The Anaconda Company *and* United Steelworkers of America and International Union of Operating Engineers and Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 222, Party to the Contract. Case 27–CA–4530

August 18, 1976

DECISION AND ORDER

BY CHAIRMAN MURPHY AND MEMBERS FANNING AND PENELLO

On April 13, 1976, Administrative Law Judge James T. Rasbury issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and Respondent and Party to the Contract filed answering briefs.

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 record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

DECISION

STATEMENT OF THE CASE

JAMES T. RASBURY, Administrative Law Judge: This matter was heard by me at Salt Lake City, Utah, on December 16, 1975,[1] The complaint dated October 16 and the amendment to complaint dated November 20 were based on an original charge filed on May 27 and served on the Anaconda Company (herein Respondent) by registered mail on the same day. The charge was jointly filed by the United Steelworkers of America and the International Union of Operating Engineers (herein Charging Parties) alleging that Respondent violated Section 8(a)(1) and (2) of the Act by recognizing, bargaining with, and signing a collective-bargaining agreement with Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 222 (herein Party to the Contract or Teamsters Local 222) before there existed a representative complement of job classifications and/or employees at Respondent's Carr Fork project because of the expanding nature of Respondent's operations at this project.

All parties have been accorded full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, and to file briefs. Based upon the entire record, including the very helpful briefs filed on behalf of the General Counsel, the Respondent, and Teamsters Local 222, and upon my observations of the demeanor of the witnesses, I make the following findings of fact and conclusions of law.

I. JURISDICTION

The Respondent is now, and at all times material herein has been, a corporation duly organized under and existing by virtue of the laws of the State of Montana. Respondent maintains an office and place of business at Carr Fork project, Toole, Utah, where it is engaged in the business of copper mining. In the course and conduct of its business operations in the State of Utah, Respondent annually purchases and receives goods and materials valued in excess of $50,000 directly from points and places outside the State of Utah. In the course and conduct of its business operations Respondent annually sells products valued in excess of $50,000 to customers in States other than the State of Utah. On the basis of these admitted facts I find Respondent to be, and at all times material herein to have been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR OGRANIZATIONS INVOLVED

The Charging Party Unions herein, United Steelworkers of America and International Union of Operating Engineers, as well as the Intervenor and Party to the Contract, Local 222 of the Teamsters, Chauffeurs, Warehousemen and Helpers of America, are now, and at all material times herein have been, labor organizations within the meaning of Section 2(5) of the Act.

III THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Issue*

The facts in this case are not in dispute and raise the following interesting issue: Are there ever circumstances under which a Respondent Company may accede to a union's recognitional demands and negotiate an arm's-length contract covering all production and maintenance employees in an admittedly expanding and growing bargaining unit at a time when it is only a fraction of its projected employee complement, without being in violation of Section 8(a)(1) and (2) of the Act?

B. *The Evidence*

Respondent began the development of its Carr Fork project on September 6, 1974. Most of the work now being

[1] Unless otherwise indicated, all dates appearing hereinafter will be in the year 1975

performed at the Carr Fork project is the work of employees of contractors and subcontractors who are involved in building the facilities that will be utilized by the Respondent in its development and production of the copper mine. However, there have been a few employees hired directly by the Respondent.

By letter dated January 10, Teamsters Local 222 requested recognition from Respondent as the exclusive bargaining representative of Respondent's employees then employed at the Carr Fork project (see G.C. Exh. 2). This demand for recognition was based on Teamsters Local 222 having obtained authorization cards from a majority of Respondent's employees

By letter dated February 21 the accounting firm of Catten, Stagg, Pacheco, and Rock informed Respondent that its examination of the signatures on the union authorization cards revealed that, of 11 eligible employees, 9 had signed valid authorization cards and 1 authorization card had a signature not comparable to any signature appearing on the employees W-4 forms furnished by the Respondent to the accounting firm (see G.C. Exh. 3).

According to the testimony of Mr. Miller, director of personnel for the Anaconda Company at the Carr Fork project, Respondent recognized Teamsters Local 222 as the exclusive collective-bargaining representative of its employees and began to negotiate a collective-bargaining agreement in March. Negotiations continued throughout April and there is nothing in the evidence to indicate that the negotiations and the resulting collective-bargaining agreement which was signed on May 17th was anything other than a *bona fide* arm's length agreement between Respondent and Teamsters Local 222 (see G.C. Exh 4a and 4b).

At the time of the hearing there were 16 employees in the bargaining unit (an increase of 5 over the number employed at time of demand and recognition), 12 of whom were having their union dues deducted pursuant to the terms of the collective-bargaining agreement.[2] The negotiated contract covers the period from March 1, 1975, thru November 30, 1977. The contract indicates there are five pay grades and within each pay grade there are multiple job classifications. (The number of classifications within the various pay grades varies from one to four. However, within the various classifications there might be one or more different types of jobs. For example, a Miner 2, in pay grade 3, could be a production miner, a pipefitter, a longhole loader, a diamond drill helper, a UG tool cribman, a UG crusherman, a shotcreter, or a bolter. (See G.C. Exh. 4a at pp. 48–51.)

At the time Respondent recognized and bargained with Teamsters Local 222 there were four employees classified as utilitymen in pay grade 1 on the payroll. These four men were all titled laborers (no drymen, janitors, or building maintenance employees). In pay grade 2 there was one employee and he was classified as repairman fourth class; in pay grade 3 there were three employees classified as equipment operator second class, in pay grade 4 none; and in pay grade 5 there were three employees classified as repairman first class (no further designation as to type of work performed). While these 11 employees occupied job classifications that will survive and be utilized when there is actual production of copper ore, as of the time of the hearing there was no actual production of ore and none was projected until mid-1979.

The testimony of Miller and General Counsel's Exhibit 5 reveal the month-to-month projected employment within the bargaining unit. In March 1976 employment is projected to jump from 16 to 32; by the end of December 1976 the projected figure is 83 employees; by the end of the current collective-bargaining contract (G.C. Exh. 4a) term the projected employment figure is 95; by the yearend of 1978–183; yearend of 1979–340; yearend of 1980–380; yearend of 1981–470; yearend of 1982–523; and midyear 1983 approximately 552, which is projected to be the full employment complement.

Analysis

The General Counsel argues effectively that an employer violates Section 8(a)(1) and (2) of the Act when it grants recognition to a union which represents only a minority of the employer's employees.[3] General Counsel then argues that by recognizing and signing a contract with Teamsters Local 222 at a time when a representative complement of employees and job classifications did not exist, Respondent was thus recognizing and rendering assistance and support to a minority union thus foreclosing the employees from a free and untrammled choice of a representative. (See *Scottex Corporation,* 200 NLRB 446, 451–452 (1972); and *Donald Leasure Jr., Robert Leasure, Harold Leasure, d/b/a Leasure Coal Company,* 182 NLRB 1011 (1970). However, in both the cited cases there were elements of either employer coercion of the employees or assistance to the union. While these cases are helpful in gleaning insight to the principles by which the Board is guided in these matters, neither is dispositive of the factual situation we have here.

In the instant situation there is not one scintilla of evidence indicating restraint, favoritism, coercion, or interference on the part of Respondent. The very heart and life blood of the Act is Section 7.[4] For what period of time must these early hires be denied their Section 7 rights? The Union had a majority at the time of demanding recognition and it still had a majority at the time of the hear-

[2] Art 11, p 32, reads as follows

> The COMPANY agrees to deduct UNION membership dues upon receipt by it of a written order from any employee in the bargaining unit in the form acceptable to the COMPANY and according to the terms thereof

It should be noted Utah has a right-to-work statute and there are no clauses in the contract requiring union membership or the involuntary payment of union dues (agency shop)

[3] *International Ladies Garment Workers Union [Bernhard-Altmann Texas Corp.]* v *N L R B*, 366 U S 731 (1961)

[4] This section provides

> Sec 7 Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)

ing—12 months later. There is no way of predicting whether the projected 97 employees which *may* be on the payroll at the end of 1977 will be representative of 50 percent of the job classifications in the contract, *but* it is a certainty that the 97 employees will only represent less than one-fifth of the projected total complement. Are the employees to be denied their rights to be represented by a collective-bargaining representative thru 1977? Thru 1978 because the projected employee complement will be only one-third of the total projected employee complement? At just what point the staffing reaches a *representative level* sufficient for the protection of a majority of the employees' rights is something the Board in exercising its infinite wisdom will ultimately decide.

But the U.S. Supreme Court recognized at an early date [5] that the Board has the responsibility of "applying the Act's general prohibitory language in the light of the infinite combinations of events which might be charged as violative of its terms." The instant case has the additional factor of the Board's responsibility in protecting a positive right as spelled out in the Act. In seeking to strike a balance in the equitable rights of all parties under the particular facts of this case as of the time the case was heard, I am compelled to the conclusion that Respondent has not violated Section 8(a)(1) and (2) of the Act and I will recommend dismissal of the complaint.

In reaching my conclusion that Respondent has not violated the Act, I have tried to consider foremost the rights and desires of the employees. While there is a voluntary dues-deduction authorization clause in the union contract, there is no other language even remotely suggesting compulsory union membership. Moreover Utah is a right-to-work state and there is nothing in the contract requiring dues payments (agency shop). Under the Board's case law [6] if and when there is a substantial increase in personnel either Charging Party herein, or any other union, may assert its right to represent the employees via a Board-conducted election and the present contract (or any succeeding one) would not act to bar the election, because the Board has said. "When the question of a substantial increase in personnel is in issue, a contract will bar an election only if at least 30 percent of the complement employed at the time of the hearing had been employed at the time the contract was executed, *and* 50 percent of the job classifications in existence at the time of the hearing were in existence at the time the contract was executed." [7]

In an early unfair labor practice case [8] which, *inter alia,* involved a consideration of the appropriate unit, the Board set forth these words of wisdom which provide a threshold approach in our efforts to arrive at an equitable solution to the problem herein presented.

> There is nothing in the statute which requires that the unit for bargaining be the *only* appropriate unit, or the *ultimate* unit, or the *most* appropriate unit; the Act requires only that the unit be "appropriate." [13] It *must* be appropriate to ensure to employees, *in each case,* "the fullest freedom in exercising the rights guaranteed by this Act." [14]

[13] Appropriate is a word with a well-defined meaning Webster's International Dictionary defines it as "Suitable for the purpose and circumstances, befitting the place or occasion" It carries with it no overtones of the exclusive or the ultimate or the superlative To convey such thoughts, the words "only" or "ultimate" or "most" must be conjoined with the word "appropriate" The statute does not conjoin them See also *Garden State Hosiery Co*, 74 NLRB 318, 324

[14] Section 9(b)

Surely the lesson to be learned from this language is that the Board has for many years recognized that the bargaining unit (and the bargaining representative) is subject to change [9] and must be decided in a manner to give the fullest freedom of choice to the employees in each case.

In an unfair labor practice case [10] where the Respondent Company had refused to bargain after the Union had won an election in an expanding unit, the Board in finding a violation said:

> In determining whether the employee complement is "representative and substantial" so as to warrant holding an immediate election, the Board has avoided the use of hard and fast rules.[4] The size of the employee complement at the time of the hearing; the nature of the industry; the time expected to elapse before a full, or substantially larger, complement of employees is on hand; and other variables all militate against a rigid formula and dictate the Board's approach. The Board must often balance what are sometimes conflicting *desiderata,* the insurance of maximum employee participation in the selection of a bargaining agent, and permitting employees who wish to be represented as immediate representation as possible. Thus, it would unduly frustrate existing employees' choice to delay selection of a bargaining representative for months or years until the very last employee is on board.

[4] By contrast, the Board has held that an employer-union contract will bar an election if 30 percent of the complement employed at the time of the hearing had been employed at the time the contract was executed, and 50 percent of the job classifications had been in existence *General Extrusion Company, Inc*, 121 NLRB 1165 In the election area, as noted, a case-by-case approach is utilized, rather than the *General Extrusion,* or any other, formula Indeed, elections have been directed where it is not certain that the formula would have been satisfied See *Endicott Johnson De Puerto Rico, Inc*, 172 NLRB 194, *General Cable Corporation,* 173 NLRB 251

In a very recent case [11] in which the Board was concerned with numerous alleged violations of Section 8(a)(1), but which also required a determination of the type of strike (economic or unfair labor practice) in a factual setting where an *election petition had been dismissed* because of an expanding unit problem [12] and the employees elected to strike rather than remain unrepresented, the Board's language is dispositive of this case.

[5] *Republic Aviation Corporation* v *N L R B*, 324 U S 793 (1945)

[6] *General Extrusion Company, Inc, General Bronze Alwintite Products Corp*, 121 NLRB 1165 (1958)

[7] 121 NLRB at 1167

[8] *Morand Brothers Beverage Co, et al*, 91 NLRB 409, 418 (1950)

[9] The same philosophy is expressed in the "no contract bar" rule set forth in *General Extrusions, supra*

[10] *Clement-Blythe Companies, A Joint Venture,* 182 NLRB 502 (1970)

[11] *Colonial Haven Nursing Home, Inc*, 218 NLRB 1007, 1010 (1975)

[12] Also true in the instant case

At the outset, we note that there is nothing unlawful or contrary to the Act in attempting to obtain voluntary recognition from an employer at a time when the Board under its expanding unit principles will not authorize the use of its resources to conduct an election because there is evidence that in the near future the number of employees in the sought-after unit and number of classifications filled will increase substantially. Although the Board will not recognize such voluntary recognition, or any agreement entered into as a result thereof, to be a bar against petitions filed after the unit has been filled by a representative complement,[8] that policy was designed to preserve the right of participation in choosing a representative, or not to be represented, to as many employees as possible so as not to "lock in" for the term of contracts up to 3 years in duration a group of nonconsenting employees disproportionately larger than that which initially made the choice between representation and no representation;[9] it was never intended, however, to preclude an employer and employees from entering into an agreement providing for terms and conditions of employment until such time as a petition has been filed for the expanded unit.

[8] *General Extrusion Company, Inc., General Bronze Alwintite Products Corp.*, 121 NLRB 1165 (1958)

[9] See *Clement-Blythe Companies, A Joint Venture*, 182 NLRB 502 (1970), for a more extensive discussion of the policy considerations underlying this Board policy

Conclusions of Law

1. Respondent, the Anaconda Company, is, and at all times material herein has been, an employer within the meaning of Section 2(2) of the Act and engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. United Steelworkers of America and International Union of Operating Engineers and Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 222 are labor organizations within the meaning of Section 2(5) of the Act.

3. Respondent has not violated the Act as alleged in the complaint.

Upon the basis of the foregoing findings of fact, conclusions of law, the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER [13]

The complaint is hereby dismissed in its entirety for lack of merit.

[13] In the event no exceptions are filed as provided by Sec 102 46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec 102 48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes