Farris Mines *and* International Union of Operating Engineers, Local 953, AFL–CIO, Petitioner. Case 28–CA–4904

October 31, 1978

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS JENKINS AND PENELLO

Upon a charge filed on June 13, 1978, by International Union of Operating Engineers, Local 953, AFL–CIO, herein called the Union, and duly served on Farris Mines, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 28, issued a complaint on July 12, 1978, 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 May 30, 1978, following a Board election in Case 28–RC–3409, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate,[1] and that, commencing on or about June 2, 1978, 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 July 17, 1978, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint. Respondent admits that it meets the Board's jurisdictional standards, that the Union is a labor organization within the meaning of the Act, and that the unit described in the election petition is appropriate, but denies all of the remaining allegations of the complaint.

On August 7, 1978, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on August 16, 1978, 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 Motion for Summary Judgment and 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

Respondent's Response to Motion for Summary Judgment and Notice To Show Cause is devoted substantially to reargument of the merit of its objections and its position on challenges in the representation case; namely, that the Board failed to give due consideration to Respondent's exceptions to the Regional Director's findings and recommendations therein. Respondent further asserts that, as to the refusal-to-bargain issue, evidence of such refusal by Respondent should properly be in the form of testimony before an Administrative Law Judge rather than by affidavit of the union business manager as in the instant case. Therefore Respondent requests that the entire proceeding be remanded for hearing before an Administrative Law Judge or that the complaint be dismissed in its entirety.

Review of the record herein, including the record in Case 28–RC–3409, reveals that on January 26, 1978, pursuant to a Stipulation for Certification Upon Consent Election, an election was held in the appropriate unit. The tally of ballots showed that 42 ballots were cast for and 28 against the Union, and 16 ballots were challenged.

On March 8, 1978, the Regional Director issued his report on determinative challenged ballots and objections to the election in which he, *inter alia,* sustained challenges to 3 of the 16 challenged ballots and recommended that the Employer's objections be overruled and that a certification of representative issue. Thereafter, Respondent filed timely exceptions to the Regional Director's report, requesting the Board to reverse the Regional Director by overruling one of the challenges which the Regional Director had sustained and making it necessary thereby to open and count the 14 determinative challenges, and by overruling the Regional Director's dismissal of the Employer's objections.

On May 30, 1978, the Board issued a Decision and Certification of Representative in which it adopted the Regional Director's report and certified the

[1] Official notice is taken of the record in the representation proceeding, Case 28–RC–3409, 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.

Union as the exclusive bargaining representative of the employees in the appropriate unit.

It thus appears that Respondent is merely attempting to relitigate issues which were raised and determined adversely to it in the underlying representation case.

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.[2]

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.[3] 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 has been at all times material herein a New Mexico corporation with its principal office in Grants, New Mexico, and an office and earthmoving operation at the St. Anthony mine near Bibo, New Mexico, where it has been engaged in open pit uranium mining. During the 12 months preceding the issuance of the complaint herein, Respondent, in the course and conduct of its business operations, purchased and received at its places of business in New Mexico goods and materials valued in excess of $50,000 directly from suppliers located outside the State of New Mexico.

We find, on the basis of the foregoing, that Respondent 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

International Union of Operating Engineers, Local 953, AFL–CIO, 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 a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All production and maintenance employees employed by the Employer at the St. Anthony mine near Bibo, New Mexico, but excluding all other employees, office clerical employees, technical employees, professional employees, guards, watchmen, and supervisors as defined by the Act.

2. The certification

On January 26, 1978, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 28, designated the Union as their representative for the purpose of collective bargaining with Respondent. The Union was certified as the collective-bargaining representative of the employees in said unit on May 30, 1978, 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 June 2, 1978, 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 above-described unit. Commencing on or about June 2, 1978, 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 said unit.

Accordingly, we find that Respondent has, since June 2, 1978, 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 en-

[2] 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).

[3] As Respondent's response to the Notice To Show Cause has not controverted the General Counsel's factual allegations of the refusal to bargain, there is no genuine issue of fact relating thereto requiring testimonial evidence before an Administrative Law Judge, as contended by Respondent.

gaged 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. Farris Mines is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. International Union of Operating Engineers, Local 953, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.
3. All production and maintenance employees employed by the Employer at the St. Anthony mine near Bibo, New Mexico, but excluding all other employees, office clerical employees, technical employees, professional employees, guards, watchmen, and supervisors as defined by the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.
4. Since May 30, 1978, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.
5. By refusing on or about June 2, 1978, 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 Relations Board hereby orders that the Respondent, Farris Mines, Grants, New Mexico, 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 International Union of Operating Engineers, Local 953, AFL–CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All production and maintenance employees employed by the Employer at the St. Anthony mine near Bibo, New Mexico, but excluding all other employees, office clerical employees, technical employees, professional employees, guards, watchmen and supervisors as defined by 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 aforesaid 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 the St. Anthony mine and at its place of business in Grants, New Mexico, copies of the attached notice marked "Appendix." [4] Copies of said notice, on forms provided by the Regional Director for Region 28, 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 conspicuous 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 28, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

[4] 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."

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 International Union of Operating Engineers, Local 953, AFL–CIO, as the exclusive representative of the employees in the bargaining unit 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 bargaining unit 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 bargaining unit is:

All production and maintenance employees employed by the Employer at the St. Anthony mine near Bibo, New Mexico, but excluding all other employees, office clerical employees, technical employees, professional employees, guards, watchmen and supervisors as defined by the Act.

FARRIS MINES