Richard O'Brien Plastering Company and Yocum Plastering Company, Inc. *and* Locals 32, 58, and 149, Operative Plasterers' and Cement Masons' International Association. Cases 27-CA-7446 and 27-CA-7448

27 January 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 18 February 1983 Administrative Law Judge Gerald A. Wacknov issued the attached decision. The General Counsel filed exceptions and a supporting brief, and Respondents filed cross-exceptions, a supporting brief, and a memorandum brief in response to the General Counsel's exceptions.

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.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] The General Counsel 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.

DECISION

STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge: Pursuant to notice, a hearing with respect to this matter was held before me in Denver, Colorado, on November 9 and 10, 1982. The initial charges in Cases 27-CA-7446 and 27-CA-7448 were filed on August 3, 1981,[1] by Locals 32, 58, and 149, Operative Plasterers' and Cement Masons' International Association (the Union or the Plasterers) and amended charges in these cases were filed on August 26. Thereafter, on October 18, the Regional Director for Region 27 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing alleging a violation by Richard O'Brien Plastering Company, and Yocum Plastering Company, Inc., respectively, O'Brien, Yocum or, jointly the Respondent of Section 8(a)(1) and (5) of the National Labor Relations Act, as amended (the Act).[2]

The parties were afforded a full opportunity to be heard, to call, to examine and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from the General Counsel and counsel for the Respondents.

Upon the entire record, and based on my observation of the witnesses and consideration of the briefs submitted, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondents are Colorado corporations engaged in the construction business, with their principal places of business in the Denver, Colorado area. Each Respondent annually provides services valued in excess of $50,000 within the State of Colorado for contractors who are directly engaged in interstate commerce within the meaning of the Board's direct inflow standards. It is admitted, and I find, that the Respondents are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Issue*

The principal issue raised by the pleadings is whether the Respondents violated Section 8(a)(1) and (5) of the Act by placing into effect certain unilateral charges prior to a bargaining impasse.

B. *The Facts*

The predecessor contract expired on May 1, on which date the Union commenced an economic strike, as the parties were unable to agree upon the terms of continuing the contract.[3] Prior to the strike, there had been a total of six negotiating meetings. The contractors[4] were satisfied with the language of the predecessor contract which had been refined over a period of many years. The Union initially desired major changes and additions to the contract, and while the contractors would not agree to any such proposed changes, the record shows abundant discussion of the items presented by the Union.

[1] All dates are within 1981 unless otherwise specified.

[2] The consolidated complaint contains the names of two additional Respondents, namely, Nielsen Plastering Company and John D. Burke, Jr., Inc., and alleges that these Respondents committed the identical violations alleged to have been committed by Respondents O'Brien and Yocum. However, the charges relating to Nielsen Plastering Company and John D. Burke, Jr., Inc. were later withdrawn by orders dated October 27, 1981, and April 6, 1982.

[3] There is a dispute regarding the parties' respective positions on continuing the terms and conditions of the predecessor contract. Apparently, the contractors desired to continue the old contract without modification until a new agreement was reached.

[4] There were approximately six or seven contractors, including the Respondents herein, who belong to the Contracting Lathers & Plasterers Association of Colorado and who, with the exception of Respondent O'Brien, were bargaining simultaneously, but independently, with the Union. Respondent O'Brien, while a member of the Association, bargained individually with the Union. The meetings between O'Brien and the Union were held on or about the same dates as the group meetings.

The record is clear that all parties understood that agreement on wages was the keystone of reaching a total agreement, and that the other items were secondary and would "fall in place" when the wage issue had been settled.

The Respondents, who had maintained a bargaining relationship with the Union for a period of over 16 years, were interested in giving the Union what they considered to be a reasonable wage increase, and the wage issue played a predominant role in the negotiating sessions on and after March 19. The two meetings prior to March 19, namely, on February 16 and March 12, were primarily concerned with noneconomic matters. At the meeting on March 19, O'Brien offered an hourly wage increase of $1.75, $1.52, and $1.67 for each year of a proposed 3-year contract. This amounted to a 13-percent increase for the first year, and a 10-percent increase for the next 2 years. Yocum and the other contractors, about the same period of time, were offering somewhat less.[5]

The Union, on the other hand, was then committed to a wage increase for the first year of the contract of $3.90 per hour. The reason for this is that the Union and the Lathers Union were "competitors" in that their crafts performed similar or related work, and apparently their wages had historically been the same. However, as a result of a recent merger between the Lathers Union and the Carpenters Union,[6] the Lathers commenced working under an agreement previously negotiated between the Carpenters Union and another Contractors Association. Application of this contract to the Lathers brought them wages considerably higher than those of the Plasterers Union. Thereupon, the Plasterers commenced to insist on a commensurate wage increase from the members of Contracting Lathers and Plasterers Association.[7]

As noted above, the strike commenced on May 1. With the commencement of picketing, the Respondents herein, and apparently the other members of the Association, were effectively shut down. Several bargaining sessions were held between the advent of the strike and May 15 with no agreement being reached. During the meetings on May 7 and 14, the Union lowered its wage demand to $3.75 per hour for the first year of the contract. According to the testimony of Larry Tobin, Sr., the Union's business manager and chief negotiator, the union membership had advised him that $3.75 was the "bottom line." The separate letters sent to the Union by the Respondents accurately set forth the parties' positions.

On May 14, O'Brien sent the following letter to the Union:

> As you know, we met in a bargaining session on Thursday, May 14, 1981. This company gave you our last and best offer. We made numerous concessions and a combined wage and fringe benefit increase of:
>
> | | |
> |---|---|
> | 1981 | $1.75 |
> | 1982 | $1.52 |
> | 1983 | $1.67 |
>
> You flatly rejected our offer and held firm at $3.75. It is clear that we are miles apart, and as we acknowledge, at an impasse.
>
> I suggested to you that you may wish to contact FMCS. In any event, this company will resume bargaining with you when and if there is an indication on your part that you will present a reasonable proposal.
>
> In the meantime, we intend to keep operating, with replacements if necessary.

On May 15, Yocum sent the following letter to the Union:

> In confirmation of our meeting on Thurday, May 7, 1981, concerning negotiations on a new agreement with your Plasterers Local #32. At that meeting you did reject our offer of 1.20—1.30 and 1.30 and other proposals pursuant to a new agreement. On Friday, May 15, 1981, I called you by telephone and asked if your negotiating committee had reconsidered and you said, "No, you had not changed your position on the offer." You further stated that you had also rejected Richard O'Brien Plastering Company's offer of 1.75—1.52—1.67 for three years.
>
> As stated at that first meeting and during our telephone conversation,[8] I feel that we have nothing further to talk about and have reached an impasse. Further meetings would not be productive unless Plasterers Local #32 does not make an effort to negotiate by coming to the bargaining table with fair and reasonable demands.

The contractors, including Yocum and O'Brien, began hiring employees following the strike, and apparently resumed operations about the last part of May or early June. Yocum began paying his employees $1 per hour above the expired contract rate, and O'Brien began paying his employees $1.75 above the expired contract rate. In addition, the Respondents, and apparently the other contractors who are no longer parties to this proceeding, began placing the employees' entire wages and fringe benefits on their checks, rather than remitting the fringe benefits to various contractual funds. It is clear that paying all fringe benefits directly to the employees rather than to the various trust funds had been O'Brien and the other contractors' consistent proposal

[5] The record is unclear regarding the precise wage offer of the other contractors at this time.

[6] See *Sollari & Sons, Inc.*, 264 NLRB 282 (1982), for background information regarding this merger.

[7] Negotiations between the Contracting Lathers and Plasterers Association and the Lathers, apparently through the Carpenters Union, were proceeding simultaneously. Although the record is not entirely clear, it appears that while working for members of the Contracting Lathers and Plasterers Association, the Lathers would be paid the lower wage rate, and while working for members of the Gypsum Dry Wall Contractors Association, they would be paid the higher rate.

[8] Yocum testified, without contradiction, that during this telephone conversation with Tobin on May 15, Yocum verbally made the same wage offer as O'Brien. This offer was similarly rejected by Tobin.

throughout many bargaining sessions prior to the unilateral changes. Throughout June and July there was wholesale disaffection by the union members, who resigned from the Union and returned to work for the various contractors.

There were additional negotiating meetings on June 2, 6, and 8. At the June 2 meeting, the Union reduced its wage demand from $3.75 to apparently $2.90.[9] No agreement was reached at those meetings. The June 8 meeting was very abbreviated, the Union walking in and abruptly leaving upon being told that the contractors had no further proposal.

About seven negotiating sessions were held between June 8 and October 22, on which date an agreement was reached, providing basically for the old contract language and benefits and hourly wage increases for a 3-year contract of apparently $2.35, $2.34, and $1.80. Yocum and O'Brien have refused to enter into this agreement.[10]

C. *Analysis and Conclusions*

It is clear that the parties desired to reach an agreement. There is no allegation that the Respondents commenced negotiations with an intent not to reach an agreement or that they engaged in bad-faith bargaining prior to the unilateral conduct alleged in the complaint.[11] It is also clear that the Union was committed to a wage increase far exceeding what the contractors considered feasible, and that the Union's demand was premised on the wage rate that members of another union received from another contractors association. As counsel for the General Counsel correctly summarizes in her brief, the Union, from the beginning of negotiations, wanted compatibility with the Lathers, their competitors. All other issues, I find, although not unimportant, were of secondary significance and were dependent on first reaching an agreement on wages.

As of mid-May, after the strike had commenced, both O'Brien and Yocum had given the Union what was described as their final offer.[12] The Union, however, despite whatever protestations that Tobin may have made that there was room to negotiate,[13] was then unalterably committed to an increase of $3.75 per hour, $2 per hour more than the Respondents' final offer. I find that at this point the Respondents reasonably concluded that, as they stated to the Union in their respective letters, an impasse had been reached because, absent a change in the Union's position, which it steadfastly maintained, there was no realistic possibility that continuation of discussion would have been fruitful. Thus, I find, that the unilateral changes which the Respondents made, commencing about June 1,[14] were not unlawful, as they were consistent with the proposals clearly advanced to the Union during bargaining. *Taft Broadcasting*, 163 NLRB 475 (1967), enfd. 395 F.2d 622 (D.C. Cir. 1968); *Hi-Way Billboards*, 206 NLRB 22 (1973), revd. on other grounds 500 F.2d 181 (5th Cir. 1974); *R. A. Hatch Co.*, 263 NLRB 1221 (1982).

In late June and thereafter, the parties discussed the subject of union fines levied against members who crossed the picket lines and returned to work. All of the contractors, including the Respondents, were admittedly concerned about this and attempted, to no avail, to get the Union to rescind the fines. Contrary to the testimony of Tobin, I find that at no time did the Respondents herein condition entering into an agreement upon the Union's agreement to nullify the fines. Rather, I credit the testimony of various contractors, including Yocum and O'Brien, who testified that, although the matter of fines was of importance, there was no ultimatum that rescission of the fines was a condition of signing the contract.

At no time did either of the Respondents refuse to bargain further with the Union after the impasse, or definitively raise lack of majority status as an issue. Rather, the Respondents continued to meet with the Union thereafter. Virtually all the Respondents' former employees returned to work during the strike, either prior to or after resigning from the Union. Yocum testified that certain employees who returned to work indicated that they were satisfied with the wage offer made to the Union by Yocum, that they believed the Union's wage demand was excessive, and that they had not wanted to strike in the first place. No employees, according to the testimony of Yocum, told him that they no longer desired to be represented by the Union. O'Brien testified that he spoke with 7 of 13 employees who returned to work. One employee told O'Brien that he was concerned that the Union did not take back the Company's offer to the membership "and that he felt the Union was not representing him to the best of his welfare." According to O'Brien, each of the employees "basically . . . said about the same thing, to varying degrees."

I conclude that such statements of dissatisfaction do not definitively show that the employees no longer desired union representation. Additionally, O'Brien's conclusionary testimony regarding his employees' statements is not sufficiently specific to warrant the conclusion that a majority of his employees no longer favored the Union. It appears that the Union's alleged lack of majority status was raised as an afterthought for purposes of this proceeding, and was never advanced by the Respondents as a reason for refusing to engage in further negotiations. Rather, negotiations continued long after

[9] O'Brien said he "believed" this was the Union's wage proposal. Business Agent Tobin testified that he could not remember the money figures as of that date.

[10] One of the original Respondents, Nielsen Plastering Company, has similarly refused to sign the agreement; however, as noted above, the Union has withdrawn its charge against Nielsen.

[11] Although Business Agent Tobin testified that the contractors, including the Respondents herein, refused to discuss the Union's proposals or make counterproposals, the record shows that in fact all of the Union's proposals were discussed, and that counterproposals were advanced by the contractors.

[12] Indeed, O'Brien had made this identical offer on March 19, 1-1/2 months prior to the strike.

[13] Tobin testified that he always refuted the contractors' repeated claims that an impasse had been reached. O'Brien and Yocum, however, testified that when they told Tobin that the parties were at an impasse, in mid-May and June, Tobin acquiesced by his silence.

[14] The complaint alleges that the unilateral changes were made on or about May 1, the date of the contract expiration and the commencement of the strike. However, it appears, and I find, that the changes were made in late May or early June, after the impasse had been reached.

the Respondents resumed operations with replacements or former striking employees. I find that the Respondents' contentions in this regard are not substantiated by the evidence. See *Orion Corp.*, 210 NLRB 633 (1974), enfd. 515 F.2d 81 (7th Cir. 1975); *Petroleum Contractors*, 250 NLRB 604, 607 (1980), enfd. 671 F.2d 496 (3d Cir. 1981); *Landmark International Trucks*, 257 NLRB 1375, 1383–84 (1981).

CONCLUSIONS OF LAW

1. The Respondents are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondents have not violated the Act as alleged.

Based on the foregoing findings of fact and conclusions of law and on the entire record, I issue the following recommended

ORDER[15]

The complaint is dismissed in its entirety.

[15] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.