Wek Drilling Co., Inc. *and* Local 826, International Union of Operating Engineers, AFL-CIO. Case 28-CA-1768

February 18, 1969

DECISION AND ORDER

BY CHAIRMAN MCCULLOCH AND MEMBERS FANNING AND BROWN

Upon a charge filed by Local 826, International Union of Operating Engineers, AFL-CIO, herein called the Union, the General Counsel of the National Labor Relations Board by the Regional Director for Region 28, issued a complaint, dated October 10, 1968,[1] against Wek Drilling Co., Inc., herein called the Respondent, alleging that the Respondent had engaged in and was engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1), and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing before a Trial Examiner were duly served upon the Respondent.

With respect to the unfair labor practices, the complaint alleges, in substance, that on or about March 5, the Union was duly certified as the exclusive bargaining representative of the Respondent's employees in the unit found appropriate[2] and that since on or about October 1, the Respondent has refused and is refusing to recognize or bargain with the Union as such exclusive bargaining representative, although the Union had requested and is requesting it to do so. On October 18, the Respondent filed its answer, admitting in part, and denying in part, the allegations of the complaint, and asserting by way of affirmative defense that the certification is invalid on the ground that the election was conducted under the special voter eligibility rule set forth by the National Labor Relations Board in *Hondo Drilling Company N.S.L.*, 164 NLRB No. 67, and that that special rule has no applicability to the Respondent.

On October 23, the General Counsel filed with the Board a Motion for Summary Judgment, contending that the pleadings, considered together with the official Board record in the underlying representation proceeding, Case 28-RC-1692, raised no issues requiring a hearing, that Respondent's defense set forth in its answer raises no litigable questions of fact, and that as a matter of law, the Respondent has no valid defense to the complaint. Thereafter, on October 28, the Board issued an Order Transferring Proceeding to the Board and Notice to Show Cause. On November 11, the Respondent filed a Response to Notice to Show Cause, contending that, in consenting to an election to be held under the eligibility rule described in *Hondo Drilling Company N.S L.*, it had insisted upon the inclusion of a clause, which it alleges provided for a hearing in the event that the Respondent lost the election to afford the Respondent an opportunity "to contest and litigate through objections to the election, Section 8(a)(5) procedures, or otherwise, the validity of or applicability of the particular voter eligibility rule followed by the Regional Director for the employees of [Respondent] in this election pursuant to *[Hondo Drilling Company N.S.L., supra]*." At this time the Respondent alleges certain facts concerning the applicability of the *Hondo* rule to its operation, which it says, in effect, that it would prove at a hearing. It maintains therefore that substantial and material issues of fact are raised which should motivate the Board to order a hearing.

On December 6, the General Counsel filed a Counterstatement in Support of General Counsel's Motion for Summary Judgment, arguing that, as all of the contentions urged by the Respondent have been litigated before the Board and finally ruled on adversely to the Respondent by the Board in the representation case, and as the Respondent does not allege or contend that it has evidence previously unknown or unavailable to it, and as the Respondent concedes that it has refused to meet and bargain with the Union from on or about October 1, and at all times thereafter, there is no matter requiring a hearing and summary judgment is therefore appropriate. In addition, the General Counsel contends that, as the Respondent recognized the Union as the duly certified bargaining representative of the employees and bargained with the Union pursuant thereto for approximately 6 months prior to its repudiation of the certification on or about October 1, the Respondent has waived any right to now question the Union's certification.

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.

RULINGS ON THE MOTION FOR SUMMARY JUDGMENT

The Respondent's contention that it is entitled to an evidentiary hearing on the applicability of the *Hondo* rule to its operation is without merit for the following reasons:

Between October 2 and October 17, 1967, pursuant to a Stipulation for Certification upon Consent Election in Case 28-RC-1692, executed by the parties and approved by the Regional Director on September 21, 1967, a majority of the employees of the Respondent in the appropriate unit, by secret ballot, designated the Union as its representative for the purpose of collective bargaining. Thereafter,

[1] Unless otherwise noted, all dates are in 1968

[2] Decision and Certification of Representative in Case 28-RC-1692 (unpublished)

pursuant to the aforementioned clause, the Respondent claimed by way of an objection to the election that the *Hondo* voter eligibility rule was inapplicable to the circumstances of its particular operation. The Regional Director then requested from the Respondent evidence in support of its objection. The Respondent answered that it did not intend to supply any but, rather, it would litigate at a formal hearing the applicability of the *Hondo* rule to its operation by showing it had put into effect certain employment incentive programs designed to encourage employees to accept and retain regular, permanent employment. The Respondent did not specify what these programs were or how and if, in fact, they affected tenure of employment. Since the Respondent did not produce evidence in support of its objection, the Regional Director recommended that the objection be overruled for failure to furnish relevant and material evidence in support thereof. The Board adopted the Regional Director's findings and recommendations and issued a Decision and Certification of Representative on March 5.

It is established Board policy, in the absence of newly discovered or previously unavailable evidence or special circumstances, 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.[3]

In its Response to Notice to Show Cause, the Respondent offers no newly discovered or previously unavailable evidence and does not allege the existence of special circumstances. The alleged facts in the Respondent's offer of proof, upon which the Respondent now bases its contention that the *Hondo* rule is inapplicable to it, were available at the representation stage and yet the Respondent refused to furnish them to the Regional Director. Inasmuch as the Respondent has had the opportunity to litigate this issue in the representation case, and as the Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding, we find that the Respondent has not raised any issue which is properly triable in this unfair labor practice proceeding.

Moreover, the Respondent entered into negotiations with the Union without any express reservation, and thereafter bargained with the Union for approximately 6 months before it questioned the validity of the certification on or about October 1. By its conduct in bargaining during the period from on or about March 24, to on or about October 1, Respondent has waived any right to now question the Union's certification by refusing to bargain.

[3]See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941), Rules and Regulations of the Board, Series 8, as amended, Section 102.67(f) and 102.69(c).

All material issues timely raised having been either decided by the Board, waived by the Respondent or admitted in the answer to the complaint, there are no matters requiring a hearing before a Trial Examiner. Accordingly, the General Counsel's Motion for Summary Judgment is granted. On the basis of the record before it, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent is and at all times material herein has been, a New Mexico corporation having a principal place of business in Roswell, New Mexico, where it is engaged in the drilling of oil wells for oil producing companies. In the course and conduct of its business operations, the Respondent, during the preceding 12-month period, a representative period, performed services valued in excess of $50,000 for out-of-State customers, which customers annually ship products directly in interstate commerce valued in excess of $50,000 and annually receive in excess of $50,000 of products directly from out-of-state suppliers.

The Respondent admits, and we find, that it 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

Local 826, International Union of Operating Engineers, AFL-CIO is a labor organization within the meaning of Section 2(6) and (7) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Representation Proceeding*

1. The unit

At all times material herein the following employees have constituted and now constitute a unit appropriate for purposes of collective bargaining within the meaning of the Act:

> All employees, excluding tool pushers, drillers, office clerical employees, technical employees, guards, professional employees and supervisors as defined in the Act.

2. The certification

On or about October 17, 1967, a majority of the employees of the Respondent in said unit, voting in a secret election conducted under the supervision of the Regional Director for Region 28, designated the Union as their representative for the purpose of collective bargaining with the Respondent, and on or about March 5, the Board certified the Union as the

exclusive collective-bargaining representative of the employees in said unit, and the Union continues to be such representative.

B. *The Request To Bargain, the Bargaining, and the Respondent's Refusal*

On or about March 24, the Union requested the Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. On July 1, the Respondent and the Union met to bargain upon a collective-bargaining agreement covering the employees in the aforesaid unit. The parties met again in bargaining sessions on September 24 and 25. Commencing on or about October 1, the Respondent refused, and continues to refuse, to bargain collectively with the Union as the exclusive collective-bargaining representative of the employees in said unit.

Accordingly, we find that the Union was duly certified as the collective-bargaining representative of the employees of the Respondent in the appropriate unit described above; that the Union at all times since March 24 has been and now is the exclusive bargaining representative of all the employees in the aforesaid unit within the meaning of Section 9(a) of the Act; and that the Respondent has since October 1, refused to bargain collectively with the Union as the exclusive bargaining representative of its employees in the appropriate unit. By such refusal, 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.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

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

THE REMEDY

Having found that 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, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.

CONCLUSIONS OF LAW

1. Wek Drilling Co., Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. Local 826, International Union of Operating Engineers, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.
3. All employees, excluding tool pushers, drillers, office clerical employees, technical employees, guards, professional employees, and 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.
4. On March 5, 1968, and at all times thereafter, the above-named labor organization has been and is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.
5. By refusing on or about October 1,1968, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all its employees in the appropriate unit, 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.
6. By the aforesaid refusal to bargain, the Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and has thereby engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a) (1) of the Act.
7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that:

A. Upon resumption of bargaining and for 6 months thereafter the Union shall be regarded as if the initial year of the certification had not yet expired.[4]

B. Wek Drilling Co., Inc., Roswell, New Mexico, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Local 826, International Union of Operating Engineers,

[4] The 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, enfd 328 F.2d 600 (C A. 5, 1964), cert denied 379 U.S 817 (1964); ***Burnett Construction Co.***, 149 NLRB 1419, enfd 350 F 2d 57 (C.A. 10, 1965).

AFL-CIO as the exclusive and duly certified bargaining representative of its employees in the following appropriate unit:

All employees, excluding tool pushers, drillers, office clerical employees, technical employees, guards, professional employees and supervisors as defined in the Act.

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

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

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Roswell, New Mexico, plant, copies of the attached notice marked "Appendix."[5] Copies of said notice, on forms provided by the Regional Director for Region 28, shall, after being duly signed by the Respondent's representative, 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 to ensure that said notices are not altered, defaced, or covered by any other material.

(c) Notify said Regional Director for Region 28, in writing, within 10 days from the date of this Decision and Order, what steps Respondent has taken to comply herewith.

[5]In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "a Decision and Order" the words "a Decree of the United States Court of Appeals Enforcing an Order"

APPENDIX

NOTICE TO ALL EMPLOYEES

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

WE WILL NOT refuse to bargain collectively with Local 826, International Union of Operating Engineers, AFL-CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below with respect to wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

The bargaining unit is:

All employees, excluding tool pushers, drillers, office clerical employees, technical employees, guards, professional employees and supervisors as defined in the Act.

WEK DRILLING CO., INC.
(Employer)

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, 7011 Federal Building & U.S. Courthouse, 500 Gold Avenue, SW, Albuquerque, New Mexico 87101, Telephone 505-247-2538.