**Arizona Public Service Company *and* International Brotherhood of Electrical Workers, Local Union No. 387.** Case 28–CA–2146

January 25, 1971

## DECISION AND ORDER

BY MEMBERS FANNING, BROWN, AND JENKINS

Upon a charge filed on July 28, 1970, by International Brotherhood of Electrical Workers, Local Union No. 387, herein called the Union, and duly served on Arizona Public Service Company, herein called the Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 28, issued a complaint on August 3, 1970, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce 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 on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges that on or about June 24, 1970, following a Board election, the Regional Director for Region 28 certified the Union as the exclusive collective-bargaining representative of Respondent's employees in the appropriate unit;[1] and that, commencing on or about July 15, 1970, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On August 12, 1970, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint, and pleading an affirmative defense.

On August 13, 1970, counsel for the General Counsel filed a Motion for Summary Judgment which the Regional Director referred to the Board for ruling. On August 27, 1970, the Respondent filed a Response to the Motion for Summary Judgment and an Amended Answer to the complaint. On the same day, counsel for the General Counsel filed an Amended Motion for Summary Judgment, which the Regional Director also referred to the Board. On September 10, 1970, the Respondent filed a Response to the Amended Motion for Summary Judgment.[2] Subsequently, on September 17, 1970, the Board issued an Order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a Response to Notice To Show Cause and Salt River Project Agricultural Improvement and Power District filed a brief *amicus curiae.*

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.

Upon the entire record in this proceeding, the Board makes the following:

### RULING ON THE MOTION FOR SUMMARY JUDGMENT

The record establishes that since about 1945 the Respondent has bargained with the Union as the exclusive representative of a unit of certain employees working in the Respondent's electrical system.[3] On July 18, 1969, the Union filed a petition seeking to represent a unit of employees classified as "System Load Supervisor" and "Assistant System Load Supervisor," who historically had been excluded from the operating and maintenance unit. Following a hearing before a Hearing Officer, the Board on May 18, 1970, issued its Decision and Direction of Election (182 NLRB No. 72), directing an election in a voting group comprising such classifications and holding that, if a majority in the voting group cast their ballots for the Union, it might bargain for them as part of its existing unit. In the ensuing election the Union was selected by a majority in the voting group, and on June 24, 1970, the Regional Director certified that the Union might bargain for such employees as part of the existing unit. The Union's subsequent request to bargain was rejected by the Respondent by letter dated July 15, 1970, and the instant proceeding was thereupon initiated.

The sole issue in the instant proceeding, as it was

[1] Official notice is taken of the record in the representation proceeding, Case 28–RC–1944, as the term "record" is defined in Section 102.68 and 102.69(f) of the Board's Rules and Regulations, 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 Co.* v. *Penello,* 269 F. Supp. 573 (D.C. Va., 1967); *Follett Corp.,* 164 NLRB 378, enfd. 397 F.2d 91 (C.A. 7, 1968), Section 9(d) of the NLRA.

[2] Salt River Project Agricultural Improvement and Power District filed a Motion to Intervene, which was denied by the Board without prejudice to its rights to file a brief *amicus curiae.*

[3] The Respondent questions the General Counsel's characterization of the contract unit historically represented by the Union as a "production and maintenance" unit. It does not, however, question either the Union's majority status in that unit or the propriety of including the system load supervisors and assistant system load supervisors in that unit if they are not required to be excluded as supervisors under the Act. This unit is described in the current contract by reference to attached wage schedules, which list numerous classifications of employees; most of them, from the job titles, appear to be of a character normally described as operating and maintenance classifications, with a few that might be characterized as clerical. For purposes of convenience only, and without in any manner purporting to modify or delimit the unit, we shall refer to the existing unit as an operating and maintenance unit and describe it as "All operating maintenance employees covered by the April 1, 1969 agreement between the Union and the Respondent excluding all other employees, guards, and supervisors as defined in the Act."

in the underlying representation proceeding, is whether the employees in the voting group are or are not supervisors as defined in the Act. It is the Respondent's contention (1) that the Board erred in concluding that the employees in issue are not supervisors and (2) that in any event the Respondent has, since the hearing in the representation proceeding, changed and clarified the positions in issue so that the employees involved are now clearly supervisors.

It is well established that in the absence of newly discovered or previously unavailable evidence or special circumstances a Respondent in a Section 8(a)(5) proceeding is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[4] Except for its contentions concerning the alleged changes and clarifications, the Respondent's other assertions are merely reiterations of contentions raised in the representation proceeding; relitigation of which is precluded under existing authority.[5]

With respect to the alleged changes and clarifications, these do not appear to modify, in any material sense, the evidence pertaining to these classifications which the Board previously considered. As before, the system load supervisors and the assistant system load supervisors are authorized to give routine directions to other employees. While they may now, under the new formalized authority, go directly into the field to give such orders the earlier record shows that, of necessity, this would likely be an infrequent occurrence; and the present system, under which the field employees are supervised by their own foreman, suggests that any such excursions would be, at best, consultative in nature. The changes in job descriptions and the efforts to endow the disputed employees with ancillary supervisory characteristics, such as inclusion on the supervisorial mailing list, do not effect any substantive change. While the purported authority to recommend discipline of field employees for operational errors is new to the case, only experience and time will tell whether the subject employees have truly been invested with a real supervisory disciplinary power. In these circumstances we conclude that at this time this new paper authority is not entitled to any significant weight.

In view of the foregoing, we find that the Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. We shall, therefore, grant the Motion for Summary Judgment.

[4] See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Sections 102.67(f) and 102.69(c).

[5] As it is presumed that a condition once shown to exist continues until a change is shown to have occurred, there is no merit to the Respondent's contention that the General Counsel has a burden of establishing the absence of change since the hearing in the representation proceeding. See *Plasterers' Local Union No. 739 (Arnold M. Hansen, Inc.)*, 157 NLRB 823, 827.

On the basis of the entire record, the Board makes the following:

## FINDINGS OF FACT

### 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 Arizona. At all times material herein, Respondent has maintained its principal office and place of business at 501 South Third Avenue, Phoenix, Arizona, and at numerous other places in the State of Arizona, and has been continuously engaged in the business of operating a public utility, including the production, distribution, and sale of electricity, and distribution and sale of natural gas. During the last calendar year, Respondent, in the course and conduct of its business operations, sold and distributed products, the gross value of which exceeded $500,000. During the same period of time, Respondent sold and provided goods and services valued in excess of $50,000 from its place of business in interstate commerce directly to customers located in States of the United States other than the State of Arizona.

We find, on the basis of the foregoing, 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, and that it will effectuate the policies of the Act to assert jurisdiction herein.

### II. THE LABOR ORGANIZATION INVOLVED

International Brotherhood of Electrical Workers, Local Union No. 387, is a labor organization within the meaning of Section 2(5) of the Act.

### III. UNFAIR LABOR PRACTICES

#### A. *The Representation Proceeding*

##### 1. The unit

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

> All operating and maintenance employees covered by the April 1, 1969, agreement between the Union and the Respondent, including all systems load supervisors and assistant system load supervisors employed in the Respondent's System Load Dispatching Department, excluding all other employees, guards, and supervisors as defined in the Act.

2. The certification

On or about June 16, 1970, a majority of the system load supervisors and assistant system load supervisors employed in the Respondent's system load dispatching department, in a secret ballot 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. On or about June 24, 1970, the said Regional Director certified that the Union might bargain for said system load supervisors and assistant load supervisors as part of the unit which it currently represents, and the Union is and continues to be the collective-bargaining representative of said entire unit.

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

Commencing on or about July 10, 1970, and at all times thereafter, the Union has requested the Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above unit. Commencing on or about July 15, 1970, and continuing at all times thereafter to date, the Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that the Union was duly certified as the collective-bargaining representative of the employees of Respondent described in the Board's certification, and that the Union at all times since June 24, 1970, 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. We further find that Respondent has, since July 15, 1970, refused to bargain collectively in the appropriate unit, and that, by such refusal, 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 activities of Respondent set forth in section III, above, occurring in connection with its 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 of commerce.

## V. THE REMEDY

Having found that Respondent had engaged 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.

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

## CONCLUSIONS OF LAW

1. Arizona Public Service Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. International Brotherhood of Electrical Workers, Local Union No. 387, is a labor organization within the meaning of Section 2(5) of the Act.
3. All operating and maintenance employees covered by the April 1, 1969, agreement between the Union and the Respondent, including all system load supervisors and assistant system load supervisors employed in the Respondent's system load dispatching department, excluding all other employees, guards, 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. Since June 24, 1970, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.
5. By refusing on or about July 15, 1970, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.
6. By the aforesaid refusal to bargain, 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 thereby has 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 Respondent, Arizona Public Service Company, Phoenix, Arizona, 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 International Brotherhood of Electrical Workers, Local Union No. 387, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All operating and maintenance employees covered by the April 1, 1969, agreement between the Union and the Respondent, including all system load supervisors and assistant system load supervisors employed in the Respondent's System Load Dispatching Department, excluding all other employees, guards, and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the rights guaranteed them in 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 offices and places of business in the State of Arizona where employees represented by the Union are employed copies of the attached notice marked "Appendix."[6] Copies of said notice, on forms provided by the Regional Director for Region 28, after being duly signed by Respondent's representative, shall be posted by 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 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 the date of this Order, what steps have been taken to comply herewith.

[6] In the event that this Order is enforced by a Judgment of the 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."

## 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 Brotherhood of Electrical Workers, Local Union No. 387, 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 ot 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. The bargaining unit is:

> All operating and maintenance employees covered by the April 1, 1969, agreement between the Union and the Respondent, including all system load supervisors and assistant system load supervisors employed in the Respondent's System Load Dispatching Department, excluding all other employees, guards, and supervisors as defined in the Act.

ARIZONA PUBLIC SERVICE
COMPANY
(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, 7011 Federal Building and U.S. Courthouse, 500 Gold Avenue, SW., P.O. Box 2146, Albuquerque, New Mexico 87101, Telephone 505–832–2508.