

encouragement of the collective bargaining process ultimately depends upon the channelization of the collective bargaining relationship within the procedures of a collective-bargaining agreement. By encouraging the utilization of such procedures in this case, we believe that statutory policy will best be effectuated. Affirmative Board action would on the other hand put the Board in the position of policing collective-bargaining agreements, a role we are unwilling to assume. Accordingly, we shall dismiss the complaint without determining whether the Respondent's conduct would, under other circumstances, warrant the issuance of a remedial order.

RECOMMENDATIONS

Upon the foregoing findings of fact, and upon the entire record in the case, and in accordance with Board policy quoted above, the Trial Examiner recommends that the complaint be dismissed in its entirety.

West Penn Power Company and Utility Workers Union of America, System Local 102, AFL-CIO. Case No. 6-CA-2644.
August 12, 1963

DECISION AND ORDER

On April 23, 1963, Trial Examiner Sydney S. Asher, Jr., 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 and the Charging Party filed exceptions to the Intermediate Report with supporting briefs. The General Counsel filed a memorandum in the nature of exceptions with a supporting brief.

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 Rodgers and Fanning].

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 and the Charging Party's exceptions and briefs, the General Counsel's memorandum in the nature of exceptions, and supporting brief and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner with the following modifications.¹

¹ The General Counsel and the Charging Party except to the Trial Examiner's failure specifically to include in the unit description as set forth in the conclusions of law, the Recommended Order and the Appendix "all transmission and distribution supervisors," in accordance with the Board's clarification Order of November 7, 1962. We find merit in the exception and accordingly will modify the unit description as requested.

The record shows that on September 1, 1960, the Respondent, as part of certain operational changes, created a new operating center in each of its divisions, abolished the classification of Charleroi second load dispatchers and Springdale load dispatchers, created in their stead the classification of "transmission and distribution supervisors," and discon-

ORDER

Upon the entire record in this case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, West Penn Power Company, Greensburg, Pennsylvania, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Utility Workers Union of America, System Local 102, AFL-CIO, as the exclusive bargaining representative of all load dispatchers located in its Springdale, Pennsylvania, power station, and Charleroi, Pennsylvania, dispatching center, and all transmission and distribution supervisors, excluding all other employees, guards, professional employees, and supervisors as defined in the Act.

(b) Interfering with the efforts of the above-named Union to negotiate for or represent the employees in the above-described unit as their exclusive bargaining agent.

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

(a) Upon request, bargain collectively with the above-named Union as the exclusive representative of all employees in the unit described above with respect to rates of pay, wages, hours, and other terms and conditions of employment, and embody in a signed agreement any understanding reached.

(b) Post at its operating centers, where notices to employees are customarily posted, copies of the attached notice marked "Appendix."² Copies of such notice, to be furnished by the Regional Director for the Sixth Region, shall, after being signed by a representative of the Respondent, be posted immediately upon the 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 such notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for the Sixth Region, in writing, within 10 days from the date of this Order, what steps it has taken to comply herewith.

tinued its load dispatching functions in Springdale. The Respondent admitted that simultaneously, nine employees formerly classified as second load dispatchers, Springdale, and nine employees formerly classified as second load dispatchers, Charleroi, all of whom until then were represented by the Union, were reclassified with their consent as transmission and distribution supervisors. It appears that they were transferred to the new operating centers. We find that as clarified by the Board's decision of November 7, 1962, the appropriate unit also includes all transmission and distribution supervisors of the Respondent employed in each of its new operating centers established in September 1960.

²In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "A Decision and Order" the words "A Decree of the United States Court of Appeals, Enforcing an Order."

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to a Decision and Order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, you are notified that:

WE WILL bargain collectively, upon request, with Utility Workers Union of America, System Local 102, AFL-CIO, as the exclusive bargaining representative of our employees in the appropriate unit described below with respect to wages, hours, and other working conditions, and embody in a signed agreement any understanding reached. The appropriate unit is:

All load dispatchers located in our Springdale, Pennsylvania, power station and Charleroi, Pennsylvania, dispatching center, and all transmission and distribution supervisors, excluding all other employees, guards, professional employees, and supervisors as defined in the Act.

WE WILL NOT interfere with the efforts of Utility Workers Union of America, System Local 102, AFL-CIO, to negotiate for or represent the employees in the above-described unit as their exclusive bargaining agent.

WEST PENN POWER COMPANY,
Employer.

Dated _____ By _____
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

Anyone having questions concerning this notice or compliance with its provisions may communicate directly with the Board's Regional Office, 2107 Clark Building, 707-17 Liberty Avenue, Pittsburgh, Pennsylvania, 15222, Telephone No. 471-2977.

INTERMEDIATE REPORT

On December 10, 1962, Utility Workers Union of America, System Local 102, AFL-CIO, New Kensington, Pennsylvania, herein called the Union, filed charges against West Penn Power Company, Greensburg, Pennsylvania, herein called the Respondent. On December 20, 1962, the General Counsel¹ issued a complaint against the Respondent alleging that since on or about December 5, 1962, the Respondent has failed and refused to bargain with the Union as the exclusive bargaining representative of the Respondent's employees in a unit appropriate for the purposes of collective bargaining, although the Union was then, and is now, the exclusive bargaining representative of these employees. It alleged that this conduct violated Section 8(a)(1) and (5) of the National Labor Relations Act, as amended (61 Stat. 136), herein called the Act. Thereafter, the Respondent filed an answer

¹ The term "General Counsel" includes the General Counsel of the National Labor Relations Board and his representative at the hearing.

denying the appropriateness of the unit, and denying the commission of any unfair labor practices. The answer further sets forth certain "new matter," or affirmative defenses, more fully described below.

Pursuant to notice, a hearing was held before Trial Examiner Sydney S. Asher, Jr., on February 18, 1963, at Pittsburgh, Pennsylvania. All parties were represented and participated fully in the hearing. At the hearing the General Counsel moved for judgment on the pleadings. Ruling on this motion was reserved. It is now denied on the ground that the pleadings raise an issue with regard to the appropriateness of the unit involved. On March 18, 1963, the Respondent filed a brief, requests for findings of fact, and requests for conclusions of law. These have been duly considered.

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

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The complaint alleges, the answer admits, and it is found that West Penn Power Company, a Pennsylvania corporation, is a public utility engaged in the business of generating and supplying electrical power. During the 12 months preceding December 1, 1962, the value of goods and supplies purchased by the Respondent from sources outside the Commonwealth of Pennsylvania exceeded \$50,000. Upon the basis of the foregoing it is found that the Respondent is, and at all material times has been, engaged in commerce within the meaning of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, the answer admits, and it is found that Utility Workers Union of America, System Local 102, AFL-CIO, is, and at all material times has been, a labor organization within the meaning of Section 2(5) of the Act.

II. THE UNFAIR LABOR PRACTICES

A. *The appropriate unit*

On June 20, 1951, following a consent election in Case No. 6-RC-846, the Regional Director certified the Union as the collective-bargaining representative of the following employees:

All load dispatchers of the West Penn Power Company who are located in the Springdale, Pennsylvania, power station and Charleroi, Pennsylvania, dispatching center, excluding all other employees, guards, professional employees, and supervisors as defined in the National Labor Relations Act, as amended.

Thereafter the parties entered into collective-bargaining agreements covering this unit.

Prior to September 1, 1960, the employees in the certified unit were divided into three classifications, namely, Charleroi first load dispatchers, Charleroi second load dispatchers, and Springdale load dispatchers. On the above date the Respondent abolished the latter two classifications and created in their stead the classification of transmission and distribution supervisors, herein called T. & D. supervisors.

On February 7, and March 14, 1962, the Respondent filed with the Board motions for clarification and/or amendment of the certification, contending that the T. & D. supervisors were supervisors within the meaning of the Act, and were not, therefore, properly includable in the bargaining unit. After a hearing the Board on November 7, 1962, issued a Decision and Order in which it found that T. & D. supervisors were neither supervisors nor managerial employees. Accordingly, it ordered that the certification referred to above be "clarified by specifically including in the unit all transmission and distribution supervisors."² At the hearing in the instant case the attorney for the Respondent conceded, and I find, that there have been no changes in the duties of T. & D. supervisors since November 7, 1962.

As part of the "new matter" in its answer, the Respondent alleges "that the duties and responsibilities of the position of Transmission and Distribution Supervisor are supervisory in nature." In the main body of the answer the Respondent attacks the Board's determination of November 7, 1962, in Case No. 6-RC-846 as "unreasonable and arbitrary, an abuse of its discretion and contrary to its established policy and to facts disclosed by the record and not supported by substantial evidence on the record as a whole." The same pleading further alleges that the Respondent "was foreclosed during the hearing in Case No. 6-RC-846 from having full and fair

² *West Penn Power Company*, 139 NLRB 810

hearing in that the hearing officer refused to permit Respondent to introduce relevant evidence." In its brief the Respondent iterates these contentions, and maintains that "the Trial Examiner is required to review the record in the representation case before issuing a cease and desist order" and that "if the Trial Examiner, after an examination of the Order [in the representation] case, believes that the Board has made a mistake and that Respondent's position is correct, he should make an appropriate recommendation to the Board." It thus appears that the Respondent has nothing new to present that had not already been presented to and passed upon by the Board. Under these circumstances, it is not my function to decide if the Board "has made a mistake." On the contrary, the Board's decision is binding upon me. It is well settled that issues fully litigated in a representation proceeding, absent evidence newly discovered or unavailable to the Respondent at that time, may not properly be relitigated in the unfair labor practice proceeding.³

In view of the foregoing, it is found that all load dispatchers of the Respondent who are located in the Springdale, Pennsylvania, power station and Charleroi, Pennsylvania, dispatching center, excluding all other employees, guards, professional employees, and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of the Act. It is further found, in accordance with the Board's decision of November 7, 1962, in Case No. 6-RC-846, that all transmission and distribution supervisors are specifically included in the above-described unit.

B. *The Union's majority status*

As noted above, the Board on June 20, 1951, pursuant to the results of a consent election, certified the Union as the collective-bargaining representative of the employees in the unit described above. It is accordingly found that the Union is, and at all times since June 20, 1951, has been, the exclusive representation of all employees in the above-described unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment.

C. *The Union's demand and the Respondent's refusal*

At the hearing the parties stipulated, and I find, that sometime after November 7 but before December 5, 1962, representatives of the Union demanded that the Respondent bargain with it regarding T. & D. supervisors. On December 5, 1962, the Respondent replied by letter, which read, in part:

West Penn Power Company, on advice of counsel, will not recognize your union as the collective bargaining representative for any of the Transmission and Distribution Supervisors Accordingly, our meeting scheduled for December 10, 1962, is cancelled.

So far as the record shows, the Respondent has not changed its position in this respect since December 5, 1962.

The Respondent contends that the charge herein "is barred by the Statute of Limitations contained in Section 10(b) of the Act" In support of this contention, the Respondent alleges that since September 6, 1960, the Union has demanded that it bargain with regard to T. & D. supervisors, and that it refused to do so. The record shows that on November 17, 1960, the Union filed with the Board charges that the Respondent had violated Section 8(a)(1), (3), and (5) of the Act (Case No. 6-CA-2124). These charges allege, among other things, that since September 6, 1960, the Respondent refused to bargain collectively with the Union as the representative of its employees in an appropriate unit. On January 6, 1961, the Regional Director refused to issue a complaint "because there is insufficient evidence of violation." The Union appealed to the General Counsel. On March 2, 1961, the General Counsel sustained the Regional Director's ruling.

The Respondent urges "that the complaint in this case is based upon the same unfair labor practice which was the subject of Case No. 6-CA-2124 and is, therefore, issued in violation of Section 10(b) of the . . . Act."⁴ To put the matter in different words, the Respondent maintains that any unfair labor practice finding now made

³ *Ideal Laundry and Dry Cleaning Co.*, 140 NLRB 1412, footnote 2; *The Mountain States Telephone and Telegraph Company*, 136 NLRB 1612, at 1614-1615; *The Western and Southern Life Insurance Company*, 142 NLRB 28.

⁴ The Respondent apparently does not take the position that the General Counsel's administrative determination of March 2, 1961, in Case No. 6-CA-2124 constitutes *res judicata* or was otherwise dispositive of the issues involved herein. In this connection, see *N L.R.B. v. Baltimore Transit Company et al.*, 140 F. 2d 51, 54-55 (C.A. 4).

would of necessity be bottomed upon events predating the limitations period. I cannot agree. When in November or December 1962 the Union demanded that the Respondent recognize it as representative of the T. & D. supervisors—regardless of how many times this same demand may have been made in the past—this gave rise to a statutory obligation to comply. In short, where as here there is a duty to bargain *upon demand*, each new and separate demand creates the obligation and each new and different refusal constitutes a new and independent violation.⁵

I conclude that when, on December 5, 1962, the Respondent refused to bargain with the Union with respect to T. & D. supervisors, it was remiss in performing the duty imposed upon it by Section 8(a)(5) of the Act, and thereby also violated Section 8(a)(1) of the Act. I further find that the charges herein were not barred by the limitation contained in Section 10(b) of the Act.

D. Disposition of the Respondent's requests for findings of fact

The Respondent filed 32 separate requests for findings of fact. Requests Nos. 1, 2, 3, 4, 14, 15, 16, 17, 18, 20, 21, 22, 25, and 26 are granted and incorporated herein.

Request No. 6 is granted except for the last six words thereof. As to the last six words, the request is denied as unsupported by the record, beyond the findings made by the Board in the representation case, and immaterial to the issues herein. Request No. 13 is granted except for the last 14 words. As to the last 14 words, the request is denied as unsupported by the record and immaterial to the issues herein. Request No. 19 is granted except for the last 14 words. As to the last 14 words, the request is denied as unsupported by the record and immaterial to the issues herein.

Request No. 23 is denied as incomplete. The facts, as previously found by the Board, are that on September 1, 1960, the Respondent changed the Charleroi first load dispatcher classification to power dispatcher with admittedly no change in duties.⁶

Requests Nos. 5, 7, 7a, 8, 9, 10, 11, and 12 are denied on the grounds that they are based upon rejected exhibits and are immaterial to the issues herein.

Requests Nos. 12a and 27 are denied as immaterial to the issues herein. Request No. 24 is denied as unnecessary; the Board's Decision and Order of November 7, 1962, speaks for itself. Requests Nos. 28, 29, and 30 are denied as unnecessary; the transcript shows all rulings made by the Trial Examiner at the hearing herein.

IV. THE REMEDY

In order to remedy the unfair labor practices found above, it will be recommended that the Respondent cease and desist from refusing to bargain collectively with the Union regarding the employees in the appropriate unit. I am convinced, and find, that the sole reason for the Respondent's refusal to bargain with the Union regarding T. & D. supervisors was its good faith but mistaken belief that it was under no statutory obligation to do so, rather than any opposition to the purposes of the Act. Moreover, the Respondent and the Union appear to have enjoyed harmonious contractual relations for a number of years. Accordingly, there would appear to be no danger of the commission of other unrelated unfair labor practices by the Respondent in the future. It will therefore be recommended that the Respondent cease and desist only from the unfair labor practices found, and from interfering with the Union's efforts to represent the employees in the appropriate unit as their exclusive bargaining agent.

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

CONCLUSIONS OF LAW

1. West Penn Power Company is, and at all material times has been, an employer within the meaning of Section 2(2) of the Act.

2. Utility Workers Union of America, System Local 102, AFL-CIO, is, and at all material times has been, a labor organization within the meaning of Section 2(5) of the Act.

3. All load dispatchers of the West Penn Power Company who are located in the Springdale, Pennsylvania, power station, and Charleroi, Pennsylvania, dispatching

⁵ The dictum from *NLRB v. Pennwoven, Inc*, 194 F. 2d 521, 524-525 (C.A. 3), cited by the Respondent in its brief, is not in point. There, the court assumed a set of facts in which the employer engaged in no further conduct between the original refusal to bargain and the filing of charges more than 6 months later. Here, on the contrary, a new demand and refusal—less than 6 months before the charges were filed—intervened between the original demand and refusal and the filing of the charges.

⁶ See *West Penn Power Company*, 139 NLRB 810, footnote 1.

center, excluding all other employees, guards, professional employees, and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Utility Workers Union of America, System Local 102, AFL-CIO, was, on June 20, 1951, and at all times since has been, the exclusive representative of all employees in the above-described unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on and after December 5, 1962, to bargain collectively with the above-named labor organization as the exclusive representative of the employees in the above-described unit, the 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 foregoing conduct, thereby interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The above-described unfair labor practices tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce, and constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

8. The charges herein are not barred by Section 10(b) of the Act.

9. Requests for Conclusions of Law Nos. 1, 2, 3, 15, 16, 32, 33, and 34 are granted and incorporated herein.

10. Request No. 4 is granted, except for the last 12 words. As to the last 12 words the request is denied as contrary to the Board's previous finding. Request No. 25 is granted, except for the last 15 words. As to the last 15 words the request is denied as immaterial.

11. All other requests for Conclusions of Law are denied:

Nos. 5 and 24 as contrary to the Board's previous findings.

No. 6 because it applies to supervisors, and the unit herein specifically excludes supervisors.⁷

Nos. 7, 8, 10, 27, and 28 for reasons already stated herein.

Nos. 9, 11, 12, 13, 14, 17, 18, 19, 23, 31, and 37 as immaterial to the issues herein.

Nos. 20, 21, 22, 35, 36, and 38 as dealing with contract obligations, not here in issue.

Nos. 29, 40, 41, and 42 because, as already stated, the Trial Examiner cannot reexamine matters already determined by the Board.

No. 26 because no unfair labor practice charges were filed by the Union on December 19, 1962.

No. 30 because the Respondent's legal right to appeal does not relieve it of its obligation to comply with the Act.

No. 39 because under Section 9(d) of the Act the record in the representation case need not become part of the record in the complaint case until "there is a petition for . . . enforcement or review" filed in a United States Court of Appeals.

[Recommended Order omitted from publication.]

⁷ In request No. 6 the reference to Section 14(2) of the Act is presumed to refer to Section 14(a) of the Act.

Beaver Valley Canning Company and Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO.
Case No. 18-CA-1553. August 13, 1963

DECISION AND ORDER

On June 3, 1963, Trial Examiner C. W. Whittemore 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 Inter-
143 NLRB No. 121.