

Williams Energy Company and Teamsters Local Union No. 104, an affiliate of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 28-CA-3381

June 30, 1975

DECISION AND ORDER

BY MEMBERS FANNING, KENNEDY, AND
PENELLO

Upon a charge filed on December 10, 1974, by Teamsters Local Union No. 104, an affiliate of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union, and duly served on Williams Energy 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 December 20, 1974, and an amended complaint on December 27, 1974, 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 an Administrative Law Judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on September 10, 1974, following a Board election the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;¹ and that, commencing on or about November 26, 1974, 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 January 6, 1975, Respondent filed its answer to the complaint admitting in part, and denying in part, the

allegations in the complaint and asserting affirmative defenses.

On January 22, 1975, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on March 12, 1975, 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.² On March 20, 1975, Respondent filed a "Motion to Postpone Show Cause Order Indefinitely." On March 24, 1975, Respondent filed its "Reply to Motion for Summary Judgment." Thereafter, the General Counsel on April 2, 1975, filed an opposition to Respondent's motion to postpone the show cause order.³

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.

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

Ruling on the Motion for Summary Judgment

In its answer to the complaint and reply to the Motion for Summary Judgment, Respondent attacks the Union's certification on the basis of its objections to the election and the failure to hold a hearing thereon in violation of due process. In addition, Respondent alleges that it was denied due process because its requests for review were denied by a panel of Board Members who did not meet and confer together. Despite the certification, Respondent argues that a refusal-to-bargain finding cannot be made because since the election certain events have occurred which constitute unusual circumstances.⁴

Our review of the record, including that in Case 28-RC-2642, shows that following a hearing on the Union's representation petition the Regional Director issued a Decision and Direction of Election. On February 2, 1974, the Board granted the Respondent's request for review and remanded the case to

the Regional Director, after investigation, may find no merit in the new charges and therefore not issue a complaint thereon. Further, there would be unnecessary delay in the processing of this initial proceeding. In these circumstances, we deny the Respondent's motion to postpone.

⁴ In its answer to the complaint, Respondent admits requests to bargain on September 25 and November 21, 1974, and its refusal to bargain on November 26, 1974. However, Respondent alleges in the answer that since November 21, 1974, no requests for collective bargaining have been made by the Union and that, at no time after November 26, 1974, has Respondent failed and refused to meet with the Union. Respondent's uncontroverted letter of November 26, 1974, refusing to bargain "in order to test validity of certifications in the courts," is appended to the Motion for Summary Judgment and warrants a finding that the Respondent is continuing to refuse to bargain and that further requests to bargain would be futile and therefore unnecessary. *Sewanee Coal Operators Association, et al.*, 167 NLRB 172 (1967).

¹ Official notice is taken of the record in the representation proceeding, Case 28-RC-2642, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (C.A. 4, 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (C.A. 5, 1969); *Inertype Co. v. Penello*, 269 F.Supp. 573 (D.C. Va., 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (C.A. 7, 1968); Sec. 9(d) of the NLRA.

² The Board, without objection by the Respondent, also granted the petition of the Board's Executive Secretary to reVOKE subpoenas directed to him.

³ In its "Motion to Postpone Show Cause Order Indefinitely," Respondent seeks to postpone the matters before the Board in this case pending the Regional Director's investigation of 8(a)(1) and (3) charges filed against the Respondent on January 31, 1975, by the Union. The prospect of a complaint being issued based upon the new charge is purely speculative as

the Regional Director for further hearings to permit the Respondent to elicit testimony as to whether the Union, if certified, intended to represent all unit employees. After the hearing before a Hearing Officer, the Regional Director issued a Supplemental Decision and Direction of Election, finding no basis to disqualify the Union and reaffirming, in substance, his prior decision. Respondent's request for review of the Regional Director's Supplemental Decision dated May 21, 1974, was denied by the Board on June 3, 1974, on the ground that it raised no substantial issues warranting review.

On June 7, 1974, a secret ballot election was conducted among the employees in the unit found appropriate. A majority of the votes were cast for the Union. Respondent filed timely objections alleging in substance that the totality of circumstances during the election campaign destroyed necessary laboratory conditions, and that the Union improperly, under the Supreme Court decision in *N.L.R.B. v. Savair Manufacturing Co.*, 414 U.S. 270 (1973), demanded payment of initiation fees while soliciting authorization cards, which fees the Union threatened to refuse to refund if it were unsuccessful in the election. Respondent renewed its objection previously considered that the Union is constitutionally and jurisdictionally incapable of representing the unit and does not have the requisite intent to represent all the unit employees. Respondent also alleged that its request for review of the Regional Director's Supplemental Decision, concerning the Union's ability to represent the employees, was denied by less than a quorum of the Board panel.

On September 10, 1974, the Regional Director issued a Second Supplemental Decision on Objections to Conduct Affecting the Results of Election and Certification of Representative in which he overruled all the objections, found that the objections concerning the Union's ability to represent the employees was relitigation of a matter previously decided by the Board, and that, on the quorum issue, he was bound by the Board's decision in the request for review. The Respondent filed with the Board a request for review in which it renewed, in effect, all its objections. The request was denied by telegraphic order as raising no substantial issues warranting review. In addition, the Board expressly noted the personal participation of and approval by the Board Members who denied review of the Regional Director's Supplemental Decision and Direction of Election.

⁵ *Heavenly Valley Ski Area, A California, Corporation, and Heavenly Valley, A Partnership*, 215 NLRB No. 129 (1974); *Big Three Industries, Inc., Formerly Big Three Industrial Gas & Equipment Co.*, 214 NLRB No. 104 (1974).

⁶ *KFC National Management Company*, 204 NLRB 630 (1973); *T. S. C.*

As to Respondent's contentions concerning the denial of due process in the representation proceeding, a hearing was held concerning the Union's intent and ability to represent the employees in the unit and those issues were determined in the Regional Director's Supplemental Decision and Direction of Election. With respect to the denial of review of that decision and the Regional Director's Second Supplemental Decision and Certification of Representative, both of which were denied because Respondent did not raise substantial issues warranting review, we necessarily found in those denials that Respondent had not raised issues warranting a hearing and, therefore, absent such substantial issues, a hearing is not required.⁵ Further, with respect to Respondent's contention that it was denied due process in the failure of the Board Members to meet and confer on the decision to deny review, it is clear that such Board action must derive from the Members' personal consideration and not necessarily be the result of a meeting to confer over the issues raised by one of the parties.⁶ It appears from the foregoing review that issues raised by Respondent concerning the validity of the election and subsequent certification of the Union were raised and considered or could have been raised and considered in the representation proceeding.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.⁷

All issues raised by the Respondent in this proceeding with respect to the representation proceeding were or could have been litigated in the prior representation proceeding, and 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 therefore find that the Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding.

Respondent now raises the contention that unusual circumstances have occurred since the election arising out of employee turnover, a petition signed by 13 out of 19 unit employees stating they no longer wish to be represented by the Union, and an alleged statement by a union representative that the Union

Motor Freight Lines, Inc., et al. v. United States, 186 F.Supp. 777, 786 (D.C. Tex., 1960), *affid. sub nom. Herrin Transportation Co. v. United States*, 366 U.S. 419 (1961).

⁷ See *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

would abandon the employees if 100 percent of the employees signed the petition. Respondent asserts that such circumstances cannot support a finding of a refusal to bargain despite the outstanding certification. We disagree. It is well established that following an election and certification the employees have committed themselves to the Union as their representative for a reasonable period which, as approved in *Ray Brooks v. N.L.R.B.*, 348 U.S. 96 (1954), has been determined by the Board to be 1 year absent unusual circumstances. The 1-year rule lends certainty to the results of the election and certification process and provides stability in the administration of the Act. An employee petition which repudiates the results of an election is not an unusual circumstance which would require invalidating the certification of the union for 1 year.⁸ Likewise, employee turnover is not an unusual circumstance.⁹ Respondent's allegation that the Union's threat to abandon the unit if all employees stated they no longer wished to be represented by it, even if made, does not alone or collectively with the petition and turnover contentions remove the obligation to bargain with the Union. There is nothing to indicate the Union is defunct.¹⁰ Nor has it disclaimed representation of the unit employees. A union's threat to unit employees that it might do so if they do not adequately support it does not justify an employer's refusal to bargain during the certification year.¹¹ Accordingly, we shall grant the Motion for Summary Judgment.

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

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

Williams Energy Company, a Delaware corporation, at all times material herein has distributed and sold propane gas and appliances on a wholesale and retail basis in the State of Arizona. The principal office and place of business of Williams Energy Company is at 9 East Fourth Street, Tulsa, Oklahoma. Its Southwest Division, involved in this proceeding, has an office in Phoenix, Arizona. During the past 12 months, Respondent derived revenues in excess of \$500,000 from sales of which \$50,000 was derived from the sale of products to customers located outside the State of Arizona. During the same period, Respondent purchased goods and materials valued in excess of \$50,000 which were delivered directly to Respondent's places of business in the State of Arizona from firms located outside 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

Teamsters Local Union No. 104, an affiliate of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE 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 transport drivers and terminal operators employed by the Respondent in New Mexico, Arizona and Utah; excluding all other employees, including mechanics, driver-salesmen, terminal managers, dispatchers, watchmen, janitors, office clerical employees and guards, professional employees and supervisors as defined in the Act.

2. The certification

On June 7, 1974, a majority of the employees of Respondent in said unit, 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. The Union was certified as the collective-bargaining representative of the employees in said unit on September 10, 1974, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

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

Commencing on or about September 25, 1974, 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-described unit. Commencing on or about November 26, 1974, and continuing at all times thereafter to date, the

⁸ *Cocker Saw Company, Inc.*, 186 NLRB 893 (1970).

⁹ *Georgetown Dress Corporation*, 217 NLRB No. 8 (1975).

¹⁰ *Cocker Saw Company, Inc.*, *supra*; *Ray Brooks v. N.L.R.B.*, *supra*.

¹¹ Member Kennedy does not adopt this generalized rule.

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 Respondent has, since November 26, 1974, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees 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 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.

In order 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, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (C.A. 5, 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (C.A. 10, 1965).

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

CONCLUSIONS OF LAW

1. Williams Energy Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Teamsters Local Union No. 104, an affiliate of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. All transport drivers and terminal operators employed by the Respondent in New Mexico, Arizona and Utah; excluding all other employees, including mechanics, driver-salesmen, terminal managers, dispatchers, watchmen, janitors, office clerical employees and 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. Since September 10, 1974, 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 November 26, 1974, 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, Williams Energy Company, Tulsa, Oklahoma, 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 Teamsters Local Union No. 104, an affiliate of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive bargaining representative of its employees in the following appropriate unit:

All transport drivers and terminal operators employed by the Respondent in New Mexico, Arizona and Utah; excluding all other employees, including mechanics, driver-salesmen, terminal managers, dispatchers, watchmen, janitors, office clerical employees and 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 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 Phoenix, Arizona, facility copies of the attached notice marked "Appendix."¹² 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.

¹² 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 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 concerning rates of pay, wages, hours, and other terms and conditions of employment with Teamsters Local Union No. 104, an affiliate of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, 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 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 transport drivers and terminal operators employed by the Respondent in New Mexico, Arizona and Utah; excluding all other employees, including mechanics, driver-salesmen, terminal managers, dispatchers, watchmen, janitors, office clerical employees and guards, professional employees and supervisors as defined in the Act.

WILLIAMS ENERGY
COMPANY