

Burnett Construction Company and International Union of Operating Engineers, Local No. 9, AFL-CIO. *Case No. 27-CA-1490. December 8, 1964*

DECISION AND ORDER

On August 4, 1964, Trial Examiner Wallace E. Royster issued his Decision 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 Decision. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision 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 [Chairmen McCulloch and Members Leedom and Brown].

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

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order, the Order recommended by the Trial Examiner, and orders that the Respondent, Burnett Construction Company, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

This matter was tried before Trial Examiner Wallace E. Royster in Durango, Colorado, on April 7, 1964.¹ At issue is whether Burnett Construction Company, herein called the Respondent, refused unlawfully to bargain with International Union of Operating Engineers, Local No. 9, AFL-CIO, herein called the Union, in violation of Section 8(a)(1) and (5) of the National Labor Relations Act, herein the Act.

Upon the entire record in the case, from my observation of the witnesses, and in consideration of the briefs filed, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent is a Colorado corporation with its principal office and place of business at Durango, Colorado, where it is and has been engaged as a general contractor and in the sale and distribution of ready-mix concrete and gravel.

¹ The charge was filed November 12, 1963. The complaint is dated January 20, 1964. 149 NLRB No. 128.

Counsel for the Respondent contends that the business operation described is retail in character and that because its annual receipts are less than \$500,000 the Board should refrain under applicable jurisdictional standards from entering the complaint. Gordon Burnett, Respondent's president, testified that the Respondent performs excavation, trenching and land leveling work, and sells ready-mix concrete of its manufacture and gravel to individuals, industrial users, commercial users, and governmental bodies, including the Highway Department of the State of Colorado. The evidence established that in 1963 the Respondent purchased cement at a net cost of about \$51,500 which was shipped to its plant in Durango from the State of New Mexico. It is obvious, and I find, that the Respondent is engaged in an operation affecting commerce within the meaning of Section 2(6) and (7) of the Act. As the Respondent's business encompasses both the manufacture and sale of a product, ready-mix concrete, to ultimate consumers without the intervention of a wholesaler, it is obvious that its sales to nonbusiness consumers have the aspect of retail transactions. However, the Respondent is also a manufacturer and sells to commercial, industrial, and governmental users. Thus it is something more than a retail enterprise. The Board has in a similar situation held it to effectuate the policies of the Act to assert jurisdiction if such an employer meets either the retail or nonretail standard. As the importation of cement having a value in excess of \$50,000 is sufficient to satisfy the nonretail standard, I find that it will effectuate the policies of the Act to assert jurisdiction here.²

II. THE LABOR ORGANIZATION

The Union is a labor organization within the meaning of Section 2(5) of the Act admitting to membership employees of the Respondent.

III. THE UNFAIR LABOR PRACTICES

On April 2, 1963, the Respondent and the Union entered into a consent-election agreement in a unit described as:

All equipment operators and oilers, mechanics, welders, mechanic helpers, and welder helpers used in operation and maintenance of construction equipment; excluding laborers, truckdrivers, supervisors, office clerical, guards and all other employees.

On May 13 following, an election was held in which the Union received a majority and, on May 21, the Regional Director of the National Labor Relations Board at Denver, Colorado, certified the Union as the exclusive bargaining representative for the employees in the described unit. Because of the agreement of April 2 and because there is nothing to indicate or suggest a contrary holding, I find that the unit described is and at all times material herein has been appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act.

On June 20, representatives of the Union met with the Respondent and offered a collective-bargaining agreement for signatures. Respondent's superintendent, John Schoser, testified, and I credit him, that the Union representatives said, in effect, that there would be no bargaining; that the Respondent must accept the contract terms submitted. No agreement was reached. On July 30, other representatives of the Union met with Burnett. When Burnett said that on June 20 he was told that he must accept the contract offered to him, he was told that the Union had several different types of agreements and copies of four such were left with Burnett for his examination. One of the Union representatives, Edward F. Blatnick, testified credibly and without contradiction that he told Burnett on this occasion that the Union would be glad to discuss with him the agreement that would work best in his operation. Blatnick testified he attempted unsuccessfully to arrange another meeting with Burnett in August and September. Carl Blomquist, another Union representative, testified that on July 30 he told Burnett that if the latter would pick out the agreement from those submitted that seemed most appropriate to Burnett's operation, the Union would try to negotiate with him. Blomquist testified that he told Burnett, "I wouldn't come along and throw the agreements on [your] desk and say that is it, you have to sign one of them." I credit Blomquist.

On October 24 Union representatives met with Gordon Burnett in the office of Respondent's counsel, Harold B. Wagner, in Denver. The Union was also represented by counsel. Discussions came to a halt, Blatnick testified when Attorney Wagner said

² *Man Products, Inc.*, 128 NLRB 546, 547

that the Respondent was unwilling to make any counterproposals to the Union until the question of jurisdiction of the National Labor Relations Board was determined. Blatnick's testimony is undenied and I credit it. I find that on and since October 24 the Respondent has refused to bargain collectively with the Union and has refused to recognize the Union as the bargaining representative of the employees in the appropriate unit.

Although the Respondent at no time questioned the authority of the Union representatives to act for the Union, in the answer filed in this proceeding and at the hearing, counsel for the Respondent asserted that the union officers, and presumably the negotiators who took office in early July, perhaps did so unlawfully. In support of this position, the Respondent offered in evidence a complaint filed in the U.S. District Court for the District of Colorado, by W. Williard Wirtz, Secretary of Labor, denominated as Civil Action No. 8325, making substantially this same assertion. This last-mentioned action appears to have been filed on December 30, 1963. I find that the refusal by the Respondent to bargain with the Union was not based upon any doubt as to the authority of the union representatives to speak for the Union and that in the circumstances of this case, at least, the Respondent was not permitted to go behind the ostensible authority of these agents to act for the Union.

The complaint alleges that the Respondent has refused unlawfully to bargain with the Union on and since June 20. Rather clearly, the Respondent was dilatory in its attitude toward meeting with the Union but on the other hand it seems uncertain that the Union was firmly insistent in the matter. Upon the evidence before me, I find that the first such refusal occurred on October 24.

I find that the Union at all times since May 13, 1963, has been and now is the exclusive representative of Respondent's employees in the unit set forth above and that on and since October 24 the Respondent, by refusing to bargain with the Union, has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relation 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 the Respondent has engaged in unfair labor practices, it will be recommended that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

By refusing to bargain for the last 7 months of the Union's first year as certified-bargaining representative, the Respondent deprived its employees of representation by a bargaining agency possessing the status and enjoying the presumptions attaching to such organizations for the period of a year following certification. To place the Respondent and the Union in as nearly the same situation as possible to that which existed before October 24, it will be recommended that upon resumption of bargaining and for 7 months thereafter the Union be regarded as if the initial year of certification had not yet expired.³

It will be recommended that upon request the Respondent bargain with the Union concerning rates of pay, wages, hours of work, and other terms and conditions of employment, and if an understanding is reached, reduce it to writing and sign it.

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

CONCLUSION OF LAW

1. Burnett Construction Company, Durango, Colorado, 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 No. 9, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act and is the exclusive representative of Respondent's employees in the appropriate unit for purposes of bargaining.

3. All equipment operators and oilers, mechanics, welders, mechanic helpers, and welder helpers used in operation and maintenance of construction equipment, excluding laborers, truck drivers, supervisors, office clerical, guards, and all other employees constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

³ *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785-787

4. By refusing on and since October 24, 1963, to bargain with the Union as the exclusive representative of employees in the appropriate unit, the Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

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

RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact, conclusions of law, and upon the entire record in the case, I recommend that Burnett Construction Company, Durango, Colorado, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain with International Union of Operating Engineers, Local No. 9, AFL-CIO, as the exclusive representative of employees in the appropriate unit.

(b) In any like or similar manner interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form labor organizations, to join or assist International Union of Operating Engineers, Local No. 9, AFL-CIO, or any other labor organization; to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) of the Act.

2. Take the following affirmative action which I find will effectuate the policies of the Act:

(a) Upon request bargain with the Union as the exclusive representative of the employees in the appropriate unit and if an understanding is reached reduce it to writing and sign it. Regard the Union upon resumption of bargaining and for 7 months thereafter as if the initial year following certification had not expired.

(b) Post at its place of business at Durango, Colorado, copies of the attached notice marked "Appendix."⁴ Copies of said notice, to be furnished by the Regional Director for Region 27, shall, after being duly signed by a representative of the Respondent, be posted 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 the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 27, in writing, within 20 days from the date of the receipt of this Decision, what steps have been taken in compliance.⁵

⁴In the event that this Recommended Order be adopted by the Board, the words "a Decision and Order" shall be substituted for the words "the Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "a Decree of the United States Court of Appeals, Enforcing an Order" shall be substituted for the words "a Decision and Order."

⁵In the event that this Recommended Order be adopted by the Board, this provision shall be modified to read: "Notify said Regional Director, in writing, within 10 days from the date of this Order, what steps the Respondent has taken to comply herewith."

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to the Recommended Order of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

WE WILL upon request bargain collectively with International Union of Operating Engineers, Local No. 9, AFL-CIO, for the unit described below, in respect to rates of pay, wages, hours of work, and other terms and conditions of employment and, if an understanding is reached, reduce it to writing and sign it. The bargaining unit is:

All equipment operators and oilers, mechanics, welders, mechanic helpers, and welder helpers used in operation and maintenance of construction equipment; excluding laborers, truckdrivers, supervisors, office clerical, guards, and all other employees.

WE WILL NOT by refusing to bargain or in any like or similar manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form, join, or assist the above-named Union or any other labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as permitted by Section 8(a)(3) of the Act.

BURNETT CONSTRUCTION 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.

Employees may communicate directly with the Board's Regional Office, 609 Railway Exchange Building, 17th and Champa Streets, Denver, Colorado, Telephone No. 297-3551, if they have any questions concerning this notice or compliance with its provisions.

**Ohio Car & Truck Leasing, Inc. and General Truck Drivers
Local No. 92, International Brotherhood of Teamsters, Chauffeurs,
Warehousemen and Helpers of America. Case No.
8-CA-3375. December 8, 1964**

DECISION AND ORDER

On July 16, 1964, Trial Examiner Robert E. Mullin issued his Decision in the above-entitled proceeding, finding that 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 Decision. Respondent filed exceptions to the Trial Examiner's Decision, 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 Jenkins].

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 Trial Examiner's Decision, the exceptions and the brief, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, except as noted below.¹

¹ We agree with the Trial Examiner's conclusion that Treacy's suggestion to employee Clrone that the men could secure a contract which would be better and easier to get along with from the Respondent without the Teamsters constituted an unlawful unilateral attempt by the Respondent to bypass the Union in dealing with its employees. However, we find it unnecessary to determine whether Sampson's remarks to Melott on or about November 2, 1963, also constituted an unlawful attempt to bypass the Union.