

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

NICHOLS & WRIGHT PAVING, INC.

and

Case 9-CA-41612

INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL NO. 132, AFL-CIO

and

Case 9-CA-41729

LABORERS DISTRICT COUNCIL,
CHARLESTON, WEST VIRGINIA,
LABORERS LOCAL UNION NO. 543

Mark G. Mehas, Esq.,
for the General Counsel.

Fred F. Holroyd, Esq.,
of Charleston, WV,
for the Respondent.

Lawrence B. Lowry, Esq.,
of Huntington, WV,
for the Operating Engineers.

James P. McHugh, Esq.,
of Charleston, WV,
for the Laborers.

DECISION

Statement of the Case

MARTIN J. LINSKY, Administrative Law Judge: On December 21, 2004 the International Union of Operating Engineers, Local No. 132, AFL-CIO, (herein Operating Engineers) filed a charge against Nichols & Wright Paving, Inc. (herein Respondent).

On February 15, 2005, Laborers' District Council, Charleston, West Virginia, Laborers' Local Union No. 543 (herein the Laborers) filed a charge in Case 9-CA-41729 against Respondent.

On July 27, 2005 the National Labor Relations Board, by the Regional Director for Region 9, issued a consolidated complaint, herein complaint, alleging that Respondent violated Section 8(a)(1) and (5) of the National Labor Relations Act, herein the Act, when on December 4, 2004 it unlawfully withdrew its recognition of the Operating Engineers and the Laborers and ceased honoring the collective-bargaining agreements it had with the two unions which collective bargaining agreements ran from December 1, 2003 to November 30, 2006.

Respondent filed an answer in which it admitted that it ceased honoring the collective bargaining agreement with the unions but denied that it violated the Act in any way.

A trial was held before me in Huntington, West Virginia on August 31, 2006.

Based on the entire record in this case, to include post-trial briefs submitted by Counsel for the General Counsel, Counsel for Respondent, Counsel for the Operating Engineers, and Counsel for the Laborers as well as the testimony of the witnesses and their demeanor I hereby make the following

I. Findings of Fact

At all material times, Respondent, a corporation, with an office and place of business in Huntington, West Virginia, has been engaged as a contractor in the construction industry doing asphalt paving work.

Respondent admits, and I find, that at all material times Respondent 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

Respondent admits, and I find, that at all material times the Operating Engineers and the Laborers have been labor organizations within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. Overview

The Constructors' Labor Council of West Virginia, Inc., is a multi-employer organization that bargains with construction unions in the state of West Virginia.

Respondent is not a member of the Constructors' Labor Council of West Virginia, Inc.

On March 8, 1991 Respondent and the Laborers signed a document entitled "Acceptance of Agreement" which provided as follows:

"The undersigned has read and hereby approves the Heavy and Highway Construction Agreement between the CONSTRUCTORS' LABOR COUNCIL OF WEST VIRGINIA, INC., and ENGINEERS' LOCAL NO. 132, AFL-CIO, TEAMSTERS' LOCALS OF WEST VIRGINIA, CARPENTERS' STATE COUNCIL, AFL-CIO, OPERATIVE PLASTERERS' & CEMENT MASONS' INTERNATIONAL ASSOCIATION operating in West Virginia, which Agreements are dated December 3, 1990, and herewith accepts the same and becomes one of the parties thereto.

These Agreements cover the term of period beginning December 3, 1990, and ending December 6, 1993 and from year to year thereafter in absence of sixty (60) days notice of intention to terminate by either party. See Section I of Article XII of each Agreement.

The undersigned also agrees to be bound by any subsequent replacement Agreement, renewals, modifications, amendments and addendums to the Agreements between the aforementioned parties." General Counsel Exhibit 8.

On October 15, 1999 Respondent and the Operating Engineers signed a similar document entitled "Acceptance of Agreement" which provided as follows:

5 "The undersigned has read and hereby approves the Heavy Construction Agreement and Highway Agreement between CONSTRUCTORS' LABOR COUNCIL OF WEST VIRGINIA INC., and ENGINEERS' LOCAL UNION NO. 132, AFL-CIO, operating in West Virginia, which Agreements becomes one of the parties thereto.

10 These Agreements cover the term of period beginning December 6, 1996, and ending December 5, 1999, and from year to year thereafter in absence of 60 days notice of intention to terminate by either party. See Section 1 of Article XII of each Agreement.

15 The Undersigned also agrees to be bound by any subsequent replacement Agreements, renewals, modifications, amendments and addendums to the Agreements, between the aforementioned parties." General Counsel Exhibit 2.

20 The "Acceptance of Agreement" signed on March 8, 1991 by Respondent and the Laborers makes reference in paragraph 2 to an agreement running from December 3, 1990 and ending December 6, 1993.

25 There was a succession of agreements which Respondent and the Laborers were bound to by virtue of the "Acceptance of Agreement." There were so-called Heavy Construction Agreements, Highway Agreements covering highway construction and beginning in 2000 a unified Heavy Construction and Highway Agreement.

30 A series of eight agreements are in evidence as General Counsel Exhibit 11(a-h).¹

The latest agreement runs from December 1, 2003 to and including November 30, 2006.

Each of these eight agreements contain the same language regarding termination.

35 The language regarding termination in the December 1, 2003 to November 30, 2006 is as follows:

"ARTICLE X

40 Termination

45 **Section 1: Agreement Effective dates.** This Agreement shall remain in full force and effect from December 1, 2003 to and including November 30, 2006 and thereafter from year to year unless either party gives written notice to the other party of its intention to terminate this Agreement at least sixty (60) days prior to the expiration of any contract year.

50 ¹ In addition, Respondent and the Laborers entered into an Asphalt Agreement on July 28, 1997 which would only be applicable to private construction projects with a gross contract values of \$500,000 or less which are not funded by the United States or state government. General Counsel Exhibit 12, the Exhibit, unfortunately, is barely legible.

Section 2: Negotiations. Negotiations for a contract for the year 2007 shall be commenced on or before September 30, 2006.” General Counsel Exhibit 11(h).

5 The “Acceptance of Agreement” between Respondent and the Operating Engineers makes reference in paragraph 2 to an agreement beginning December 6, 1996 and ending December 5, 1999.

10 There was a succession of agreements which Respondent and the Operating Engineers were bound to by virtue of the “Acceptance of Agreement.”

As with Respondent and the Laborers these agreements were either Heavy Construction Agreement, Highway Agreements, or Heavy Construction and Highway Agreements.

15 A series of four agreements are in evidence as General Counsel Exhibit 4(a-d).²

The latest agreement runs from December 1, 2003 to and including November 30, 2006.

20 Each of the four agreements contains the same language regarding termination.

The language regarding termination in the December 1, 2003 to November 30, 2006 agreement is as follows:

25 “ARTICLE X

Termination

30 **Section 1: Agreement Effective dates.** This Agreement shall remain in full force and effect from December 1, 2003 to and including November 30, 2006 and thereafter from year to year unless either party gives written notice to the other party of its intention to terminate this Agreement at least sixty (60) days prior to the expiration of any contract year.

35 **Section 2: Negotiations.** Negotiations for a contract for the year 2007 shall be commenced on or before September 30, 2006.” General Counsel Exhibit 4(d).

40 These agreements between Respondent on the one hand and the Laborers and Operating Engineers on the other hand were Section 8(f) agreements and as such conferred on the Laborers and the Operating Engineers limited exclusive collective-bargaining representation to the Laborers for laborers employed by Respondent in the State of West Virginia³ and to the Operating Engineers for equipment operators and pavers employed by Respondent in the State of West Virginia.⁴

45 ² In addition, Respondent and the Operating Engineers on October 10, 1999 entered into a so-called “small paving contract” to be applied on smaller projects. General Counsel Exhibit 3.

³ All laborers employed by Respondent in the State of West Virginia, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

50 ⁴ All equipment operators and pavers employed by Respondent in the State of West Virginia, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

An examination of the two "Acceptance of Agreement" documents set forth above and an examination of the termination language for the December 1, 2003 to November 30, 2006 contracts reveal that Respondent is bound to the current contract until November 30, 2006 and was without authority to cease honoring the contract and without authority to withdraw recognition when it purported to do so effective December 4, 2004.

If, for example, no successor contract had been agreed to prior to the agreement running out and the prior agreement had been extended year to year then and only then could Respondent terminate on 60 days notice at the end of any contract year. On the other hand if a three year contract had been agreed to then Respondent could terminate with 60 days notice at the end of the final year of the contract.

The parties stipulated as follows:

"both before and after August 31, 2004, Nichols and Wright had more than one employee that they paid in the classifications of Laborer and Operating Engineer. However, during this period Nichols and Wright only submitted contribution reports for fringe benefits for one employee to the Laborers' Combined Fund and one employee to the Operating Engineers Funds."

The parties amended that stipulation as follows:

"The contribution reports that we referred to previously, with only reporting on one man with respect to the Laborers and the Operating Engineers, that they have continued to file reports to the present, again only reflecting one man, to the present time."

I found the witnesses for the General Counsel, i.e., Donald Huff from the Operating Engineers and Gary Tillis from the Laborers to be credible witnesses.

I don't give any weight to the testimony of Respondent's President Christopher Strow. He claims that two union representatives met with him in early September 2004 shortly after Respondent sent the August 31, 2004 letters to the Operating Engineers and Laborers and one of the two, i.e., a person Strow identified as Tommy Plymale said the union wanted one more dues paying member and they would leave Respondent alone. He further claims that he didn't know the name of the other union representative and didn't know what union Tommy Plymale represented. Strow had no evidence at all to corroborate his claims. I give this testimony no weight whatsoever.

Accordingly, Respondent violated Section 8(a)(1) and (5) of the Act when it ceased honoring the contract and withdrew recognition from the Unions effective December 4, 2004.

Remedy

The remedy in this case should include a cease and desist order and the posting of an appropriate notice. The order should direct Respondent to reinstate the current collective-bargaining agreement and apply the terms of the collective-bargaining agreement as if it had never been terminated.

Respondent shall further make whole the unit employees for any loss of wages or benefits they may have suffered as a result of the Respondent's failure to comply with the agreement since December 4, 2004, in the manner set forth in *Ogle Protection Service*, 183

NLRB 682 (1970), enfd. 444 F.2d 52 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

5 In the event that the agreement provides for contributions to pension and benefit funds, the Respondent shall make all contractually required contributions to those funds that they have failed to make since December 4, 2004, including any additional amounts due to the funds on behalf of the unit employees in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979). Further, the Respondent shall reimburse unit employees for any expenses
 10 ensuing from its failure to make required contributions as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2(1980), enfd. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection Service*, supra, with interest as prescribed in *New Horizons for the Retarded*, supra.

15 In addition, Respondent shall deduct and remit union dues and fees as required by the check-off provisions in the 2003-2006 and reimburse the Unions for the Respondent's failure to do so since December 4, 2004, with interest as prescribed in *New Horizons for the Retarded*, supra.

20 Conclusions of Law

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

2. The Unions are labor organizations within the meaning of Section 2(5) of the Act.

25 3. Respondent violated Section 8(a)(1) and (5) of the Act when it terminated its contract with the Laborers and the Operating Engineers and failed to comply with the terms and conditions of the contract.

30 4. Respondent violated Section 8(a)(1) and (5) of the Act when it withdrew recognition of the Unions.

5. The above violations of the Act are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

35 On these findings of fact and conclusions of law and on the entire record I issue the following recommended⁵

ORDER

40 The Respondent, Nichols & Wright Paving, Inc., its officers, agents, successors, and assigns, shall

45 1. Cease and desist from

50 ⁵ 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.

(a) Unlawfully terminating collective-bargaining agreements with Unions and failing to comply with the terms and conditions of collective-bargaining agreements.

(b) Unlawfully withdrawing recognition from Unions.

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

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

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(a) Reinstate the unlawfully terminated contract and comply with all its terms and conditions retroactive to December 4, 2004.

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(b) Make whole employees for any loss of wages or benefits they may have suffered as a result of its failure to comply with the collective-bargaining agreement since December 4, 2004, with interest, as set forth in the remedy section of this decision.

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(c) Deduct and remit union dues and fees as required by the check off provisions in the collective-bargaining agreements with the Unions, and reimburse the Union for its failure to do so since December 4, 2004, with interest as set forth in the remedy section of this Decision.

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(d) Within 14 days after service by the Region, post at its facility in Huntington, West Virginia, copies of the attached notice marked "Appendix."⁶ Copies of the attached notice, on forms provided by the Regional Director for Region 9, 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. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 4, 2004.

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(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., November 9, 2006.

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Martin J. Linsky
Administrative Law Judge

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⁶ 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 Federal labor law and has ordered us to post and abide by this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT unlawfully terminate collective-bargaining agreements with the Unions and fail to comply with the terms and conditions of collective-bargaining agreements.

WE WILL NOT unlawfully withdraw recognition of the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights guaranteed by Federal Law.

WE WILL reinstate the contracts we unlawfully terminated and comply with all its terms and conditions retroactive to December 4, 2004.

WE WILL reimburse our employees, with interest, for any loss of wages or benefits they may have suffered as a result of our failure to comply with the collective-bargaining agreement since December 4, 2004.

WE WILL deduct and remit union dues and fees are required by the check off provisions in the collective-bargaining agreements with the Unions, and reimburse the Unions with interest for our failure to do so since December 4, 2004.

NICHOLS & WRIGHT PAVING, INC.

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

550 Main Street, Federal Office Building, Room 3003
Cincinnati, Ohio 45202-3271
Hours: 8:30 a.m. to 5 p.m.
513-684-3686.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 513-684-3750.