Globe Construction Co., Inc.[1] ***and*** **Local 826, International Union of Operating Engineers, AFL-CIO.** *Case 28-CA-1301. February 9, 1967*

DECISION AND ORDER

On September 29, 1966, Trial Examiner E. Don Wilson 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 Trial Examiner's Decision. The Trial Examiner also found that the Respondent had not engaged in certain other unfair labor practices alleged in the complaint. Thereafter, the General Counsel filed exceptions to the Trial Examiner's Decision and a brief and a supplemental brief in support thereof.[2]

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

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 entire record in this case, including the Trial Examiner's Decision, the General Counsel's exceptions and briefs, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

[The Board adopted the Trial Examiner's Recommended Order.]

[The Board dismissed the complaint, insofar as it alleges unfair labor practices not found herein.]

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[1] The name of the Respondent appears as amended at the hearing

[2] A motion to correct the transcript of the hearing was attached to the General Counsel's brief in support of exceptions, and copies were served upon the parties. In the absence of objection, the General Counsel's motion is hereby granted

On November 18, 1966, the General Counsel filed a motion for leave to file a supplemental brief in support of his exceptions The brief was attached to the motion and copies had been served upon the parties In the absence of objection, the General Counsel's motion is hereby granted and the supplemental brief has been duly considered.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

Pursuant to due notice, a hearing was held before Trial Examiner E. Don Wilson on May 11, 12, and 13 at Hobbs, New Mexico. The parties fully participated. Upon a charge filed by Local 826, International Union of Operating Engineers, AFL-CIO, herein the Union, the General Counsel of the National Labor Relations Board, herein the Board, issued a complaint dated February 25, 1966, alleging that Globe Construction Company, herein Respondent, violated Section 8(a)(1) and (5) of the National Labor Relations Act, as amended, herein the Act.

Briefs of General Counsel and Respondent have been received and considered. Upon the entire record [1] in the case and from my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

At all material times, Respondent has been a New Mexico corporation continuously engaged in the oil field construction industry in Hobbs, New Mexico, and in the year ending February 25, 1966, sold or performed to customers outside of New Mexico services having a value equal to $50,000, and during the same period of time sold or performed services equal to $50,000 to firms which in turn made sales to customers outside New Mexico. During 1965, Respondent purchased goods and materials worth more than $50,000 from firms which had purchased them outside New Mexico. Respondent is an employer engaged in commerce within the meaning of the Act.

II. THE LABOR ORGANIZATION

At all times material the Union has been a labor organization within the meaning of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The issues*

(1) Did Respondent violate Section 8(a)(1) of the Act by granting an across-the-board, 10-cent-per-hour wage increase on September 2, 1965,[2] after a representation petition was filed on August 26 and before an election was held on October 12? (2) Did Respondent violate Section 8(a)(1) of the Act by polling and unlawfully soliciting its employees on September 14? (3) Did Respondent violate Section 8(a)(1) of the Act by advising two employees through its superintendent, immediately after the election the Union lost, that if the Union had won the election, Respondent would have sold its dump trucks and discharged the dump truck drivers? (4) Did Respondent unlawfully refuse to bargain with the Union on or after May 2?

B. *The wage increase*

Shortly before September 2, employee A. D. Willis asked Respondent's Superintendent W. G. Brown to set up a meeting between Respondent's employees and J. O. Williams, Respondent's president.[3] An election petition had been filed by the Union on August 26. Willis said the men wished to discuss their complaints that they were receiving 10 cents an hour less than the employees of Respondent's competitor, New Mex. Willis told Brown the men wanted a raise to bring them up to New Mex. Brown told Williams the men wanted a meeting about a raise. Williams spoke to his attorney, Theodore R. Johnson, and told him the employees wanted a meeting to discuss a wage increase. Johnson advised Williams a raise could not be granted unless New Mex had granted a raise and it had been Respondent's policy to pay wages equal to or better than its competitors. Williams and Johnson held a meeting with about 12 of Respondent's employees on September 2.[4] Substantially all of the employees were heavy equipment operators who wanted a raise from $2.25 to $2.35 per hour. Spokesmen for the employees advised Johnson and Williams that New Mex was paying 10 cents an hour more than Respondent. Johnson told the employees Respondent could grant a raise only to meet competition and Respondent would have to check with New Mex. Johnson asked the employees whether they understood that Respondent had a policy of paying wage rates equal to those of its competitors. The employees stated that New Mex was paying 10 cents an hour more, than Respondent and they wished a 10-

[1] Two sets of the 3 days' transcripts were received from the reporter. General Counsel and Respondent have stipulated that the correct transcript relied upon by them and the one to be considered official consists of volume I, pp 1—232, volume II, pp. 233–617; and volume III, pp. 618–804. This stipulation is marked TX Ex #1 and is made a part of the record. I accept the stipulation and have relied upon the transcript stipulated to be correct.

[2] All dates herein are 1965, unless otherwise specified.

[3] The request expressed the desires of the operators.

[4] No employee was excluded from the meeting.

cent raise for all employees. Johnson stated that if an increase were given it would only be for the purpose of meeting competition and would have nothing to do with the Union.[5]

It had always been Respondent's policy to equal competitive wages[6] and give across-the-board raises. Immediately after the meeting, Williams called an official of New Mex, and found that New Mex was paying its employees 10 cents an hour more than Respondent and had been doing so for some time. Respondent, in line with its policy, granted all but one of its employees[7] a 10-cent-an-hour wage increase effective September 1.

I find insufficient substantial evidence that Respondent granted this wage increase for the purpose of influencing its employees in their voting for or against the Union. The raises were given pursuant to the request of the employees to keep Respondent in line with its policy of paying wages equal to a competitor. I do not believe an employer is obliged to withhold a wage increase, which is in order, merely because a representation petition has been filed. Without regard to the petition Respondent raised its employees' wages in conformity with its policy of at least meeting a competitor's wages. There is insufficient probative evidence that by so acting, Respondent violated Section 8(a)(1) of the Act.

C. *Polling and unlawful solicitation*

Johnson testified that this entire matter was his first labor case. When he examined the petition, he found no information as to the showing of interest. He testified he was unaware that a 30 percent showing was purely an administrative matter reserved to the Board. He directed the preparation of memoranda signed by Williams and distributed to each of about 30 employees at a meeting called by Respondent on September 14. Johnson addressed the employees and told them he understood some did not understand what they had signed for the Union. He added that he considered it to be his duty to investigate and determine whether the Union had a sufficient showing of interest. He said he wished the information only to show to the Board attorney. The memoranda were distributed to every employee reporting to work on September 14. The name of each employee was typed in on each memorandum. Williams signed each memorandum. Each employee was requested to state whether he had signed an authorization card for the Union and if he answered the question in the affirmative, then he was asked to state if he wished to revoke the authorization. Each of the approximately 30 employees received a memorandum with his name on it. The memoranda were returned to Johnson after they were filled out. The distribution of these questionnaires to all employees violated Section 8(a)(1) of the Act. Respondent unlawfully sought to assume the Board's function of determining administratively whether there was a sufficient showing of interest by the Union to warrant the holding of an election by the Board. Respondent was plainly not seeking to determine whether the Union had a majority card showing. Particularly reprehensible here is Respondent's attempt to obtain revocations of union authorizations from its employees. Respondent infringed upon its employees' right to privacy in their union affairs. Such a right is essential to the full and free exercise of rights guaranteed by Section 7 of the Act.[8] Respondent unlawfully required its employees to state whether they had been for the Union or, if they had, whether they wished to repudiate the Union. These memoranda were permanent records. Johnson's claimed good-faith ignorance does not alleviate the essentially coercive effect of Respondent's polling and unlawful solicitation and invasion of employees' privacy as to union matters. Respondent had no right systematically, to investigate the Union's showing of interest.

D. *Brown's statements to two employees on October 12*

Shortly after the polls closed on October 12, Respondent's Superintendent William Brown spoke to Respondent's employees Deaver and Wright. Having considered their respective demeanors I credit the testimony of Deaver and Wright and do not credit the testimony of Brown where it conflicts with that of Deaver and

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[5] Respondent did not limit attendance at the meeting to operators

[6] There is no substantial evidence that Respondent knew New Mex was paying higher wages before the meeting.

[7] He had been employed a very short time

[8] Respondent by its memoranda successfully obtained information that several of its employees by name wished to revoke their designations of the Union as representative

Wright. Brown told the two employees that if the Union had won the election, Respondent would have sold its dump trucks and terminated the dump truck drivers. He referred to union supporters by an unprintable epithet, stating that this was the way Respondent's president regarded union supporters. Brown's statements were threats of reprisal should the employees again exercise their rights to vote in a union election. They were violative of Section 8(a)(1) of the Act.

E. *The alleged refusal to bargain*

Thomas L. Booth, a part-time business representative of the Union, Harold Henley, a business representative of the carpenters, W. H. Frazier, an International representative of the Union, Johnson, and Williams, each, testified concerning the alleged unlawful refusal to bargain. In making the following findings I have considered their respective demeanors and have had due regard for the inherent probabilities in the particular situations. I believe that at times the various participants, in conversations, were talking at cross-purposes and particular witnesses did not have clear recollections as to what was said to whom. I am convinced that what follows is an accurate recitation of the substance of what took place between Respondent and the Union as to bargaining requests and "refusals."

On *March 9,* Booth told Williams he represented a majority of Respondent's employees. Williams said he would not discuss the matter further without Johnson. Arrangements were made for another meeting. It must be here noted that the charge herein was not filed until *November 2.* The Section 10(b) cutoff date is *May 2.*[9] Booth met with Williams and Johnson on *March 17.* Henley was present. Booth asked for recognition and presented authorization cards, asking if Respondent's representatives wished to examine them. Johnson said he was not familiar with labor law and would like further time to study the matter. He did not examine the cards. There was some discussion that Respondent was one of the best paying contractors in the business and Booth told Johnson the Union was attempting to organize Respondent's competitors. The parties agreed to meet again after Johnson had an opportunity to scan the law.

They met again on *March 31.* This time Henley was not present. Johnson said he had familiarized himself with the law and felt the democratic process of a Board election was in order. Booth said he did not wish an election because of the distance and time involved.[10] Johnson replied that when the Union got Respondent's competitors' wages raised to those of Respondent, Respondent would consider recognizing the Union. Booth replied the Union couldn't wait that long but would forgo wage demands and needed Respondent's recognition so the Union could work "on the other thirty-three contractors." Subsequently Johnson said Respondent might recognize the Union if he (Johnson) represented the four dirt contractors in Hobbs. Again, at this meeting, authorization cards were made available to Respondent. They were bundled together inside a rubberband. Johnson insisted that the NLRB procedure of an election was the proper course to follow. There was further discussion that maybe Booth could have put in writing an understanding that there would be no request for an increase in wages if Respondent would recognize the Union. There was also some vague and inconclusive conversation about the possibility of Booth bargaining with Johnson as the representative of the four dirt contractors in Hobbs. This request for bargaining and failure to comply were also weeks before the 10(b) period.

Frazier, the Union's International representative, was very vague in his testimony. He went to Johnson's office without an appointment and after a 20-minute wait saw Johnson, who was very busy. Frazier told Johnson he was picking up where Booth had left off. Frazier and a busy Johnson then had a pleasant chat about how busy Johnson was, Booth's present occupation, and wage scales paid in Texas as compared with those paid in New Mexico. Recognition or bargaining were not mentioned as such. Johnson and Frazier had a nice talk but there was no demand for recognition. In any event, and even were it found that Frazier was requesting recognition from Respondent as distinct from the possibility of dealing with Johnson as the representative of four Hobbs dirt contractors, or putting something or other in writing, this meeting between Frazier and Johnson was still beyond the 10(b) period. Frazier fixed the date of his meeting with Johnson as May 6 or 7 "if my memory serves me right." On the other hand, Johnson and Williams testified with certainty and I find that Johnson could not have had the meeting

[9] A copy of the charge was served on Respondent's superintendent on May 2

[10] Booth was located a considerable distance from Hobbs.

with Frazier on either of those dates. Beginning the morning of May 6 and continuing for some days, Johnson was hundreds of miles from Hobbs. In evidence is a customer draft on an Oklahoma City clothing store drawn by Johnson in Oklahoma City on May 6. Circumstantially, Johnson established through his testimony and office records that his meeting with Frazier occurred in *April* and not after May 2. Williams' testimony corroborated Johnson's. Certainly, prior to the filing of the petition herein, which I shall discuss hereinafter, there was no demand for bargaining or refusal to bargain within the 10(b) period.[11]

Following Frazier's meeting with Johnson in *April* (beyond the 10(b) period) the Union did nothing but file a petition on August 26. There is no suggestion that Respondent did anything relating to recognition of the Union during this period.

About 4 months after Frazier met with Johnson, the Union filed a petition for an election, on August 26. There is insufficient probative evidence that then or any time thereafter, the Union represented a majority of Respondent's employees. On September 15, Respondent agreed to a consent election. On October 12, the Union lost the election by a vote of 14 to 10 The Union having filed objections, the election was set aside because of the September 2 wage increase [12] and the September 14 meeting [13]

I find insufficient substantial evidence that the Union, while representing a majority of employees, has requested Respondent to recognize the Union within the 10(b) period. What happened in March and April is ancient history and does not establish a majority in August or September.

The evidence establishes that on September 15, when the consent election was agreed to by Respondent and the Union, the Union did not have a card showing of a majority. It further establishes that at no time after May 2, did the Union request recognition when it had a majority General Counsel urges that I find the requests made in March and allegedly in April were "continuing" so that some refusal made in the 10(b) period was an unlawful refusal. He relies particularly on *International Union, United Automobile, Aerospace and Agricultural Implement Workers (Aero Corporation)*, 149 NLRB 1283, enfd 363 F.2d 702. I find no continuing demand or request to bargain after Booth left the scene. I find Frazier did not request or suggest bargaining. At best, he was expressing a desire to talk to Johnson, and, having observed Johnson, I am satisfied they could have talked about many things other than those limited to recognition of the Union by Respondent. This Respondent did not, as did the Respondent in the *Aero* case, commit unfair labor practices extensively before, during, and after the election and while the demands were being made. There is here no suggestion of an 8(a)(3) violation. I find no reasonable ground to find that a request for recognition and bargaining within the 10(b) period and particularly between May 2 and August 26 "would have been useless." This *is* a case of "mere company inaction" for months following a request for bargaining rather than an absolute refusal to bargain. Here, Booth dropped the matter and Frazier, even beyond the 10(b) period, did not pick it up. Here, it cannot be said as in the *Aero* case, that "the Company's determination to refuse to bargain was actively implemented in the months following its letter by its efforts to undermine the Union." This Union could have requested or demanded or insisted upon recognition day after day while it possessed a majority. It chose to be quiescent. Unlike the company in *Aero*, this Respondent interfered with its employees rights not in the slightest until immediately before it agreed to a consent election. This Respondent expressed its legitimate doubt to the extent that as early as March it requested an election. The Union did nothing until it filed its petition months later. I cannot and do not find that it continued to demand recognition particularly when it did nothing between March 31 and August 26 but permit Frazier to be its emissary. There were no unfair labor practices committed by Respondent between March 31 and September 14. This Union during those times was entirely free to request or demand recognition or bargaining It refused so to do. It apparently had no concern. I cannot find a refusal to bargain where there has been no request or refusal to bargain within the 10(b) period, especially where there is no substantial evidence of majority representation within the 10(b)

[11] There is no suggestion that prior to the 10(b) period, Respondent committed any unfair labor practice other than the possible refusal to bargain

[12] I have considered the Regional Director's decision in this regard and having considered it as having some persuasive relevance, I do not, as this Decision indicates, consider myself bound by it especially since I have had the benefit of testimony under oath before me

[13] I am advised, by the brief of Respondent, that on June 3, 1966, after this hearing closed, the Union withdrew its petition for an election.

period. I cannot and do not find that a demand to bargain when the Union represented a majority, within the 10(b) period, would have been useless. Such a finding would be speculation. It is clear that there is no evidence in this case that at any time the Union represented a majority of Respondent's employees, did Respondent engage in "efforts to undermine the Union." Here there is no occasion to refer to previous acts to shed light on the true character of matters occurring within the limitations period. Here the basic employer approach was at least innocent. There was here no underlying refusal to bargain but rather a request for an election or a willingness to meet on perhaps broader terms, if again, perhaps, such were possible.

Particularly after the pleasant chats that Respondent's representatives had with the Union's representatives in March and April, before the 10(b) period and long before Respondent's 8(a)(1) violation on September 14, I find it would not have been a futile gesture for the Union to have demanded recognition within the 10(b) period, at such time as it had a majority. It never did so.

I find insufficient probative evidence that Respondent violated Section 8(a)(5) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The operations of Respondent, described in section I, above, occurring in connection with the unfair labor practices described in section III, 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 Respondent has engaged in certain unfair labor practices of a very serious nature, I shall recommend that it cease and desist therefrom and from any other invasions of its employees' rights under Section 7 of the Act, and take certain affirmative action designed to effectuate the policies of the Act.

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

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of the Act.
2. By interfering with, restraining, and coercing employees in the exercise of rights guaranteed them by Section 7 of the Act, as found above, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.
3. The unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact, and conclusions of law it is recommended that Respondent, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Polling or interrogating its employees concerning their union activities, or unlawfully seeking to assume the Board's functions in administratively discharging its duties, or seeking to obtain revocations of union authorizations, or infringing upon its employees' rights to privacy in their union affairs, or threatening reprisals should Respondent's employees again exercise their rights to vote in a union election.

(b) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

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

(a) Post at its plant or place of operations in Hobbs, New Mexico, copies of the attached notice marked "Appendix." [14] Copies of such notice, on forms pro-

[14] In the event that this Recommended Order is 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"

vided by the Regional Director for Region 28, after being duly signed by an authorized representative of Respondent, shall be posted immediately upon receipt thereof, and be maintained by it for a period of 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 said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 28, in writing, within 20 days from the receipt of this Decision, what steps Respondent has taken to comply herewith.[15]

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

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to a 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 our employees that:

WE WILL NOT poll or interrogate our employees about their union activities or try by such means to assume the functions of the National Labor Relations Board in its discharge of its duties, or seek to obtain from our employees revocation of union authorization cards, or interfere with or infringe upon our employees' rights to privacy in conducting their union affairs, or threaten employees with bad consequences if they should vote for a union in an election.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees because of their union activity.

All our employees have the right to join or assist Local 826, International Union of Operating Engineers, AFL–CIO, or any other union.

GLOBE 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.

If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, Room 7011, Seventh Floor, 500 Gold Avenue SW., Albuquerque, New Mexico, Telephone 247–2583.

J. C. Penney Company (Store #134) *and* Retail Clerks International Association, Local 253, AFL–CIO. *Case 30–CA–376. February 9, 1967*

DECISION AND ORDER

On September 30, 1966, Trial Examiner Maurice S. Bush 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 Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision and a brief in support of said exceptions,