-bargaining agreement with the Carpenters Union. Sometime thereafter, in about February 1994, Respondent then readopted the same collective-bargaining agreement with the Carpenters Union, which currently remains in effect and will expire on May 31, 1995.[5] Article II, section 2.2 of the collective-bargaining agreement entitled ''Union Security'' reads as follows:

> All other employees covered by this Agreement shall, as a condition of employment, become members of the UNION after the seventh (7) day of, but not later than the eighth (8) day following the beginning of, such employment, or the effective date of this Agreement, whichever is later and they shall maintain such membership as a condition of continued employment as hereinafter provided.

The collective-bargaining agreement also contains a savings clause in article XXXIII, which states as follows:

> 33.1 Should any part of or any provision herein contained by rendered or declared invalid by reason of any existing or subsequent enacted legislation, or by any decree of a court of competent jurisdiction, such invalidation of such part or portion of this Agreement shall not invalidate the remaining portions thereof; provided, however, upon such invalidation the parties signatory hereto agree to immediately meet to renegotiate such parts or provisions affected.

The Employer wanted to provide testimonial evidence of the majority status of the Carpenters Union at the time the contract was signed in 1990 and thereafter as of February 1994, in order to argue that the whole collective-bargaining agreement is void ab initio. In support of its argument, Respondent asserted several affirmative defenses, including an argument that the invalid union-security clause constitutes a violation of Section 8(a)(2), and that any liability for improperly deducted dues lies with the Carpenters Union and not Respondent. Counsel for the General Counsel did establish, at the instant hearing, a prima facie violation of Section 8(a)(3) as alleged in the complaint and notice of hearing, and objected to the presentation of any further testimony regarding Respondent's affirmative defenses, i.e., that an 8(a)(2) violation occurred, on the grounds that such evidence is irrelevant to the issues presented by the complaint. I agreed with this position and allowed the Respondent to present certain evidence as an offer of proof to support a special appeal of my ruling. Respondent filed such an appeal shortly after the close of the hearing. On February 21, 1995, the Board denied the Respondent's request for special permission to appeal without prejudice to renewal in the exceptions process.

### B. *Conclusions with Respect to the Alleged 8(a)(3) Violation and the Respondent's Affirmative Defenses*

Section 8(a)(3) of the Act provides that employers may enter into collective-bargaining agreements which require, as a condition of employment, that employees become members of the union on or after the 30th day following the beginning of such employment or the effective date of such agreement.[6]

The Board has held that an employer violates Section 8(a)(3) of the Act where it maintains a union-security clause that allows a 7-day grace period, instead of the 30-day period required by the statute. *Kansas City Riverboat*, 285 NLRB No. 65 (Aug. 31, 1987) (not reported in Board volumes). It is of no consequence in this case that no evidence of the enforcement of the unlawful union-security clause was proffered. *Paragon Products Corp*., 134 NLRB 662 (1961). The Respondent may argue that the instant security clause is a forbidden provision so basic to the whole scheme of the contract and so interwoven with all of its terms that the contract must stand or fall as an entity. However, the Board in *Kansas City Riverboat*, supra, only invalidated the unlawful union-security provision rather than the entire contract. Moreover, the collective-bargaining agreement in the instant case contains a ''savings clause,'' as set forth above, which clause, according to established precedent, preserves the remaining portions of a collective-bargaining agreement when one provision is rendered invalid. *NLRB v. Rockaway News Supply Co.*, 345 U.S. 71 (1953). Thus it is evident that the mere maintenance of the 7-day grace period instead of the required 30-day grace period in the instant union-security clause is violative of Section 8(a)(3).

Respondent attempted, in the instant hearing, to introduce evidence that the Carpenters Union lacked majority status at the time the contract at issue was executed in March 1990. However, that asserted lack of majority status was not challenged within the 6-month period that began running at the

[3] The appropriate unit of employees involved is described:

> All regular full-time production employees performing carpentry work employed at the Employer's facility located at 2210 W. 162nd Street in Markham, Illinois, but excluding all office clericals, truck drivers, fork lift operators, technicians who are computer designers and layout men, guards, and supervisors as defined in the Act.

[4] There are no credibility determinations to be made with respect to the complaint allegations. Therefore, as the brief filed by the General Counsel succinctly sets out the material facts and the applicable law, it has been utilized as the basis for this decision.

[5] Although the Carpenters Union takes the position that the collective-bargaining agreement has been in effect since March 14, 1990, Respondent asserts it was released from the contract in 1993. The parties are presently involved in litigation in Federal District Court regarding Respondent's failure to make certain contributions to the benefit and pension funds. It is, however, of no consequence whether the contract was readopted, as Respondent claims, or if Respondent agreed to be bound by the contract once again, since Respondent admits that the collective-bargaining agreement has been in effect since February 1994.

[6] Sec. 8(f) of the Act sanctions agreements by employers engaged primarily in the building and construction industry to make an agreement covering employees engaged in the building and construction industry where such agreement requires as a condition of employment, membership in a labor organization after the seventh day following the beginning of such employment or the effective date of the agreement. As noted earlier, there is no contention by any party that the involved unit is engaged in the building and construction industry within the meaning of Sec. 8(f).

time of the execution of the contract. Thus, that evidence is now stale and time barred since it occurred outside the Board's 6-month statute of limitations period.[7] Respondent must therefore honor the contract since it is a lawful contract. *Machinists Local 1424 (Bryan Mfg. Co.)*, 362 U.S. 411 (1960).

Respondent's February 1994 actions, however, are characterized, whether as a readoption of the previously existing contract or by the use of another verb, Respondent was nonetheless agreeing to be bound by, and abide by, the terms of the original contract signed in March 1990. The Supreme Court in *Bryan Mfg. Co*., supra, has held that a union's majority status may not be attacked even when a new agreement is entered into between the contracting parties, when such original recognition occurred more than 6 months prior to the execution of the new agreement, since the original execution occurred outside the Board's 10(b) period. In *Bryan Mfg. Co.*, the employer and union had entered into a collective-bargaining agreement on August 10, 1954, and subsequently entered into a new agreement on August 30, 1955, which replaced the old agreement. The Supreme Court therein determined that since the original contract execution was beyond the Act's statute of limitations, issues concerning the original recognition could not be raised at the time that the new agreement was executed. Thus in the present case, even if the Carpenters Union did not represent a majority of Respondent's employees when the original contract was signed in March 1990, that fact may no longer be raised by Respondent as an affirmative defense in the instant proceeding. To allow Respondent to reach back to March 1990 when the collective-bargaining agreement was initially executed, and allow Respondent to challenge the Carpenters Union's presumed majority status at that time is contrary to the Supreme Court's pronouncements in *Bryan Mfg. Co*.

Respondent claims that, in addition to having violated Section 8(a)(3), it has also violated Section 8(a)(2). Respondent wants to broaden the complaint in hopes of arguing that the entire collective-bargaining agreement is rendered unlawful and ineffective ab initio. However, it has long been established that only the General Counsel may amend its complaint. *West Virginia Baking Co.*, 299 NLRB 306 (1990); *Sheet Metal Workers Local 91 (Schebler Co.)*, 294 NLRB 766 (1989).

Respondent also attempts to argue that the present facts support a finding of a violation of Section 8(a)(1) and (2) of the Act as found in *Julius Resnick, Inc*., 86 NLRB 38 (1949), and *Promenade Garage Corp*., 314 NLRB 172 (1994). Yet, those cases are readily distinguishable. The Board invalidated entire contracts in those two cases because it was faced with a situation where an incumbent union had a contract with the employer therein and then that same employer entered into a contract with a competing union covering the same employees in the unit already represented by the incumbent. That is clearly not the case here. Respondent has not been faced with a challenge from a competing union, nor has it entered into a contract with a competing union, thereby warranting an invalidation of the contract signed with such competing union. Not only are the cited cases inapposite, there are no other Board cases which stand for the proposition that the entire contract must be invalidated in the instant case.[8]

## 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 Operating Engineers and the Carpenters Union are labor organizations within the meaning of Section 2(5) of the Act.

3. Respondent has violated Section 8(a)(3) and (1) of the Act by maintaining an unlawful union-security clause containing a 7-day grace period in its collective-bargaining agreement with the Carpenters Union, where the work performed by the involved unit does not fall within the building and construction industry proviso of Section 8(f) of the Act.

4. This unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

## Remedy

Having found that Respondent has engaged in conduct in violation of Section 8(a)(3) and (1) of the Act, it is ordered that it cease and desist therefrom and post an appropriate notice to employees.

Based on these findings of fact, conclusions of law and on the entire record, I issue the following recommended[9]

## ORDER

The Respondent, Royal Components, Inc., Markham, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a 7-day grace period in the union-security clause in its collective-bargaining agreement with Chicago and Northeast Illinois District Council of Carpenters, AFL–CIO, United Brotherhood of Carpenters and Joiners of America.

(b) Encouraging membership in Chicago and Northeast Illinois District Council of Carpenters, AFL–CIO, United Brotherhood of Carpenters and Joiners of America, or any other labor organization, by maintaining a union-security clause in its collective-bargaining agreement with the Union, which requires its employees as a condition of employment, to join the Union before the 30-day grace period required by Section 8(a)(3) of the Act.

(c) Giving effect to the union-security provision in its collective-bargaining agreement with the Chicago and Northeast Illinois District Council of Carpenters, AFL–CIO, United Brotherhood of Carpenters and Joiners of America which calls for a 7-day grace period for membership because the work does not fall within the building and construction industry proviso of Section 8(f) of the Act.

[7] At no time have the parties filed any unfair labor practice charges before the NLRB alleging that the contract is invalid or is being violated.

[8] There is nothing precluding the Respondent from filing an unfair labor practice charge challenging the Union's majority status, if it has legitimate and objective proof that that is the fact. If it does so, the Union would properly be put on notice and may defend its status if it chooses to do so. The backdoor attack mounted by Respondent here is not sustainable.

[9] 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.

(d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action deemed necessary to effectuate the policies of the Act.

(a) Post at its Markham, Illinois facility copies of the attached notice marked ''Appendix.''[10] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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

[10] 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 EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT maintain a 7-day grace period in the union-security clause in our collective-bargaining agreement with Chicago and Northeast Illinois District Council of Carpenters, AFL–CIO, United Brotherhood of Carpenters and Joiners of America.

WE WILL NOT encourage membership in Chicago and Northeast Illinois District Council of Carpenters, AFL–CIO, United Brotherhood of Carpenters and Joiners of America, or any other labor organization, by maintaining a union-security clause in our collective-bargaining agreement with the Union, which requires our employees as a condition of employment, to join the Union before the 30-day grace period required by Section 8(a)(3) of the Act.

WE WILL NOT give effect to the union-security provision in our collective-bargaining agreement with the Chicago and Northeast Illinois District Council of Carpenters, AFL–CIO, United Brotherhood of Carpenters and Joiners of America which calls for a 7-day grace period for membership because the work does not fall within the building and construction industry proviso of Section 8(f) of the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

ROYAL COMPONENT, INC.