

Nichols & Wright Paving, Inc. and International Union of Operating Engineers, Local No. 132, AFL-CIO and Laborers District Council, Charleston, West Virginia, Laborers Local Union No. 543. Cases 9-CA-41612 and 9-CA-41729

February 23, 2007

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN
AND WALSH

On November 9, 2006, Administrative Law Judge Martin J. Linsky issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and the Charging Parties each filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order as modified and set forth in full below.²

ORDER

The National Labor Relations Board orders that the Respondent, Nichols & Wright Paving, Inc., Huntington, West Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unlawfully terminating its collective-bargaining agreements with International Union of Operating Engineers, Local No. 132, AFL-CIO, and Laborers District Council, Charleston, West Virginia, Laborers Local Union No. 543 (collectively, the Unions), including any automatic renewals or extensions of them, and failing to comply with the terms and conditions of these collective-bargaining agreements.

(b) Unlawfully withdrawing recognition from the Unions.

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

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² We shall modify the judge's recommended Order to include the Board's standard remedial language and shall substitute a new notice to employees to correspond with the modified Order.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Reinstate the unlawfully terminated collective-bargaining agreements, including any automatic renewals and extensions thereof, and comply with all their terms and conditions retroactive to December 4, 2004.

(b) Recognize International Union of Operating Engineers, Local No. 132, AFL-CIO as the exclusive collective-bargaining representative in the following unit:

All equipment operators and pavers employed by Respondent in the State of West Virginia, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

(c) Recognize Laborers District Council, Charleston, West Virginia, Laborers Local Union No. 543 as the exclusive collective-bargaining representative in the following unit:

All laborers employed by the Respondent in the State of West Virginia, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

(d) Make whole employees for any loss of wages or benefits they may have suffered as a result of its failure to comply with the 2004-2006 collective-bargaining agreements, and any automatic renewals or extensions of them, since December 4, 2004, with interest, as set forth in the remedy section of the judge's decision.

(e) Deduct and remit union dues and fees as required by the checkoff provisions in the 2004-2006 collective-bargaining agreements, and any automatic renewals or extensions of them, and reimburse the Unions for its failure to do so since December 4, 2004, with interest, as set forth in the remedy section of the judge's decision.

(f) Within 14 days after service by the Region, post at its facility in Huntington, West Virginia, copies of the attached notice marked "Appendix."³ Copies of the attached notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other

³ If 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."

material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 4, 2004.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT unlawfully terminate collective-bargaining agreements with the Unions, International Union of Operating Engineers, Local No. 132, AFL-CIO and Laborers District Council, Charleston, West Virginia, Laborers Local Union No. 543, including any automatic renewals or extensions of them, and fail to comply with the terms and conditions of those collective-bargaining agreements.

WE WILL NOT unlawfully withdraw recognition from the Unions.

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

WE WILL reinstate the unlawfully terminated collective-bargaining agreements, including any automatic renewals and extensions thereof, and comply with all their terms and conditions retroactive to December 4, 2004.

WE WILL recognize the International Union of Operating Engineers, Local No. 132, AFL-CIO as the exclusive

collective-bargaining representative in the following unit:

All equipment operators and pavers employed by us in the State of West Virginia, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

WE WILL recognize the Laborers District Council, Charleston, West Virginia, Laborers Local Union No. 543 as the exclusive collective-bargaining representative in the following unit:

All laborers employed by us in the State of West Virginia, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

WE WILL make whole employees for any loss of wages or benefits they may have suffered as a result of our failure to comply with the 2004–2006 collective-bargaining agreements, and any automatic renewal or extension of them, since December 4, 2004, with interest.

WE WILL deduct and remit union dues and fees as required by the checkoff provisions in the 2004–2006 collective-bargaining agreements, and any automatic renewals or extensions of them, and reimburse the Unions for our failure to do so since December 4, 2004, with interest.

NICHOLS & WRIGHT PAVING, INC.

- Mark G. Mehas, Esq.*, for the General Counsel.
- Fred F. Holroyd, Esq.*, of Charleston, West Virginia, for the Respondent.
- Lawrence B. Lowry, Esq.*, of Huntington, West Virginia, for the Operating Engineers.
- James P. McHugh, Esq.*, of Charleston, West Virginia, for the Laborers.

DECISION

STATEMENT OF THE CASE

MARTIN J. LINSKY, Administrative Law Judge. On December 21, 2004, the International Union of Operating Engineers, Local No. 132, AFL-CIO (Operating Engineers) filed a charge against Nichols & Wright Paving, Inc. (Respondent).

On February 15, 2005, Laborers' District Council, Charleston, West Virginia, Laborers' Local Union No. 543 (the Laborers) filed a charge in Case 9-CA-41729 against Respondent.

On July 27, 2005, the National Labor Relations Board (the Board), by the Regional Director for Region 9, issued a consolidated complaint (the complaint) alleging that Respondent violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act), when on December 4, 2004, it unlawfully withdrew its recognition of the Operating Engineers and the Laborers and ceased honoring the collective-bargaining agreements it

had with the two unions which collective-bargaining agreements ran from December 1, 2003, to November 30, 2006.

Respondent filed an answer in which it admitted that it ceased honoring the collective-bargaining agreement with the unions but denied that it violated the Act in any way.

A trial was held before me in Huntington, West Virginia, on August 31, 2006.

Based on the entire record in this case, to include posttrial briefs submitted by counsel for the General Counsel, counsel for Respondent, counsel for the Operating Engineers, and counsel for the Laborers as well as the testimony of the witnesses and their demeanor I make the following

FINDINGS OF FACT

At all material times, Respondent, a corporation, with an office and place of business in Huntington, West Virginia, has been engaged as a contractor in the construction industry doing asphalt paving work.

Respondent admits, and I find, that at all material times Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

I. THE LABOR ORGANIZATIONS INVOLVED

Respondent admits, and I find, that at all material times the Operating Engineers and the Laborers have been labor organizations within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Overview

The Constructors' Labor Council of West Virginia, Inc. is a multiemployer organization that bargains with construction unions in the State of West Virginia.

Respondent is not a member of the Constructors' Labor Council of West Virginia, Inc.

On March 8, 1991, Respondent and the Laborers signed a document entitled "Acceptance of Agreement" which provided as follows:

The undersigned has read and hereby approves the Heavy and Highway Construction Agreement between the CONSTRUCTORS' LABOR COUNCIL OF WEST VIRGINIA, INC., and ENGINEERS' LOCAL NO. 132, AFL-CIO, TEAMSTERS' LOCALS OF WEST VIRGINIA, CARPENTERS' STATE COUNCIL, AFL-CIO, OPERATIVE PLASTERERS' & CEMENT MASONS' INTERNATIONAL ASSOCIATION operating in West Virginia, which Agreements are dated December 3, 1990, and herewith accepts the same and becomes one of the parties thereto.

These Agreements cover the term of period beginning December 3, 1990, and ending December 6, 1993 and from year to year thereafter in absence of sixty (60) days notice of intention to terminate by either party. See Section I of Article XII of each Agreement.

The undersigned also agrees to be bound by any subsequent replacement Agreement, renewals, modifications, amendments and addendums to the Agreements between the aforementioned parties. [GC Exh. 8.]

On October 15, 1999, Respondent and the Operating Engineers signed a similar document entitled "Acceptance of Agreement" which provided as follows:

The undersigned has read and hereby approves the Heavy Construction Agreement and Highway Agreement between CONSTRUCTORS' LABOR COUNCIL OF WEST VIRGINIA INC., and ENGINEERS' LOCAL UNION NO. 132, AFL-CIO, operating in West Virginia, which Agreements becomes one of the parties thereto.

These Agreements cover the term of period beginning December 6, 1996, and ending December 5, 1999, and from year to year thereafter in absence of 60 days notice of intention to terminate by either party. See Section I of Article XII of each Agreement.

The Undersigned also agrees to be bound by any subsequent replacement Agreements, renewals, modifications, amendments and addendums to the Agreements, between the aforementioned parties. [GC Exh. 2.]

The "Acceptance of Agreement" signed on March 8, 1991, by Respondent and the Laborers makes reference in paragraph 2 to an agreement running from December 3, 1990, and ending December 6, 1993.

There was a succession of agreements which Respondent and the Laborers were bound to by virtue of the "Acceptance of Agreement." There were so-called heavy construction agreements and highway agreements covering highway construction and beginning in 2000 a unified heavy construction and highway agreement.

A series of eight agreements are in evidence as General Counsel's Exhibits 11(a-h).¹

The latest agreement runs from December 1, 2003, to and including November 30, 2006.

Each of these eight agreements contain the same language regarding termination.

The language regarding termination in the December 1, 2003, to November 30, 2006, is as follows:

ARTICLE X

Termination

Section 1: Agreement Effective dates. This Agreement shall remain in full force and effect from December 1, 2003 to and including November 30, 2006 and thereafter from year to year unless either party gives written notice to the other party of its intention to terminate this Agreement at least sixty (60) days prior to the expiration of any contract year.

Section 2: Negotiations. Negotiations for a contract for the year 2007 shall be commenced on or before September 30, 2006. [GC Exh. 11(h).]

The "Acceptance of Agreement" between Respondent and the Operating Engineers makes reference in paragraph 2 to an

¹ In addition, Respondent and the Laborers entered into an asphalt agreement on July 28, 1997, which would only be applicable to private construction projects with a gross contract values of \$500,000 or less which are not funded by the United States or State Government. GC Exh. 12, the exhibit, unfortunately, is barely legible.

agreement beginning December 6, 1996, and ending December 5, 1999.

There was a succession of agreements which Respondent and the Operating Engineers were bound to by virtue of the "Acceptance of Agreement."

As with Respondent and the Laborers these agreements were either heavy construction agreement, highway agreements, or heavy construction and highway agreements.

A series of four agreements are in evidence as General Counsel's Exhibits 4(a-d).²

The latest agreement runs from December 1, 2003, to and including November 30, 2006.

Each of the four agreements contains the same language regarding termination.

The language regarding termination in the December 1, 2003, to November 30, 2006 agreement is as follows:

ARTICLE X

Termination

Section 1: Agreement Effective dates. This Agreement shall remain in full force and effect from December 1, 2003 to and including November 30, 2006 and thereafter from year to year unless either party gives written notice to the other party of its intention to terminate this Agreement at least sixty (60) days prior to the expiration of any contract year.

Section 2: Negotiations. Negotiations for a contract for the year 2007 shall be commenced on or before September 30, 2006." General Counsel Exhibit 4(d).

These agreements between Respondent on the one hand and the Laborers and Operating Engineers on the other hand were 8(f) agreements and as such conferred on the Laborers and the Operating Engineers limited exclusive collective-bargaining representation to the Laborers for laborers employed by Respondent in the State of West Virginia³ and to the Operating Engineers for equipment operators and pavers employed by Respondent in the State of West Virginia.⁴

On August 31, 2004, Respondent sent the following letter to the Laborers:

West Virginia Laborer's Combined Fund
One Union Square
Suite 4
Charleston, WV 25302

August 31, 2004

To Whom It May Concern:

This is to inform you that we will be canceling our contract with Local Laborers 543 effective on December

4, 2004. We do not find a need at this time to be an employer participating in union jobs.

If you have any questions or concerns please feel free to call me at the above number. [GC Exh. 9a.]

Also, on August 31, 2004, Respondent sent the following letter to the Operating Engineers:

I.U.O.E. Local 132
Welfare, Pension and Apprenticeship Funds
P.O. Box 2626
Huntington, WV 25726

August 31, 2004

To Whom It May Concern:

This is to inform you that we will be canceling our contract with Local 132 Operating Engineers effective on December 4, 2004. We do not find a need at this time to be an employer participating in union jobs.

If you have any questions or concerns please feel free to call me at the above number. [GC Exh. 5.]

Respondent's president, Christopher Strow, authorized Vicki Sheffey to sign his name on the two letters.

B. Discussion

It is the position of the General Counsel as well as counsels for the Laborers and the Operating Engineers that this withdrawal of recognition of the Unions and Respondent ceasing to honor the 2003 to 2006 collective-bargaining agreement violated Section 8(a)(1) and (5) of the Act because it was untimely. I agree.

Respondent incorrectly takes the position that it could terminate the contract and withdraw recognition with 60 days notice before the end of any year of the contract whether there was a 3-year contract in place or whether the contract had expired and the old contract was being extended year to year till a new contract was agreed upon by the parties.

An examination of the two "Acceptance of Agreement" documents set forth above and an examination of the termination language for the December 1, 2003, to November 30, 2006 contracts reveal that Respondent is bound to the current contract until November 30, 2006, and was without authority to cease honoring the contract and without authority to withdraw recognition when it purported to do so effective December 4, 2004.

If, for example, no successor contract had been agreed to prior to the agreement running out and the prior agreement had been extended year to year then and only then could Respondent terminate on 60 days notice at the end of any contract year. On the other hand if a 3-year contract had been agreed to then Respondent could terminate with 60 days notice at the end of the final year of the contract.

The parties stipulated as follows:

both before and after August 31, 2004, Nichols and Wright had more than one employee that they paid in the classifications of Laborer and Operating Engineer. However, during this period Nichols and Wright only submitted contribution reports for fringe benefits for one employee to the Laborers'

² In addition, Respondent and the Operating Engineers on October 10, 1999, entered into a so-called "small paving contract" to be applied on smaller projects. GC Exh. 3.

³ All laborers employed by Respondent in the State of West Virginia, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

⁴ All equipment operators and pavers employed by Respondent in the State of West Virginia, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

Combined Fund and one employee to the Operating Engineers Funds.

The parties amended that stipulation as follows:

The contribution reports that we referred to previously, with only reporting on one man with respect to the Laborers and the Operating Engineers, that they have continued to file reports to the present, again only reflecting one man, to the present time.

I found the witnesses for the General Counsel, i.e., Donald Huff, from the Operating Engineers and Gary Tillis from the Laborers to be credible witnesses.

I don't give any weight to the testimony of Respondent's president, Christopher Strow. He claims that two union representatives met with him in early September 2004 shortly after Respondent sent the August 31, 2004 letters to the Operating Engineers and Laborers and one of the two, i.e., a person Strow identified as Tommy Plymale said the Union wanted one more dues paying member and they would leave Respondent alone. He further claims that he didn't know the name of the other union representative and didn't know what union Tommy Plymale represented. Strow had no evidence at all to corroborate his claims. I give this testimony no weight whatsoever.

Accordingly, Respondent violated Section 8(a)(1) and (5) of the Act when it ceased honoring the contract and withdrew recognition from the Unions effective December 4, 2004.

REMEDY

The remedy in this case should include a cease and desist order and the posting of an appropriate notice. The order should direct Respondent to reinstate the current collective-bargaining agreement and apply the terms of the collective-bargaining agreement as if it had never been terminated.

Respondent shall further make whole the unit employees for any loss of wages or benefits they may have suffered as a result of the Respondent's failure to comply with the agreement since December 4, 2004, in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 52 (6th Cir.

1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

In the event that the agreement provides for contributions to pension and benefit funds, the Respondent shall make all contractually required contributions to those funds that they have failed to make since December 4, 2004, including any additional amounts due to the funds on behalf of the unit employees in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979). Further, the Respondent shall reimburse unit employees for any expenses ensuing from its failure to make required contributions as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection Service*, supra, with interest as prescribed in *New Horizons for the Retarded*, supra.

In addition, Respondent shall deduct and remit union dues and fees as required by the checkoff provisions in the 2003–2006 and reimburse the Unions for the Respondent's failure to do so since December 4, 2004, with interest as prescribed in *New Horizons for the Retarded*, supra.

CONCLUSIONS OF LAW

1. The Respondent, Nichols & Wright Paving, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Unions are labor organizations within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) and (5) of the Act when it terminated its contract with the Laborers and the Operating Engineers and failed to comply with the terms and conditions of the contract.

4. Respondent violated Section 8(a)(1) and (5) of the Act when it withdrew recognition of the Unions.

5. The above violations of the Act are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommended Order omitted from publication.]