

**Maine Yankee Atomic Power Company and Utility
Workers Union of America, AFL-CIO, Local 497.
Case 1-CA-15571**

July 9, 1979

DECISION AND ORDER

**BY CHAIRMAN FANNING AND MEMBERS PENELLO
AND TRUESDALE**

Upon a charge filed on February 5, 1979, by Utility Workers Union of America, AFL-CIO, Local 497, herein called the Union, and duly served on Maine Yankee Atomic Power Company, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 1, issued a complaint on February 22, 1979, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on January 18, 1979,¹ following a Board election in Case 1-RC-15704 the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the residual voting group found appropriate;² and that, commencing on or about January 26, 1979, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On March 5, 1979, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On March 16, 1979, counsel for the General Coun-

sel filed directly with the Board a Motion for Summary Judgment.³ Subsequently, on April 5, 1979, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to Notice To Show Cause.

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.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint, and response to the Notice To Show Cause, Respondent denies the validity of the Union's certification based on its contention that the Board erred in including Respondent's six shift operating supervisors in an appropriate residual group eligible for inclusion in the existing production and maintenance unit already represented by the Union.⁴ Counsel for the General Counsel asserts in her Motion for Summary Judgment that Respondent is attempting to relitigate issues which were fully litigated in the underlying representation proceeding. We agree.

Review of the record herein, including that of the representation proceedings in Case 1-RC-15704, shows that on July 24, 1978, the Acting Regional Director for Region 1 issued his Decision and Direction of Election in which he found, *inter alia*, that certain of Respondent's job classifications, including that of the shift operating supervisors, were not supervisory within the meaning of the Act, and that, therefore, the employees in question were eligible to vote in the election. On August 7, 1978, Respondent filed a request for review contending, *inter alia*, that the Acting Regional Director erred by including these employees in the residual group. Thereafter, on August 23, 1978, the Board telegraphically granted the request for review with respect to the supervisory status of Respondent's shift operating supervisors as well as to the supervisory authority of additional employees whose status is not at issue herein. An election by secret ballot was then conducted on August 24, 1978,

¹ On January 18, 1979, the Regional Director for Region 1 issued a Certification of Results of Election which was amended on January 24, 1979, to exclude the position of stores supervisor from the certified unit in accordance with the Board's Decision on Review and Direction in the instant case (239 NLRB 1216 (1979)).

² Official notice is taken of the record in the representation proceeding, Case 1-RC-15704, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV ElectroSystems, Inc.*, 166 NLRB 938 (1967), *enfd.* 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), *enfd.* 415 F.2d 26 (5th Cir. 1969); *Intertype Co. v. Penello*, 269 F. Supp. 573 (D.C. Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), *enfd.* 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

In 1972, in Case 1-RC-12130 the Union was certified as the collective-bargaining agent for a unit of Respondent's production and maintenance employees. The Acting Regional Director in the instant case determined that the residual group involved herein is eligible for inclusion in the existing production and maintenance unit already represented by the Union.

³ On May 23, 1979, counsel for the General Counsel filed an amendment to the Motion for Summary Judgment. This amendment involved only correcting the date on the tally of ballots from August 24, 1978, the date of the election, to January 11, 1979, the date the ballots were actually opened and counted.

⁴ Respondent stated in its letter to the Union declining the Union's request to bargain with Respondent that its refusal was for the "sole and express purpose of securing judicial review of the Board's decision by the United States Circuit Court of Appeals."

at which time the ballots were impounded pending the Board's Decision on Review.

Subsequently, on January 5, 1979, the Board issued its Decision on Review and Direction⁵ in which it affirmed, *inter alia*, the Acting Regional Director's finding of the nonsupervisory status of the shift operating supervisors and ordered that the Regional Director open and count their ballots.⁶ The Regional Director, then, on January 11, 1979, issued the tally of ballots which indicated a union victory, as there were eight votes for and five against the Union, with no challenged ballots. On January 18, 1979, based on the tally of ballots, the Regional Director issued a Certification of Results of Election which was amended on January 24, 1979, with regard to the residual voting group's composition.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.⁷

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent, a Maine corporation with its principal office and place of business in Wiscasset, Maine, is a public utility engaged in the operation of a nuclear power plant. Further, Respondent has an annual gross volume of business in excess of \$250,000, and annually receives directly from outside the State of Maine goods valued in excess of \$50,000.

We find, on the basis of the foregoing, that Respon-

⁵ See fn. 1, *supra*.

⁶ The Board also directed the Regional Director to open and count all of the impounded ballots in the classifications it had reviewed with the exception of that of the stores supervisor, who was found to be a supervisor within the meaning of the Act.

⁷ See *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

dent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

Utility Workers Union of America, AFL-CIO, Local 497, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Representation Proceeding*

1. The unit

The following employees of Respondent constitute an appropriate residual group, eligible for inclusion in the existing production and maintenance unit currently represented by the Union, for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

All technical employees, plant clerical employees and other unrepresented non-professional employees of the Employer at its Wiscasset, Maine power plant, including administrative and engineering aides in the plant engineering assurance group, administrative aides in the chemistry and health physics and maintenance departments, assistant to instrumentation and controls department head, senior training coordinator, training coordinator, and shift operating supervisors, but excluding all office clerical employees, all production and maintenance employees currently represented by Utility Workers of America, AFL-CIO and its Local Union No. 497, stores supervisor, managerial employees, professional employees, guards, and all supervisors as defined in the Act.

2. The certification

On August 24, 1978, a majority of the employees of Respondent in said residual group, in a secret-ballot election conducted under the supervision of the Regional Director for Region 1 designated that the Union may bargain for the employees in said residual group as part of the existing production and maintenance unit currently represented by the Union. The Union was certified as the collective-bargaining representative of the employees in said residual group as part of the unit it already represented on January 18, 1979, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about January 23, 1979, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the appropriate unit. Commencing on or about January 26, 1979, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in the appropriate unit.

Accordingly, we find that Respondent has, since January 26, 1979, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), *enfd.* 328 F.2d 600 (5th Cir. 1964), *cert. denied* 379 U.S. 817 (1964); *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), *enfd.* 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. Maine Yankee Atomic Power Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Utility Workers Union of America, AFL-CIO, Local 497, is a labor organization within the meaning of Section 2(5) of the Act.

3. All technical employees, plant clerical employees and other unrepresented non-professional employees of the Employer at its Wiscasset, Maine, power plant, including administrative and engineering aides in the plant engineering assurance group, administrative aides in the chemistry and health physics and maintenance departments, assistant to instrumentation and controls department head, senior training coordinator, and shift operating supervisors, but excluding all office clerical employees, all production and maintenance employees currently represented by Utility Workers of America, AFL-CIO and its Local Union 497, stores supervisor, managerial employees, professional employees, guards, and all supervisors as defined in the Act, constitute an appropriate residual group eligible for inclusion in the existing production and maintenance unit currently represented by the Union for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since January 18, 1979, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid residual group for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about January 26, 1979, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

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

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Rela-

tions Board hereby orders that the Respondent, Maine Yankee Atomic Power Company, Wiscasset, Maine, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Utility Workers Union of America, AFL-CIO, Local 497, as the exclusive bargaining representative of its employees in the following appropriate residual group who are eligible for inclusion in the existing production and maintenance unit:

All technical employees, plant clerical employees and other unrepresented non-professional employees of the Employer at its Wiscasset, Maine power plant, including administrative and engineering aides in the plant engineering assurance group, administrative aides in the chemistry and health physics and maintenance departments, assistant to instrumentation and controls department head, senior training coordinator, training coordinator, and shift operating supervisors, but excluding all office clerical employees, all production and maintenance employees currently represented by Utility Workers of America, AFL-CIO and its Local Union No. 497, stores supervisor, managerial employees, professional employees, guards, and all supervisors as defined in the Act.

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

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Wiscasset, Maine, facility copies of the attached notice marked "Appendix."⁸ Copies of said notice, on forms provided by the Regional Director for Region 1, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicu-

ous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 1, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

APPENDIX

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

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Utility Workers Union of America, AFL-CIO, Local 497, as the exclusive representative of the employees in the appropriate unit, including the residual group described below.

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.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the appropriate unit, including the residual group described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The residual group, eligible for inclusion in the existing production and maintenance unit, is:

All technical employees, plant clerical employees and other unrepresented non-professional employees of the Employer at its Wiscasset, Maine power plant, including administrative and engineering aides in the plant engineering assurance group, administrative aides in the chemistry and health physics and maintenance departments, assistant to instrumentation and controls department head, senior training coordinator, training coordinator, and shift operating supervisors, but excluding all office clerical employees, all production and maintenance employees currently represented by Utility Workers of America, AFL-CIO and its Local Union No. 497, stores supervisor, managerial employees, professional employees, guards, and all supervisors as defined in the Act.

MAINE YANKEE ATOMIC POWER COMPANY

⁸ 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."