

Arco Electric Company and International Brotherhood of Electrical Workers, Local Union No. 611, AFL-CIO. Case 28-CA-4601

August 22, 1978

DECISION AND ORDER

BY MEMBERS JENKINS, MURPHY, AND TRUESDALE

On May 9, 1978, Administrative Law Judge Bernard J. Seff issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering 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, and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.¹

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, as modified below, and hereby orders that the Respondent, Arco Electric Company, Roswell, New Mexico, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

Substitute the following for the first sentence of paragraph 2(b):

"In addition, reimburse all employees in the bargaining unit for any loss of wages incurred by the employees as a result of Respondent's unilateral changes, with interest calculated in the manner set forth in *Florida Steel Corporation*, 231 NLRB 651 (1977), in accordance with *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962)."

¹ The Administrative Law Judge, in his recommended Order, required that Respondent reimburse all unit employees for any loss of wages incurred as a result of Respondent's unlawful conduct. However, the Administrative Law Judge failed to require that Respondent pay interest on such moneys owed to employees. Accordingly, we shall modify the Administrative Law Judge's recommended Order to require that any money owed by Respondent to its employees shall bear interest to be computed in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977), and *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

DECISION

STATEMENT OF THE CASE

BERNARD J. SEFF, Administrative Law Judge: This case came on for a hearing before me in Roswell, New Mexico, on February 28, 1978. The original charge was filed by the Union on November 9, 1977. The charge was filed by the International Brotherhood of Electrical Workers, Local Union No. 611, AFL-CIO, hereinafter referred to as the Union. Respondent is the Arco Electric Company, hereinafter referred to as Respondent or the Company. The complaint was issued on December 29, 1977. It alleges that Respondent, since July 1977 has refused to bargain with the Union and made unilateral changes by establishing different rates of pay than had prevailed under the contract.

Respondent admits in its answer jurisdictional facts, and the fact that the Union is a labor organization within the meaning of the Act. It denies the commission of any unfair labor practices.

Upon consideration of the entire record in this case and the briefs which were submitted by the General Counsel and Respondent, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

Respondent is and has been at all times material herein a corporation duly organized under and existing by virtue of the laws of the State of New Mexico. At all times material herein, the Respondent has maintained its principal office and place of business at 210 East Fifth Street, Roswell, New Mexico, where it is engaged as an electrical contractor in the building and construction industry. Respondent, in the course and conduct of its business purchased goods and materials valued in excess of \$50,000 and has caused the same to be transported in interstate commerce and delivered to its place of business in New Mexico, directly from suppliers located in States of the United States other than the State of New Mexico. I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Union is a labor organization within the meaning of Section 2(5) of the Act, and I so find.

III. THE ALLEGED UNFAIR LABOR PRACTICES

There is no dispute as to the facts of the instant case. For a good many years, Respondent has been operating under a contract with the Union.

All employees employed by the Respondent who are engaged in performing electrical work, excluding office clerical employees, guards, and supervisors as defined in the Act, and all other employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

On or about May 16, 1975, the Respondent signed a letter of assent which provided, *inter alia*, that the Respondent would be bound by the terms and conditions of employment contained in the collective-bargaining agreement negotiated between the Central New Mexico Chapter of NECA, Inc., (herein called NECA), and the Union which was effective from April 1, 1974, through March 31, 1976, and that said letter of assent would renew itself unless the Respondent notified the Union of the contrary in writing at least 60 days prior to the termination date of the aforesaid collective-bargaining agreement.

The Respondent failed to timely notify the Union that it desired to withdraw or cancel said letter of assent as required by the provision of the letter of assent referred to above.

On or about April 1, 1976, NECA and the Union entered into a successor collective-bargaining agreement which was to be effective from April 1, 1976, to May 31, 1978.

Respondent, since May 16, 1975, had abided by and complied with all the terms and conditions of employment set forth in the agreement referred to above, including the payment of contractual wage scales and fringe benefits for its unit employees.

Richard Vogel, the president of Arco, testified that on May 16, 1975, he, on behalf of Arco Electric, executed a letter of assent in which he agreed that Arco Electric would comply "with all the terms and conditions of employment contained in . . . and all approved amendments thereto" of the 1974-76 labor agreement between NECA and Local 611. The undertaking in the letter of assent further states, in substance, that the signing of the letter of assent shall be as binding as though Arco Electric had signed a 1974-76 labor agreement including any improved amendments thereto. The effective date of the letter of assent is stated as April 1, 1975, and it is provided that it shall remain in effect until March 31, 1976. Significantly, there is a further provision in the document that if Arco Electric does not intend to renew the assent it shall notify Local 611 in writing at least 60 days prior to March 31, 1976.

At no time did Respondent notify Local 611 in writing or otherwise that it did not intend to renew the assent signed on May 16, 1975. Subsequently, NECA and Local 611 negotiated a successor labor agreement to the 1974-76 agreement whose stated term is April 1, 1976, through May 31, 1978.

It should be noted especially that until approximately July 1977, Arco Electric attempted to comply with all of the terms of the 1976-78 labor agreement. Therefore, Arco Electric, during the period from April 1, 1976 to approximately July 1977, availed itself of the benefits of the union hiring hall for referral of employees; pursuant to appropriate authorizations, deducted union assessments and remitted them to Local Union 611; made appropriate deductions for various funds including the health and welfare trust fund, vacation plan, and apprenticeship fund, and remitted the required payments to the trustees of those funds; reported the fund payments on forms provided therefore under the contract and paid its employees working under the contract the wage scale called for or even higher pay. The monthly payroll report for the month of

July 1977 was the last one submitted by Vogel on behalf of Arco Electric on which he wrote "final report" and signed his name under that notation. From that point forward in 1977, Vogel, on behalf of Arco Electric, has not observed the collective-bargaining relationship with Local 611 and has refused to consider that the 1976-78 labor agreement is binding on Respondent.

The General Counsel argues that by the terms of the assent signed on behalf of Arco Electric on May 16, 1975, and since Arco Electric did not notify Local 611 of its intention not to renew the assent, it thereby became bound to the 1976-78 labor agreement between NECA and Local 611. Since the letter of assent was as binding as if Respondent had signed the 1974-76 labor agreement, the changes to that agreement which were incorporated in the 1976-78 labor agreement also became binding on Respondent.

Furthermore, it is obvious that Vogel understood the obligations that attached by not notifying the Union of his intention to terminate the letter of assent since he continued to conduct his business in conformance with his understanding of the provisions of the 1976-78 labor agreement. It was only when he felt that the new provisions of the agreement had become financially burdensome that he attempted to avoid those obligations. It is well settled and the Board has consistently held that financial hardship is no justification for repudiation or modification of a collective-bargaining agreement or any of its terms. See *Oak Cliff-Golman Baking Company*, 207 NLRB 1063, 1064 (1973); *Osage Manufacturing Company*, 173 NLRB 458, 461-462 (1968).

It should be emphasized that Respondent engaged in a course of conduct under the 1976-78 agreement which prevented it from calling a halt to performance under the agreement except in accordance with its terms. Respondent argues that its actions and compliance with the agreement's provisions were undertaken voluntarily in an effort to keep its employees from suffering any adverse consequences. The General Counsel calls attention to the fact that whatever the motivation, Respondent made payments to the various funds as called for by the 1976-78 labor agreement, utilized Local 611's hiring hall to obtain employees, paid at least the wage scale required by the terms of the agreement, deducted working dues pursuant to valid authorizations, and otherwise attempted to abide by all of the terms of the agreement.

In conclusion to this argument, the General Counsel takes the position that the cases are numerous, that where such a course of conduct is undertaken by an employer, the employer is bound by its actions and is estopped to assert that it is not a party to such an agreement.

Particular attention is called to the case of *Paint Power, Inc.*, 230 NLRB 758 (1977), and more especially to footnote 1:

In finding that Respondent was bound to abide by the contract negotiated between the Union and the Association, we rely solely on Respondent's course of conduct after the effective date of such contract. In this regard, Respondent made payments into the Union's health and welfare and pension trust funds; utilized the Union's hiring hall to obtain employees;

and specifically relied on the provisions of the contract in pressing its claim against Steven Evans for improper workmanship. Respondent cannot claim freedom from the contract where its actions demonstrate that it did, in fact, abide by certain terms of the contract, and, further, where it seeks to utilize the provisions of the contract to its own benefit. Cf. *Vin James Plastering Company*, 226 NLRB 125 (1976), and cases cited therein.

Attention is particularly called to the fact that in the footnote dropped by the Board in its short form affirmance of the decision in *Paint Power* is the sentence, "We rely solely on Respondent's course of conduct after the effective date of such contract."

Respondent's Defense

The major burden of the Respondent's defense is that the evidence clearly demonstrates that Respondent never affirmatively assented to be bound by the terms of the 1976-78 contract negotiated between the Union and NECA. It is further contended that at no time did the Respondent agree to an extension of that agreement. It is also further contended by the Respondent that a party cannot be bound by the terms of an instrument, when such party has never been made an offer in any form, simply because the party has conducted some of its affairs in the manner described by some of the terms of that instrument. Contracts by implication arise after there has been a legally sufficient offer. There was no such offer made by the Union with respect to the 1976-78 contract.

Respondent also argues that it had reasonable doubt based on objective circumstances that the Union had lost its majority status. Two of the Respondent's three employees allegedly stated to the Respondent that they wanted to terminate their relationship with the Union. According to the Respondent, this action by its employees terminated Respondent's duty to bargain with the Union.

None of these arguments are persuasive. It would appear that all that happened in this case is that the Respondent continued to maintain its relationship with the Union until certain of the fringe benefits were elevated in cost and it did not want to be burdened with any additional financial responsibilities.

Respondent submitted a very lengthy brief consisting of 45 pages, but most of the material contained in this brief does not appear to me to be relevant. Board case law is clear that when a company has been involved in a long relationship with the labor union and has complied with many of the essential terms of this agreement, it is estopped from attempting to escape from the conditions of the contract because it claims that to continue would create additional financial hardships on it. The explicit terms in the contract required that if Arco Electric did not intend to renew the assent it should notify Local 611 in writing at least 60 days prior to March 31, 1976. At no time did Respondent notify Local 611 in writing or otherwise, that it did not intend to renew the assent signed on May 16, 1975. In conclusion, it should be noted that by the terms of the

letter of assent signed on behalf of Arco Electric on May 16, 1975, since Arco Electric did not notify Local 611 of its intention not to renew the assent, it thereby became bound to the 1976-78 labor agreement between NECA and Local 611. Since the letter of assent was as binding as if Respondent had signed the 1974-76 labor agreement, the changes to that agreement which were incorporated in the 1976-78 labor agreement also became binding on Respondent.

With respect to the question of the continued majority status of the Union in the unit, since Respondent has historically recognized the Union as such, a presumption of majority status arose which was in no way rebutted by Respondent. The General Counsel calls attention to two recent cases where the principle that, "recognition establishes a presumption of majority status" has been reiterated by the Board. See *B. C. Hawk Chevrolet, Inc.*, 226 NLRB 527, 529 (1976); *James W. Whitfield, d/b/a Cutten Supermarket*, 220 NLRB 507 (1975). In any event, the Union represented an actual majority of Respondent's employees doing electrical work in July 1977 when Respondent broke off its relationship with the Union. Respondent's President Vogel, admitted that he knew that two of the three employees employed by him in July 1977 were members of Local 611.

The two principal issues in this case are: Is Respondent bound by the terms and obligations of the 1976-78 collective-bargaining agreement between NECA and the Union as a result of its having executed the letter of assent on May 16, 1975; is Respondent bound by the terms and obligations of the 1976-78 collective-bargaining agreement between NECA and the Union as a result of its having engaged in a course of conduct which estops it from repudiating the collective-bargaining agreement. From the record evidence it is clear that the answer to both these issues is in the affirmative.

By unilaterally terminating its contractual relationship with the Union and making changes in wage rates without consultation with the Union, I find that the Respondent has violated Section 8(a)(1) and (5) of the Act.

IV. THE REMEDY

Having found that Respondent has committed certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom, and to take certain affirmative action, including the posting of appropriate notices and taking other action designed to effectuate the policies of the Act.

CONCLUSIONS OF LAW

1. Respondent, Arco Electric Company, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. International Brotherhood of Electrical Workers, Local Union No. 611, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.
3. All employees employed by the Respondent who engage in performing electrical work, excluding office clerical employees, guards, and supervisors as defined in the Act,

and all other employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. By ceasing to honor and abide by the terms of the 1976-78 agreement from which it never withdrew according to its terms, Respondent has violated Section 8(a)(1) and (5) of the Act.

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

ORDER¹

Respondent, Arco Electric Company, Roswell, New Mexico, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to recognize and bargain collectively with the International Brotherhood of Electrical Workers, Local Union No. 611, AFL-CIO, as the exclusive bargaining representative of its employees consisting of all employees employed by the Respondent who engage in performing electrical work, excluding office clerical employees, guards, and supervisors as defined in the Act, and all other employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

(b) Refusing to recognize and bargain collectively with the International Brotherhood of Electrical Workers, Local Union No. 611, AFL-CIO, as the exclusive bargaining representative of its employees performing work covered by the collective-bargaining contract between the Respondent and the Union.

(c) Refusing to acknowledge, honor, implement, or comply with the collective-bargaining contract here and above mentioned for its full term with respect to employees performing the services of the type described above.

(d) In any like or related manner, interfering with, restraining, or coercing employees with respect to their exercise of rights which Section 7 of the Act guarantees.

2. Take the following affirmative action which is required to effectuate the policies of the Act:

(a) Upon request, engage in good-faith bargaining with the Union, and restore the *status quo ante* which the Respondent shall maintain retroactively to July 1977. All the terms and conditions of employment that were in effect pursuant to the 1976-78 contract shall be complied with.

(b) In addition, pay to all employees in the bargaining unit sufficient money to make up any loss of wages incurred by the employees as a result of Respondent's unilateral changes. Respondent should be required to pay all fund payments as provided in the 1976-78 collective-bargaining agreement which have not been paid and which would have been paid absent Respondent's unlawful discontinuance of such payments.

(c) Post at its place of business in Roswell, New Mexico, copies of the attached notice marked "Appendix."² Copies of the notice, on forms provided by the Regional Director for Region 28, shall be posted immediately upon their re-

ceipt, after being duly signed by Respondent's representative. When posted, they shall remain posted 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 these notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 28, in writing, within 20 days of the date of this Order, what steps Respondent has taken to comply herewith.

¹ 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.

² In the event that this Order is enforced by a judgment of the 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 with the International Brotherhood of Electrical Workers, Local Union No. 611, AFL-CIO.

The appropriate unit consists of all employees employed by the Respondent who engage in performing electrical work, excluding office clerical employees, guards, and supervisors as defined in the Act, and all other employees.

WE WILL NOT refuse to acknowledge, honor, implement, and comply with the collective-bargaining contract for its full term.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees with respect to their exercise of the rights guaranteed in Section 7 of the Act.

WE WILL restore retroactively the *status quo ante* established in the collective-bargaining contract with respect to all the terms and conditions of employment which we terminated in July 1977.

WE WILL pay to all the employees in the bargaining unit sufficient money to make up any loss of wages incurred by the employees as a result of our unilateral changes.

WE WILL pay all fund payments as provided in the applicable 1976-78 collective-bargaining agreement which have not been paid and which would have been paid absent our unlawful discontinuance of such payments.

ARCO ELECTRIC COMPANY