

**Moran Oil Producing and Drilling Corporation and
Local 826, International Union of Operating
Engineers, AFL-CIO. Case 28-CA-1714**

January 17, 1969

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZAGORIA

On October 21, 1968, Trial Examiner Stanley Gilbert issued his Decision in the above-entitled proceeding, granting General Counsel's Motion for Summary Judgment, on the ground that there are no unresolved issues requiring an evidential hearing and 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. The Trial Examiner recommended that the Respondent cease and desist from such unfair labor practices and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision and a supporting brief.

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

The Board has considered the Trial Examiner's Decision, the exceptions and brief, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.¹

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the Recommended Order of the Trial Examiner, and hereby orders that the Respondent, Moran Oil Producing and Drilling Corporation, Hobbs, New Mexico, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

¹We note that Respondent excepted to the overruling of its objection to the application of the Board's requirements for voter eligibility as set forth in *Hondo Drilling, N.S.L.*, 164 NLRB 416, and *Carl B. King Drilling Co.*, 164 NLRB 422. These requirements were applied in the instant case pursuant to the Regional Director's Decision and Direction of Election issued after the subject of eligibility to vote had been litigated in a hearing. Respondent did not seek to have this determination reviewed by the Board prior to the election although it could have done so. Sec. 102.67 of the Board's Rules and Regulations, as amended.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

STANLEY GILBERT, Trial Examiner: Based upon a charge filed June 7, 1968, by Local 826, International

Union of Operating Engineers, AFL-CIO, hereinafter referred to as the Union, as amended June 13, 1968, the complaint herein was issued June 21, 1968. The complaint alleges that Moran Oil Producing and Drilling Corporation, hereinafter referred to as Respondent or Employer, is, and has been, engaged in unfair labor practices affecting commerce within the meaning of Sections 8(a)(5) and (1) and 2(6) and (7) of the National Labor Relations Act. The aforesaid unfair labor practices alleged in the complaint are, in substance, that the Respondent refused and continues to refuse to bargain with the Union as the bargaining representative, within the meaning of Section 9(a) of the Act, of the employees in the appropriate bargaining unit hereinafter described, although the Union has been certified by the Board as such exclusive representative after an election. Respondent, in its answer, as amended, admits some of the allegations of the complaint and denies others. The answer admits the jurisdictional averments of the complaint, the fact of the election, the appropriateness of the bargaining unit, the certification of the Union, the fact that the Union requested the Respondent to bargain and the further fact that it refused to do so. Respondent, however, denies the validity of the certification and consequently denies having committed the unfair labor practices alleged.

On August 14, counsel for the General Counsel filed herein a motion for summary judgment on the ground that the record in the related representation proceeding and Respondent's answer, as amended, reveal that there are no triable issues requiring a hearing in this proceeding. I was duly designated as Trial examiner to rule upon said motion.

Upon an order to show cause returnable September 16, 1968, issued by me directing the parties to show cause, if any, as to whether or not the motion for summary judgment should be granted, the Respondent filed its response thereto within the time designated therefor. Counsel for the General Counsel requested and was granted leave to file a counterstatement to said Respondent's response to the order to show cause and said counterstatement was filed within the time designated therefor. No other response to the order to show cause has been received.

Ruling on Motion for Summary Judgment

The record of the related representation proceeding¹ discloses the following: A hearing was held on June 22, 1967, on the petition filed by the Union in Case 16-RC-4575 at Hobbs, New Mexico, to receive evidence and argument on the issues raised by said petition. On August 29, 1967, the Regional Director for Region 16 issued his Decision and Direction of Election among the employees in the appropriate bargaining unit described hereinbelow. In his said Decision and Direction of Election, the Regional Director determined that the eligibility formula to be used in the election would be that announced by the Board in *Hondo Drilling Company*, NSL, 164 NLRB 416, and *Carl B. King Drilling Co.*, 164 NLRB 422.

¹*Moran Oil Producing & Drilling Corporation*, 16-RC-4575. Official notice is taken of the record in the representation proceeding as the term "record" is defined in Secs. 102.68 and 102.69(f) of the Board's Rules (Rules and Regulations and Statements of Procedure, National Labor Relations Board, Series 8, as amended January 1, 1965).

Pursuant thereto an election by secret ballot was conducted on September 28, 1967, among the employees in said unit under the direction and supervision of said Regional Director. The tally of ballots served upon all parties at the conclusion of the counting of all ballots on September 29, 1967, reflected that 21 votes had been cast for the Union, 18 votes had been cast against the Union; and 18 votes were challenged. On October 3, 1967, Respondent filed timely objections to conduct of election and motion to refuse certification with respect to the aforesaid election. On December 11, 1967, the Regional Director for Region 16 issued his Supplemental Decision and Order, as corrected by an Errata issued December 21, 1967, in which he found Respondent's objections without merit; denied Respondent's motion to refuse certification; sustained the challenges to eight ballots based upon a stipulation of the parties, and additionally sustained the challenges to five ballots and overruled the challenges to five ballots. On December 21, 1967, Respondent timely filed with the Regional Director for Region 16 exceptions to said Supplemental Decision and Order. Regarding the challenged ballots Respondent excepted only to the sustaining of the challenge to one ballot and the overruling of the challenges to two ballots.

On January 12, 1968, the Acting Regional Director for Region 16 issued a Second Supplemental Decision and Order in which he considered said exceptions to Respondent as a Motion to Reconsider and overruled the motion. On January 22, 1968, Respondent timely filed exceptions to said Second Supplemental Decision and Order and Request for Review. By telegram on March 14, 1968, the Board, acting through its Deputy Executive Secretary, denied Respondent's Request for Review insofar as it related to the challenged ballots. Pursuant to an agreement of the parties, those ballots to which the challenges had been overruled were opened and counted on March 22, 1968. The revised tally of two of the challenged ballots counted had been cast for the Union and three had been cast against the Union, resulting in a final tally of 23 votes for the Union and 21 against the Union. By telegram on April 22, 1968, the Board, acting through its Deputy Executive Secretary, denied Respondent's aforesaid request for review insofar as it related to Respondent's objections to the election on the ground that the objections raised no substantial issues warranting review. On March 22, 1968, the Regional Director for Region 16 issued his certification of representative in which the Union was certified as the collective-bargaining representative of the employees in the appropriate unit described hereinbelow.

The denial by the Board of the request for review both with respect to the challenges to the ballots and the objections to the election constitutes an affirmation of the action taken in Case 16-RC-4575 by the Regional Director and Acting Regional Director and precludes relitigation of the issues raised by said request for review in any related unfair labor practice case.

In its response to the order to show cause, the Respondent contends that the pleadings raised issues of fact and that the Trial Examiner is without authority to issue a decision without a hearing being held. The factual issues raised by the pleadings are enumerated by the Respondent and are issues which have been previously considered and finally resolved by the Regional or Acting Regional Director and by the Board in the related representation proceeding.

In the absence of newly discovered or previously unavailable evidence or special circumstances (none of

which are here asserted by the Respondent), it is established Board policy 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.² This policy is applicable even though no formal hearing on objections or challenges to ballots has been provided by the Board. Such a hearing is not a matter of right unless substantial or material issues are raised.³ That there are no such issues here has been decided by the Regional or Acting Director and the Board. The Board's denial of the request for review of the Director's and Acting Director's decisions constitutes an affirmation of their decisions. In these circumstances the Board's and the Director's and Acting Director's dispositions constitute the law of the case at this stage of the proceedings.

The refusal to meet and bargain with the Union being conceded, the refusal to bargain is established. There are no issues litigable before a trial examiner, there is no matter requiring hearing, and summary judgment is therefore appropriate.

The General Counsel's Motion for Summary Judgment is granted, and I hereby make the following further

FINDINGS AND CONCLUSIONS

I. THE BUSINESS OF THE RESPONDENT

Respondent is, and has been at all times material herein, a corporation duly organized under and existing by virtue of the laws of the State of New Mexico. At all times material herein Respondent has maintained an office and place of business in Hobbs, New Mexico, and has been continuously engaged in the business of drilling oil wells. During the 1 year period prior to the issuance of the complaint herein, Respondent, in the course and conduct of its business operations, sold and performed services valued in excess of \$500,000 of which services valued in excess of \$50,000 were performed outside the State of New Mexico. In addition it has purchased goods valued in excess of \$50,000 directly from States other than the State of New Mexico.

Respondent is now, 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

All dragsmen, motormen, floorhands, and truckdrivers of the Employer's drilling operations in the Permian Basin, Hobbs, New Mexico, excluding office clerical employees, professional employees, guards, tool pushers,

²*Howard Johnson Company*, 164 NLRB 801, *Metropolitan Life Insurance Company*, 163 NLRB 579. See *Pittsburgh Plate Glass Co v N.L.R.B.*, 313 U.S. 146, 161-162 (1941), Rules and Regulations and Statements of Procedure, National Labor Relations Board, Series 8, as revised January 1, 1965, Secs. 102.67(f) and 102.69(c).

³*O.K. Van & Storage, Inc.*, 127 NLRB 1537, 297 F.2d 74 (C.A. 5, 1961). And see *N.L.R.B. v. Air Control Window Products, Inc.*, 335 F.2d 245, 249 (C.A. 5, 1964) "If there is nothing to hear, then a hearing is a senseless and useless formality." See also *N.L.R.B. v. Tennessee Packers, Inc.*, 379 F.2d 172, 179 (C.A. 6, 1967).

drillers, and all other supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

On or about September 28, 1967, a majority of the employees of the Respondent in the unit described above, by a secret ballot election conducted under the supervision of the Regional Director for Region 16 of the Board, designated and selected the Union as their representative for the purposes of collective bargaining with Respondent, and on or about April 22, 1968, the Board certified the Union as the exclusive collective-bargaining representative of the employees in said unit.

On or about April 30, 1968, and continuing to date, the Union has requested, and is requesting, the Respondent to bargain collectively with respect to rates of pay, wages, hours of employment, working conditions, and other terms and conditions of employment, with the Union as the exclusive collective-bargaining representative of all the employees in the unit described above.

Commencing on or about May 6, 1968, and at all times thereafter, Respondent did refuse, and continues to refuse, to bargain collectively with the Union as the exclusive collective-bargaining representative of all the employees in the unit described.

By the acts described above, Respondent did refuse to bargain collectively, and is refusing to bargain collectively, with the Union as the exclusive collective-bargaining representative of its employees, and thereby did engage in, and is engaging in, unfair labor practices affecting commerce within the meaning of Sections 8(a)(5) and (1) and 2(6) and (7) of the Act.

Upon the foregoing findings and conclusions and the entire record in the case, it will be recommended that the Board issue the following:

ORDER

A. For the purpose of determining the effective period 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 bargaining representative in the appropriate unit described hereinbelow.⁴

B. Moran Oil Producing and Drilling Corporation, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Refusing to bargain collectively with Local 826, International Union of Operating Engineers, AFL-CIO, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All dragmen, motormen, floorhands, and truckdrivers of the Employer's drilling operations in the Permian Basin, Hobbs, New Mexico, excluding office clerical employees, professional employees, guards, tool pushers, drillers, and all other supervisors as defined in the Act.

(b) Interfering with the efforts of said Union to negotiate for or represent the employees in said appropriate unit as their 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 Local 826, International Union of Operating Engineers, AFL-CIO, as the exclusive representative of the employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours of work, and other terms and conditions of employment, and embody in a signed agreement any understanding reached.

(b) Post at its Hobbs, New Mexico, plant copies of the attached notice marked "Appendix."⁵ Copies of said notice, on forms to be furnished by the Regional Director for Region 28, after being duly signed by an authorized representative of the Respondent, shall be posted by the Respondent 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 the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 28, in writing, within 20 days from receipt of this Recommended Order, what steps it has taken to comply herewith.⁶

⁴In the event that this Recommended Order is adopted by the Board, the words "a Decision and Order" shall be substituted for the words "the Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "a Decree of the United States Court of Appeals Enforcing an Order" shall be substituted for the words "a Decision and Order."

⁵In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for Region 28, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith."

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to the Recommended Order of a Trial Examiner of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that

WE WILL NOT refuse to bargain collectively with Local 826, International Union of Operating Engineers, AFL-CIO, as the exclusive collective-bargaining representative of all the following employees:

All dragmen, motormen, floorhands, and truckdrivers of our Company's drilling operations in the Permian Basin, Hobbs, New Mexico, excluding office clerical employees, professional employees, guards, tool pushers, drillers, and all other supervisors as defined in the Act.

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

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

MORAN OIL PRODUCING
AND DRILLING
CORPORATION
(Employer)

⁶The purpose of this provision is to ensure 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 Co., Inc.*, 136 NLRB 785, *Commerce Co. d/b/a Lamar Hotel*, 140 NLRB 226, 229, enfid. 328 F.2d 600 (C.A. 5, 1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421, enfid. 350 F.2d 57 (C.A. 10, 1965).

Dated _____ By _____
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, Federal Building and U.S. Court House, 500 Gold Avenue, Room 7011, P.O. Box 2146, Albuquerque, New Mexico, Telephone 247-0311, Ext. 2556.