

**Rucker Company, The, Roylyn Division and International Association of Machinists, District #727, Local #758, AFL-CIO. Case 31-CA-1641**

June 29, 1970

### DECISION AND ORDER

BY MEMBERS FANNING, BROWN, AND JENKINS

On March 18, 1970, Trial Examiner George H. O'Brien issued his Decision the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices within the meaning of the National Labor Relations Act, as amended, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision, together with a supporting brief.<sup>1</sup>

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 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.

### 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 and hereby orders that the Respondent, The Rucker Company, Roylyn Division, Glendale, California, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's recommended Order.

<sup>1</sup> As the record, exceptions, and brief adequately present the contentions of the parties, we hereby deny Respondent's request for oral argument

### TRIAL EXAMINER'S DECISION

#### STATEMENT OF THE CASE

GEORGE H. O'BRIEN, Trial Examiner: The case arises on a Motion for Summary Judgment filed by counsel for the General Counsel upon an admitted

refusal by the Respondent<sup>1</sup> to bargain with the certified Charging Union, the Respondent contending that the certification of the Union in the related representation case is invalid.

#### The Representation Proceeding<sup>2</sup>

Upon a petition filed under Section 9(c) of the National Labor Relations Act on July 19, 1968, by Roylyn, Inc., Respondent herein, Respondent and International Association of Machinists, District #727, Local #758, AFL-CIO, herein called the Union, entered into a Stipulation for Certification Upon Consent Election on July 29, 1968, which was approved by the Regional Director for Region 31 on July 30, 1968.

On August 28, 1969, the Board handed down its Decision and Order To Open and Count Challenged Ballots (178 NLRB 197) wherein it stated:

Pursuant to a stipulation for certification upon consent election, an election by secret ballot was conducted on August 9, 1968, under the direction and supervision of the Regional Director for Region 31, among the employees in the unit agreed upon by the parties. At the conclusion of the election, the parties were furnished with a tally of ballots which showed that of approximately 132 eligible voters, 117 cast ballots, of which 36 were for the Union, 53 were against, and 28 were challenged. The challenged ballots were sufficient in number to affect the results of the election. No objections were filed to conduct affecting the results of the election.

Pursuant to the provisions of the National Labor Relations Board Rules and Regulations, after reasonable notice to the parties and opportunity to present relevant evidence, the Regional Director conducted an investigation of the issues raised by the challenges and on November 6, 1968, issued and served upon the parties his Report on Challenges to the ballots cast by Charles Weyhrauch, Otto Hager, Robert Knapp, Frank Van Wagner, and John Bozis be sustained, and further recommending that the challenges to the ballots cast by Imants Bozis, Thomas Byrd, James Brazier, Jarold Comer, Lynn Davis, Walter Dietrich, Emery Gant, Donald Heath, Frank Lewis, John Roberts, William Stuckenbroker, Jack Wiley, James Anderson, A. E. Berthold, Lawrence

<sup>1</sup> The complaint was amended to conform to an averment in Respondent's answer that "Respondent alleges that it is now a Division of The Rucker Company, a California Corporation, successor to Roylyn, Inc."

<sup>2</sup> Administrative or official notice is taken of the record in the representation proceeding, Case 31-RM-142, as the term "record" is defined in §§ 102.68 and 102.69(f) of the Board's Rules and Regulations and Statements of Procedure, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938, enfd. 388 F 2d 683 (C.A. 4, 1968), *Golden Age Beverage Co.*, 167 NLRB 151, *Intertype Company v NLRB*, 401 F 2d 41 (C.A. 4), *Follett Corporation*, 164 NLRB 378, enfd. 397 F 2d 91 (C.A. 7), § 9(d) of the Act

Clarke, Lawrence Henry, Garvin Keith, James MacIsaac, Frank Rodriquez, Stephen Scordato, Mitchell Truesdale, Ralph Wortelboer, and Faustina Asbury be overruled and that their ballots be opened and counted. Thereafter, the Employer filed timely exceptions to the Regional Director's recommendation regarding the challenges to ballots cast which were overruled, and to the challenge of the ballot of Charles Weyhrauch, which was sustained. No exceptions were filed by the Union.

Upon the entire record in this case, the Board finds:

1. The Employer-Petitioner is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

2. The Union is a labor organization claiming to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of the employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

4. The parties agreed, and we find, the following employees constitute a unit appropriate for the purpose of collective bargaining within the meaning of the Act:

All production and maintenance employees, including shipping and receiving employees, janitors, truckdrivers, leadmen and working foreman; but excluding all office clerical employees and watchmen, and also excluding guards, supervisors, and professional employees, as defined in the Act.

5. The Board has considered the Regional Director's Report and the Employer's exceptions thereto, and as the exceptions raise no material or substantial issues of fact or law which would warrant reversal or require a hearing, we hereby adopt the Regional Director's findings and recommendations.

Our dissenting colleagues conclude that some of the strikers abandoned their jobs, apparently basing this upon their interpretation of employee rights or employer obligations under the contractual vacation clause. It is clear from that Article of the contract that employees could request vacations for periods other than the general vacation period which the employer customarily designated.<sup>1</sup> It cannot be determined from the face of the contract what rights were conferred by that provision upon the employees or what obligations devolved upon the company. We are not called upon and do not purport to determine that question.

The sole issue [before the Board] in this

proceeding . . . is whether the action of certain employees herein, i.e., signing a quit slip in order to obtain vacation pay, is sufficient to show that economic strikers abandoned their interest in their struck jobs and lost the status of economic strikers for purposes of eligibility.<sup>2</sup> On the facts of this case it is patent that the strikers did not wish to abandon their employee status and did not sign the quit slips with that intent. Therefore, there could be no such abandonment regardless of other possible legal effects of their action.<sup>3</sup> Accordingly, we find that the Employer has not affirmatively shown by objective evidence that these strikers abandoned their interest in their struck jobs, and that the presumption that an economic striker remains in such status has not been rebutted.<sup>4</sup>

As we have adopted the Regional Director's recommendation that the challenges to the 23 above-designated ballots be overruled and these ballots may effect the results of the election, we shall direct that the Regional Director open and count these ballots and cause to be served on the parties a revised tally of ballots and an appropriate certificate.

<sup>1</sup> [The article reads as follows ]

#### ARTICLE VII VACATIONS

\* \* \* \* \*

<sup>1</sup> Vacation periods shall conform to the requirements of the Company's operations and the Company reserves the right, in accordance with its past practice to designate a general vacation period for all employees, provided ninety (90) days notice thereof is given. It is further agreed that such general vacation period will fall between the dates of June 15th and September 15th. The company agrees, however, to give due consideration to requests made by employees for vacation during periods other than those herein set forth.

<sup>2</sup> *Pacific Tile and Porcelain Company*, 137 NLRB 1358, 1359

<sup>3</sup> We do not, of course, question the validity of the statement that an employer need not finance a strike against itself. However, this is not relevant in the instant case, where the only issue is whether an abandonment occurred.

<sup>4</sup> Cf. *Guyan Machinery Company*, 155 NLRB 591, 593-594, S & M *Manufacturing Company*, 165 NLRB 663.

On September 8, 1969, Respondent filed with the Board a motion for reconsideration and the Board on October 13, 1969, handed down the following:

#### ORDER DENYING MOTION

On August 22, 1969, the National Labor Relations Board issued a Decision and Direction To Open and Count Challenged Ballots in the above-entitled proceeding.<sup>1</sup> The Board, after consideration of the Regional Director's Report on Challenged Ballots dated

<sup>1</sup> 178 NLRB 197, Chairman McCulloch and Member Zagora dissenting

November 6, 1968, and the Employer's exceptions thereto, concluded that the exceptions raised no material or substantial issues of fact or law which would warrant reversal or require a hearing, and adopted the Regional Director's findings and recommendations with respect to the challenged ballots. Therefore, the Board, *inter alia*, overruled the challenges to 23 ballots, and directed the Regional Director to open and count said ballots, cause to be served on the parties a revised tally of ballots, and issue an appropriate certification.

Thereafter, on September 8, 1969, the Employer filed a motion for reconsideration, requesting that the Board reconsider the Decision and Direction to Open and Count Challenged Ballots and, upon reconsideration, revise its Decision to sustain the Employer's challenges. In the alternative, the Employer requests that the Board order a hearing on issues affecting the validity of the challenges and the results of the election. On September 10, 1969, the Union filed opposition to the Employer's motion.

The Board having duly considered the matter,

IT IS HEREBY ORDERED that the Employer's motion for reconsideration or hearing be, and it hereby is, denied as it contains nothing not previously considered by the Board and is lacking in merit.<sup>2</sup>

As an inadvertent error appears in the Decision,

IT IS FURTHER ORDERED that the Decision and Direction To Open and Count Challenged Ballots be, and it hereby is, corrected by striking the first line of the [last] paragraph on page [197] and substituting therefor the following: "The sole issue in this proceeding upon which our colleagues disagree is whether the."

IT IS FURTHER ORDERED that the Decision and Direction To Open and Count Challenged Ballots, as printed, shall appear as hereby corrected.

<sup>2</sup> Chairman McCulloch and Member Zagoria adhere to their dissent expressed in the original decision

Pursuant to the foregoing order of the Board the Regional Director opened and counted 23 challenged ballots and on October 20, 1969, issued a revised tally of ballots showing 58 votes cast for, and 54 votes cast against, the Union. Certification issued October 24, 1969.

#### The Instant Unfair Labor Practice Case

On November 20, 1969, the Union filed the unfair labor practice charge initiating this proceeding, alleging that Respondent had refused and continued to refuse to bargain with the Union.

On December 11, 1969, the Regional Director

for Region 31 issued a complaint and notice of hearing alleging that Respondent had committed unfair labor practices in violation of Sections 8(a)(1) and (5) and 2(6) and (7) of the Act, by refusing and continuing to refuse to bargain collectively with the Union as the exclusive collective-bargaining representative of all the employees in the appropriate unit described above.

On January 9, 1970, Respondent filed its answer to the complaint in which it admitted certain allegations in the complaint and denied others. Among other things Respondent did admit that it has been and is refusing to bargain collectively with the Union, but it specifically denied that a majority of the employees in the appropriate unit selected the Union as their bargaining agent and denied that the Union has been or is now their exclusive collective-bargaining agent. By way of affirmative defense the answer avers that the certification is void because:

1. Among the 23 persons casting ballots challenged by Respondent, but counted by the Regional Director were the ballots of 12 persons who had voluntarily quit their employment and thereby abandoned their status as strikers eligible to vote.

2. Among the said 23 persons were 10 persons who were not employees within the meaning of the Act, because each had, prior to the date of the election obtained other regular and substantially equivalent employment and thereby abandoned his status as a striker.

3. The action of the Board in holding that the said 22 persons or any of them were strikers eligible to vote was without warrant in the record or a reasonable basis in law, was arbitrary and capricious and constituted an abuse of discretion.

4. By failing and refusing to direct a hearing on the factual matters raised by Respondent's exceptions to the Regional Director's report, the Board deprived Respondent of its constitutional rights to due process of law, and acted arbitrarily and capriciously and abused its discretion.

On January 21, 1970, counsel for the General Counsel filed a Motion for Summary Judgment and a memorandum in support thereof on the ground that Respondent's answer raised no issues not already disposed of in the representation proceeding, but that, in fact, it admitted violations of Section 8(a)(1) and (5) of the Act. I issued an order to show cause to which Respondent filed a timely response on February 24, 1970. Respondent also filed with the Regional Director an amended answer.

Respondent in its Statement in Opposition to Motion for Summary Judgment reargues each of the points which it lost before the Board in the representation case and further argues that I should grant a hearing on "newly discovered evidence" set forth as a further affirmative defense in Respond-

ent's amended answer. The evidence newly tendered is:

13. Respondent's normal general vacation period for the bargaining unit was between June 15 and September 15 of 1968 and prior years.

14. Acting without discrimination and for valid business purposes, Respondent did not allow any bargaining unit employees, including striker replacements and strikers who had returned to work, to take vacations from the onset of said strike until July 8, 1968, Respondent's purpose was to maximize production during the strike.

15. Under Respondent's vacation practice then in effect, accrued vacation pay was not available to employees except at scheduled vacation time or except in case of prior termination of employment.

16. In case of a voluntary quit by an employee Respondent's practice in effect between the dates of January 4, 1968 and July 8, 1968 was to pay accrued pro rata vacation pay.

17. When said persons after hearing said explanation by Respondent proceeded with their voluntary quits Respondent accepted their quits and in compliance with said practice proceeded to pay them their respective accrued pro rata vacation pay.

18. But for their having voluntarily quit their employment Respondent would not have granted them or any of them said accrued pro rata vacation pay, since workers were urgently needed in the plant, since accordingly no vacations were being scheduled or allowed, since in any event Respondent's normal bargaining unit vacation period had not yet begun.

Respondent's argument on this point is that:

... even where a hearing was held by the Regional director, the existence of newly-discovered or previously-unavailable evidence requires a new hearing. . . .

This is true even though the proffered evidence is "newly relevant" rather than actually discovered after the hearing. *Bausch & Lomb, Inc.* [v. *N.L.R.B.*, 404 F.2d 122 (C.A. 2, 1968), denying enforcement of 171 NLRB No. 114] . . . .

\* \* \* \* \*

The instant case is not dissimilar from *Bausch and Lomb*. Here the meaning of the vacation provisions of the contract between Respondent and the union and the prior practice, if any, of the Respondent became significant after the Regional Director filed his Report and the Board its decision. . . .

The evidence of this vacation practice is also made relevant because the majority's position is seen to be in error in the light of the Board's recent decision in *Texaco, Inc.*, 179 NLRB No. 152 (1969). . . .

\* \* \* \* \*

As it now appears for the first time that these facts are relevant and create obvious factual issues, the Motion for Summary Judgment herein must be denied. Rule 56(c), Fed. R. Civ. Proc. NLRA, Sec. 10(b).

In summation Respondent states:

The prior proceeding herein contains significant and prejudicial errors, including those discussed above—failure to order a hearing herein and failure to find for Respondent on the basis of evidence on the record taken as a whole. Respondent submits that either of these errors would require a Court of Appeals to deny enforcement or remand for a full hearing. As was said in *N.L.R.B. v. Air Control Products*, [355 F.2d 245 (C.A. 5, 1964)]:

Of course, it is clear that § 8(a)(5) orders which rest on crucial factual determinations made after *ex parte* investigations and without hearing cannot stand. *Id.* at 249.

The hearing argument is developed, *supra*, and need not be reiterated here.

Neither could the present record support an order by the Board to bargain collectively. It is devoid of facts supporting the certification of representatives, and therefore no enforcement order would be proper. NLRA § 10(e); *Universal Camera Corporation v. N.L.R.B.*, 340 U.S. 474 (1951). Because it is apparent that seeking enforcement herein, given the defects in the prior proceedings, will not advance the interests of any party but will defeat the purposes of the Act by causing extensive delay in the ultimate resolution of the question of representation, Respondent urges the Trial Examiner to take remedial steps immediately by denying the Motion for Summary Judgment or, in the alternative, dismissing the complaint herein.

#### Ruling on the Motions

It is established Board policy in the absence of newly discovered evidence or previously unavailable evidence not to permit litigation before a Trial Examiner in an unfair labor practice case of issues which were or could have been litigated in a prior related representation proceeding.<sup>3</sup> It is equally well established that where all material issues have

<sup>3</sup> *Krieger-Ragsdale & Co., Inc.*, 159 NLRB 490, enfd 379 F.2d 517 (C.A. 7) cert denied 389 U.S. 1041, *N.L.R.B. v. Macomb Pottery*, 376 F.2d 450 (C.A. 7), *Howard Johnson Company*, 164 NLRB 801, *Metropolitan Life In-*

*urance Company*, 163 NLRB 579 See *Pittsburgh Plate Glass Co v N.L.R.B.*, 313 U.S. 146, 162 (1941), NLRB Rules and Regulations, §§ 102.67(f) and 102.69(c)

either been previously decided by the Board, or are admitted in the pleadings, a hearing is not required as a matter of due process.<sup>4</sup>

The question before me is whether the "newly relevant" evidence first tendered by Respondent in its amended answer warrants a reopening of the issue of voting eligibility and a hearing thereon. I find that it does not. This evidence was at all times in the possession of and available to Respondent. It became "newly relevant" (on Respondent's theory) on August 28, 1969, when the Board handed down its Decision and Order. No explanation is offered by Respondent for its failure to make this evidence known to the Board when it moved, on September 8, 1969, for reconsideration.

There are thus no unresolved matters requiring an evidentiary hearing. The General Counsel's Motion for Summary Judgment is granted. Respondent's motion to dismiss the complaint is denied. I shall not order oral argument herein since the pleadings and briefs adequately treat with all issues before me. On the basis of the record, I make the following:

#### FINDINGS AND CONCLUSIONS

##### I. THE BUSINESS OF THE RESPONDENT

Respondent is a California corporation which through its Roylyn Division manufactures components for aircraft, marine vessels, and industrial systems in Glendale, California. Respondent's Roylyn Division in the normal course and conduct of its business operations annually sells directly to customers outside California products valued in excess of \$50,000.

It is admitted, and it is hereby found, that Respondent is, and has been, at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

##### II. THE LABOR ORGANIZATION INVOLVED

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

##### III. THE UNFAIR LABOR PRACTICES

The following employees of Respondent constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act.

All production and maintenance employees of Respondent at Respondent's Roylyn Division, Glendale, California plant, including shipping and receiving employees, janitors, truckdrivers,

leadmen and working foremen; but excluding all office clerical employees and watchmen; also excluding guards, supervisors and professional employees as defined in the Act.

On or about October 24, 1969, the Board certified the Union as the exclusive collective-bargaining representative of the employees in the above-described unit with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

Commencing on or about November 4, 1969, and continuing to date, Respondent has refused, and continues to refuse, to recognize and bargain collectively with the Union as the collective-bargaining representative of the employees in the appropriate unit.

By thus refusing to bargain collectively Respondent has engaged in unfair labor practices in violation of Section 8(a)(5) of the Act and has interfered with, restrained, and coerced employees in violation of Section 8(a)(1) of the Act.

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

Upon the foregoing findings and conclusions and pursuant to Section 10(c) of the Act, I recommend that the Board issue the following:

#### ORDER

The Rucker Company, Roylyn Division, its officers, agents, successors, and assigns, shall:

##### 1. Cease and desist from:

(a) Refusing to bargain collectively with International Association of Machinists, District #727, Local #758, AFL-CIO, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All production and maintenance employees of Respondent at Respondent's Roylyn Division, Glendale, California plant, including shipping and receiving employees, janitors, truckdrivers, leadmen and working foremen; but excluding all office clerical employees and watchmen; also excluding guards, supervisors and professional employees as defined in the Act.

(b) Interfering with the efforts of said Union to negotiate for or represent employees as such exclusive collective-bargaining representative.

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

(a) Upon request, bargain collectively with International Association of Machinists, District #727, Local #758, AFL-CIO, as the exclusive representative of all employees in the appropriate unit with respect to rates of pay, wages, hours of

<sup>4</sup> *Busfor-Pelzner Division, Inc.*, 169 NLRB 998, *NLRB v. E-Z Davies Chevrolet and NLRB v. Carl Simpson Buick, Inc.*, 395 F.2d 191 (C.A. 9), enf. 161 NLRB 1380 and 1389

employment, and other terms and conditions of employment, and embody in a signed agreement any understanding reached.<sup>5</sup>

(b) Post at its place of business in Glendale, California, copies of the attached notice marked "Appendix."<sup>6</sup> Copies of said notice, on forms provided by the Regional Director for Region 31, after being duly signed by Respondent's representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by the Respondent for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 31, in writing, within 20 days from the receipt of this Decision, what steps have been taken to comply herewith.<sup>7</sup>

<sup>5</sup> For the purpose of determining the duration of the certification, the initial year of certification shall be deemed to begin on the date the Respondent commences to bargain in good faith with the Union as the recognized exclusive bargaining representative in the appropriate unit. The purpose of this provision is to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785, *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229, enf'd 328 F.2d 600 (C.A. 5), cert. denied 379 U.S. 817, *Burnett Construction Company*, 149 NLRB 1419, 1421, enf'd 350 F.2d 57 (C.A. 10).

<sup>6</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 National 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>7</sup> In the event that this recommended Order is adopted by the Board, this provision shall be modified to read "Notify the Regional Director for Region 31, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith."

## APPENDIX

## NOTICE TO EMPLOYEES

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

WE WILL NOT refuse to bargain collectively with International Association of Machinists, District #727, Local #758, AFL-CIO, as the exclusive collective-bargaining representative of all the following employees:

All production and maintenance employees, including shipping and receiving employees, janitors, truckdrivers, leadmen and working foremen; but excluding all office clerical employees and watchmen; also excluding guards, supervisors and professional employees as defined in the Act.

WE WILL NOT interfere with the efforts of the Union to negotiate for or represent employees as exclusive collective-bargaining representative.

WE WILL bargain collectively with the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit, and if an understanding is reached we will sign a contract with the Union.

THE RUCKER COMPANY,  
ROYLYN DIVISION  
(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, Federal Building, Room 12100, 11000 Wilshire Boulevard, Los Angeles, California 90024, Telephone 824-7357.