Chemical Producers Corporation and International Union of Operating Engineers, Local 826, AFL-CIO. Case 28-CA-1948

June 9, 1970

DECISION AND ORDER

By Members McCulloch, Brown, and Jenkins

On February 18, 1970, Trial Examiner Herman Marx issued his Decision in the above-entitled proceeding, finding that Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety, as set forth in the attached Trial Examiner's Decision. Thereafter, the General Counsel filed exceptions to the Decision and a supporting brief, and Respondent filed cross-exceptions and an answering 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, the briefs, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner

The complaint alleged, inter alia, that Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally granting wage increases during a strike called by the Union in support of its bargaining position. Respondent admitted that it unilaterally granted the wage increases equal to its last bargaining offer, but contended that the parties had previously reached impasse in negotiations. The Trial Examiner dismissed the allegation, finding that a genuine impasse existed. The General Counsel excepts. We agree with the Trial Examiner's finding of impasse for the reasons set forth below, in addition to those set out in his Decision.

After about a dozen previous negotiation sessions, the parties met on September 2, 1969. At the conclusion of this meeting, the positions of the parties had crystallized to differences on a few issues, including wages for two employee classifications. About 3 weeks prior to the September 2 meeting, the Union had notified the Respondent

that the employees would strike, starting on September 8, 1969, in support of the unresolved demands.

On September 5, 1969, in seeking to set a date for another meeting, the Union's negotiator, Givens, telephoned Respondent's negotiator, Parton. Parton said he would meet, but that he could see no purpose in any meeting consisting of a mere repetition of positions previously taken by the parties. Givens replied, "If that's the way you feel about it we won't have any meeting,"2 thus indicating that the Union was not prepared to change its position. Taking into consideration the background of good-faith bargaining, the clear disagreement of the parties, the failure of either side to express an inclination to make further concessions, the Union's declared intention to strike, and the telephone conversation evidencing mutual assent to the fact that further negotiations would prove fruitless, we find that a bona fide impasse existed at least by September 5.

Nor are we satisfied that this impasse was broken by subsequent events. Thus, following the September 5 telephone conversation, at 10 p.m. on September 8, 2 hours before the strike deadline, the parties again met. The Union's negotiator stated that he wanted to avert a strike and that the Union had "room to move," but made no concrete proposals. Respondent's negotiator replied that the Company's position was unchanged and that the Company was prepared for a strike. As the Union's negotiator did not even hint as to areas in which the Union might be prepared to make concessions, the meeting ended. The Union struck shortly after midnight.

Although the Union stated that it had room to move, such a general statement, in the circumstances of this case, including the nature of past bargaining and the clearly defined positions of the parties, was not sufficient to break the impasse. Accordingly, we find that the impasse continued through and beyond the September 8 meeting and that Respondent's September 13 grant of unilateral wage increases, previously offered the Union in general contract negotiations, did not violate its duty to bargain in good faith. For these reasons, we agree with the Trial Examiner and shall dismiss the complaint in its entirety.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor

¹ In the absence of exceptions thereto, we adopt the Trial Examiner's conclusion that Respondent did not violate the Act by unilaterally granting

a wage increase to employee Walker

² Based on the uncontradicted testimony of Parton

Relations Board adopts as its Order the Recommended Order of the Trial Examiner and hereby orders that the complaint herein be, and it hereby is, dismissed in its entirety.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

HERMAN MARX, Trial Examiner: The complaint alleges that an employer, Chemical Producers Corporation (herein the Respondent or Company), has refused to bargain with a labor organization known as International Union of Operating Engineers, Local 826, AFL-CIO (herein called the Union), as the representative of an appropriate unit of the Company's employees, by making unilateral changes in the wages and other terms and conditions of employment of such employees; and has thereby violated Section 8(a)(5) and (1) of the National Labor Relations Act¹ (herein the Act). The Respondent has filed an answer denying the commission of the unfair labor practices imputed to it.²

Pursuant to notice duly served by the Board's General Counsel upon the Respondent and the Union, a hearing on the issues was held before me, as duly designated Trial Examiner, in El Paso, Texas, on January 13, 1970. The General Counsel and the Respondent appeared through respective counsel, and all parties were afforded a full opportunity to adduce evidence, examine and cross-examine witnesses, submit oral arguments, and file briefs.

Upon the entire record and my observation of the demeanor of the witnesses, and having read and considered the respective briefs of the General Counsel and the Respondent filed with me since the close of the hearing, I make the following:

FINDINGS OF FACT

I. NATURE OF THE COMPANY'S BUSINESS; JURIS-DICTION OF THE BOARD

The Company is a Texas corporation; maintains an office and place of business in El Paso, Texas, where it is engaged in the business of producing and selling chemical products, including sulphuric acid; and is, and has been at all material times, an employer within the meaning of Section 2(2) of the Act.

During the calendar year preceding the issuance of the complaint, in the course and conduct of its business operations in Texas, the Company has processed products valued in excess of \$50,000, and has sold and distributed products valued in excess of that sum to customers located outside the said State. By reason of such sale and distribution,

the Company is, and has been at all times material to the issues, engaged in interstate commerce, and operations affecting such commerce, within the meaning of Section 2(6) and (7) of the Act. Accordingly, the Board has jurisdiction over the subject matter of this proceeding.

II. THE LABOR ORGANIZATION INVOLVED

The Union is, and has been at all material times, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Prefatory Statement

As the record establishes without dispute, all production and maintenance employees, including truck drivers, employed at the Company's place of business in El Paso, Texas, but exclusive of office clerical employees, professional employees, guards, and supervisors as defined in the Act, constitute, and have constituted at all material times, a unit appropriate for the purposes of collective bargaining, within the meaning of Section 9(b) of the Act.

Employees in the unit, numbering about 17 or 18 in all, variously hold the job classifications of operator, operator's helper, utility man, maintenance mechanic, truck driver, and laborer.

The production of sulphuric acid at the plant is a continuous 24-hour process, entailing three shifts and the assignment of an operator and helper to each. The operators' basic functions are to keep the acid-processing equipment under requisite observation, and to make analyses of the product, and adjustments in the equipment and process, as may be necessary. Operators and helpers usually work rotating shifts, changing from one to another every 7 days. The operator and helper on duty during the two night shifts are usually the only employees in the plant during their shifts.

All employees in the unit, whether on the day or night shifts, are subject to supervision by a foreman, Ira Couch, who is authorized to hire, discharge, transfer and assign employees. He is subordinate to the plant manager, E. J. Creider, who has overall responsibility for operation of the plant, but is subject to direction by its general manager, Arthur Parton, who is also vice president of the Company. Couch, Creider, and Parton are supervisors within the meaning of Section 2(11) of the

On January 24, 1969, following a representation election, held under the Board's auspices, the Union was duly certified as the exclusive representative of all employees in the unit for the purposes of collective bargaining, within the meaning of Section 9(b) of the Act. It holds that status now, and

^{1 29} U S C 151, et seq

² The complaint was issued on October 31, 1969, and is based on a

charge filed by the Union on September 10, 1969 Copies of the complaint and charge have been duly served upon the Respondent

has held it at all times since the certification.

B. The Wage Increases

The certification was followed by about a dozen bargaining meetings between the Union and the Company prior to one on September 2, 1969.³ The Union's demands included wage increases for all classifications of employees in the unit; provisions for checking off union dues; and a wage differential for the night shift. Some 3 weeks before the September 2 meeting, the Union had notified the Company that the employees would strike, starting on September 8, in support of the demands still unresolved at that date.

As matters stood at the close of the September 2 meeting, an accord had been reached on wages for all classifications except those of operator and laborer, the difference amounting to 3 cents an hour for the former, and 5 cents an hour for the latter. During the course of the meeting, the Union proposed that the Company apply to the requested wage increases still in dispute the cost of supplying and laundering the employees' work clothes, an expense previously borne by the Company, and that the employees thenceforth bear such cost. Parton, who spoke for the Company at the meeting, said that he would consider the matter.

The parties were then also at issue over the Union's wage differential and checkoff demands, the Company rejecting both, and taking the position regarding the checkoff that the period for which the Union sought to make the checkoff authorizations binding was too long. A representative of the Union, J. D. Givens, said that he would propose language shortening the period, and Parton stated that he "would like to see" the proposal.

The meeting ended with an understanding that the parties would meet again at a time to be arranged on the initiative of one or the other.

On September 3, the Company promoted one of the operators, William Walker, to the position of "lead operator and assistant foreman," increasing his hourly rate, without consultation with the Union, from \$3.35, the rate then in effect for operators, to \$3.75 per hour (15 cents more than the rate sought by the Union for the

operators, and 18 cents more than the Company's offer); and posted a notice, addressed to "all personnel," announcing the new position for Walker, and expressing the expectation that "everyone will give Mr. Walker the same consideration and attention to instructions that is afforded to all supervisory personnel." Walker thereafter continued to function as an operator, taking his regular turn, with some additional duties to which reference will be made later.

On September 5, Givens telephoned Parton; read to the latter a "management rights clause," a subject in which Parton had previously expressed interest, and a revised checkoff proposal; and requested a meeting. Parton replied that he would meet, but that he could see no purpose in a meeting for repetition of positions. The conversation ended without any arrangement for another meeting.⁵

However, by subsequent arrangement, the parties met at the Company's office again at 10 p.m. on September 8, shortly before the time for the scheduled strike. The meeting was brief, and what occurred, in substance, was that a representative of the Union named Wilson told Parton that it would like to avert a strike, and that it "had room to move on the unresolved issues"; and that Parton replied that the Company "could not move" on them; had nothing new to propose, and was ready for a strike. Neither side made any new proposal.

The strike began about 2 hours later and lasted for approximately a week, ending in circumstances that do not appear in the record.

On September 13, 2 days before the end of the strike, the Company, without any further negotiation with the Union, put into effect the wage increases on which agreement had been reached, and the respective rates it had last offered the Union for the operators and the one laborer in its employ.⁷

C. Discussion of the Issues; Concluding Findings

The ultimate issues in this proceeding are (1) whether the Company violated its bargaining obligation by increasing the wage rates for the operator and laborer classifications, as described above; and (2) whether the increase given Walker separately constituted an unlawful refusal to bargain.

³ Unless otherwise specified, all dates mentioned below occurred in 1969

⁴ A negotiator for the Union, J D Givens, testifying for the General Counsel, and manifesting some uncertainty, expressed a belief that wages for the drivers were also in dispute as of the September 2 meeting, but at a later point the General Counsel in effect conceded that "agreement had been reached as to drivers". The results here are the same whether or not such an accord had been reached

⁵ Replying to a question by the Respondent's counsel about a "meeting" on September 5, Parton gave an account of his conversation with Givens on that date, thus implying that there was a "meeting" on September 5 However, it is evident from his later testimony, as well as that of Givens, that the conversation between them that day was on the tele-

According to Givens, the meeting had been arranged for 3 pm in a telephone conversation with Parton on September 6 or 7, but Parton did

not appear, telephoning the office after Givens had waited almost 2 hours that he had been delayed, and then agreeing to meet at 10 Parton, on the other hand, denied that they had fixed a definite hour in the earlier conversation, stating that he had told Givens on that occasion that he would be "available to talk to him if he had any new positions", but that he was out of the office and unavoidably busy elsewhere when Givens came there in the afternoon. The issue need not be resolved, for there is no dispute that the parties did, in fact, meet, by agreement, on the night of September 8. In any event, I believe it likely that Givens and Parton differed in their understanding of their initial discussion of a meeting for September 8, find Parton's explanation of his absence on the afternoon of that date credible, and see no basis for a holding that he acted in bad faith in not meeting with Givens that afternoon

⁷ The Union's last demand for the operators was an hourly rate of \$3 60, and \$1 80 for the laborer, and the Company's last offer in the negotiations had been \$3 57 for the operators and \$1 75 for the laborer

Dealing, first, with the legality of the increases for the operator and laborer classifications, it is well settled that upon a genuine bargaining impasse over wages, an employer does not violate his bargaining obligation by increasing those of the affected employees to the levels he had offered their bargaining representative in wage negotiations conducted in good faith.⁸

The principle fits the facts here. What there is in the record on the course of the wage negotiations demonstrates good-faith bargaining by the Company on the subject. It reached agreement with the Union on increases for all but two of the classifications, and with respect to these two, receded from positions previously taken, as the negotiations progressed, with the result that the Company's last offer for both represented a substantial increase for each, and was but a few cents lower, in each case,

than the rate sought by the Union.

That the parties were at an impasse on the remaining wage issues, at least, by the end of the September 8 meeting, if not earlier, is hardly open to question. That view of the matter is undiminished by the fact that at the September 2 meeting Parton had said he would give further consideration to the Union's clothing allowance proposal, and had expressed interest in a "management rights clause," and in seeing a revised checkoff proposal in writing. The record impels a conclusion that by the end of the September 8 meeting, the Company's position on these matters and the remaining issues had hardened into a resolution by the Company to take a strike rather than yield any ground. In the face of the imminent strike, this was the clear meaning of Parton's statements at the meeting that the Company "could not move," had nothing to propose, and was ready for the threatened strike. It is noteworthy that these positions were taken in response to Wilson's statement that the Union "had room to move on the unresolved issues"; and that the Union did not, in fact, "move" at the meeting, but, instead launched the strike shortly thereafter. In the context of circumstances, the very fact that it followed this course is persuasive evidence that it, too, regarded the negotiations as deadlocked.

I find, in short, that the negotiating parties reached a genuine impasse in collective bargaining on the subject of the wage rate increases for the operator and laborer classifications, and that the Company did not violate its bargaining obligation by the increases put into effect on September 13.

As for Walker, the central question is whether his promotion constituted him a supervisor within the purview of the Act. The General Counsel makes no

claim that the Company was obligated to bargain over a promotion to that status, but argues, rather, that Walker did not, in fact, achieve it, and is thus still in the bargaining unit, and that, therefore, the wage increase given him, without negotiation with the Union, constituted an unlawful refusal to bargain.

That Walker, in contrast to Foreman Couch, who is paid a straight weekly salary, is paid at an hourly rate and takes his regular turn as an operator is not decisive of the issue, for he was given additional duties as assistant foreman. Nor is it controlling that Walker is "in training" for the job of foreman, nor that at a meeting with representatives of the Union, held during the week following the end of the strike, in reply to a query by Wilson as to Walker's status, Parton said that the latter was "a lead operator," and "supposed that he was still in the bargaining unit." (Creider, who was present, took a contrary position, stating that Walker is a supervisor, and "can't be in the bargaining unit.") The nub of the matter is that the labels given Walker do not define his status under Section 2(11) of the Act, and that the hinge question is whether any of the additional duties given him with his promotion place him within the reach of the statutory definition of "supervisor.'

The fact that the processing of sulphuric acid at the plant is a continuous 24-hour operation bears materially on the issue. From time to time, an operator on duty during one of the two nightshifts or on weekends, or a driver engaged in night hauling, will encounter a problem or other situation which requires a supervisory judgment, and in such cases, prior to Walker's promotion, the employee involved usually called Couch or Creider at home for instructions, looking primarily to Couch rather than Creider, for direction, since Couch was the immediate supervisor of the labor force. Calls to Couch from operators at night and during weekends averaged some four to six a week.9 Either he or Creider was usually at home on weekends to be available for a call from the plant.

Parton gave testimony to the effect that the labor force at the plant is too small to require two full-time foremen, but that the continuous nature of the operation requires "full-time supervision"; and that the new position was created to provide a substitute for Couch to receive calls from employees in need of supervisory direction while on duty during the night or on weekends, thus providing relief for Couch during such period, and obviating any necessity that either he or Creider remain at home every weekend.

⁸ N L R B v Bradley Washfountain Co, 192 F 2d 144, 150-152 (C A 7), American Laundry Machine Co, 107 NLRB 1574, 1581, cf N L R B v Crompton-Highland Mills, Inc, 337 U S 217, 224, N L R B v Benne Katz, etc, d/b/a Williamsburg Steel Products Co, 369 U S 736, 745

⁹ The General Counsel's cross-examination of Creider would make it appear that Creider testified that prior to Walker's promotion, the combined average of nighttime and weekend calls from operators to himself and

Couch amounted to four, but what Creider said, in effect, was that "in addition" (to one or two weekend calls, according to the sense of the testimony), Couch was receiving "three or four during the week " I credit this estimate, noting in that regard that it is not refuted by testimony by one operator, Eugene Barrera, that during the night shift tours that he has had since Walker's promotion, the latter has come to the plant only once

According to Creider, upon creation of the new position, he filled it with Walker, who was then the "senior operator," with substantially more experience than the other three operators; and told Walker, upon his appointment, that his duties would be "very similar" to those of Couch, "but to a somewhat lesser degree," and that he and Couch were to be available at home on alternate weekends for calls from employees on duty. Creider testified, too, without specifying any date, that he told Walker that he has authority to discharge, reprimand, or otherwise discipline employees; change their work assignments, act on grievances; and make hiring recommendations.

The General Counsel intimated a position at the hearing (although omitting the claim from his brief) to the effect that Walker's promotion, which came less than a week before the strike, was a subterfuge, in anticipation of the strike, aimed at giving Walker a supervisory facade for continuing to work during the strike. Parton denied having such a purpose. There is actually no evidence that Walker worked during the strike, but whether he did or not, the weight of the evidence does not support the General Counsel's intimated theme. In view of the continuous processing operations and nighttime trucking, it seems only rational that the Company would provide for an additional supervisory aide empowered to act on emergency calls from the plant or drivers on the road, thus materially reducing the amount of time Couch would otherwise be confined to his home at night and on weekends to keep himself available for such calls, and substantially relieving Couch's superior, Creider, of the burden of calls of that nature. Significantly, the Company has a history of successive designations of various operators (apparently no longer in its employ) to serve as relief for Couch and Creider in taking emergency calls at home during night and weekend shifts. Neither the authority of such personnel, nor the extent to which they exercised it, is spelled out with sufficient detail or clarity to warrant a judgment whether their supervisory status met the statutory definition, and, in any case, their status is not in issue;¹⁰ but the very fact that the Company has a history of attempting to provide some supervisory relief for Couch and Creider argues against a claim that the new position given Walker was but a contrivance designed to serve a strike-breaking purpose of the management.

Moreover, so far from being merely theoretical, Walker's supervisory authority is exercised in substantial ways. He receives and handles about a third

It is reasonable to infer that when an operator on a night or weekend shift encounters an emergency that leads him to look to Couch or Walker for direction or guidance, the problem is not routine, but requires the exercise of responsible and independent judgment by the supervisor for its resolution, and that conclusion is reinforced by the fact that the production processes at the plant may involve safety hazards if the equipment is not operated properly. Similarly, the record warrants a conclusion that such supervisory functions of Walker as the authorization of overtime, assignment of employees, rearrangement of shift schedules, and the dispatch of drivers and trucking equipment to meet road emergencies require his use of responsible and independent judgment.

While it is true that 'Valker's actual working time is devoted, in the main, to the nonsupervisory duties of an operator, and the actual applications of his supervisory authority are subject to the vagaries of industrial chance and circumstance, the Act

of the night and weekend calls made by employees seeking supervisory guidance or direction (Couch receives and handles the balance); keeps himself available for such calls every other weekend, alternating with Couch; and during his weekend turns, visits the plant to make sure that it is operating properly and that those on duty are adequately supplied. He has rearranged and extended shift schedules of other employees to fill manpower needs occasioned by absences because of vacations or illnesses; has assigned drivers and trucking equipment to meet emergency problems on the road; in response to complaints from employees that they have been harrassed by other employees, has warned the latter that they are subject to discharge or other discipline for misconduct; has authorized overtime by other employees on a number of occasions; has served as a graveyard shift foreman for a period of about a week in supervising the work of eight or more employees engaged in a special project of overhauling equipment; and has effectively recommended the promotion of a helper to a position as "stand-by operator." In addition, Walker, as assistant foreman, has various functions and privileges which although not of themselves supervisory in nature are often identified with a supervisory status. Thus, unlike any other employees in the bargaining unit, he attends meetings of management personnel; has keys to the entire plant, including the office; and has access to the Company's personnel and other office records.11

¹⁰ According to Creider, these operators did not have the authority given Walker, and Parton testified that the system "didn't work out for various reasons" (not elaborated) The General Counsel, in effect taking the position that such operators were not supervisors within the meaning of the Act, sees significance in the fact that none had the title of "assistant foreman" But the absence of a label, like its presence, does not define a supervisory status under the Act, nor does the record establish that the operators in question had the same duties, in all material respects, as Walker now had.

The findings as to Walker's supervisory functions are based on undisputed testimony given by him and Creider. This testimony is not effectively refuted by Barrera's testimony to the effect that on the occasions that he has worked at night since Walker's promotion, the latter has come to the plant only once "as a trouble-shooter," and on that occasion, in response to an emergency call by Barrera to Creider who, according to Barrera, sent Walker Conceivably, Barrera's experience with Walker is not typical of that of other employees on night and weekend shifts

prescribes no quantum standard for the performance of any of the functions that qualify one for supervisory status within the statutory definition, and it would serve no useful purpose to search for analogy among the many cases where the Board or the courts have had occasion, in applying the definition, to draw a line between part-time supervisory functions that are substantial and those that are not. Because of the vast range of variables that may condition the actual function and scope of a supervisory structure, each case must of necessity be determined on its particular facts. Here the decisive considerations, in my view, are that Walker is vested with standing authority to exercise responsible supervision over the assignment and work of other employees of the Company during all night shifts, and on alternate weekends, as circumstances require, and that these have arisen in substantial number, and with substantial frequency, as I infer from the evidence that he handles about a third of the night and weekend emergency calls. Because of such considerations, I find that Walker is, and has been since his promotion to the position of assistant foreman, a supervisor within the meaning of Section 2(11) of the Act.

That determination leads me to conclude, and I find, that the Company did not violate its bargaining obligation by unilaterally giving Walker the wage increase that went with his promotion to that supervisory status.

CONCLUSIONS OF LAW

Upon the basis of the foregoing findings of fact, and upon the entire record in this proceeding, I

make the following conclusions of law:

- 1. The Company is, and has been at all material times, an employer within the meaning of Section 2(2) of the Act.
- 2. The Union is, and has been at all material times, a labor organization within the meaning of Section 2(5) of the Act.
- 3. All production and maintenance employees, including truck driver, employed at the Company's place of business in El Paso, Texas, but exclusive of office clerical employees, professional employees, guards, and supervisors as defined in the Act, constitute, and have constituted at all material times, a unit appropriate for the purposes of collective bargaining, within the meaning of Section 9(b) of the Act.
- 5. The said Union is, and has been at all material times, the exclusive representative of all the employees in the aforesaid unit for the purposes of collective bargaining, within the meaning of Section 9(a) of the Act.
- 6. The record does not establish that the Company committed the unfair labor practices imputed to it in the complaint.

RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact and conclusions of law, and the entire record in this proceeding, I recommend that the National Labor Relations Board dismiss the complaint.¹²

in Section 102 48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and order, and all objections thereto shall be deemed waived for all purposes

¹² In the event no exceptions are filed as provided by Section 102 46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and Recommended Order herein shall, as provided