

**International Union, United Mine Workers of America and Peabody Coal Company and Wagner Equipment Company, Case 27-CE-22**

October 30, 1980

**DECISION AND ORDER**

BY CHAIRMAN FANNING AND MEMBERS  
JENKINS AND PENELLO

On July 22, 1980, Administrative Law Judge Michael D. Stevenson issued the attached Decision in this proceeding. Thereafter, Respondent International Union, United Mine Workers of America, filed exceptions, a supporting brief, and a reply brief, and Respondent Peabody Coal Company filed a brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,<sup>1</sup> and conclusions of the Administrative Law Judge and to adopt his recommended Order.

**ORDER**

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that Respondent International Union, United Mine Workers of America, its officers, agents, and representatives, and Respondent Peabody Coal Company, Denver, Colorado, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

<sup>1</sup> We agree with the Administrative Law Judge that members of the Pit Committee were authorized to act for the Union pursuant to the Committee's duty under the collective-bargaining agreement to adjust disputes between the mine management and employees. We therefore find it unnecessary to rely on the Administrative Law Judge's discussion concerning the relevance of agency under Sec. 8(e) of the Act.

Respondent International Union, United Mine Workers of America, has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

**DECISION**

**STATEMENT OF THE CASE**

MICHAEL D. STEVENSON, Administrative Law Judge: This case was heard before me at Denver, Colorado, on

February 19, 1980,<sup>1</sup> pursuant to a complaint issued by the Regional Director for the National Labor Relations Board for Region 27 on January 10, 1980, and which is based on a charge filed by Wagner Equipment Company (herein called Wagner) on December 26. The complaint alleges that the Respondents, International Union, United Mine Workers of America (herein called UMWA) and Peabody Coal Company (herein called Peabody) have engaged in certain violations of Section 8(e) of the National Labor Relations Act, as amended (herein called the Act).

**Issue**

Whether a provision of Respondents' current collective-bargaining agreement, article II, (g), (2), "Repair and Maintenance Work" violates Section 8(e) of the Act on its face and as interpreted and applied by Respondents.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of the General Counsel, UMWA, and Peabody.

Upon the entire record of the case, and from my observation of the witnesses and their demeanor, I make the following:

**FINDINGS OF FACT**

**I. THE EMPLOYER'S BUSINESS**

Respondent Peabody admits that it is a Delaware corporation engaged in the business of mining coal and having a strip mining site located near Hayden, Colorado. It further admits that during the past year, in the course and conduct of its business, Peabody has sold and sent goods and materials valued in excess of \$50,000 to customers outside the State of Colorado. Accordingly, it admits, and I find, that the Employer is engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

**II. THE LABOR ORGANIZATION INVOLVED**

Respondent UMWA admits, and I find, that it is a labor organization within the meaning of Section 2(5) of the Act.

**III. THE ALLEGED UNFAIR LABOR PRACTICES**

**A. The Facts**

Peabody and UMWA negotiated a collective-bargaining agreement which at all times material to this case was in full force and effect. The controversy herein presented involves one portion of that agreement; article II, "Scope and Coverage," section (g), "Contracting and Subcontracting," (2) "Repair and Maintenance Work." This section reads as follows:

(2) Repair and Maintenance Work—Repair and maintenance work customarily performed by classi-

<sup>1</sup> All dates herein refer to 1979 unless otherwise indicated.

fied Employees at the mine or central shop shall not be contracted out except (a) where the work is being performed by a manufacturer or supplier under warranty, or (b) where the Employer does not have available equipment or regular Employees with necessary skills available to perform the work at the mine or central shop, provided, however, that the work shall be performed by UMWA members to the extent and in the manner permitted by law.

Certain facts and circumstances surrounding the above-cited section of the contract are material to the controversy herein. On or about December 10, a Monday, two employees of Wagner Equipment Company reported for work at Peabody's Seneca minesite. At this time, Peabody had three mechanics on the shift who were capable of doing the work performed by the Wagner employees. Peabody brought in two Wagner mechanics because there was more work available than could be done by Peabody mechanics, and because Peabody wanted Wagner mechanics to install an engine in some equipment, thereby receiving a warranty on the engine which would not otherwise be available.

Both of the Wagner employees testified at the hearing. Douglas White and Tom Edwards testified that on Thursday, December 13, they were working at an inside area at the Seneca shop. White was installing a rebuilt engine in some Peabody equipment and Edwards was reassembling an engine which Peabody mechanics had disassembled. Edwards had worked at Peabody before on warranty work and doing other types of work, but White had not. No complaints had been made on these prior occasions.

While White and Edwards were doing the inside work described above, two Peabody mechanics were working in an outside area in temperatures of approximately 20 below zero. These mechanics learned of the Wagner people working inside and complained to two other Peabody employees who were members of the Pit Committee. At hearing the parties stipulated that the "Pit Committee" was the same as the "Mine Committee" described in article XX of the contract. Basically, members of the Pit Committee were elected by their fellow employees to represent the employees' interests at the initial stages of disputes between union and management over terms and conditions of employment.

The two members of the Pit Committee to whom the Peabody mechanics complained were George Deatherage and George Temple, both of whom testified at the hearing. They admitted speaking to the two Wagner employees. First, however, they spoke to the mine superintendent, Donald Zulian, also a witness. There are conflicts in the testimony regarding exactly what was said.

Zulian was approached by Deatherage and Temple in his office and asked whether the Wagner employees were doing warranty work. Zulian said he did not think so. Then one of the two told Zulian that the Wagner people would have to be signed up for the UMWA, to which Zulian responded, "Go and sign them up yourselves." Both Deatherage and Temple denied saying to Zulian that the Wagner employees would have to join

the UMWA. Although Deatherage does remember Zulian saying, "sign them up," he did not describe the context. I resolve this dispute in favor of Zulian, because his version of the conversation is consistent with the Wagner employees and because the testimony of Deatherage and Temple seemed inherently improbable on this point.

Another conflict involved the conversation with White and Edwards. They testified that they were approached by Deatherage and Temple in the late afternoon of December 13 and asked whether they were performing warranty work. When told the work being done was not warranty work, the Peabody employees asked whether White and Edwards were interested in joining the UMWA and the Wagner employees responded that they were not as they already belonged to another union. Whereupon, White and Edwards were told that they better leave.

Deatherage and Temple denied that they asked the Wagner employees to leave the Peabody premises. Witness this exchange:

[General Counsel] Q. You never suggested that to either of them that they leave?

[Deatherage] A. No, sir, George and I looked at each other and we didn't know what to do and we looked at them and they were in the same shape we were.

I reject this testimony because it is incredible to believe that where Peabody mechanics felt they were working in temperatures of 20 below zero because Wagner mechanics were doing their work indoors and where they complained to members of the Pit Committee about this perceived injustice, I cannot believe that Deatherage would say he did not know what to do. After White and Edwards consulted both with a supervisor at Wagner and with Mine Superintendent Zulian, all decided they would leave work for that day. While it was close to 4:30 p.m., the normal quitting time, Wagner mechanics on detail to Peabody generally worked overtime. Zulian told White and Edwards that he would try to resolve the matter and have the men return the next day. However, White and Edwards did not return to Peabody the next day or ever.

A few days later, Zulian had one or two additional meetings with the Pit Committee to resolve the matter involving Wagner. The UMWA took the position that Wagner should do no work at Peabody except for warranty work. At one of these December meetings, Zulian was told by an unidentified member of the Pit Committee that if Wagner continued to perform nonwarranty work at Peabody, the Company might end up short a work force. Zulian interpreted this remark to mean that some people probably would not report for work.

Subsequent to these unsuccessful attempts to resolve the matter at the company level, a formal grievance was filed on January 3, 1980. This was after a charge had been filed by Wagner with the Board. On January 9, 1980, the grievance was settled by Peabody agreeing to the UMWA's position.

Joe Garcia, a UMWA official at the district level, testified that in October an incident occurred at Peabody with a contractor named Robinson performing work which was customarily performed by UMWA people under the contract. In this case, Robinson was a UMWA signatory, but the Union still took the position that the disputed work had to be done by Peabody UMWA employees. Thus Garcia concluded that it makes no difference to his union whether a contractor is UMWA or not. Their position is, if the disputed work falls under the work jurisdiction clause of the contract, then it must be done by Peabody UMWA people.

### B. Analysis and Conclusions

I begin with the very recent case of *United Mine Workers of America, Local No. 1854 and United Mine Workers of America (Amax Coal Company)*, 238 NLRB 1583 (1978), affd. in relevant part 614 F.2d 872 (3d Cir. 1980). The provision of the contract at issue in the instant case is a verbatim provision of a contract found to have violated Section 8(e)<sup>2</sup> of the Act in *Amax Coal Company*. Although Respondents here offer a factual defense different from that proposed by Respondent in *Amax*, I am constrained to hold preliminarily that the General Counsel has clearly proven a *prima facie* case.<sup>3</sup> That is, the provision here at issue is plainly intended to protect, preserve, acquire, or reclaim work for union members generally (i.e., outside the immediate bargaining unit); therefore, it violates both Section 8(e) and 8(b)(4)(B) of the Act on the theory that it exceeds the legitimate interests of the unit employees *vis-a-vis* their own employer and is, therefore, tactically calculated to satisfy union objectives elsewhere.<sup>4</sup>

I am of the view that the provision at issue was interpreted by the parties in accord with its plain meaning; i.e., to coerce the Charging Party to join the UMWA or to lose the Peabody work. The credited testimony in "The Facts" portion of this opinion clearly shows this to be so. Briefly, I found that two members of the Pit Committee asked the Wagner employees to join the UMWA.<sup>5</sup> When White and Edwards declined on the grounds that they were members of another union, they were asked to leave. Subsequently, Peabody acquiesced in UMWA's position by terminating the employment of the Wagner employees pursuant to the demand of the

UMWA and by agreeing to the settlement of the grievance which resulted from the Wagner incident. It was clear to me that the events in question occurred here not because Wagner mechanics were working inside and Peabody mechanics were working outside, but because non-UMWA employees were working inside and UMWA employees were working outside. Why else would the Wagner employees have been asked to join the UMWA and told to leave when they declined. In this respect, I have considered the testimony of UMWA official Garcia regarding a prior incident with a contractor named Jackson. I assume without finding that Jackson was a UMWA signatory as described by Garcia. I further assume that he was precluded from performing work at Peabody by the UMWA's objection. I even assume the conclusion that the UMWA's objective there was only to preserve work for its members at Peabody at the expense of its members with Jackson. In the instant case, however, the credited evidence shows that the UMWA's objected to Wagner employees only because they were not UMWA employees. That the UMWA and Peabody, for whatever reason, may have elected to act lawfully in October does not detract from the unlawful conduct here. Moreover, as the General Counsel points out, Zulian testified without contradiction that Peabody had more maintenance work to be done than qualified Peabody mechanics to do it.<sup>6</sup> Thus, no work was being taken from UMWA members, but, rather, they insisted on the removal of the Wagner employees to gain their illegal secondary objectives; i.e., coercion of Wagner employees into UMWA membership.

While it is true as UMWA argues that neither the grievance nor the settlement reflects any concern over the union membership or lack of membership of any subcontractor employees, it is also true that the grievance was filed on January 3, 1980, about a week after the charge in this case was filed. Thus, the wording of the grievance and the settlement of January 9, 1980, is suspect, especially in the context of the facts of this case.

As to UMWA's argument that the Pit Committee was not proven to be agents of the UMWA for the purpose of interpreting or applying the provision in question, I reject that argument: first, the provision in question is unlawful on its face so its subsequent interpretation is not crucial; second, its unlawful interpretation was ratified by the International Union;<sup>7</sup> third, I find that the Pit Committee was an agent of the UMWA for the purpose of binding it in the context of the instant case.<sup>8</sup> Thus, the

<sup>2</sup> Sec. 8(e) of the Act provides in pertinent part:

It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer . . . agrees to . . . cease doing business with any other person, and any contract or agreement . . . containing such an agreement shall be to such extent unenforceable and void.

<sup>3</sup> See also *United Mine Workers (Wagner Equipment)*, JD-(SF) 177-77, where again the exact clause now in issue was found by the administrative law judge to violate Sec. 8(e) of the Act.

<sup>4</sup> *Local Union No. 282, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (D. Fortunato, Inc.)*, 197 NLRB 673, 677 (1972).

<sup>5</sup> Witness this exchange:

[General Counsel] Q. And you asked him [White] if he belonged to the UMWA?

[Deatherage] A. I don't know if I--I didn't specifically ask him in those terms. I believe I asked him if he would be willing to join our union. I didn't ask him if he belonged to our Union.

<sup>6</sup> This important point was not covered in Garcia's testimony regarding the Jackson incident.

<sup>7</sup> E.g., Garcia learned of the Wagner incident on December 20 or 21 and subsequently advised Cobb, president of the UMWA local at Peabody, to file a grievance over the matter. At no time did Garcia or Cobb expressly disavow the representations of the Pit Committee, rather, I find that they acted in complete accord with these representations.

<sup>8</sup> In considering the agency argument I also accept and adopt Peabody's argument:

Agency is not an issue because the reference to unfair labor practices by a labor organization or its agents refers only to unfair labor practices arising under 8(b) of the Act . . . Section 8(e) of the Act does not refer to agents but to the labor organization and employer . . . Accordingly, agency need not be proved in the same manner as a

*Continued*

committee existed pursuant to Respondent's contract representing UMWA's interest in grievance resolution as described in article XX, (c), "Grievance Procedure 2."

Peabody also argues that if a violation of Section 8(e) occurred, only a portion of the provision in question is unlawful:

... provided, however, that the work shall be performed by UMWA members to the extent and in the manner permitted by law.

This argument has merit and I will recommend to the Board that only that portion of article II.(g).(2), quoted above be struck from the Respondents' collective-bargaining agreement. As authority, I rely first on article XXV (Severability Clause), section (a) (General Rule), of the contract:

Except for the provisions of Section (b) of this Article, if any provisions of this Agreement is declared invalid, all other provisions of this Agreement shall remain in full force and effect.

In addition, I rely on the legal authorities cited by Peabody. In *Meat and Highway Drivers, Dockmen, Helpers and Miscellaneous Terminal Employees, Local 710, International Brotherhood of Teamsters [Wilson & Co.] v. N.L.R.B.*, 335 F.2d 709 (D.C. Cir. 1964), the court noted that the Board found objectionable only a portion of a clause in a contract yet its order ran against the entire clause. There, as here, deletion of the unlawful material would leave the total collective-bargaining agreement in a state close to what the parties contend they always intended anyway. Further, as explained below, deletion would satisfy totally the requirements of Section 8(e). Thus, the court held that no more of the contract should be invalidated than is unlawful, "where the excess may be severed and separately condemned as it can here." *N.L.R.B. v. Rockaway News Co.*, 345 U.S. 71, 79 (1953).<sup>9</sup> See also *Lewis v. Seanor Coal Co.*, 382 F.2d 437, 440, fn. 6 (3d Cir. 1967), cert. denied 390 U.S. 947 (1968).

In conclusion, I find that absent the offending material, the provision of the contract at issue is not unlawful. In *Pacific Northwest Chapter of the Associated Builders & Contractors, Inc. v. N.L.R.B.*, 609 F.2d 1341, 1346 (9th Cir. 1979), the court stated:

In *National Woodwork Manufacturers Association v. N.L.R.B.*, 386 U.S. 612 . . . (1967), the Supreme Court read into Sec. 8(e) a distinction between primary and secondary objectives. An agreement which advances only primary objectives of the bar-

gaining employees, such as preserving work opportunities, is not unlawful.

The circuit court went on to explain that under *National Woodwork Manufacturers Association*, each disputed agreement must be examined to see whether, under all the surrounding circumstances, the Union's objective was preservation of work for the employees, or whether the agreement was tactically calculated to satisfy union objectives elsewhere. By this standard, I am satisfied that article II.(g).(2), absent the stricken material, does not violate Section 8(e) of the Act, since it serves only to preserve work opportunities of Peabody employees.

Upon the basis of the foregoing findings of fact, and upon the entire record in the case, I make the following:

#### CONCLUSIONS OF LAW

1. By entering into and reaffirming a portion of the clause of their collective-bargaining contract (art. II, sec. (g).(2)) relating to the contracting out of repair and maintenance work as heretofore described and as found herein, Respondents Peabody and UMWA engaged in unfair labor practices within Section 8(e) of the Act.

2. These unfair labor practices affect commerce within Section 2(6) and (7) of the Act.

#### THE REMEDY

Having found that the Respondents have engaged in unfair labor practices, I shall recommend that they cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

#### ORDER<sup>10</sup>

Respondent, International Union, United Mine Workers of America, its officers, agents, and representatives, and Respondent Peabody Coal Company, its officers, agents, successors, and assigns, shall:

1. Cease and desist from entering into or reaffirming that portion of the clause of their collective-bargaining contract article II, section (g).(2), relating to the contracting out of repair and maintenance work, as heretofore described, and from violating the Act in any like or related manner.

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

(a) Post at their respective places of business copies of the attached notice, marked "Appendix."<sup>11</sup> Copies of the notice, on forms provided by the Regional Director for

violation of Section 8(b) of the Act. The Pit Committee enforces the contract. Therefore, it acts for the UMWA.

<sup>9</sup> In the normal case where a decision of the Board is at odds with a circuit court of appeals, I am, of course, bound to follow the Board's rule. Here, however, that issue is not presented. First, the Supreme Court has spoken on the matter and this binds all; second, even without *Rockaway News Co.*, *supra*, it is not at all clear the Board would rule differently here since the facts are different than in *Meat & Highway Drivers*; finally, the General Counsel here does not argue to the contrary of my recommended Order since he asks only that an "appropriate order should issue," holding that Sec. 8(e) of the Act has been violated. This, I will do.

<sup>10</sup> In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

<sup>11</sup> In the event that 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."

Region 27, after being duly signed by representatives of both Respondents, shall be posted by Respondents immediately upon receipt thereof and be maintained by them for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees on the one hand, and to members on the other, are customarily posted. Reasonable steps shall be taken by Respondents to insure that said notices are not altered, defaced, or covered by any other material.

(b) Furnish said Regional Director with signed copies of the said notice for posting by Wagner Equipment Company, should it so desire, at all places where notices to its employees are customarily posted.

(c) Notify the Regional Director for Region 27, in writing, within 20 days from the date of this Order, what steps Respondents have taken to comply herewith.

## APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

WE WILL NOT enter into or reaffirm that portion of the clause of our collective-bargaining contract (art. II, sec. (g),(2)) relating to the contracting out of repair and maintenance work. And more specifically described as follows:

... provided, however, that the work shall be performed by UMWA members to the extent and in the manner permitted by law.

WE WILL NOT violate the Act in any like or related manner.

PEABODY COAL COMPANY  
INTERNATIONAL UNION, UNITED MINE  
WORKERS OF AMERICA