

**Wisconsin Contractors, Inc. and Local Union No. 6-111 Oil, Chemical and Atomic Workers, affiliated with the Oil, Chemical and Atomic Workers International Union. Case 30-CA-1010**

June 22, 1970

### DECISION AND ORDER

BY MEMBERS FANNING, BROWN, AND JENKINS

On October 30, 1969, Trial Examiner William W. Kapell issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged 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 alleged unfair labor practices. Thereafter, the General Counsel filed exceptions and a brief in support thereof; the Respondent filed cross-exceptions to certain parts of the Trial Examiner's Decision.

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 briefs, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner as modified herein.

The Trial Examiner found, and we agree, that the Respondent's failure to post the M-4 jobs pursuant to the collective-bargaining agreement changed the contractual terms and conditions of employment without complying with the requirements of Section 8(d) of the Act, thereby violating Section 8(a)(5) of the Act. However, he further found that the as-

signment of the operation of the M-4's and the Midwest plow to nonunit personnel did not violate Section 8(a)(5) and (1) of the Act. In reaching this conclusion the Trial Examiner found that the Respondent had bargained to impasse with the Union<sup>1</sup> over whether the M-4 work belonged to the unit and whether any of the Union's members were capable of performing the work.<sup>2</sup> The General Counsel excepts to that finding. We find merit in the General Counsel's exception.

In late 1968 the Respondent decided to expand its operations with heavy equipment capable of plowing in up to 4-inch plastic pipe (a new development in the art) and 4-inch cable for electric and telephone companies. Two M-4 tanks and a Midwest Static Mainline plow were acquired for this purpose. In conjunction with its plan to expand its operation or form a new division<sup>3</sup> the Respondent hired James Hicks, a graduate engineer with extensive experience in road and building construction work.

Although the new equipment is larger and more powerful than the equipment previously operated by the O.C.A.W., the M-4's were to be used to pull the Midwest plow in a manner similar to that in which O.C.A.W. had used the smaller tractors to pull the PT-90 and Ulrich vibrating plow. The Trial Examiner concluded that by reason of the similarity of function and purpose the M-4 was properly unit work.

On April 2, 1969, one of the M-4's was used for the first time on an unplanned emergency basis.<sup>4</sup> The M-4 was operated by a nonunit employee, Redell,<sup>5</sup> over the O.C.A.W.'s protest. On April 8, at the O.C.A.W.'s request, a meeting was held to discuss the operation of the M-4's. At this meeting Kunze, the president of the O.C.A.W. local, complained that Respondent was breaching its contract by using non-O.C.A.W. welders to operate the M-4's, that this work was unit work, and that there were seven O.C.A.W. members on layoff status. Soetenga, Respondent's general manager and vice president, denied that the contract covered the operation of the M-4's, claimed the O.C.A.W. had

<sup>1</sup> Hereinafter referred to as O C A W or the Union

<sup>2</sup> The Trial Examiner found the operation of the M-4's and the Midwest plow was unit work, yet despite this finding he concluded that the Respondent was warranted in departing from its past practice relative to trial periods (a 30-day trial period) in operating new machines because of the greater safety problems involved in the operation of the M-4's. The General Counsel excepts, contending the Respondent's unilateral departure from its past practice with respect to trial periods, which was not included as a separate allegation in the complaint, violated 8(a)(5). Since this issue is encompassed within the overall issue of whether Respondent unilaterally assigned new jobs to nonunit people prior to notifying the Union and to affording it an opportunity to bargain about the matter, we treat it within that broader context.

<sup>3</sup> The Respondent did not set up a new corporation or negotiate separate working agreements for what it referred to as a new division. Nor, except

for a discussion with union officials concerning the feasibility of the Union providing men for a specific job at Tamms, Illinois, did the Respondent discuss its intentions or long-range plans with respect to the new work until after the operation of the M-4's had been assigned to the nonunit employees.

<sup>4</sup> As we view this case it is unnecessary to adopt the Trial Examiner's distinction between normal and emergency operations.

<sup>5</sup> Over the years Respondent employed welders who were not members of O C A W, but were hired because of O C A W's inability to provide sufficient welders. These welders perform shop maintenance work and weld pipe on jobs only. They did not otherwise perform unit work. At the time of the hearing the Respondent employed two such welders, the above-mentioned Redell (a member of both the Plumbers and the Operating Engineers) and Peyer (a member of the Plumbers).

no one qualified to run the M-4's, and affirmed his decision to assign Redell to operate the M-4's. When Kunze demanded that the jobs be posted and O.C.A.W. members be given the 30-day trial period to familiarize themselves with the M-4's in accordance with the contract and past practice, Soetenga refused, asserting that the contract applied only to the laying of gas pipe and not to underground cable work. At two other meetings held on May 19 and July 30, the Respondent adhered to its position.

We are unable to agree with the Trial Examiner that the Respondent bargained in good faith to impasse. At the meetings with the Union the Respondent insisted only that the contract with O.C.A.W. did not cover nongas work in spite of the fact that the unit employees had been doing nongas work of a similar nature since 1965.<sup>6</sup> Prior to this time, the Respondent had never questioned the application of the contract to its nongas work. In these circumstances, we hold that the Respondent's contention was not advanced in good faith.

At the meetings with O.C.A.W., the Respondent also stated that O.C.A.W. had no members qualified to operate the new equipment. The Respondent, however, had never in the past questioned the ability of the O.C.A.W. unit employees when it acquired new equipment. Rather, the Respondent had utilized the posting provisions of the contract and the trial period as established by past practice. The Respondent's refusal to abide by the contract and past practice further evidences its bad faith. This is not to say that Respondent was obligated to assign an O.C.A.W. member to the M-4 if none were qualified. It is only to say that the O.C.A.W. members were entitled to an opportunity to qualify to operate the new equipment similar to that they had been given when Respondent acquired new equipment in the past.<sup>7</sup>

Moreover, it appears clear that, at the time of its discussions with the Union, the Respondent had no intention of using O.C.A.W. people to operate the

M-4's even if qualified. In fact the record reveals Respondent had decided as early as January or February 1969 to use members of the Operating Engineers to operate the M-4's and the Midwest plow. Soetenga testified that in January 1969 he (and Hicks) had decided that members of the Operating Engineers would operate the M-4's and the plow;<sup>8</sup> he further testified he had advised Hicks to contact the Operating Engineers prior to April 2 (an agreement with the Operating Engineers was signed on April 24).

In our opinion the Respondent's overall conduct did not meet the requirements of the statutory bargaining duty to bargain in good faith. It neither provided adequate notice nor otherwise afforded the Union an opportunity to engage in meaningful bargaining prior to the assignment of the M-4's or thereafter. Accordingly, we find the Respondent's unilateral assignment of nonunit employees to operate the M-4's and the Midwest plow violative of Section 8(a)(5) of the Act.

#### ADDITIONAL CONCLUSIONS OF LAW

5. By failing to notify the Union and affording the Union an opportunity to bargain about the filling of newly created unit jobs, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

#### THE REMEDY

The Trial Examiner ordered the Respondent to cease and desist from changing the terms and conditions of employment by failing to post job vacancies or newly created jobs, and to post his attached notice to that effect. In addition to that remedial provision we will order the Respondent to bargain with the Union over the filling of job vacancies or newly created jobs where it may be necessary, in the future, to deviate from past practice. For, in our

<sup>6</sup> Despite the changes in operation, Respondent's successive renewal contracts with O C A W remained unchanged

<sup>7</sup> In this regard it should be noted that O C A W member Ranker, who had operated an M-4 in World War II and had been operating similar although smaller and less sophisticated equipment for Respondent, was not given an opportunity, the contract notwithstanding, to qualify on the M-4. On the other hand Redell, an Operating Engineer who had never operated an M-4 and who had spent at least the last 8 years as a welder, was assigned to the job. The issue is not whether Ranker could have operated the M-4 but whether, pursuant to the contract and past practice, he should have been given the opportunity

<sup>8</sup> The General Counsel contended the Respondent had decided to use members of the Operating Engineers long before April 2, 1969. The Respondent argues that the portion of the record relied on by the General Counsel refers only to the prospective job at Tamms, Illinois, as did all testimony with respect to contacting the Operating Engineers. However, the record does not support the Respondent's contention, since the above-

mentioned statement by Soetenga was not made with reference to the Tamms job. Moreover, Soetenga testified that Hicks' contract with the Operating Engineers just prior to April 2 was not with regard to the Tamms job but in anticipation of development of the new division.

Likewise, Hicks' testimony indicated Respondent had decided not to use O C A W people on the M-4's. He testified that although, to his knowledge, none of the O C A W people were qualified to operate the M-4 tractor, "there are a number of people that could be trained to operate the equipment." Hicks' testimony revealed his feeling toward the O C A W, which he testified he had never heard of until he came to Respondent. He testified that with the companies he had previously been associated with hiring was done by calling the various unions (Carpenters, Operating Engineers, etc.) and telling them what you needed. When the dispatched employees arrived, if they had some qualifications you accepted them and watched them operate, if they were not qualified you sent them back. Yet Hicks was not willing to give the O C A W members the same opportunity in spite of the O C A W contract.

opinion, it is clear that effectuation of the policies of the Act requires that the Respondent be directed to cease and desist from failing to notify the Union before making any future decision to remove work from the unit represented by the Union, and also to bargain upon request with the Union with respect to any such proposed decision insofar as it affects rates of pay, wages, hours of employment, and other terms and conditions of employment.

Finally, the mere posting of job vacancies or newly created jobs will not suffice herein in view of the past practice of giving eligible employees an opportunity to try out on the job for a 30-day period. Since this practice was unilaterally changed by Respondent, the O.C.A.W. members were deprived of an opportunity to qualify for the M-4 jobs. Therefore, we will order that the Respondent provide a qualifying period for interested O.C.A.W. applicants and the award of backpay (the difference between their regular rate and the M-4 rate, if any) to the O.C.A.W. members who qualify as M-4 operators.<sup>9</sup>

#### 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 herein, and hereby orders that Respondent, Wisconsin Contractors, Inc., Lake Geneva, Wisconsin, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order, as so modified:

1. Add the following as paragraph 1(b) and re-letter the following paragraph accordingly:

"(b) Unilaterally filling newly created unit jobs without prior notification to the Union and prior to affording the Union an opportunity to bargain with respect to such jobs."

2. Add the following as paragraph 2(a) and re-letter the following paragraphs accordingly.

"(a) Upon request, meet and bargain with the O.C.A.W. over any removal of work from the established unit, job vacancies, and newly created jobs, and provide the opportunity for unit members to qualify for the M-4 jobs as provided in The Remedy section of this Decision."

3. Substitute the attached notice for the notice attached to the Trial Examiner's Decision.

<sup>9</sup> This does not mean that the Respondent must allow all O C A W employees an opportunity to qualify on the M-4. For under the Respondent's past practice job assignments on new equipment were made after it decided which employees had the potential to acquire sufficient operating skill within a 30-day trial period. It means only that Respondent may not disregard potentially qualified unit employees as it did herein.

#### APPENDIX

#### NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

WE WILL NOT assign newly created unit work to nonunit members without prior notification to Local Union No. 6-111 O.C.A.W. and prior to providing the Union an opportunity to bargain with respect to such jobs.

WE WILL NOT make changes in the existing rates of pay, wages, or other terms and conditions of employment so as to alter the existing rates of pay, wages, or other terms and conditions of employment, without giving prior notice to and bargaining with the Union over any proposed changes, and the effects of such changes on employees.

WE WILL, upon request, bargain collectively with Local Union No. 6-111 O.C.A.W. with respect to the filling of job vacancies or newly created jobs.

WE WILL, in accordance with past practice, provide an opportunity for O.C.A.W. members to qualify as M-4 operators and award backpay, if appropriate, to O.C.A.W. members who so qualify.

WE WILL NOT change the terms and conditions of employment by failing to post job vacancies or newly created jobs as heretofore required.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights under the Act.

WISCONSIN  
CONTRACTORS, INC.  
(Employer)

Dated

By

(Representative) (Title)

This is an official notice and must not be defaced by anyone.

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.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Second Floor, Commerce Building, 744 North Fourth Street, Milwaukee, Wisconsin 53203, Telephone 414-272-3861.

## TRIAL EXAMINER'S DECISION

### STATEMENT OF THE CASE

WILLIAM W. KAPPELL, Trial Examiner. Case 30-CA-1010, a proceeding under Section 10(b) of the National Labor Relations Act, as amended, herein called the Act, was heard in Lake Geneva, Wisconsin, on August 28 and 29, 1969,<sup>1</sup> with all parties participating pursuant to notice on the complaint<sup>2</sup> issued on August 8 by the Regional Director for Region 30, alleging violations of Section 8(a)(1) and (5) by Wisconsin Contractors, Inc., hereafter referred to as the Company or Respondent. The complaint alleges in substance that since on or about April 8, Respondent has refused and continues to refuse to bargain in good faith with O.C.A.W. by unilaterally removing bargaining unit work from unit employees and assigning such work to employees outside the unit without any prior notification to or bargaining with the Union and without observing the contractual job posting provisions of their current collective-bargaining agreement in violation of Section 8(a)(1) and (5) of the Act. Respondent in its duly filed answer admitted that at all times material herein it has recognized and bargained with O.C.A.W. as the exclusive bargaining representative of an appropriate unit of all its production and maintenance employees performing local gas pipeline installation work, and that, on April 2, 3, 7, 8, and 21, it assigned the operation of an M-4 tractor to an employee not a member of the unit represented by the Union under emergency circumstances to extricate trucks and equipment of the Wisconsin Electric Power Company from a swampy area, and denied that O.C.A.W. has unit members qualified to operate the M-4 tractor or that the operation of the M-4's was work included within the scope of their collective-bargaining agreement, as claimed by the Union, and pleaded further that disagreement over the assignment of the work in question gave rise to a jurisdictional dispute necessitating a 10(k) hearing which must be determined before the within proceeding can be processed.

All parties were afforded full opportunity to be heard, to introduce relevant evidence, to present oral argument, and to file briefs. Respondent and the General Counsel filed briefs which have been

duly considered. On the entire record<sup>3</sup> in the case, and from my observation of the witnesses, I make the following:

### FINDINGS OF FACT

#### I. COMMERCE

Respondent, a Wisconsin corporation, maintaining its principal office in Lake Geneva, Wisconsin, where it is engaged in the business of laying underground cable and pipelines made purchases of machinery and equipment from points located outside the State of Wisconsin in excess of \$8,000 during the past year, and during the same period, in the course and conduct of its business, it performed services in excess of \$50,000 for Wisconsin Southern Gas Company, Inc., a public utility providing gas service to industries and homes throughout southern Wisconsin. During the past year, said gas company had gross sales in excess of \$500,000 and purchased and received, in interstate commerce, goods and service valued in excess of \$50,000 from points located outside Wisconsin. Respondent admits, and I find, that at all times material herein it has been engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

#### II. THE LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that at all times material herein O.C.A.W. has been a labor organization within the meaning of Section 2(5) of the Act.

#### III. THE ALLEGED UNFAIR LABOR PRACTICES

##### A. Background

Respondent was organized as an independent company in 1951 to take over the installation of short main extensions and services for the Wisconsin Southern Gas Company, hereafter referred to as the Gas Company, a Wisconsin public utility located in Lake Geneva, Wisconsin. Prior to Respondent's organization, such work had been performed by the Gas Company. For many years Respondent virtually performed only such work. In the last several years such work gradually saturated the area and its expansion rate declined, although it still remained Respondent's principal source of revenue, totaling about 86 percent of its gross income pursuant to a blanket contract on a cost-plus basis. As a consequence of the failure of the work to expand, Respondent since about 1965 began doing underground installation work (trenching for

<sup>1</sup> All dates hereafter refer to the year 1969 unless otherwise noted

<sup>2</sup> Based on a charge filed on April 25, by Local Union No 6-111 Oil, Chemical and Atomic Workers, affiliated with the Oil, Chemical and

Atomic Workers International Union, hereafter referred to as O C A W

<sup>3</sup> Pursuant to General Counsel's stipulated motion, the transcript has been corrected as requested

laying electric cable) for Wisconsin Electric Power Company in the Lake Geneva area. This work is performed on a blanket contract unit price rather than on a cost-plus basis. More recently, a similar arrangement was entered into with Wisconsin Bell Telephone Company. The work for the Gas Company and the above two utilities has been limited to a geographical area consisting of Walworth, western Racine, and western Kenosha Counties. However, on occasion Respondent has done larger cross-country jobs on a competitive bid basis, such as the 1965 11-mile telephone cable trenching job between Evansville and Jamesville, Wisconsin, the 1966 trenching job across Delevan Lake, and the 1968 1,500- to 1,800-foot open trenching job for the electric company in Waukesha. In each of these jobs the O.C.A.W. members did not handle the electric or telephone cable but trenched or plowed the ground so that the utility employees could actually lay the cable. The equipment used in the above operations included a back hoe (a case tractor with a device on the back for digging well holes for setting pipe), a Cleveland trencher (a revolving wheel digger on caterpillar tracks for digging an open trench), a Parsons trencher (a chain digger on caterpillar tracks for digging an open trench), a Davis digger (a chain digger of various sizes), Ulrich PT-90 and Davis plows (vertical vibrating plows), small tractors, and various size trucks.<sup>4</sup> These machines are classified in the construction trades as small utility equipment.

At the time Respondent began operating in 1951, it took over and hired a number of Gas Company employees who were familiar with the work and had been members of O.C.A.W. Respondent, since that time, recognized and has entered into a series of collective-bargaining agreements with the O.C.A.W. as the representative of a unit consisting of production and maintenance employees. The most recent agreement became effective on March 1, 1968, and will expire on February 28, 1970.<sup>5</sup>

The work described above was performed exclusively by unit members. During the years, Respondent also employed welders who were neither members of nor became members of O.C.A.W., and were initially hired because of O.C.A.W.'s inability to provide qualified welders.<sup>6</sup> These welders perform maintenance work in the shop and also welded pipe on jobs. Currently, Respondent employs two such welders—Richard Redell,<sup>7</sup> hired in 1961, and James Peyer,<sup>8</sup> hired in 1965.

### B. Respondent Plans To Expand its Operations

In 1968 Respondent decided to expand its operations with heavy equipment capable of plowing in up to 4-inch plastic pipe (a new development in the market) and 4-inch cable<sup>9</sup> or wire for electric and telephone companies, a type of work in great demand and in short supply. Respondent formed a new division, hired James Hicks, a graduate engineer with extensive experience on road and building construction work and with the heavy equipment used in such work, purchased two M-4 tanks,<sup>10</sup> and rented on a purchase option plan a Midwest Static Mainline plow, capable of performing the new type of work. This equipment is much larger, more powerful, and more sophisticated than the machines previously operated by Respondent. Before placing the M-4 tanks in operation they were modified by Redell<sup>11</sup> under the direction of Hicks. The M-4's were to be used to pull the Midwest plow in the manner similar to that in which the smaller tractors had been previously used by O.C.A.W. members of the production and maintenance unit to pull the PT-90 and Ulrich vibrating plows.

### C. The Respondent Embarks on its New Work

In response to an emergency request of Wisconsin Electric Power Company to pull its equipment through and from a swampy area, Respondent on April 2 dispatched Redell with an M-4 to do the job. The following morning as Redell prepared to drive out of Respondent's yard with an M-4 on a lowboy trailer to continue the previous day's work, he was accosted by O.C.A.W. Steward Edward Baumeister and asked whether he knew that its members were on layoff status. As Redell replied in the affirmative, Foreman Robert Kirkman appeared and joined in the conversation. Baumeister also asked him whether he knew O.C.A.W. members were on layoff status and who was going to operate the M-4. When Kirkman replied that Redell would, Baumeister asked whether that was right inasmuch as Redell was not an O.C.A.W. member. According to Kirkman, corroborated by Redell, he told Baumeister to produce an O.C.A.W. man if he had one capable of operating the M-4. Baumeister thereupon walked to the shop about 40 feet away where a group of O.C.A.W. employees were congregated. After waiting several minutes during which Bau-

<sup>4</sup> In trenching the machine makes an open ditch in which pipe or cable is laid and the ditch is then backfilled. In plowing, the machine makes a v-shaped trench without removing any earth, the pipe or cable is then laid and the trench is closed by the machine and made smooth by being rolled.

<sup>5</sup> The recognition clause of the current contract provides:

The Company hereby recognizes the Union as the exclusive bargaining representative of all production and maintenance employees to whom this contract applies for the purpose of bargaining in respect to rates of pay, wages, hours, or other working conditions.

<sup>6</sup> Respondent also employed welders who were members of O.C.A.W.

<sup>7</sup> Currently a member of Local 722 of the Plumbers and Pipefitters and Local 139 of the Operating Engineers.

<sup>8</sup> A member of the Plumbers and Pipefitters.

<sup>9</sup> Much smaller cable had previously been laid in its trenching and plowing operations.

<sup>10</sup> Used by the military during World War II.

<sup>11</sup> The gun turrets and ammunition box were removed, the transmission was modified, and a rear deck was installed. In the performance of this work Redell, assisted by employee Glen Ranker, once or twice actually drove the tanks in Respondent's yard.

meister did not return and Redell remained in the yard, Kirkman directed Redell to proceed to the job.<sup>12</sup>

Pursuant to O.C.A.W.'s request a meeting with Respondent was held on April 8 to discuss the operation of the M-4's. Edward Kunze, the O.C.A.W. president, Glen Ranker, the O.C.A.W. vice president of Respondent's O.C.A.W. employees, and Baumeister appeared for O.C.A.W., while Henry Soetenga, general manager and vice president, and James Hicks, company engineer, appeared for Respondent. Kunze complained to Soetenga that Respondent was breaching their bargaining contract by using non-O.C.A.W. welders to operate the M-4's and the Midwest plow, that this work was unit work, and that there were seven O.C.A.W. members in layoff status awaiting recall. Soetenga denied that the bargaining contract covered the operation of the M-4's, claimed that O.C.A.W. did not have anyone qualified to operate them, asserted that he would not jeopardize the safety of the employees of the Electric Company, or risk damaging an expensive piece of equipment by permitting an unqualified man to operate the M-4, and also affirmed his adherence to Kirkman's initial decision to assign Redell to operate the M-4. When Kunze claimed that Ranker had had previous experience on the same equipment while in military service, Soetenga requested that Ranker submit a letter attesting to his experience with this type of equipment.<sup>13</sup> Kunze also demanded that Respondent post the job of operating the new equipment on the bulletin board in compliance with their contract, and that O.C.A.W. members be given a 30-day trial period in which to familiarize themselves with the operation of the machines, as had been their practice in the past. Soetenga refused, asserting that their contract applied only to the laying of gas pipe and not to underground cable work. Prior to this time however, Respondent had never questioned the application of the contract to its nongas work. On May 19, the same parties met again and reiterated and adhered to their respective positions regarding the operation of the new heavy equipment. At this meeting Soetenga also requested O.C.A.W. to submit its grievances in writing, which has never been done. On July 30, the parties met to discuss an unrelated grievance but they again restated their respective positions relative to the disputed work.<sup>14</sup>

Beginning in April and subsequently, Respondent, in addition to assisting the Wisconsin Electric

Company in pulling its equipment from a swampy area as indicated above, used non-O.C.A.W. employees, including new employees as well as the two non-O.C.A.W. welders, to operate the M-4's as prime movers for the Midwest plow on jobs involving a 3-mile telephone cable installation, an electric cable installation of 1,000 yards, and a 37-mile toll cable for the Wisconsin Telephone Company between Watertown and Madison, Wisconsin.

It also appeared that prior to April 2, Respondent had contacted the Operating Engineers in connection with the availability of men to operate the M-4's in anticipation of its newly expanded work, and on April 24 Respondent signed a bargaining contract with that Union.

#### *D. Employee Qualifications for Operating an M-4*

Redell, who was assigned to operate an M-4, testified that he had never operated one before, that he had worked on modifying and rebuilding them following their purchase by Respondent, and that he had performed the maintenance work on them. Hicks testified that in assigning personnel to operate M-4's, he considered the man's previous experience in operating similar equipment and his personal observation of the man's work, that he regarded Redell's prior operation of D-7, 8, and 9's, caterpillar tractors, as the best prerequisite for operating an M-4, and that on these grounds he assigned Redell to operate an M-4. Hicks also pointed out that the ability to start an M-4 or even run it while not in actual operation on a job was not comparable to the ability to operate it on a job, and that its operation on a job also increased the risk of injury to personnel as well as the extent of potential damage as compared to the operation of smaller equipment.

Ranker, an O.C.A.W. member classified as an operator, testified that he had operated the Davis 1000 (a tractor) without any prior training as he had with other new machines purchased by Respondent in the past, that about 17 years ago he operated an M-4 hauling artillery and ammunition while in military service, and that he helped Peyer (a nonunit welder) start an M-4 in the yard, and he actually drove it out of the shop into the yard. He, however, never claimed to be qualified to run an M-4 and had so advised Soetenga but believed he was potentially qualified to and could operate one within the 30-day trial period, if given the opportunity.

<sup>12</sup> I do not credit Baumeister's denial that Kirkman indicated to him that if he had someone available who could not operate the M-4, he (Kirkman) would let him operate it.

<sup>13</sup> Nothing was ever submitted, and Baumeister admitted that he was not personally familiar with Ranker's qualifications to run the M-4's.

<sup>14</sup> It appears that Respondent contemplated undertaking its first large-scale adventure in the new type of work several months prior to any of the above discussions between the parties. Thus, in the late fall of 1968, Soetenga had explored the possibilities of bidding on a rather extensive underground cable laying job for the city of Tamms, Illinois, about 350 miles

from the Lake Geneva area. During trips to Tamms he discussed the prospective job with local construction trade union representatives who claimed jurisdiction over the work. He also discussed the job with representatives of O.C.A.W. and its International regarding the use of its members in the Tamms area, but obtained no commitment as to their jurisdiction over the job other than that he could not force any O.C.A.W. members to work on the job in that area. After successfully bidding for the job, it was dropped because of the city's inability to finance the work due to the condition of the municipal bond market, and the nascent jurisdictional question never materialized to the point of requiring a resolution.

John Umnus, an O.C.A.W. member classified as an operator, testified that he had previously operated Respondent's lighter equipment in trenching, and that he could learn to operate the M-4's if given the opportunity as was done with other employees, including the newly hired employees, Swanson and Olsen.

#### E. *The Contentions of the Parties*

The General Counsel contends that the operation of the M-4's is unit work, and that without consulting O.C.A.W., Respondent unilaterally assigned this work to non-O.C.A.W. unit personnel, thereby changing the terms and conditions of employment in derogation of its duty to bargain and to post said jobs, in violation of Section 8(a)(1) and (5) of the Act. Respondent takes the position that the work in question is neither unit work nor covered by their contract, that, nevertheless, it bargained with O.C.A.W. concerning the work, that O.C.A.W. was unable to furnish qualified members to perform the work, and that its disagreement with O.C.A.W. gave rise to a jurisdictional dispute which must be resolved before the within proceeding may be processed.

#### F. *The Conclusions*

##### 1. *The jurisdictional contention*

I find that the facts herein do not disclose a "jurisdictional dispute" as contemplated in Sections 8(b)(4)(D) and 10(k) of the Act. There was no competition for the disputed work between unions or groups of employees in the sense envisioned by Congress in those sections. Here, the Employer created the dispute by assigning the work to non-O.C.A.W. employees rather than to employee-members of that Union as it demanded. As the court stated in *Pennello v. Local Union No. 59, Sheet Metal Workers International Association [E. I. Dupont de Nemours & Co.]*, 195 F. Supp. 458 (D.C. Del.), the application of Sections 8(b)(4)(D) and 10(k) was confined to disputes "between rival groups of employees" and not to disputes between an employer and a union as such. See also *Highway Truck Drivers and Helpers, Local 107 (Safeway Stores Inc.)*, 134 NLRB 1320, 1322-23. I, accordingly, conclude that there is no merit to Respondent's contention that there is a jurisdictional dispute involved herein which precludes processing the within proceeding unless and until a 10(k) determination is made with regard to the work in question.

##### 2. *The changes in Respondent's work and the effect on the production and maintenance unit*

Initially, Respondent's production and maintenance employees were engaged solely in perform-

ing trenching and related work for the Gas Company. In fact, some of its employees originally were transferred from that Company to Respondent when it was organized, and Respondent's bargaining contracts with O.C.A.W. appear to match the Gas Company's contracts with O.C.A.W. Beginning about 1965, Respondent began trenching and plowing for the laying of cable for electric and telephone companies. Meanwhile, from about 1951 and continuing to the present time, Respondent has hired non-O.C.A.W. welders, members of the Pipefitters and the Operating Engineers, with the consent of O.C.A.W. whenever it was unable to supply them upon request. The current roster of employees shows that members of the Laborers union are also employed. These non-O.C.A.W. members were hired to perform specialized production or maintenance work which they did in concert with the O.C.A.W. production and maintenance members. Despite these changes in operation and hiring practices, Respondent's successive renewal contracts with O.C.A.W. remained unchanged.<sup>15</sup>

As indicated above, Respondent for the past several years has been engaged in digging and plowing trenches for the laying of gas pipe or small electric or telephone cable, which has been performed by its production and maintenance employees. During that period Respondent on occasion has purchased new and more sophisticated equipment to perform that work. This equipment was regarded as small utility equipment, as was its other equipment, and the production and maintenance employees, who were assigned to operate the new equipment, were, when feasible, given a 30-day trial period in which to familiarize themselves with its operation in accordance with the past practice of Respondent. The M-4's, following their modification, became in reality heavy tractors more powerful than Respondent's other tractors, and capable of pulling heavier and more powerful trenchers or plows required in the laying of up to 4-inch plastic pipe or electric cable. Neither the purpose nor the nature of Respondent's work was changed, only the power of its new equipment was greatly increased. The production and maintenance unit already contained employees of various skills, such as operating small tractors, trenchers, and trucks. The operation of the M-4's would require an additional skill. I, therefore, conclude that by reason of the similarity of function and purpose, the operation of the M-4's properly belongs in the production and maintenance unit. However, the higher sophistication, increased power, and larger size of the M-4's presented a greater safety problem in their operation than the other smaller machines used by Respondent. Their operation involved not only the

<sup>15</sup> Apparently, O C A W made no attempt to exercise its contractual rights under the "Maintenance of Membership" provision (which in effect was also a union-security provision), and the non-O C A W employees doing production or maintenance work retained their own union affiliations, and did not become members of O C A W

safety of their operators and the utility employees working in the immediate vicinity but also the possible damage to this very expensive equipment. In view of these factors, the assignments to operate the M-4's were made to employees, who appeared to management to be the most capable of operating them immediately on jobs, rather than to risk entrusting their operation to employees who may have had the potential to acquire sufficient operating skill in a 30-day trial period. I, accordingly, find that these conditions warranted Respondent in departing from past practices relative to trial periods in operating new machines

### 3. The posting requirement

In connection with "Job Vacancies," the contract provides:

Job vacancies or newly created jobs shall be posted on the bulletin board at all offices for one [(1)] week. Rates of pay and hours of work shall be clearly stated in the notice.

As found above, Respondent regarded the operation of the M-4's as newly created jobs to which it assigned incumbent unit-members as well as newly hired employees. Regardless of whether or not Respondent concluded that none of its employees except Redell and Peyer were competent to compete for the new jobs, the aforesaid provision required that the jobs be posted. Respondent's failure to do so changed the contractual terms and conditions of employment without complying with the requirements of Section 8(d) of the Act, in violation of Section 8(a)(5).

### 4. The alleged failure to bargain

If, as claimed by the General Counsel, and as has been found above, the new jobs were unit work, then it would follow that there was an obligation to bargain about the new assignments. Although Respondent contended that the jobs involved were not unit work and, therefore, was under no obligation to bargain with O.C.A.W., it, nevertheless, on several occasions discussed the matter with O.C.A.W. and argued to impasse not only whether the work belonged to the unit, but also the competency of O.C.A.W. members to operate the M-4's.<sup>16</sup> O.C.A.W. took the position during these negotiations that the disputed work was unit work which had to be assigned to O.C.A.W. unit-members.

For almost two decades the parties have maintained a generally amicable bargaining relationship. There is no suggestion that the charges which are the subject of the instant proceeding were other than economically motivated. Nor does it appear

that Respondent acted in bad faith in discussing the dispute with O.C.A.W. and adhering to its position. Also, it must be noted that Respondent has been willing to meet and discuss the dispute, which should be entitled to some weight in an evaluation of its overall conduct. Based on the totality of the evidence, I conclude that the General Counsel has failed to prove by the preponderance of the evidence that Respondent failed to bargain in violation of Section 8(a)(5) of the Act.

### IV. THE EFFECT OF THE UNFAIR LABOR PRACTICE UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with Respondent's operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

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

#### CONCLUSIONS OF LAW

1. At all times material herein, Respondent has been engaged in commerce as an employer within the meaning of Section 2(6) and (7) of the Act.

2. At all times material herein, O.C.A.W. has been a labor organization within the meaning of Section 2(5) of the Act.

3. By failing to post the jobs to operate the M-4's Respondent changed the conditions and terms of employment without complying with Section 8(d) of the Act in violation of Section 8(a)(1) and (5).

4. Respondent has not engaged in other alleged unfair labor practices not specifically found herein.

#### THE REMEDY

Having found that Respondent engaged in an unfair labor practice in violation of Section 8(a)(1) and (5) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

#### RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact and conclusions of law and the entire record in this case, I recommend that Wisconsin Contractors, Inc., its officers, agents, successors, and assigns, shall:

<sup>16</sup> While the initial assignment to Redell to assist the Electric Power Company extricate its equipment from a swampy area was made prior to any discussion with the Union concerning the assignment, I do not regard this emergency work as regular operations involving trenching and plow-

ing, which is in issue herein. Discussions relative to M-4 assignments did take place prior to any M-4 operations on regular jobs. See *Hartmann Luggage Company*, 145 NLRB 1572, as to the effect of the prediscussion assignment.

## 1. Cease and desist from:

(a) Changing the terms and conditions of employment by failing to post job vacancies or newly created jobs within the meaning of Section 8(a)(5) and 8(d).

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

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

(a) Post at its plant in Lake Geneva, Wisconsin, copies of the attached notice marked "Appendix."<sup>17</sup> Copies of said notice, on forms provided by the Regional Director for Region 30, after being

duly signed by its representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 30, in writing, within 20 days from the receipt of this Decision, what steps have been taken to comply herewith.<sup>18</sup>

IT IS FURTHER RECOMMEND that the complaint be dismissed insofar as it alleges that Respondent has violated the Act other than as found herein.

<sup>17</sup> 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, recommendations, and Recommended Order herein shall, as provided 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. In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the Na-

tional Labor Relations Board" shall be changed to read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

<sup>18</sup> 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."