International Union of Operating Engineers, Local Union No. 12 (Tri-County Association of Civil Engineers and Land Surveyors) *and* Thomas B. Flynn. Case 31–CB–180

November 9, 1967

DECISION AND ORDER

BY CHAIRMAN MCCULLOCH AND MEMBERS FANNING AND BROWN

On August 2, 1967, Trial Examiner David F. Doyle 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 Decision 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 powers in connection with this case to a three-member panel.

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 brief, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, with the following modifications.

In dissenting from our finding that Respondent violated Section 8(b)(3), our colleague relies, in part, upon his view that the Association was bound to honor the Union's second vote, as it voiced no protest when told one would be taken. We view the facts differently. While not mouthing the words "we protest," the Association's representative, Flynn, remarked that perhaps the first vote just didn't suit the Union. Furthermore, Flynn testified without contradiction that he immediately notified the members of the Association of the Union's intent to take a second vote, asking each to be prepared to decide if they would accept such a vote. Following the second vote, all agreed not to accept it. We do not view this as a "mutual agreement" to rescind "any final agreement prior to the second employee vote."[1]

The dissent takes the position that the memorandum agreement of September 12 was final and clear, and the embodiment of the parties' total understanding, and in any event the Board is precluded from considering the intent of the parties as evidenced by their contract. We cannot agree. A clause containing a contingency makes the terms of that clause precisely that – contingent. Here the contingency was a vote, which was taken, the results of which were communicated to the Association, and upon which it acted in reliance. The contingency fulfilled, the understanding between the parties then became final and clear, but not before. Even assuming, *arguendo,* that the contract herein was not a contingent one, it is well settled that the Board may properly evaluate contractual provisions against the background of bargaining negotiations in determining contractual intent.[2]

As we agree with the Trial Examiner that, upon the completion of the first vote, the contract terms became defined with certainty, we find that the parties reached an understanding on or about September 16, 1966, the day on which Union Representative Whisman told Flynn the results of the vote and the Association, relying upon Whisman's assurances, put the retroactive wage increases into effect. As it is precisely at that point that we find final agreement was reached as to that term of employment, we shall modify the Trial Examiner's Recommended Order and Notice.[3]

ORDER

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 Trial Examiner as modified below and hereby orders that the Respondent, International Union of Operating Engineers, Local Union No. 12, its officers, agents, and representatives, shall take the action set forth in the Trial Examiner's Recommended Order, as herein modified:

1. Delete paragraph 1 of the Trial Examiner's Recommended Order and substitute therefor the following:

"1. Cease and desist from refusing to reduce to writing the understanding reached on or about September 16, 1966, as the representative of its mem-

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[1] Our dissenting colleague excerpts portions of the Trial Examiner's Decision in an attempt to show that the Trial Examiner found the memorandum agreement of September 12, 1966, to have been a final agreement embodying the parties' total understanding. The excerpts are, however, taken out of context Continuing after the last full sentence of the excerpt· "The memorandum of agreement settled that with certainty – the 15 cents per hour would go into the pension fund or to the men in wages, dependent upon a vote of the majority of the employees involved. It is undisputed that the Union conducted an election in accordance with the memorandum of agreement and that the men voted to receive the 15 cents per hour in wages. *Upon the completion of that vote,* every term of the contract was defined with certainty . . ." [Emphasis supplied.] We agree with the Trial Examiner.

[2] See, for example, *C & C Plywood Corporation,* 148 NLRB 414; *Kennecott Copper Corporation (Chino Mines Division),* 148 NLRB 1653, as to both of which our dissenting colleague was in agreement.

[3] We specifically disavow as extraneous and of doubtful validity the Trial Examiner's conclusions that unlawful threats were made and that the Respondent did not respect the rights of, deal fairly with, or accord good faith to, the employees it represents.

bers employed by Tri-County Association of Civil Engineers and Land Surveyors, including a provision to pay the increase of 15 cents per hour to employees, in the form of wages—rather than paying same into the Respondent's pension fund."

2. Delete paragraph 2(a) of the Trial Examiner's Recommended Order and substitute therefor the following:

"(a) Upon request, reduce to writing the understanding reached on or about September 16, 1966, with Tri-County Association of Civil Engineers and Land Surveyors, with regard to paying the employees in the appropriate unit an increase in wages rather than paying same into the Respondent's pension fund."

3. Substitute for the Notice attached to the Trial Examiner's Decision marked "Appendix," the attached Notice marked "Appendix."

MEMBER BROWN, dissenting:

I subscribe fully to the views of my colleagues expressed in footnote 3 of this Decision. However, I would reverse the Decision of the Trial Examiner and dismiss the complaint herein. While the Act requires a union, negotiating a collective-bargaining agreement, to reduce to writing any agreement reached, upon request; I note that here, on September 12, 1966, the parties did carefully reduce their understanding to writing, sign it and execute an agreement which purported to be their "total understanding."[4]

I view the later controversy between the parties as nothing more than a dispute over the meaning of a clause which was part of a fully operative contract; one in which the Association took the position that the disputed clause provided for a single vote on the "wage versus pension" question which would be determinative of the manner in which the increased compensation would be paid, and the Union maintained that the clause allowed the employees, at any time during the contract period, to decide that they would, from that point on, receive the 15-cent increase as a contribution to the pension fund rather than as wages. Thus, the Union, even if wrong in its position, can be guilty only of failure to abide by a contract obligation, and not failure to live up to a bargaining obligation under the Statute. The record is devoid of evidence of bad faith. The Union was doing no more than placing an interpretation on the contract most favorable to it, having previously executed a "total understanding." Under these circumstances, the Board is not the place for the resolution of this dispute.

Alternatively, even if I were to accept my colleagues' view—that despite the completeness and specificity of the existing written documents, the parties by their conduct disclosed a mutual intent to consolidate into a single contract the totality of their understanding including the method of payment chosen by the employees, or that only a tentative decision was reached on September 12, contingent upon and completed by the first vote—on this record I would also have to find that by its conduct the Association thereafter accepted the Respondent's interpretation that a second vote was permissible. For, when the Respondent advised the Association that such a vote would be forthcoming, no protest was expressed to indicate that the first vote had been conclusive and definitive or that under the Association's interpretation of the agreement a further vote would be meaningless. It was only when the vote was not to its liking that the Association advanced the interpretation now espoused. Indeed, it is clear from the Trial Examiner's Decision that the members of the Association decided to take this position only after the second vote had been held and after they had been informed of the results of this vote. In these circumstances, I would have to find the Board's *F. W. Means & Co.*[5] Decision controlling and hold that by mutual agreement the parties had rescinded any final agreement prior to the second employee vote. Accordingly, as the parties by their subsequent conduct vitiated any understanding previously reached, the Union, by its failure to submit a written contract embodying a clause reflective of the outcome of the first vote, did not violate Section 8(b)(3) of the Act.

[4] As correctly found by the Trial Examiner, "on September 12, 1966, the representatives of the Union and the Association reached a complete agreement as evidenced by the memorandum . . . of that date. [T]he parties had agreed to continue the terms of the expiring contract with three additional benefits . . . There was nothing indefinite about the increase in pay The memorandum agreement settled that with certainty . . ."

[5] 157 NLRB 1434, 1437.

APPENDIX

NOTICE TO ALL MEMBERS OF THE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL UNION NO. 12, AND EMPLOYEES OF EMPLOYER MEMBERS OF TRI-COUNTY ASSOCIATION OF CIVIL ENGINEERS AND LAND SURVEYORS

Pursuant to an Order 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 members that:

After a trial in which all parties had the chance to give evidence, the National Labor Relations Board has found that we violated the law on and after September 16, 1966:

By refusing to reduce to writing the understanding, made final by the first employee vote, that the 15-cent increase agreed upon on September 12, 1966, for the contract period September 1, 1966, to August 31, 1967, would be paid to employees in the appropriate unit in the form of wages and not as contributions to the Operating Engineers pension fund.

WE WILL NOT insist that the 15-cent-per-hour increase be paid as a contribution to the Operating Engineers pension fund.

NOTE: This notice in no way requires a change in the current contract effective from September 1, 1967.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL UNION NO. 12
(Labor Organization)

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 members or employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 10th Floor, Bartlett Building, 215 West 7th Street, Los Angeles, California 90014, Telephone 688–5850.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

DAVID F. DOYLE, Trial Examiner: This proceeding, with all parties represented by counsel, was heard by me at Santa Barbara, California, on June 1, 1967, on complaint of the General Counsel and answer of the Respondent.

The complaint dated April 11, 1967, was based on a charge filed by Thomas B. Flynn, manager, Tri-County Employers Association (herein the Association) on November 30, 1966. The complaint alleged in substance that International Union of Operating Engineers, Local Union No. 12 (herein the Union) had violated Section 8(b)(3) of the Act by refusing and failing to bargain with the Association. In its duly filed answer the Union denied the commission of unfair labor practices. At the hearing counsel for the parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence bearing on the issues, to argue the issues orally upon the record, and to file briefs and proposed findings. The General Counsel has filed a scholarly brief which has been carefully considered. At the hearing the Union did not present any evidence and has not filed a brief herein. At the close of the evidence at the hearing, counsel for the Union called the Trial Examiner's attention to a case which he claimed was pertinent to the issues herein.

Upon the entire record in the case and upon my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE ASSOCIATION

At the hearing counsel placed in evidence a written stipulation executed by a representative of the Union, the Association, and the General Counsel, which states the following concerning the business of the Association:

> Tri-County Association of Civil Engineers and Land Surveyors, herein called the Association, has been, at all times material herein, an unincorporated association of employers performing engineering and surveying services in Ventura, Santa Barbara, and San Luis Obispo Counties California. The Association engages in, and represents its member firms in, the negotiation of collective-bargaining agreements on a multi-employer basis with a labor organization in the counties referred to above. Annually, in the course and conduct of their business operations, the Association's members collectively perform services valued in excess of $50,000 for firms within the State of California, which firms in turn annually make sales directly to, and perform services directly for, customers and firms located outside the State of California valued in excess of $50,000. Annually, in the course and conduct of their business operations, the Association's members collectively purchase and receive goods and materials valued in excess of $50,000 from firms located in the State of California, which firms in turn purchased and received those same goods and materials directly from suppliers located outside the State of California. The Association and its members are now, and have been at all times material herein, employers engaged in commerce and in an industry affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the basis of the stipulated facts, I find that the Association and its members are, and have been at all times material herein, employers engaged in commerce and in an industry affecting commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Upon all the evidence in the case I find that the Union is a labor organization within the meaning of Section 2(5) of the Act, and that Orville J. Whisman, Turney Powers, and William Begley are authorized representatives of the Union in the events hereinafter related.

III. THE UNFAIR LABOR PRACTICES

At the hearing, the General Counsel produced five witnesses and some documentary evidence which composed his case. The Union offered no witnesses, being content to rest its case on the record developed by the General Counsel and cross-examination by union counsel.

Undisputed Facts

It is undisputed that on or about October 15, 1964, the Union was selected by a majority of the employees in the unit described below in a secret-ballot election conducted by the Board and thereafter on or about October 26, 1964, the Regional Director (Region 21) certified the Union as the exclusive collective-bargaining representative of the employees in the unit.

The appropriate unit is described as follows:

> All employees of Tri-County Association of Civil Engineers and Land Surveyors employed in field survey crews, including chiefs of party, instrument men, chainmen and field apprentices; excluding all office

clerical employees, draftsmen, engineers, architects, watchmen, guards, and supervisors as defined in the Act.

After the Union's certification the Union and the Association met and bargained. These meetings resulted in an agreement in the year 1964 which agreement was reaffirmed in 1965 and which expired on August 31, 1966. It is undisputed that on August 19, 1966, the Union held a meeting of its members employed by the employers belonging to the Association for the purpose of authorizing the Union and certain officials thereof to negotiate a new contract with the Association to replace the contract expiring on August 31.[1] At this meeting the membership authorized a union negotiating team of which the union business agent, Orville J. Whisman, was chairman.

The Oral Testimony

Thomas B Flynn, manager of the Association, testified credibly and without contradiction to the sequence of events which make up this controversy between the Union and the Association. He said that on August 15, representatives of the Union and the Association met at the Association's offices. Representing the Union were Whisman, chairman, and Union Officials Ojeda and Powers. Representing the Association were Flynn and the representatives of two member-employers, Grant and Martin. At the start of negotiations, Whisman announced that the union membership had met and voted his committee full authority to negotiate and to execute a contract on behalf of the employees. The first meeting of the representatives of the parties was fruitful so they met again in a series of meetings. The final meeting took place at the Union's office in the city of Ventura on September 12. At this final meeting Whisman, Ojeda, and Powers represented the Union, and Flynn alone represented the Association. At this meeting, the parties found that they were in agreement on all terms of the collective-bargaining contract. However, one point was to be decided by a vote of the employees in the unit. The Association had agreed to pay a 15-cent-per-hour increase for all employees covered by the collective-bargaining agreement. The Association wanted this money to be paid directly to the employees in the form of wages while the Union, on the other hand, wanted the Association Employers to pay this money into the Operating Engineers pension fund. At that time the Association Employers were already paying 15 cents per hour per employee into the pension fund and the Union wanted them to pay an additional 15 cents per hour to match the 30-cent-per-hour contribution made by the employers in Los Angeles County with whom the Union had contracts. After discussing this difference, the representatives of the Association and the Union agreed to a compromise of the situation by agreeing to submit the matter to the employees in the unit, to decide by majority vote whether they wanted the 15-cent increase paid to them in wages or paid into the pension fund. This agreement which was executed at this meeting by the parties reads as follows: (G.C. Exh. 3.)

MEMORANDUM OF AGREEMENT BETWEEN THE INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 12 AND THE TRI-COUNTY ASSOCIATION OF CIVIL ENGINEERS AND LAND SURVEYORS.

The Contract now in effect between the above named parties, including the 1966 addendum shall be extended one year to August 31, 1967, with the following agreement on modifications:

1. The employers offer a 15 cent per hour wage increase for the period September 1, 1966 through August 31, 1967 in all classifications. If the employees of the employers of the Association by majority vote wish the wage increase to be applied as payments into the Operating Engineers Pension Fund, the Association employers agree to so do.
2. The Association will contract for benefits under their current insurance plan to match improved current benefits of the Operating Engineers Health and Welfare Fund. Effective as soon after September 1, 1966 as possible, in no event later than December 1, 1966.
3. 2 Weeks vacation after 2 years. $10.00 per day subsistance. Language clarifications on non-cost items as agreed. Sept. 12, 1966

(Initiated T.F. – O.J.W.)

This constitutes the total understanding between the parties.

/s/ O.J. Whisman
Union Representative

/s/ Thomas B. Flynn
Association Representative

Dated this 12 September 1966.

Flynn testified that he insisted that the language limiting the vote to "the employees of the employers of the association" be specific because one of the union negotiators had threatened they would have union members not in the appropriate unit vote on the proposition. Whisman told Flynn at the end of this meeting that the Union would allow the members a fair vote on the proposition and that it would be presented to them without any recommendation pro or con by the union negotiating committee.

The Employees Vote to Take the 15 cents as Wages

Employees Schwann, Peyton, Hill, and Acquistapace testified to what occurred at two meetings conducted by the Union on the subject of whether the 15-cent increase would be put into wages or into the Operating Engineers pension fund. These employees testified in a fair and forthright manner and their testimony is uncontradicted in this record. I credit the entire testimony of each of the named witnesses. While there are small variations in minor details in their versions of what occurred at these meetings, the important facts are amply established.

Employee Harry M. Peyton, who appears to have been

[1] All dates in this section of this Decision are in the year 1966 unless specified otherwise.

an active participant at the first meeting, testified that a meeting was called by the Union a few days after September 12 for the purpose of deciding whether the increase would to into wages or into the pension fund. Whisman, the chairman of the negotiating committee, presided at this meeting which was held at the union hall in Ventura. He explained that the meeting was called to decide whether the 15-cent increase would be paid to the men in wages or be paid into the pension fund. Whisman asked for a standing vote. Peyton objected and asked for a secret ballot, but Whisman replied that a secret ballot wasn't necessary and that it would take too long. A standing vote was then taken and approximately two-thirds of the members present voted to put the money into wages. Peyton estimated that about 25–30 members, all in the appropriate unit, participated in this election.

Employee Schwann also explained the way the vote was conducted. After Whisman explained the purpose of the meeting and the vote, an appropriate motion was made from the floor and then Whisman asked for the persons to stand who were in favor of the 15 cents per hour being put into wages. Those members in favor rose and a head count was taken. Then Whisman asked the persons to stand who were in favor of putting the 15 cents into the pension fund. A head count of these members was also taken. The result was in favor of having the money put into wages.

According to Schwann, Whisman said later that he was unhappy about the results of the vote. Whisman said that the officials of the Union thought it would be better to put the money in the pension fund than into wages and that Whisman was unhappy at the result of the voting.

The Association Puts the Agreement into Effect

On the day after the meeting, according to the testimony of Flynn, manager of the Association, Whisman phoned him and told Flynn the results of the voting, and that he would bring the completed contract to Flynn's office later in the week for Flynn's signature. Flynn immediately notified the members of the Association of the result of the employees' vote and told them that the new contract between the Union and the Association was complete except for the actual exchange of signed contracts. Flynn explained that the wage increase was retroactive, so he wished the members to pay the new wage rate at the next payday and gave notice so they could compute the retroactive amounts of pay. The members of the Association began paying the employees the new rate of pay at the next payday.

The Union Repudiates the Contract and Has a Second Meeting of Employees; the Union's Coercive Tactics

Flynn testified that Whisman never brought the completed contracts to him for his signature as he had promised. On or about September 28, Powers, district representative of the Union and a member of the negotiating committee, called at Flynn's office while Flynn was out. Flynn phoned Powers at Ventura the next day to see what Powers wanted. Powers told Flynn that the Union was going to have another vote of the employees on the wage question because the first vote had not been by secret ballot. Flynn remarked that perhaps the first vote didn't suit the Union. It is undisputed that approximately a week later the Union called another meeting of the employees in the unit for the purpose of having the employee-members vote again on whether the 15-cent increase should go into the pension fund or into wages. According to the employees, Whisman also presided at this meeting. He stated that the first vote was invalid because no "Nay" votes had been taken. According to employee Acquistapace, William Begley, secretary of the Union, in a speech to the men told them that if they didn't vote to put the 15 cents into pension fund, to make their contributions to the fund equal to the contribution of members in the Los Angeles area, that the men should leave the Union and negotiate for themselves; that the Union would return their initiation fees to them and the Union would stop representing them. Employee Peyton quoted Begley as saying that the large membership in the Los Angeles area would not be dictated to by their small group and if they failed to vote in favor of putting the money into the pension fund Begley would carry back a recommendation to the Union that their initiation fees be refunded and the men be put out of the Union. A discussion on the floor followed this and one of the employees asked, "If the men persisted, and took the 15 cents in wages, what would happen to the sums of money they had already contributed to the pension fund?" The union officials replied, "That is wiped out. Its all gone." A ballot was then distributed to each employee. One of the ballots in evidence reads as follows:

INTERNATIONAL UNION OF OPERATING ENGINEERS
LOCAL UNION NO. 12

I accept Contractor's offer [ ]

I reject Contractor's offer [ ]

A tally of ballots was announced as 20 in favor of the pension fund, and 11 against the pension fund.

The Union Submits its New Contract

Approximately in mid-October, Whisman called Flynn and told him that the employees had voted "the other way, to accept the money as pension payment" and he would be out the first of the week with contracts. A few days later he presented a contract to Flynn. This contract which embodies terms of the expired contract is in evidence and has the following provision:

Pension Fund

A pension fund known as the Operating Engineers Pension Trust has been established by certain employers and the Union by an Agreement and Declaration of Trust dated December 13, 1960. The Employers agreed to abide by said Agreement and Declaration of Trust and further to make payments to the fund, of 15 cents per hour for each hour worked by (or paid) each employee under this Agreement, excluding travel time. Participation of the employers in said Trust shall be for the duration of this Agreement and any renewals or extension thereof, or for the period workmen are employed under the terms of this Agreement. Effective November 1, 1966 the 15 cents shall be increased to 30 cents and will be applicable in the same manner as the 15 cents.

After reading this, Flynn told Whisman that he felt that this contract was not the contract agreed upon. In his opinion they had a complete contract when Whisman notified him that the men had voted in favor of putting the money into wages; that in reliance on the information he had called a meeting of the employer-members of the Association and had advised them to go ahead and pay the new wage scale, and to prepare to pay the retroactive wages under the new scale. Flynn also told Whisman that when he was told that the Union was going to seek a new election on the wage question, he informed the Employers that they should decide whether they wanted to take the position that they already had a contract, or accept a modified contract. Flynn testified also that he was informed by the Employers that after the second meeting the men had complained to the Employers that they hadn't had a fair chance to vote. The question was presented in such a fashion that they had only one way to vote and the employees felt that both the spirit and the letter of the agreement had not been carried out. In consequence of this, Flynn told Whisman that the Association refused to sign the new agreement and took the position that it already had a complete agreement providing, among other things, for the payment of the increase of 15 cents per hour to be paid to the employees in wages.

Late in October, Flynn and a member of the Association named Woodyard met with Whisman, Powers, and Begley of the Union. Among other things Flynn brought up the form of the ballot at the second vote. Whisman remarked that if the men, "hadn't voted 'yes' in this election, the Union would have made out another ballot." Begley, toward the close of the meeting finally told the Association representatives that their choice was, "to either go along with the pension fund or face economic action."

Flynn filed the charge against the Union on November 30, 1966.

It is undisputed that although the disagreement between the Union and the Association has continued there has been no strike action taken by the Union. Also, the Employers are paying the 15 cents per hour in question into an escrow fund at the present time.

Concluding Findings

As noted previously the Union offered no evidence contrary to that offered by the General Counsel. From thir undisputed evidence it is clear that on September 12, 1966, the representatives of the Union and the Association reached a complete agreement as evidenced by the memorandum of agreement executed and signed on that date. On September 12 the parties had agreed to continue the terms of the expiring contract with the three additional benefits to be afforded to the employees. These benefits were: (1) 2 weeks' vacation after 2 years and $10 per day subsistence; (2) an increase in benefits under the current insurance plan of the Operating Engineers Health and Welfare Fund; and (3) an increase in pay for the employees of 15 cents per hour. There was nothing indefinite about the increase in pay. The memorandum of agreement settled that with certainty – the 15 cents per hour would go into the pension fund or to the men in wages, dependent upon a vote of the majority of the employees involved. It is undisputed that the Union conducted an election in accordance with the memorandum of agreement and that the men voted to receive the 15 cents per hour in wages. Upon the completion of that vote, every term of the new contract was defined with certainty – the complete agreement was evidenced by the expired contract and the memorandum of agreement which modified the expired agreement in the three particulars, (1) vacation; (2) increase in Health and Welfare benefits; and (3) 15-cent increase in wages.

It is clear from the evidence that the Union was not pleased with the first vote of the employees. The reason for the Union's displeasure is not disclosed in the transcript of these proceedings, but it is clear that in the second meeting the union officers threatened the employees with expulsion from the Union and forfeiture of the moneys the employees had paid into the pension fund in prior years, if the employees did not vote to put the 15-cent increase in the pension fund. These were oppressive and coercive conditions that forced the men to change their vote. This conduct does not comply with the recognized obligation of unions to deal fairly and honestly and in highest good faith with the employees for whom the Board has certified their representative rights. This second vote under the circumstances existent here does not change in any way the contractual obligation of the Union to execute the contract to which it had agreed, when asked to do so by the Association.

The Union has also demonstrated bad faith in the efforts to force the men to repudiate the first vote. In the evidence are indications of several captious grounds for the Union's conduct; that no "nay" votes were taken at the first meeting; that the vote was not secret; and finally that the larger membership in Los Angeles would not countenance the action of the smaller group in this appropriate unit. Further, the wording of the ballot and the threats of the union officers evince an utter disregard of the rights of the employees here involved, and also of the rights of the Association, to whom the union representatives had promised a fair election on the alternatives to be presented to the employees.

Upon all the evidence I find that the Union has violated Section 8(b)(3) as alleged in the complaint.[2]

At the close of the hearing herein counsel for the Union made reference to *Operating Engineers Local Union No. 3, AFL–CIO (California Association of Employers)*, 123 NLRB 922. At one point in that Decision the Board pointed out in a footnote[3] that the relationship of unions to employers and to employees whom the union represents is not limited by the common law rules of agency. The Trial Examiner is not persuaded that the reference in the cited case can be accepted as authority exculpating the Union in this case.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Union set forth in section III, above, occurring in connection with the operations of the Associatien, described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and

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[2] *Glass Workers Union No 1220 (Industrial Conference Board)*, 162 NLRB 168, *Los Angeles Mailers' Union No 9 (Dow Jones & Company, Inc)*, 155 NLRB 684

[3] Fn 19

commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

V. THE REMEDY

Having found that the Union has engaged in unfair labor practices, it will be recommended that the Union cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Union, as the certified representative of the employees of the Association in the unit described above, engaged in collective bargaining with the representatives of the Association, and agreed upon the terms of a contract governing wages, hours, and conditions of employment of the said employees, including a term whereby the said employees would be paid an increase of 15 cents per hour as wages, and thereafter having found that the Union refused to execute a contract, as previously agreed to, the undersigned will recommend that the Union be required, upon request by the Association, to execute and sign the aforementioned contract.

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

CONCLUSIONS OF LAW

1. International Union of Operating Engineers, Local Union No. 12, is a labor organization within the meaning of Section 2(5) of the Act.

2. The employees of the member-employers of Tri-County Association of Civil Engineers and Land Surveyors in the unit described below is a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

The appropriate unit is:

> All employees of Tri-County Association of Civil Engineers and Land Surveyors employed in field survey crews, including chiefs of party, instrument men, chainmen and field apprentices; excluding all office clerical employees, draftsmen, engineers, architects, watchmen, guards, and supervisors as defined in the Act.

3. The Union has been since October 26, 1964, and at all times thereafter the exclusive collective-bargaining representative of all the employees in the unit described above for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

4. By refusing on or about October 5, 1966, and at all times thereafter to execute the labor contract with the Association to which the Union had previously agreed, including the payment of an increase in wages of 15 cents per hour to the employees in the form of wages, the Union has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(b)(3) of the Act, as amended.

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 above findings of fact and conclusions of law and upon the entire record in the case I recommend that International Union of Operating Engineers, Local Union No. 12, its officers, agents, and representatives, shall:

1. Cease and desist from refusing to execute the collective-bargaining agreement agreed to on September 12, 1966, as the representative of its members employed by Tri-County Association of Civil Engineers and Land Surveyors.

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

(a) Upon request, execute the labor agreement with the Association agreed to on September 12, 1966, including the provision to pay the increase in wages to the employees in the form of wages.

(b) Post at its business office in Santa Barbara and Los Angeles, California, copies of the attached notice marked "Appendix."[4] [Board's Appendix substituted for Trial Examiner's.] Copies of said notice, on forms provided by the Regional Director for Region 31, after being duly signed by the Union's representative, shall be posted by the Union immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Union to insure that said notices are not altered, defaced, or covered by any other material. The Union shall also sign copies of the notice which the Regional Director shall make available for posting at the business places of the members of the Association, each being willing.

(c) Notify the Regional Director for Region 31, in writing, within 20 days from the receipt of this Decision, what steps have been taken to comply herewith.[5]

IT IS FURTHER RECOMMENDED that, unless on or before 20 days from the date of receipt of this Trial Examiner's Decision and Recommended Order, the Union notify said Regional Director in writing that it will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring the Union to take the action aforesaid.[5]

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[4] 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"

[5] In the event that this Recommended Order is 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 Respondent has taken to comply herewith"