

Petitioner seeks to enjoin the Unions' picketing activities in the Petitioner's port area. No responses as provided by the Board's Rules and Regulations have been filed by the Unions.

The Board has duly considered the allegations of the petition. The Board's advisory opinion procedures "are designed primarily to determine questions of jurisdiction by application of the Board's discretionary standards to the 'commerce' operations of an employer."<sup>1</sup> The issue posed herein by the Petitioner relates to whether the Unions are "labor organizations" within the meaning of the Act. As this issue does not concern questions of the applicability of the Board's discretionary *commerce* standards, it does not fall within the intentment of the Board's Advisory Opinion Rules.<sup>2</sup>

[The Board dismissed the petition.]

<sup>1</sup> *Interlake Steamship Company and Pickands Mather & Co.*, 138 NLRB 576, and cases cited herein

<sup>2</sup> See *Interlake Steamship Company and Pickands Mather & Co.*, *supra*, footnote 3

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**Insulation & Specialties, Inc., Petitioner and International Association of Heat and Frost Insulators and Asbestos Workers, Local No. 66.** *Case No. 16-RM-244. November 13, 1963*

DECISION AND ORDER

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before Hearing Officer Sulton Boyd. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel [Chairman McCulloch and Members Leedom and Brown].

Upon the entire record in this case, the Board finds:

1. The Employer is engaged in commerce within the meaning of the Act.
2. The labor organization involved claims to represent certain employees of the Employer.
3. For the following reasons we find that no question exists concerning the representation of employees of the Employer.

Insulation & Specialties, Inc., a Texas corporation in Odessa, Texas, is an insulation contractor engaged in the insulation of piping, boilers, and other components of industrial plants under construction, and in the repair and maintenance of such facilities. El Paso Natural Gas Products Company, herein called El Paso Natural, and the Rexall Chemical Company, herein called Rexall, operate industrial plants

near Odessa. The Employer has a maintenance crew based at El Paso Natural which provides continuous maintenance services to El Paso Natural and, in addition, performs occasional maintenance services for Rexall. The only employees involved herein are those in the aforementioned maintenance crew.

The Employer was formerly located in and operated in El Paso, Texas. During this time the Erectors and Construction Company (herein called E & C), a firm which was related to the Employer, was also based in El Paso, and, *inter alia*, performed maintenance services under contract with El Paso Natural. In, or about, September 1960 E & C was dissolved and the Employer took over the E & C contract with El Paso Natural. Shortly thereafter, on or about October 7, 1960, the Employer entered into an area contract with Asbestos Workers' Local No. 106, and at the same time entered into a "maintenance addendum" modifying the area contract with regard to the El Paso Natural maintenance crew. The addendum incorporated by reference the area contract governing wage scales and conditions of employment and provided that maintenance employees were not to be paid travel allowance or subsistence. It also established work shifts and overtime provisions which differed from the area contract.

The Employer moved to Odessa in early 1961, and joined the Master Felters Association, a multiemployer group of insulation contractors, herein called the Association. On January 17, 1961, the Employer became a party to the associationwide contract with the Union, to expire June 30, 1961, and at the same time made the "maintenance addendum" effective between the Employer and the Union. Thereafter, on April 9, 1961, pursuant to the terms of the basic contract, the Employer commenced making payments into the Local No. 66 Health and Welfare Fund on behalf of the maintenance crew members. On July 3, 1961, and July 3, 1962, the Association, on behalf of its members including the Employer herein, entered into collective-bargaining agreements with the Union. The latter contract expires by its terms on June 30, 1965. The Employer and the Union, after numerous bargaining meetings, were unable to agree on an addendum covering the maintenance employees at El Paso Natural, the employees involved herein. However, the Employer has continued payments into the Local No. 66 Welfare Fund for these employees.

As noted above, pursuant to the terms of the January 17, 1961, addendum, the El Paso Natural maintenance crew was paid the basic contract wage scale. Although the July 3, 1961, contract provided for an increase in the basic wage scale, the maintenance crew was not paid the increased contract scale. Thereafter, on November 28, 1961, the Union filed a charge with the Joint Board<sup>1</sup> alleging that the Em-

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<sup>1</sup> At that time a proceeding before the Joint Board, comprised of three representatives each from the Union and the Association, was the final step in the grievance procedure.

ployer was paying substandard wages to these employees. This charge was not resolved by the Joint Board and no further action was taken. The July 3, 1962, contract<sup>2</sup> provided for further wage increases and again the contract scale was not applied to the maintenance crew's wages. On October 12, 1962, the Union filed charges with the Joint Board alleging, *inter alia*, "Violation of Article VIII [contract wage scale]; by paying substandard wages to some employees on the El Paso Gas Products Plant, Odessa, Texas." These charges were considered on October 27, 1962, by the Joint Board, the parties deadlocked, and, pursuant to a motion by the Association's representative, the Joint Board directed that the matter be referred to the American Arbitration Association in accordance with the arbitration clause. Accordingly, on October 29, 1962, the Union instituted arbitration proceedings. The Employer refused to acknowledge the right of the Union to take the matter to arbitration, challenged the authority of the arbitrator, and refused to participate. Thereafter, on April 19, 1963, the Employer filed the instant petition. On September 16, 1963, an award was handed down by an arbitrator designated by the American Arbitration Association,<sup>3</sup> holding that the contract entered into July 3, 1962, between the Employer and the Union "is valid on its face and covers the employees in question."

The Union contends that its contract with the Employer covers the employees herein, and that since the instant petition is not timely filed with respect to such contract, the petition should be dismissed. In the alternative, the Union urges that the petition should be dismissed on grounds that the matter would be determined by the award in the then-pending arbitration case. Subsequently, in its Motion To Reopen Record, etc., the Union contends that the Board should honor the Arbitrator's award. The Employer contends that the El Paso Natural maintenance crew did not become a part of the multiemployer

<sup>2</sup> *Inter alia*, this contract provided, for the first time, for arbitration of matters not resolved by the Joint Board. This provision reads, in pertinent part, as follows:

Article V

7. If the parties don't agree, a disinterested umpire shall be selected by agreement of the parties; provided, however, that if the parties are unable to agree on the selection of an umpire, then the umpire shall be selected from a panel, or panels, supplied by the American Arbitration Association, or Federal Mediation and Conciliation Service, and in accordance with the rules and regulations of either chosen. The cost of the services shall be borne by the party found in error.

<sup>3</sup> Opinion and Award of Arbitrator Charles W. Webster, dated September 16, 1963, *In the Matter of the Arbitration Between the International Association of Heat and Frost Insulators and Asbestos Workers Local 66 and Insulation and Specialties, Inc.*, a copy of which was appended to the Union's Motion To Reopen Record To Include Arbitration Award, dated September 20, 1963, and received by the Board on September 23, 1963. Copies of said Motion were duly served on all the parties herein. On October 1, 1963, the Employer filed its Employer-Petitioner's Reply in Opposition to Union's Motion To Reopen Record To Include Arbitration Award. The Board having duly considered the matter, it is hereby ordered that the aforesaid Opinion and Award of the arbitrator be, and it hereby is, made a part of the record herein.

unit in the Odessa area by virtue of the maintenance addendum and denies that the Union was ever designated or authorized by these employees to represent them. The Employer further contends that this group meets all of the tests and criteria used by the Board in determining an appropriate unit and accordingly constitutes an appropriate separate unit. For the reasons hereinafter set forth, we find merit in the Union's contention that the Board should honor the arbitration award and conclude that the contract covers the El Paso Natural maintenance crew, that the petition is not timely filed with respect to the contract, and that the petition should be dismissed.

In the recently decided *Raley's* case,<sup>4</sup> the Board stated that in representation cases, as well as unfair labor cases, where "a question of contract interpretation is in issue, and the parties thereto have set up in their agreement arbitration machinery for the settlement of disputes arising under the contract, and an award has already been rendered which meets Board requirements applicable to arbitration awards, we think that it would further the underlying objectives of the Act to promote industrial peace and stability to give effect thereto. It is true, of course, that under Section 9 of the Act the Board is empowered to decide questions concerning representation. However, this authority to decide questions concerning representation does not preclude the Board in a proper case from considering an arbitration award in determining whether such a question exists."

We are satisfied that the award upon which the Union relies meets the above-mentioned requirements applicable to arbitration awards for the following reasons: The arbitration proceeding was conducted pursuant to a provision in the agreement between the Union and the Employer. The parties in the arbitration proceeding were the Employer and the Union, although, as noted above, the Employer refused to participate. The issue presented to the arbitrator was, *inter alia*, whether the Employer was in violation of the contract because of its failure to pay its El Paso Natural maintenance employees in accordance with the contract wage scale. The Union took the position that this contract covered these maintenance employees. The Employer contended that the contract did not cover these employees. In his award of September 16, 1963, the arbitrator held that the contract is valid on its face and that the maintenance employees in question are covered by this contract.

The arbitrator decided essentially the same issue as to the scope of the contract that confronts the Board in the instant representation case. In addition, the arbitration proceeding was fair and regular and free from any procedural infirmity which might render the award

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<sup>4</sup> *Raley's Inc. d/b/a Raley's Supermarkets*, 143 NLRB 256.

unacceptable.<sup>5</sup> Indeed, even without reliance on the arbitrator's award, we would find on the record in this proceeding that the contract executed on July 3, 1962, covers, in an appropriate bargaining unit, the employees herein petitioned for, among others, and accordingly operates as a bar to the petition.

In view of the foregoing, we find it will effectuate the policies and purposes of the Act to honor the arbitration award. We, accordingly, find that the contract between the Employer and the Union covers within an appropriate unit the employees named in the petition herein, and that, since the petition is untimely with respect to such contract, the contract is a bar to the petition.

[The Board dismissed the petition.]

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<sup>5</sup> While the Employer did not participate in the arbitration hearing, as already indicated, we do not consider this to be fatal to the arbitration proceedings. Where, as here, parties to a contract have agreed to the arbitration of disputes arising thereunder, the arbitration process may not be frustrated by the refusal of either party to the arbitration to appear at the arbitration hearing. Moreover, the transcript and exhibits of the instant proceeding which were forwarded to the arbitrator by the Employer and were introduced in evidence before the arbitrator after the hearing and which were considered by him prior to making his award, adequately set forth the Employer's position.

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**Valley Date Gardens, Inc. and United Packinghouse, Food and Allied Workers, AFL-CIO.** *Case No. 21-CA-5277. November 14, 1963*

#### DECISION AND ORDER

On July 29, 1963, Trial Examiner Maurice M. Miller issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Intermediate Report. Thereafter, the Respondent filed exceptions to the Intermediate Report and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, the Board has delegated its powers in connection with this case to a three-member panel [Chairman McCulloch and Members Leedom and Brown].

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the Respondent's exceptions and brief, and the entire record in this proceeding, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.