

Washington Employers, Inc , Diamond Ice & Storage Co , Olympic Cold Storage & Warehouse Co , Inc , Rainier Ice & Cold Storage, Inc , Rainier Port Cold Storage, Inc , New England Fish Company, Washington Fish & Oyster Co , Inc and International Union of Operating Engineers, Local No 286, AFL-CIO Case 19-CA-5594

December 11, 1972

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND
KENNEDY

Upon a charge¹ duly filed by International Union of Operating Engineers, Local No 286, AFL-CIO (herein called the Union), against Washington Employers, Inc (herein called Respondent Association) and its member-employers, Diamond Ice & Storage Co , Olympic Cold Storage & Warehouse Co , Inc , Rainier Ice & Cold Storage, Inc , and Rainier Port Cold Storage, Inc (herein called Respondent ice employers), New England Fish Company, and Washington Fish & Oyster Co , Inc (herein called Respondent fish employers), the General Counsel of the National Labor Relations Board, by its Regional Director for Region 19, on April 13, 1972, issued and served on the parties a complaint alleging violations of the National Labor Relations Act, as amended. In substance, the complaint alleges that Respondents violated Section 8(a)(5) and (1) of the Act by refusing to be bound by the terms of collective-bargaining agreements negotiated by the parties on November 12, 1971.

Respondents' answer admits certain factual allegations of the complaint but denies the commission of unfair labor practices.

Thereafter, on May 26, 1972, the parties entered into a stipulation in lieu of hearing wherein they agreed that certain documents shall constitute the entire record herein,² expressly waived all intermediate proceedings before an Administrative Law Judge, and submitted this case directly to the Board for its decision and order. On June 7, 1972, the Board approved the stipulation, transferred the proceeding to itself, and set dates for the filing of briefs. Thereafter, briefs were filed by the General Counsel and by Respondents.

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

The Board has considered the entire record herein and the briefs, and makes the following

¹ The charge was filed on January 6, 1972.

² The stipulated record consists of the charge, complaint, Respondents'

FINDINGS OF FACT

I THE BUSINESS OF RESPONDENTS

Respondent Association is a multiemployer association organized for certain purposes, one of which is to represent employer-members in collective bargaining. Respondents Diamond Ice & Storage Co , Olympic Cold Storage & Warehouse Co , Inc , Rainier Ice & Cold Storage, Inc , and Rainier Port Cold Storage, Inc , are Washington corporations engaged in the manufacture, sale, and distribution of ice and the operation of cold storage facilities. Respondent New England Fish Company is a Massachusetts corporation and Respondent Washington Fish & Oyster Co , Inc , is a Washington corporation. Both are engaged in the processing, sale, and distribution of fish and fish-related products. In the course and conduct of their operations, Respondent fish and Respondent ice employers each have annual combined sales or perform services to customers located outside the State of Washington valued in excess of \$50,000. The complaint alleges, Respondents' answer admits, and we find that Respondents are, and at all times material have been, employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II THE LABOR ORGANIZATION INVOLVED

The complaint alleges, Respondents' answer admits, and we find that the Union is, and at all material times has been, a labor organization within the meaning of Section 2(5) of the Act.

III THE APPROPRIATE UNITS AND THE UNION'S MAJORITY

The complaint alleges, Respondents' answer admits, and we find that all employees employed by Respondent ice employers at their Washington State facilities to perform plant maintenance work, including, but not limited to, the operation of refrigeration machinery, excluding production employees, office clerical employees, professional 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.

Likewise, all production, operating, and maintenance engineers employed by Respondent fish employers at their Seattle, Washington, facilities, excluding office clerical employees, professional employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of

answer and the stipulation with attached exhibits

collective bargaining within the meaning of Section 9(b) of the Act

The complaint alleges, Respondents' answer admits, and we find that at all times material herein, the Union has been the representative for the purposes of collective bargaining of a majority of the employees in the units described above and, by virtue of Section 9(a) of the Act, has been, and is now, the exclusive representative of all the employees in each said unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment

IV THE ALLEGED UNFAIR LABOR PRACTICES

A *The Stipulated Facts*

Respondent Association has historically negotiated separate agreements on behalf of Respondent ice and Respondent fish employers. Collective-bargaining agreements between the parties involved herein had expired on May 1, 1971

On November 12, 1971, 3 days before the Economic Stabilization Act of 1971, herein called the presidential wage-price freeze, was scheduled to give way to Pay Board controls ("Phase I"), Respondent Association, negotiating on behalf of both Respondent ice and Respondent fish employers, reached agreement with the Union on the terms of new contracts in the above units. This oral agreement was reduced to writing in the form of a "Settlement Agreement" which was executed by the parties on this same date. This agreement contained provisions for 12.5-percent wage increases (which were to become effective on November 15, 1971) for the employees in the units.

On November 15, the "wage-price freeze" expired and "Phase II" began.

Subsequently, the above-mentioned agreement was formally incorporated into two new contracts, one covering each unit, and the new contracts were signed by the parties on November 29, 1971. These contracts set forth all the terms of the settlement agreement, including the November 15, 1971, effective date for the first wage increase.

In a phone conversation on December 29, 1971, confirmed by letter of January 3, 1972, however, Respondent Association, acting on behalf of its employer-members, for the first time, so far as the stipulation shows, informed the Union that a decision had been made not to place into effect the terms of the new contracts until Pay Board action on the increase. Subsequently, Pay Board action was requested through that Board's "Challenge" procedure, the request being filed by Respondents on January 14

By letter of April 17, 1972, the Union was informed that, because the Pay Board had not yet acted on the request, a 5.5-percent wage increase would be put into effect immediately, retroactive to November 14. The Union was also informed that an additional 5.5-percent increase would be forthcoming on May 1 (the contracts provided that an additional increase of approximately 7 percent was due on this date). Moreover, the Union was told that if the Pay Board's ultimate ruling on the request was that an increase in excess of 5.5 percent was allowable, further "adjustments" would be made.

B *Contentions of the Parties*

The General Counsel argues that the regulations of the Pay Board do not affect Respondent's obligation to pay the agreed-upon wage increase and, thus, that Respondents violated Section 8(a)(5) and (1) of the Act by refusing to abide by the terms of the negotiated collective-bargaining agreements.

Respondents contend that, in the circumstances involved in this case, it is inappropriate for the Board to apply its usual principles in determining whether Section 8(a)(5) has been violated inasmuch as interpretations of the Pay Board's regulations are involved. Thus, Respondents argue that they believe the negotiated 12.5-percent increase is "unreasonably inconsistent" with the Pay Board guidelines and that it would be "anomalous" for this Board to require Respondents to pay the increase before the Pay Board has ruled on the matter.

Moreover, in light of the fact that they have placed into effect a 5.5-percent increase which is consistent with the Pay Board's general guidelines and because they have stated their willingness to pay whatever additional part of the 12.5 percent the Pay Board ultimately decides is acceptable, Respondents argue that by conditionally refusing to pay the full negotiated amount, they did not violate Section 8(a)(5).

C *Discussion and Conclusions*

On August 17, 1972, we requested an opinion from the Pay Board on the question of whether, under the circumstances outlined above, Respondents were required to submit the contracts to the Pay Board before paying the negotiated increase. On August 24, 1972, the chief of interpretations and rulings of the Pay Board responded that

[C]oncerning the contract[s] involved in this case, applicable Pay Board rules allowed full implementation of the disputed increase under the contract[s] without prior Pay Board approval or pre-notification.

Consequently, it appears that nothing in the Pay

Board's rules and regulations prevented Respondents from paying the wage increases. We find that by their failure to do so, Respondents violated Section 8(a)(5) and (1) of the Act. We find that when Respondents agreed unconditionally to the 12.5-percent increase, they were on notice that some kind of controls would remain on the economy after the expiration of the wage-price freeze. Moreover, Respondents in fact knew specifically, when they signed the contracts on November 29, 1971, that controls remained. It follows that Respondents were willing to assume the risk of being obliged to pay what might later be excused as an increase in excess of the Pay Board's regulations. Respondents thus cannot now complain of this Board's requiring them to pay what they agreed upon, first during the negotiations, and again after Phase II went into effect. This should not be construed, however, as a determination regarding the obligations of Respondents, or indeed of other employers in future cases, should the Pay Board rule that it is not in the interests of the economic stabilization program to allow the continued payment of the full amount of the negotiated increase.

V THE REMEDY

Having found that Respondents have engaged in and are engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that they cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act. Since Respondents unlawfully refused to pay their employees the increases and fringe benefits due them under the contracts, we shall require Respondents to reimburse said employees for the amounts not paid (less the partial amounts Respondents may have paid retroactively on April 17, 1972), together with interest computed in accordance with the formula prescribed in *Isis Plumbing & Heating Co.*, 138 NLRB 716.

The Board, upon the basis of the foregoing findings of fact and the entire record, makes the following

CONCLUSIONS OF LAW

1 Respondent Association and its member-employers individually and collectively are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2 The units described in the section of this Decision entitled "The Appropriate Units" constitute units appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

3 The Union, International Union of Operating Engineers, Local No. 286, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act and has been at all times material herein the exclusive representative of all employees in the aforesaid appropriate units for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4 Respondents have engaged in conduct violative of Section 8(a)(5) and (1) of the Act.

5 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 the Respondent Association and Respondent Employers, individually and collectively, their officers, agents, successors, and assigns, shall

1 Cease and desist from refusing to bargain collectively with the Union as the exclusive representative of the employees in the appropriate units by failing and refusing to pay the wage increases which were to become effective on November 15, 1971.

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

(a) Bargain collectively with the Union as the exclusive bargaining representative of Respondents' employees in the appropriate units with respect to rates of pay, wages, hours, and other terms and conditions of employment.

(b) Apply the terms of the collective-bargaining agreements retroactively to the effective date of said agreements and tender backpay to the employees employed in the appropriate units in the manner set forth in the section above entitled "The Remedy."

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at their various places of business in and around Seattle, Washington, copies of the appropriate attached notices marked "Appendix A" or "Appendix B"³. Copies of said notices, on forms provided by the Regional Director for Region 19, after being duly signed by Respondents' authorized representatives, shall be posted by them immediately upon receipt thereof and be maintained by them for

³ In the event that this 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 read "Posted pursuant to a

60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondents to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 19, in writing, within 20 days from the date of this Order, what steps the Respondents have taken to comply herewith.

APPENDIX A

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 Union of Operating Engineers, Local 286, AFL-CIO, as the exclusive representative of all our employees in the following unit:

All employees employed by us at our Washington State facilities to perform plant maintenance work, including, but not limited to, the operation of refrigeration machinery, excluding production employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

WE WILL NOT fail and refuse to pay our employees employed in the above unit the full amount of the wage increases negotiated between the Union and ourselves on November 12, 1971.

WE WILL bargain collectively with the above Union as the exclusive bargaining representative of our employees in the above unit with respect to rates of pay, wages, hours, and other terms and conditions of employment.

WE WILL apply the terms of our collective-bargaining agreement with the above Union to the employees in the appropriate unit retroactively to the effective date thereof and WE WILL tender backpay to said employees for the amount of wages withheld.

WASHINGTON
EMPLOYERS, INC.,
DIAMOND ICE &
STORAGE Co., OLYMPIC
COLD STORAGE &
WAREHOUSE Co., INC.,
RAINIER ICE & COLD
STORAGE, INC., RAINIER
PORT COLD STORAGE,
INC.
(Employers)

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, 10th Floor, Republic Building, 1511 Third Ave., Seattle, Washington 98101, Telephone 206-442-4532.

APPENDIX B

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 Union of Operating Engineers, Local No 286, AFL-CIO, as the exclusive representative of all our employees in the following unit:

All production, operating and maintenance engineers employed by us at our Seattle, Washington, facilities, excluding office clerical employees, professional employees, guards and supervisors as defined in the Act.

WE WILL NOT fail and refuse to pay our employees in the above unit the full amount of the wage increases negotiated between the Union and ourselves on November 12, 1971.

WE WILL bargain collectively with the above Union as the exclusive bargaining representative of our employees in the above unit with respect to rates of pay, wages, hours, and other terms and conditions of employment.

WE WILL apply the terms of our collective-bargaining agreement with the above Union to the employees in the appropriate unit retroactively to the effective date thereof and WE WILL tender backpay to said employees for the amount of wages withheld.

WASHINGTON
EMPLOYERS, INC., NEW
ENGLAND FISH
COMPANY, WASHINGTON
FISH & OYSTER Co.,
INC.
(Employers)

Dated _____ By _____
(Representative) (Title)

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