

International Maintenance Corporation and International Union of Operating Engineers, Local Union No. 406, AFL-CIO. Case 15-CA-16374

June 26, 2002

DECISION AND ORDER

BY MEMBERS LIEBMAN, COWEN, AND BARTLETT

This is a refusal-to-bargain case in which the Respondent seeks to contest the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge and an amended charge filed on November 16 and 27, 2001, respectively, the General Counsel issued a complaint on November 28, 2001, alleging that the Respondent has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to bargain following the Union's certification in Case 15-RC-8349. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982)). The Respondent filed an answer admitting in part and denying in part the allegations in the complaint.

On December 31, 2001, the General Counsel filed a Motion for Summary Judgment and Memorandum in Support. On January 4, 2002, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

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

Ruling on Motion for Summary Judgment

The Respondent admits its refusal to bargain, but contests the validity of the certification based on its contention, raised and rejected in the representation proceeding, that the election was premature because the unit would be expanding in the near future. The Respondent maintains that, in view of the then-impending expansion, the unit at the time of the election did not constitute a substantial and representative complement of employees in the bargaining unit.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding.¹ We

¹ The Respondent alleges that there has been a nearly 10-fold increase in the size of the unit since the October 1, 2001 election. The Respondent argues that this is a "special circumstance" requiring the Board to revisit the Respondent's contention in the representation pro-

ceeding that the election was premature. This contention does not warrant denial of the General Counsel's Motion for Summary Judgment. The Respondent failed to file exceptions to the Regional Director's October 23, 2001 decision overruling the Respondent's objections, which also alleged that the unit had increased significantly. In these circumstances, the Respondent is precluded under Secs. 102.69(d) and 102.67(f) of the Board's Rules and Regulations from raising this issue in the instant proceeding. See *Dynacorp/Dynair Services*, 322 NLRB 602 fn. 1 (1996), *enfd. mem.* 121 F.3d 698 (4th Cir. 1997). Accordingly, we find it unnecessary to address whether a 10-fold increase in the unit is a special circumstance warranting reexamination of the decision in the underlying representation proceeding.

therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.²

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a Louisiana corporation with an office and principal place of business in Baton Rouge, Louisiana, and a jobsite in Sulphur, Louisiana, has been engaged in the business of industrial construction and maintenance. During the 12-month period ending November 30, 2001, the Respondent, in conducting its operations described above, performed services valued in excess of \$50,000 in States other than the State of Louisiana. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Certification*

Following the election held October 1, 2001, the Union was certified on October 23, 2001, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time employees operating heavy equipment defined as Draw Works, Carry Deck and cranes rated at 14 tons or heavier employed by the Employer at the CITGO Lake Charles Manufacturing Complex located in Sulphur, Louisiana, excluding all other employees, craftsmen, foremen, managers, clerical employees, professional employees, guards, and supervisors as defined in the Act.

² The Respondent's request to dismiss the complaint is therefore denied. Members Cowen and Bartlett did not participate in the underlying representation proceeding. They find, however, that the Respondent has not raised any new matters that are properly litigable in this unfair labor practice proceeding.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. Refusal to Bargain

Since October 23, 2001, the Union has requested the Respondent to bargain and, since about November 5, 2001, the Respondent has refused. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By refusing on and after November 5, 2001, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by the law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), *enfd.* 328 F.2d 600 (5th Cir. 1964), *cert. denied* 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), *enfd.* 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, International Maintenance Corporation, Sulphur, Louisiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with International Union of Operating Engineers, Local Union No. 406, AFL-CIO, as the exclusive bargaining representative of the employees in the bargaining unit.

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

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

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment,

and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time employees operating heavy equipment defined as Draw Works, Carry Deck and cranes rated at 14 tons or heavier employed by the Employer at the CITGO Lake Charles Manufacturing Complex located in Sulphur, Louisiana, excluding all other employees, craftsmen, foremen, managers, clerical employees, professional employees, guards, and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in Sulphur, Louisiana, copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 15, 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 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 November 5, 2001.

(c) 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

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."

Act together with other employees for your benefit and protection

Choose not to engage in any of these activities.

WE WILL NOT refuse to bargain with International Union of Operating Engineers, Local Union No. 406, AFL-CIO, as the exclusive representative of the employees in the bargaining unit.

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

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and

conditions of employment for our employees in the bargaining unit:

All full-time employees operating heavy equipment defined as Draw Works, Carry Deck and cranes rated at 14 tons or heavier employed by us at our CITGO Lake Charles Manufacturing Complex located in Sulphur, Louisiana, excluding all other employees, craftsmen, foremen, managers, clerical employees, professional employees, guards, and supervisors as defined in the Act

INTERNATIONAL MAINTENANCE CORPORATION