Jefferson Chemical Company, Inc *and* Oil, Chemical & Atomic Workers International Union, AFL–CIO Case 23–CA–4248

December 20, 1972

DECISION AND ORDER

On May 5, 1972, Administrative Law Judge[1] Benjamin K Blackburn issued the attached Order in this proceeding in which he granted Respondent's Motion for Summary Judgment of Dismissal Thereafter, the General Counsel filed a request for permission to seek special appeal, and Respondent filed a brief in response thereto

The Board has considered the attached Order in light of the request and brief and has decided to affirm[2] the conclusions of the Administrative Law Judge and to adopt his Order [3]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety

MEMBERS FANNING AND JENKINS, dissenting

Despite the absence of any evidence whatsoever of a violation of due process or prior litigation of the issues involved, our colleagues have affirmed the Administrative Law Judge's dismissal of the complaint herein predicated primarily upon the General Counsel's disavowal in an earlier unfair labor practice proceeding[4] of his intention to litigate a nonalleged and unknown surface bargaining violation of Section 8(a)(5) of the Act Inasmuch as we do not understand our colleagues to attribute knowledge of the alleged surface bargaining issue to the General Counsel at the time of his disavowal, we are at a loss to comprehend the rationale underlying their action, which has the effect of allowing a possible unfair labor practice to go unremedied in contravention of the policies and purposes of the Act

Our colleagues' decision, in essence, requires that the General Counsel be aware of each and every fact giving rise to a possible unfair labor practice prior to the issuance of a complaint However, in practice, this is not possible, due primarily to the fact that the Board's investigation is normally confined to those allegations of the charge which sets the Board's investigatory machinery in motion Should additional violations be disclosed during the investigation it is, of course, the Board's policy to include those in any subsequent complaint Moreover, anticipating the handicaps the Board would face in the administration and application of the Act and recognizing the fact that additional violations may surface at any time prior to the final litigation of a complaint, Congress expressly provided in Section 10(b) for the amendment of an outstanding complaint at any time prior to the issuance of an order based thereon Thus, in line with such unlimited authority, the Board has consistently followed a liberal policy with respect to allowing the amendment of complaints during litigation thereof Additionally, the Board has allowed and sanctioned the litigation of separate and distinct complaints predicated upon evidence or allegations disclosed during the litigation of prior outstanding complaints involving the same respondent without any inquiry as to why same was not alleged in the prior complaint Cf *Schill Steel Products, Inc*, 144 NLRB 69, 70–71, enforced 340 F 2d 568 (C A 5)

Moreover, as an administrative matter, there appears to be substantial justification for the General Counsel to have proceeded initially against Respondent only for its prenegotiation unfair labor practices Issuance of the complaint limited to those matters might well have led to a settlement with corresponding corrective action by Respondent setting the stage for good-faith negotiations Though that eventuality failed to materialize, limitation of the litigation to the prenegotiation events could be expected to result in an earlier decision with the same

[1] The title of Trial Examiner was changed to Administrative Law Judge effective August 19 1972

[2] See also *Peyton Packing Company Inc* 129 NLRB 1358

[3] Our dissenting colleagues argue that the General Counsel should not be required to be aware of each and every fact giving rise to a possible unfair labor practice prior to the issuance of a complaint since its investigation is normally limited to the allegations set forth in the charge While we do not disagree with this principle we believe that as a corollary, the General Counsel is dutybound to investigate all matters which are encompassed by the charge and to proceed appropriately thereafter As noted by the Administrative Law Judge the charge in Jefferson Chemical Co Case 23–CA–4088 filed on August 31 1971 was a broad refusal to bargain collectively charge The General Counsel was thereby put on notice to investigate all aspects of that 8(a)(5) and (1) charge and his failure to litigate bad faith bargaining in that case for whatever reason cannot now justify his litigation of surface bargaining in the instant case

Moreover the Charging Party itself is not totally without fault here At the time the charge in Jefferson Chemical Co Case 23–CA–4088 was filed if not by the time the complaint in that case issued the Charging Party must have known of the Respondent s bargaining tactics (the first bargaining session was held in July 1971) and if it was dissatisfied with the General Counsel s narrow complaint it could have made the facts regarding the alleged surface bargaining known either before or during the hearing in that case Instead however the Charging Party chose to file a second charge, the charge herein (which in part spans the same time period as that covered by the charge in the earlier case) 2 days after the hearing was recessed

We believe that such multiple litigation of issues which should have been presented in the initial proceeding constitutes a waste of resources and an abuse of our processes and that we should not permit it to occur

[4] *Jefferson Chemical Company Inc* Case 23–CA–4088 200 NLRB No 135 alleging that the Respondent therein violated Section 8(a)(5) of the Act by unilaterally effecting certain changes in conditions of employment prior to the beginning of the collective bargaining negotiations which form the subject matter of this case

result Surface bargaining cases, such as the instant one, usually do require exhaustive investigation and result in lengthy hearings, all of which could conceivably have been avoided by a successful prosecution of the complaint in Case 23–CA–4088 In any event, there is nothing to show that the General Counsel did in fact have information as to such conduct in his possession at the time of the hearing in the earlier case To hold, as our colleagues do, that the General Counsel should have conducted an exhaustive investigation into every aspect of Respondent's conduct on the basis of the first charge and that failure to have done so necessarily estops him from proceeding on the later filed charges dealing with issues arising after those litigated in the first case imposes an intolerable investigatory burden on him, which, if assumed in every case, will necessarily result in a less effective enforcement of the provisions and policies of the Act

Although our colleagues do not disagree with the principle enunciated above, i e, limitation of the General Counsel's investigation to the facts alleged, they nevertheless would still impose the burden upon the General Counsel to investigate the myriad facts and circumstances which could possibly underly an unfair labor practice cognizable under any of the subsections of Section 8 of the Act Thus, our colleagues would make the complete separation of the wheat from the chaff a condition precedent to the issuance of a complaint Failing such purification, the General Counsel, under the majority's position, would not be allowed at any stage of the proceedings to amend his complaint or, as here, to issue a new complaint to allege any additional unfair labor practices which were not cognizable under his original complaint This of course, as noted *supra,* flies directly in the face of Section 10(b) of the Act which expressly provides to the contrary

Lastly, our colleagues appear to have misconceived the purposes and policies of the Act, since under their position, they would leave unfair labor practices unremedied solely on the grounds that the Charging Party or the General Counsel had, respectively, inadvertently failed to bring the facts underlying the new complaint immediately to the attention of the General Counsel or because the General Counsel failed to discover them prior to the issuance of his original complaint By such action, they would convert what is now a public act designed to protect public policy into one designed solely to vindicate the rights of private individuals Moreover, in predicating their dismissal on the Union's failure to raise in timely fashion the acts underlying the new complaint, the majority completely overlooks the fact that the prosecution or prevention of unfair labor practices is a duty invested by the Act solely in the General Counsel and the Board, and that duty cannot be limited or curtailed by an inadvertence or other act of the Charging Party

We would reverse the Administrative Law Judge's Decision and remand this case to him for hearing

ORDER

Respondent filed with the National Labor Relations Board a Motion for Summary Judgment of Dismissal herein on April 7, 1972 The executive secretary of the Board transferred it to me for ruling on April 19, 1972

I conducted a hearing in Conroe, Texas, on February 15 and 16, 1972, in *Jefferson Chemical Company, Inc*, Case 23–CA–4088, and closed it by Order on March 23, 1972 That case involved the same parties as this The issue litigated was whether Respondent had violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended, by specific unilateral changes in the terms and conditions of employment of its employees At the outset of the hearing, the following exchange took place between counsel for the General Counsel and me

> TRIAL EXAMINER Mr Levy, are you trying to expand this Complaint in any way?
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> MR LEVY No, sir, most assuredly not, and we would specifically tell this Court and Mr Sieger [counsel for Respondent] that we are not asking the Trial Examiner make any findings as to unfair labor practices other than those which are alleged in the Complaint
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> * * * * *
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> TRIAL EXAMINER But very specifically, now, the General Counsel is making no contention of general bad faith bargaining?
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> MR LEVY No, sir

The charge herein was filed on February 18, 1972 The gravamen of the complaint, issued on March 31, 1972, is that, "at all times [after August 18, 1971] Respondent negotiated with the Union in bad faith, with no intention of entering into any final or binding collective-bargaining agreement"[1]

A Verified Statement of Facts which accompanied Respondent's Motion for Summary Judgment of Dismissal stated, in part

> On information and belief, most matters tending to support the allegations in [the complaint in Case 23–CA–4248] occurred prior to the commencement of the hearing in case number 23–CA–4088, and all occurred prior to the conclusion of said hearing

Consequently, on April 20, 1972, I issued an Order directing the General Counsel and the Charging Party to show cause why Respondent's Motion for Summary Judgment of Dismissal should not be granted The General Counsel's response, dated April 27, 1972, stated, in part

> The charge in this proceeding was of course,

[1] The complaint also alleges an independent violation of Sec 8(a)(1) of the Act in October or November 1971 and a violation of Sec 8(a)(5) and (1) in that Respondent unilaterally eliminated its policy of furnishing uniforms to employees on or about November 1 1971

investigated upon a surface bargaining concept It was determined that the charge had merit and complaint issued alleging said violations *The period of time covered during the course of this surface bargaining by Respondent begins at the commencement of the Section 10(b) period and runs continuously thereafter The events complained of in the subject case encompassed periods of time both before and after the hearing in Conroe before the Honorable Trial Examiner* Not only is it a broader period of time, but the charge alleging such violations had not been filed until after the hearing as noted above *The initial charge in Case 23–CA–4088, upon which complaint issued, narrowly defined the issues as specific unilateral changes in terms and conditions of employment and not a surface bargaining concept* [Emphasis supplied]

* * * * *

This, of course, is predicated upon a surface bargaining concept Such issue was *not* before the Trial Examiner in the prior proceeding, was *not* raised in the prior case, and an investigation had *not* been made as to this allegation at the time of the trial It was only upon the filing on the charge on January [sic] 18, 1972, that an investigation was made predicated upon the allegation that Respondent had no intention of bargaining in good faith with the Union

* * * * *

General Counsel is just as desirous as is Respondent in having a proceeding which totally embraces all issues This can only be had where all the issues, and the evidence upon which they are founded, are known to the General Counsel The initial proceeding was restricted solely to unlawful *unilateral* action By stipulation of the parties, the evidence did not consider any facts relating to face-to-face bargaining conduct Only after the charge in this proceeding was filed alleging the surface bargaining concept, was the investigation commenced disclosing that the charge had merit As already observed, this occurred after the hearing in Case 23–CA–4088

First, counsel for the General Counsel does not aver that events which occurred after February 15, 1972, the date of his explicit disavowal of a contention that Respondent had engaged in general bad-faith bargaining with the Charging Party, form the basis of the General Counsel's present contention that it has Second, he has misstated the allegations in the charge in Case 23–CA–4088 It was filed on August 31, 1971, alleged violations of Section 8(a)(1), (3) and (5) of the Act and read, in the block labeled "Basis of the Charge (Be specific as to facts, names, addresses, plants involved, dates, places, etc)"

> Since on or about June 18, 1971, the above named employer has refused to bargain collectively with the certified representative of its employees in an appropriate unit, The Oil, Chemical and Atomic Workers International Union On or about the last part of July the said employer discriminated in regard to term or condition of employment as to Grady Yawn because of his union support and activities and to discourage membership in the union [2]

I conclude, therefore, that Respondent is correct in its averment that this complaint is predicated on events which took place prior to February 15, 1972, and which were, or should have been, known to the General Counsel through his investigation of the broad refusal to bargain allegation in the charge in Case 23—CA—4088 when, on that date, he stated, in effect, that Respondent had not engaged in general bad-faith bargaining

To permit the General Counsel to raise such an issue in this manner through the vehicle of this case would, in my opinion, be a denial of due process to the Respondent The situation is analogous to one in which a party, after the close of hearing, moves the Board to reopen in order to present additional evidence The principle is so well established that citation of cases would be superfluous If the moving party knew, or should have known, of the existence of the evidence at the time of the hearing, his motion is denied In Case 23–CA–4088, the violation alleged was that Respondent had refused to bargain with the Charging Party within the meaning of Section 8(a)(5) After investigation, the General Counsel elected to proceed to litigation on the narrow theory of unilateral changes in terms and conditions of employment If he investigated thoroughly, he knew at the time of the hearing all that had transpired between Respondent and the Charging Party and had rejected a general bad-faith bargaining theory If he elected, for whatever reason, to limit his investigation so that he did not, in fact, know all that had happened when the hearing opened, it would be unfair to Respondent to permit him now to use his own failure to conduct a complete investigation as an excuse from permitting him to litigate an issue he was unwilling to litigate on February 15, 1972

Counsel for the General Counsel's response to my Order to Show Cause is essentially a legal argument The cases he relies on are, in the main, inapposite since they involve the principle of *res judicata* This is obviously not a *res judicata* situation In fact, as counsel for the General Counsel's response, *supra,* points out, the issue of whether Respondent had engaged in general bad-faith bargaining with the Charging Party was intentionally excluded as a result of counsel for the General Counsel's position, and all parties

[2] The charge in Case 23–CA–4088 appears among the formal documents received into evidence in that case There is no copy of the charge in this case among the documents before me I assume based on the following excerpt from the Charging Party s response to my Order to Show Cause that it contains the specific words bad faith or something synonymous

> In Case No 23–CA–4088 the emphasis was on certain unilateral conduct on the part of the Employer The General Counsel found merit to that contention and issued complaint on that theory During the course of the hearing in that case it became apparent to the Union and more particularly its counsel who entered the case at that stage that other violations of Section 8(a)(5) had occurred
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> One of the conclusions reached by the Union s attorney was that there had been a general absence of good faith on the part of the Employer in its negotiations with the Union i e surface bargaining Since that theory had not been advanced previously and had not been alleged in the complaint it was deemed advisable to file a new charge A new charge Case No 23–CA–4248 was filed in which a surface bargaining theory was urged and such charge was investigated by the Regional Office of the Board in its usual procedure [Footnote omitted]

stipulated that evidence relating to Respondent's and the Charging Party's efforts to negotiate a collective-bargaining agreement would not be received However, I note the following two footnotes from cases cited by counsel for the General Counsel for the light they throw on the Board's attitude in similar procedural situations in the past *Neuhoff Bros , Packers,* Inc , 159 NLRB 1710

> We do not agree with the Trial Examiner's conclusion that certain alleged 8(a)(1) violations did not require litigation herein because they occurred at approximately the same time as and were similar in nature to violations found by a Trial Examiner in an earlier case involving this same Respondent See *Neuhoff Bros Packers, Inc ,* 151 NLRB 916 Suffice it to say, the alleged violations occurred after the complaint issued in the earlier case, were not known to the General Counsel at the time of the earlier hearing, *were independent acts, and were not the type of alleged violation commonly known or readily discoverable, even after an exhaustive investigation* However, in view of our subsequent findings, including the issuing of a cease and desist order against the Respondent, *we find it unnecessary to pass on these alleged violations at this time* [Emphasis supplied]

Central Power & Light Company, 173 NLRB 287

> In its exceptions and supporting brief the Respondent renewed its contentions that the Trial Examiner erred in granting the General Counsel's motion to reopen the record in Case 23–CA–2774 (which hearing had been held and closed) and consolidating that case with Case 23–CA–2885, and also renewed its contention that the amendments to the complaint in Case 23–CA–2885, made by the General Counsel at the reopened and consolidated hearing, were barred by the provisions of Section 10(b) of the Act We find that the Trial Examiner did not exceed the discretion permitted him under Section 102 35(h) of the Rules and Regulations, Series 8, as amended *However, our affirmance of the Trial Examiner's ruling in this respect is not to be construed as approval of the General Counsel's method of procedure in these cases* [Emphasis supplied]

Therefore,

It is ordered that Respondent's Motion for Summary Judgment of Dismissal herein be, and it hereby is, granted