

Vernon Weeke, a Sole Proprietor, d/b/a Weeke Electric Company and Congress of Independent Unions

ORDER

International Brotherhood of Electrical Workers, Local Union No. 702, AFL-CIO and Congress of Independent Unions. Cases 14-CA 11738 and 14-CP-291

June 11, 1979

DECISION AND ORDER

BY MEMBERS PENELLO, MURPHY, AND TRUESDALE

On March 1, 1979, Administrative Law Judge George F. McNerny issued the attached Decision in this proceeding. Thereafter, Respondent Union filed exceptions and a supporting 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 brief and has decided to affirm the rulings,¹ findings,² and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.³

¹ We agree with Administrative Law Judge's ruling that Respondent Union was not entitled, in the circumstances present here, to collaterally attack the lawfulness of the Employer's recognition of Congress of Independent Unions (CIU), since that recognition took place more than 6 months prior to the filing of the charges herein and, therefore, could not be challenged directly in proceedings under Sec. 8 or 9 of the Act. We note that, contrary to the Administrative Law Judge's statement, in *Sheet Metal Workers International Association Local No. 2, AFL-CIO (Farmer & Sipes, Inc. d/b/a Rain-Flow of Kansas City)*, 201 NLRB 568 (1973), and *Local Union No. 42, Laborers International Union of North America, AFL-CIO (R & E Asphalt Service, Inc.)*, 185 NLRB 163 (1970), as well as in the instant case, the employers' allegedly unlawful recognition and assistance of the incumbent unions took place more than 6 months prior to the filing of the charges. We, however, agree with the Administrative Law Judge's finding that *Rain-Flow* and *R & E Asphalt* are distinguishable from the present case in that in those cases the Board did not reach the issue presented here, i.e., whether a union, in defense of 8(b)(7)(A) charges, may litigate the lawfulness of an employer's recognition of another labor organization more than 6 months prior to the filing of the 8(b)(7)(A) charges. Rather, in *Rain-Flow* and *R & E Asphalt*, the Board dismissed the complaints on the ground that the contracts, on their face and as administered, did not constitute bars to the raising of questions concerning representation under Sec. 9(c) of the Act.

² In various places in his Decision, the Administrative Law Judge refers to the Charging Party as "Congress of Industrial Unions," whereas the correct name of the Charging Party is Congress of Independent Unions.

Member Penello notes that he dissented in *Local 1575, International Longshoremen's Association (Puerto Rico Marine Management, Inc.)*, 227 NLRB 471 (1976), cited by the Administrative Law Judge, on the ground that in his view the employer in that case was exempt from the coverage of the Act.

³ In par. 1 of the recommended Order directed to Respondent Union, the Administrative Law Judge provides that Respondent Union shall cease and desist from certain activity "under conditions prohibited by Section 8(b)(7)(A) of the Act." We shall modify the recommended Order to specifically conform to the language of Sec. 8(b)(7)(A), which proscribes such activity by a labor organization when "the employer has lawfully recognized in accordance with [the] Act any other labor organization and a question concerning representation may not appropriately be raised" under Sec. 9(c) of the Act.

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 Respondents, Vernon Weeke, a Sole Proprietor, d/b/a Weeke Electric Company, Nashville, Illinois, his agents, successors, and assigns, and International Brotherhood of Electrical Workers, Local Union No. 702, AFL-CIO, its officers, agents, and representatives, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 1 of the Order directed to Respondent Union:

"1. Cease and desist from picketing, or causing to be picketed, or threatening to picket Vernon Weeke, a Sole Proprietor, d/b/a Weeke Electric Company, where an object thereof is forcing or requiring said Employer to recognize or bargain with it as the representative of the Employer's employees, or forcing or requiring said employees to accept or select Respondent Union as their collective-bargaining representative, when said Employer has lawfully recognized Congress of Independent Unions, and a question concerning representation may not appropriately be raised under Section 9(c) of the Act."

2. Substitute the attached notice for the notice of the Administrative Law Judge marked "Appendix B."

APPENDIX B

NOTICE

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

To all members of International Brotherhood of Electrical Workers, Local Union No. 702, AFL-CIO, and to all employees of Vernon Weeke d/b/a Weeke Electric Company:

We hereby notify you that:

WE WILL NOT picket, or cause to be picketed, or threaten to picket Vernon Weeke, a Sole Proprietor, d/b/a Weeke Electric Company, where an object thereof is to force or require Vernon Weeke to recognize or bargain with us as the representative of his employees, or to force or require the employees of Vernon Weeke to accept or select us as their collective-bargaining representative, when Vernon Weeke has lawfully recognized Congress of Independent Unions, and a question concerning representation may

not appropriately be raised under Section 9(c) of the National Labor Relations Act.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 702, AFL-CIO

DECISION

STATEMENT OF THE CASE

GEORGE F. McINERNEY, Administrative Law Judge: On August 15, 1978, the Charging Party, Congress of Independent Unions, herein referred to as CIU, filed a charge against Weeke Electric Company, herein referred to as Respondent Employer or the Company. Then, on August 18, 1978, CIU filed a charge against International Brotherhood of Electrical Workers, Local Union No. 702, AFL-CIO, herein referred to as Respondent Union or IBEW. Thereafter, the General Counsel of the National Labor Relations Board, herein referred to as the Board, by the Regional Director for Region 14, issued a consolidated complaint dated September 8, 1978, alleging that Respondent Employer¹ had violated Section 8(a)(1), (2), and (5) of the National Labor Relations Act, as amended, herein referred to as the Act, and that Respondent Union had violated Section 8(b)(7)(A) of the Act. In response, the Company denied, generally, the commission of any unfair labor practices, and IBEW did the same, further alleging that its conduct was proper in that Respondent Employer had unlawfully recognized CIU as the bargaining agent for its employees.

Pursuant to notice contained in the consolidated complaint, a hearing was held before me at St. Louis, Missouri, on November 3, 1978, at which all parties were represented and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce documentary and other evidence.² After the close of the hearing, the General Counsel and Respondent Union filed briefs, and CIU filed a memorandum in support of the complaint. These have been carefully considered.

Upon the entire record in this case, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent Employer, Vernon Weeke, is a sole proprietor doing business as Weeke Electric Company. At all times material herein he has maintained his principal office and place of business in Nashville, Illinois, where he is engaged in the business of electrical contracting and the sale and distribution of electrical appliances and related products. During the year ending December 31, 1977, which period is representative of its operations during all times material herein, Respondent Employer purchased goods and materials valued in excess of \$50,000, which goods

¹ The complaint was amended at the hearing to reflect the correct name of the Employer.

² On December 8, 1978, the General Counsel filed a motion to correct record. In the absence of objection, the motion is allowed.

were transported to his place of business in Nashville, Illinois, directly from points outside the State of Illinois. The complaint alleges, the Respondent Employer's answer admits, and I find that Respondent Employer is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

(a) The complaint alleges, Respondent Union's answer admits, and I find that International Brotherhood of Electrical Workers, Local Union No. 702, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

(b) Respondent Union's answer denies that the Congress of Industrial Unions is a labor organization. I find that the Congress of Industrial Unions is a labor organization within the meaning of Section 2(5) of the Act.³

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Facts

There are no disputed facts in this case, based upon the uncontroverted testimony of Vernon Weeke, Respondent Employer, and two of his employees, Paul Wilkey and Gene Dinkelman, which testimony I find to be credible. I find the following facts. Respondent Employer employs three employees, who described themselves as electricians and servicemen, and he operates a retail store and also does electrical contracting of both residential and commercial natures. The sequence of events in this case begins with the execution of a collective-bargaining agreement covering the three employees between Respondent Employer and the Charging Party, CIU, on February 8, 1978.⁴ Shortly thereafter, Respondent Union began picketing at the Company's retail store and at two construction sites. The picketing continued into the month of March, the pickets carrying signs which identified Local 702 and which bore a legend to the effect that the Company was not paying the area standard wages and fringe benefits.

Around the middle of March, the Company's three employees met with Gary Roan and Gary Butler, representatives of Respondent Union, at the Company's premises. In response to a question from the employees as to why the picketing was taking place, Roan and Butler said it was because the Company was not paying "standard wages."⁵ Roan and Butler added that as long as the employees belonged to CIU, they really had nothing to talk about. However, they continued to talk, and eventually Roan asked if

³ Richard Davis, national business representative for CIU, testified in a credible and undenied manner that employees attend membership meetings; vote on election of officers, revocation of contracts, and constitution changes; and otherwise participate in CIU activities. The organization itself represents employees in dealing with employers on grievances, wages, hours, and conditions of work. This testimony shows that CIU clearly meets the criteria established by the Board for classification as a labor organization. *Alto Plastics Manufacturing Corporation*, 136 NLRB 850 (1962).

⁴ All dates herein are in 1978.

⁵ The CIU contract called for an hourly rate of \$7.97 per hour, with no health and welfare or pension payments. The IBEW contract provides a basic rate of \$7.15 per hour, with 40-cent health and welfare and 6-1/2 percent pension contributions, bringing the total package to slightly over \$8.00 per hour.

he could speak to Wilkey outside. Then Roan explained the "operation of Local 702, their benefits and so forth." They were then joined by Dinkelman, Butler, and the Company's third employee, Fred Chwarzinski, and the discussion continued, with Butler joining Roan in explaining the benefits and advantages of belonging to Local 702. According to Dinkelman, the union representatives stated that the only way to be rid of the pickets would be "to join their union."

As a result of this meeting the three employees joined IBEW, and, at the same time, Weeke himself executed two letters of assent agreeing to recognize Local 702 and to be bound by a collective-bargaining agreement between Respondent Union and Southern Illinois Division, Illinois Chapter, N.E.C.A., Inc. Since that time Weeke has been paying the rates called for in the IBEW agreement.⁶

B. Analysis and Conclusions

Respondent Union contends here that the recognition of CIU by the Company was unlawful and that the collective-bargaining agreement entered into between CIU and the Company is, presumably, null and void. In that case, argues the Union, the General Counsel has not established that the Company "lawfully recognized" CIU, and the complaint that the Union has violated Section 8(b)(7)(A) of the Act must fall.

Respondent Union was not permitted to adduce evidence in support of this argument, but offered to show that in response to a threat by Respondent Union to picket the Company because it was paying substandard wages and fringe benefits, Vernon Weeke suggested CIU to his employees as a bargaining representative for them, he telephoned CIU and arranged for a representative of that organization to come to his premises, he arranged a meeting with a CIU representative and his employees, and after the picketing had begun, he went to the offices of CIU and, without any negotiations, signed a standard form of contract.

In such circumstances, Respondent Union asserts, its picketing in protest against the payment of substandard wages and fringe benefits would be perfectly proper, or at least not violative of Section 8(b)(7)(A). That section provides that

"It shall be an unfair labor practice for a labor organization or its agents to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees: (A) Where the employer has lawfully recognized in accordance with this Act any other labor organization and a question concern-

ing representation may not appropriately be raised under Section 9(c) of this Act."

In order to prevail here, the General Counsel must show (1) that the Company lawfully recognized CIU as the exclusive bargaining representative of the employees in question, (2) that a question concerning representation could not properly be raised, and (3) that the picketing was for the purpose of organizing the Company's employees or of forcing the Company to recognize the Union. *Local 1575, International Longshoremen's Association (Puerto Rico Marine Management, Inc.)*, 227 NLRB 471 (1976); *International Longshoremen's and Warehousemen's Union Local 8 (Waterway Terminals Company)*, 193 NLRB 477 (1971).

In examining cases arising under these standards, the Board has dismissed complaints alleging violation of Section 8(b)(7)(A) where the General Counsel produced no evidence concerning the circumstances under which the alleged incumbent union became the bargaining representative of the employer's employees: (*Local Union No. 42, Laborers International Union of North America (R & E Asphalt Service, Inc.)*, 185 NLRB 163 (1970); or in a situation where the contract alleged to make the picketing unlawful itself appeared unlawful on its face (*Sheet Metal Workers International Association Local No. 2, AFL-CIO (Farmer & Sipes, Inc. d/b/a Rain-Flow of Kansas City)*, 201 NLRB 568 (1973)).

The instant case, while it bears some relation to these cited cases, is also distinguishable from them in that the recognition of the alleged incumbent and the alleged unlawful assistance took place more than 6 months prior to the filing of the charge. In these circumstances the situation would seem to come within the rule articulated in *International Hod Carriers' Building & Common Laborers' Union of America, Road & Heavy Construction, Local 1298, AFL-CIO (Roman Stone Construction Company, and Kindred Concrete Products, Inc.)*, 153 NLRB 659 (1965). In that case, the Board held that a contract between an employer and an incumbent union, lawful on its face, and executed more than a year before picketing by another union commenced, precluded the existence of a question concerning representation; and Section 10(b) of the Act would bar an unfair labor practice complaint attacking the incumbent union's representative status. In these circumstances, the Board noted that Section 8(b)(7)(A) was intended to promote stability in established bargaining relationships, "an interest also served by the contract-bar rules and by Section 10(b). To hold . . . that an incumbent union's representative status may be placed in issue as a defense to 8(b)(7)(A) charges would permit a rival union to accomplish by means of picketing what it could not achieve under established Board procedures. Such an application of 8(b)(7)(A) would offend the very policy which that Section was designed to further. Consistent with the congressional scheme, it is our opinion that the term 'lawfully recognized' was meant to include all bargaining relationships immune from attack under Sections 8 and 9 of the Act." See also *Local No. 8280, United Mine Workers of America (Leatherwood No. 1 Mine of Blue Diamond Coal Company)*, 166 NLRB 271, 272 (1967).

Respondent, while recognizing this point, argues that *Roman Stone* and *Blue Diamond* may be distinguished from

⁶ Both the "residential" and "inside" agreements provide for a union shop and for deduction of 1-1/2 percent of each employee's gross earnings as union dues to be forwarded to Local 702 by the employer. However, there is no allegation in the complaint that Respondent Employer unlawfully deducted such dues and no evidence in the record that dues were ever deducted.

this instant case, pointing to *R & E Asphalt Service, supra*, and *Rain-Glow of Kansas City, supra*. In these cases, both decided after *Roman Stone* and *Blue Diamond*, the decisions spoke in terms of the fact that a question concerning representation could have been raised at the time of the picketing. Thus, in those cases the 8(b)(7)(A) charges were dismissed.

It is true that the facts here differ from those in *Roman Stone* and *Blue Diamond*,⁷ but it is my view that the rule laid down in *Roman Stone* is absolute and that it should be applied in any and all circumstances. Here IBEW did exactly what the rule is designed to prevent. Respondent Union attempted to, and did, accomplish by picketing what it *did not choose to do* under established Board procedures. Respondent Union could, at any time within the 10(b) period, have filed charges of unlawful assistance against the Company. It did not, but through picketing⁸ achieved the objective which Section 8(b)(7)(A) was designed to prevent. With regard to Respondent Union's argument that *Roman Stone* may have impliedly been overruled by later cases, I note that the rule seems to have continuing vitality, as it is quoted with approval in *Waterway Terminals Company, supra* at 486.

Accordingly, since the contract between the Company and CIU appears to be valid on its face,⁹ has a beginning and an end, includes wage rates and vacation benefits, and appears otherwise to be a legitimate and functionally operational document and since the picketing by Respondent Union was undeniably for purposes of organization and recognition, I find that Respondent Union has violated Section 8(b)(7)(A).

It follows, then, that by recognizing and entering into a collective-bargaining relationship with IBEW while he was under a valid and continuing obligation to bargain with the contractual representatives of his employees, Vernon Weeke violated Section 8(a)(2) of the Act. Further, by terminating his bargaining relationship with CIU and by repudiating the collective bargaining agreement he had entered into with CIU, Weeke has violated Section 8(a)(5) of the Act. *Supreme Equipment & Systems Corporation*, 235 NLRB 244 (1978).

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

CONCLUSIONS OF LAW

1. Respondent Employer is an employer engaged in an industry affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. Respondent Union is a labor organization within the meaning of Section 2(5) of the Act.

⁷ Respondent Union's offers of proof certainly raise questions as to the good faith of Weeke and CIU in early February.

⁸ While the picket signs may have borne a legend concerning area standards, it is clear from the undenied and credited testimony of Wilkey and Dinkelman that the object of the picketing was organization of the employees and recognition by the Company, both proscribed objectives under Sec. 8(b)(7)(A).

⁹ The unit description in the contract varies from the unit alleged to be appropriate in the complaint in that the statutory exclusions do not appear in the contract. However, since Vernon Weeke testified without contradiction that he had only three full-time employees, I do not find this discrepancy significant.

3. The Charging Party is a labor organization within the meaning of Section 2(5) of the Act.

4. By picketing the premises of and jobsites occupied by Respondent Employer, for purposes proscribed by law, Respondent Union has violated Section 8(b)(7)(A) of the Act.

5. By recognizing and bargaining with Respondent Union, Respondent Employer has violated Section 8(a)(2) of the Act.

6. By withdrawing recognition from and repudiating his collective-bargaining agreement with CIU, Respondent Employer has violated Section 8(a)(5) of the Act.

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

THE REMEDY

Having found that Respondents have committed certain unfair labor practices, I shall recommend that they be ordered to cease and desist therefrom and that Respondent Employer take the affirmative action provided for in the recommended Order below, which I find necessary to effectuate the policies of the Act.

I hereby issue the following recommended:

ORDER¹⁰

Respondent Vernon Weeke, a Sole Proprietor, d/b/a Weeke Electric Company, his agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to recognize CIU as the collective-bargaining representative of his employees.

(b) Refusing to give effect to the provisions of a collective-bargaining agreement with CIU dated February 8, 1978.

(c) Recognizing and bargaining with Respondent Union.

(d) Giving effect to "letters of assent" dated March 23, 1978, and to any collective-bargaining agreements referred to or incorporated by reference therein.

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

2. Take the following affirmative action, which is necessary to effectuate the policies of the Act.

(a) Recognize and bargain with CIU as the collective-bargaining representative of his employees.

(b) Give effect to, and honor the terms of, a collective-bargaining agreement with CIU dated February 8, 1978.

(c) Post at his place of business in Nashville, Illinois, copies of the notice attached hereto as "Appendix A."¹¹ Copies of said notice, on forms provided by the Regional Director for Region 14, after being signed by Respondent,

¹⁰ 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.

¹¹ 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."

shall be posted by him immediately upon receipt thereof, and be maintained by him for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material.

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

Respondent International Brotherhood of Electrical Workers, Local Union No. 702, AFL-CIO, shall:

1. Cease and desist from:

Picketing or causing to be picketed or threatening to picket Vernon Weeke d/b/a Weeke Electric Company under conditions prohibited by Section 8(b)(7)(A) of the Act, where an object thereof is forcing or requiring such employer to recognize or bargain with them as the collective-bargaining representative of his employees or forcing or requiring said employees to select or accept Local Union No. 702 as their collective bargaining representative.

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

(a) Post at its business offices, meeting halls, and all places where notices to members are customarily posted copies of the attached notice marked "Appendix B."¹² Copies of said notice, on forms provided by the Regional Director for Region 14, after being signed by an authorized representative of Respondent Union, shall be posted immediately on receipt thereof, and be maintained by Respondent Union for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent Union to insure that said notices are not altered, defaced, or covered by any other material.

(b) Forthwith mail to the Regional Director for Region 14 copies of said notices for posting by the Employer, if he

be willing, in places where notices to his employees are customarily posted.

(c) Notify the Regional Director for Region 14, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

APPENDIX A

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

The National Labor Relations Act, as amended, gives all employees the following rights:

- To organize themselves
- To form, join, or support unions
- To bargain as a group through a representative they choose
- To act together for collective bargaining or other mutual aid or protection
- To refrain from any and all such activities except to the extent that the employees' bargaining representative and employer may have a collective-bargaining agreement which imposes a lawful requirement that employees become union members.

In recognition of these rights, I hereby notify my employees that:

I WILL NOT unlawfully recognize International Brotherhood of Electrical Workers, Local Union No. 702, AFL-CIO.

I WILL NOT in any like or related manner interfere with, restrain, or coerce my employees in the exercise of rights guaranteed by the National Labor Relations Act.

I WILL recognize and, upon request, bargain with Congress of Industrial Unions, and I WILL give effect to any collective-bargaining agreement with that organization.

VERNON WEEKE D/B/A WEEKE ELECTRIC COMPANY

¹² 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."