Niagara Wires, Inc. *and* International Brotherhood of Electrical Workers, Local Union No. 1965, AFL–CIO. Case 12–CA–8126

March 13, 1979

DECISION AND ORDER

BY MEMBERS PENELLO, MURPHY, AND TRUESDALE

Upon a charge filed on March 31, 1978, by International Brotherhood of Electrical Workers, Local Union No. 1965, AFL–CIO, herein called the Union, and duly served on Niagara Wires, Inc., herein called the Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 12, issued a complaint and notice of hearing on May 10, 1978, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(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 Respondent, on or about December 6, 1977, and continuing to date, violated Section 8(a)(1) of the Act by promulgating, maintaining, publicizing, and giving effect to a provision in its pension plan which limited eligibility to employees who were not subject to the terms of a collective-bargaining agreement. Subsequently, Respondent filed its answer admitting in part, and denying in part, the allegations of the complaint.

Thereafter, on July 18, 1978, counsel for the General Counsel filed with the Regional Director of Region 12 a Motion for Summary Judgment, and by order of the same date the Regional Director referred the motion to the Board. On July 27, 1978, the Board issued an order transferring the proceeding to the Board and a Notice To Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a brief in opposition to the General Counsel's Motion for Summary Judgment.

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 paragraph 6 of its answer, Respondent denies that portion of the complaint (para. 4) in which it was charged with unlawfully promulgating, publicizing, maintaining, and giving effect to an eligibility provision in its pension plan which reads as follows:

> TOPIC NO. 1
> YOUR MEMBERSHIP IN THE PLAN
>
> WHO IS ELIGIBLE FOR THE PLAN?
>
> If you are not already a Member of the Plan, your membership will automatically begin on the first April 1, July 1, October 1, or January 1 on or immediately after you become eligible. *To be eligible you must be employed by the Company and your employment must not be subject to the terms of a collective-bargaining agreement. You are eligible for membership if:*
>
> —you are at least 25,
> —you were younger than age 65 when you started to work with the company, and
> —you have completed at least 3 months of service.
>
> [Emphasis supplied.]

In her Motion for Summary Judgment, counsel for the General Counsel has referred to, and attached, a portion of Respondent's pension plan booklet indicating that the eligibility provision cited above is, in fact, part of Respondent's pension plan. The General Counsel also attached to the motion a letter from Respondent's attorney addressed to Mr. William E. Franke, a field examiner employed at the Board's Jacksonville Resident Office, Region 12, stating that Respondent distributed a summary description of the pension plan to its employees in November 1977. This summary description included the eligibility requirements as stated above. From these documents, the General Counsel contends that paragraph 4 of the complaint must be deemed to have been admitted as true insofar as it alleges that Respondent promulgated, maintained, and publicized a provision in its pension plan which limited eligibility in such plan to employees who were not subject to the terms of a collective-bargaining agreement. The General Counsel, in effect, concedes that a factual dispute remains regarding whether Respondent has given effect to the eligibility provision, but asserts that the resolution of such an issue is not necessary for finding a violation of Section 8(a)(1).

Respondent, in its brief in opposition to the General Counsel's motion, admits that it has promulgated the eligibility provision, but denies that it was

publicized. However, nowhere in its brief does Respondent address, or in any way refute, the validity of the two exhibits accompanying the Motion for Summary Judgment which clearly show that Respondent distributed summaries of the plan in November 1977, including the alleged illegal eligibility requirements. Respondent further contends that a violation as alleged by the General Counsel cannot stand without a finding that the eligibility provision was, in fact, given effect and, since the pleadings raise a factual dispute with regard to this matter, the Motion for Summary Judgment is not appropriate.

Contrary to Respondent's contentions, it is apparent from the General Counsel's exhibits, as well as Respondent's own brief in opposition to the General Counsel's motion, that paragraph 4 of the complaint, absent the allegation dealing with the implementation of the eligibility provision, has, in effect, been admitted. As it is well settled that the promulgation, maintenance, and publication of an employee benefit plan whose benefits are conditioned on the unrepresented status of the employees are themselves sufficient for finding an 8(a)(1) violation,[1] the only issue to be resolved is whether, as a matter of law, Respondent's eligibility provision violates the Act. Accordingly, we find that no triable issue remains requiring a hearing, and, as discussed below, we 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 RESPONDENT

Respondent is a Florida corporation with an office and place of business located in Quincy, Florida, where it operates a manufacturing plant engaged in the production of fourdrinier wires. In the 12 months preceding the issuance of the complaint, a representative period, Respondent shipped goods and materials valued in excess of $50,000 from its Quincy, Florida, facility directly to points outside the State of Florida. Accordingly, we find 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

International Brotherhood of Electrical Workers, Local Union No. 1965, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

As noted above, the General Counsel contends that Respondent has promulgated, maintained and, sometime during November 1977, a few weeks before a scheduled union election,[2] distributed to its employees a pension plan which by its terms requires the employees to forgo participation in the plan if their employment becomes "subject to the terms of a collective-bargaining agreement." According to the General Counsel, the existence of such a provision, which was made known to the employees, inherently infringes on basic Section 7 guarantees because, under the plan, union representation and the negotiation of a collective-bargaining agreement are predicates for ineligibility. Contrary to the General Counsel's position, Respondent claims that the mere existence of a restrictive eligibility provision has not been held to violate the Act unless the employer emphasizes the eligibility restriction in order to coerce employees during an election campaign, or actually implements the restrictive provision, and deprives otherwise eligible employees from the benefits under the plan. We reject Respondent's contention.

While, as Respondent notes, the Board has indeed found violations under the Act based on an employer's unlawful conduct in implementing a restrictive eligibility provision to deprive otherwise eligible employees of benefits, or by explicitly using the eligibility restriction as a coercive device during an election campaign,[3] it is clear that such conduct is not a *sine qua non* for finding a violation in this area. Rather, we have consistently stated that the mere maintenance and continuance of a provision in a pension plan, making lack of union representation one of the qualifications for eligibility to participate therein, itself tends to interfere with, restrain, and coerce employees who are otherwise eligible in the exercise of their self-organizational rights.[4] Here, Respondent's plan, in limiting eligibility to employees who are *not* covered by a collective-bargaining agreement, in effect, conditions eligibility on the unrepresented status of the employees. It is clear that Respondent publicized this restriction by distributing summaries of

[1] See text accompanying cases cited in fns. 4 and 5, *infra*.

[2] The election was held on December 9, 1977. The Union won the election and has since been certified as the collective-bargaining representative of the employees involved.

[3] See, e.g., *Firestone Synthetic Fibers Company*, 157 NLRB 1014, 1018, 1019 (1966), enforcement denied 374 F.2d 211 (1967); *Sunshine Food Markets, Inc.*, 174 NLRB 497, 504 (1969).

[4] See, e.g., *Jim O'Donnell, Inc.*, 123 NLRB 1639, 1643 (1959); *Melville Confections, Inc.*, 142 NLRB 1334, 1338 (1963), enfd. 327 F.2d 689 (7th Cir. 1964), cert. denied 377 U.S. 933. See also *A. M. Steigerwald Co.*, 236 NLRB 1512 (1978).

the plan to its employees a few weeks before they were scheduled to vote in the union election. While there is no reason to assume that the distribution of the plan was unlawfully motivated, the communication and the continued existence of such an exclusionary eligibility requirement necessarily exert a coercive impact on the employees. It is for this reason that an employee benefit plan which restricts coverage to unrepresented employees is *per se* violative of Section 8(a)(1) of the Act, regardless of whether the employer adds to the misconduct by implementing the restriction or exploiting it during an organizing campaign.[5]

Aside from the above, Respondent further claims that its pension plan, including the language on eligibility, was first drafted in 1968; that it was designed to apply to all of Respondent's plants—some of which were unionized at that time and some of which were nonunion; and that the eligibility provision was needed to delineate between plants which already had collective-bargaining agreements containing pension plans and those which did not. According to Respondent, the eligibility provision was not meant to discourage union organizing in nonunion plants, and the benefits under the plan are not conditioned on the unrepresented status of the employees. Rather, the restrictive language was meant to exclude only those employees in plants already covered by a negotiated pension plan. However, notwithstanding Respondent's interpretation of the eligibility requirements, the plan itself and the summary of the plan, which were distributed to the employees, contain no language regarding eligibility other than that which automatically excludes unit employees from its coverage as soon as a collective-bargaining agreement is negotiated on their behalf. Thus, the plan as written is clearly susceptible of conveying the impression that the employees would ultimately lose the benefits under the pension plan if they chose to become members of a bargaining unit. If, as Respondent claims, the eligibility requirements under the plan were only designed to exclude employees *already* covered by negotiated pension plans and were not meant to exclude employees because of their "represented" status, the eligibility provision as it now reads is clearly too broad. Accordingly, we find that in promulgating, maintaining, and continuing to maintain such a pension plan Respondent violated and continues to violate Section 8(a)(1) of the Act.

[5] See, e.g., *White Sulphur Springs Company, d/b/a Greenbrier Hotel*, 216 NLRB 721, 727 (1975); *Sunshine Food Markets, Inc.*, 174 NLRB 497, 504 (1969); *Goodyear Tire & Rubber Company*, 170 NLRB 539, 550 (1968), modified in part 413 F.2d 158 (6th Cir. 1969); *Dura Corporation*, 156 NLRB 285, 288, 289 (1965), enfd. 380 F.2d 970 (6th Cir. 1967).

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with the 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)(1) of the Act, we shall order that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Specifically, having found that Respondent continues to maintain a provision in its pension plan which by its terms unlawfully excludes from participation therein otherwise eligible employees who become subject to a collective-bargaining agreement, we shall order Respondent to amend the pension plan so as to clearly eliminate the unlawful eligibility restriction.

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

CONCLUSIONS OF LAW

1. Niagara Wires, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. International Brotherhood of Electrical Workers, Local Union No. 1965, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.
3. By promulgating, maintaining, and publicizing a pension plan for its employees which excludes from participation therein otherwise eligible employees who select a collective-bargaining representative and who subsequently become subject to the terms of a collective-bargaining agreement, Respondent has violated and continues to violate Section 8(a)(1) of the Act.
4. 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 the Respondent, Ni-

agara Wires, Inc., Quincy, Florida, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Promulgating, maintaining, and publicizing a pension plan for its employees which excludes from participation therein otherwise eligible employees who become members of a collective-bargaining unit and who subsequently become subject to the terms of a collective-bargaining agreement.

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

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Amend its pension plan by eliminating therefrom the provision which by its terms excludes from participation therein otherwise eligible employees who become subject to the terms of a collective-bargaining agreement.

(b) Post at its plant located in Quincy, Florida, copies of the attached notice marked "Appendix."[6] Copies of said notice, on forms provided by the Regional Director for Region 12, 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 12, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

[6] 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 promulgate, maintain, and publicize a pension plan for our employees which excludes from participation therein otherwise eligible employees who become members of a collective-bargaining agreement.

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.

NIAGARA WIRES, INC.