

DECISIONS OF THE NATIONAL LABOR RELATIONS BOARD

322 NLRB No. 74

International Union of Operating Engineers, Local 825 (Enserch Environmental Corporation; Foster Wheeler Environmental Corporation, and Foster Wheeler USA Corporation, Single Employer) and Robert Gavin, Thurman Lee Brown, Stephen Thomas, Zachery Brown, Garret West, Don Nolan, David Cradic, Bruce Kates, Joseph Burt, and Clyde Martin, Jr. Cases 4-CB-7296, 4-CB-7407-1, -2, 4-CB-7359, 4-CB-7519-1 to 5, 4-CB-7527, 4-CB-7544, 4-CB-7596

OCTOBER 31, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND HIGGINS

The issue presented in this case is whether the judge\1\ erred in recommending dismissal of the complaint alleging that the Respondent violated Section 8(b)(1)(A) and (2) of the Act by maintaining agreements with the Employers that discriminated in favor of employees referred from the Respondent's hiring hall and against employees hired directly by the Employers.

\1\On June 7, 1996, Administrative Law Judge Richard H. Beddow, Jr., issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

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,* and conclusions and to adopt the recommended Order.

*The correct citation for the Board decisional language quoted in the second paragraph of the ``Discussion'' section of the judge's decision is Manitowoc Engineering Co., 291 NLRB 915, 918-919 (1988), enf. 909 F.2d 963 (7th Cir. 1990).

ORDER

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

Dated, Washington, D.C. October 31, 1996

William B. Gould IV, Chairman

Margaret A. Browning, Member

John E. Higgins Jr., Member

(seal) National Labor Relations Board

Steven B. Goldstein, Esq., for the General Counsel.
Edward A. Cohen, Esq., of Kenilworth, New Jersey, for the Respondent.

DECISION

STATEMENT OF THE CASE

Richard H. Beddow Jr., Administrative Law Judge. This matter was heard in Philadelphia, Pennsylvania, on March 26 and 27, 1996. Subsequently, briefs were filed by the General Counsel and the Respondent.\1\ The consolidated proceedings are based on an original charge filed August 8, 1994,\2\ and a series of additional charges filed by numerous individuals. The Regional Director's consolidated complaint dated November 30, 1995, alleges that the Respondent, International Union of Operating Engineers, Local 825, of Little Falls, New Jersey, violated Section 8(b)(1)(A) and 8(b)(2) of the National Labor Relations Act by maintaining and abiding by a series of unlawful contract clauses and practices and understandings, pursuant to which employees hired from the union's hiring hall made a higher wage rate than employees hired directly by the employers.

\1\The General Counsel's unopposed Motion to Correct is hereby granted and is received into evidence as General Counsel's Exhibit 10.

\2\All following dates will be in 1994, unless otherwise indicated.

On a review of the entire record in this case and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent Union is a labor organization within the meaning of Section 2(5) of the Act. It has had a collective-bargaining and a project agreement with Ebasco Constructors, Inc., and its successors Enserch Environmental Corporation and Foster Wheeler Corporation (both of Texas) and it is established that in the last 12 months the employer engaged in construction projects and purchased and received goods and materials valued in excess of \$50,000 directly from points outside the State of Texas and I find that the circumstances meet the Board's jurisdictional standards and it effectuates the policy of the Act to exercise jurisdiction in a case of this nature.

II. THE ALLEGED UNFAIR LABOR PRACTICES

The Union had operated a hiring hall under the labor agreement with the New Jersey National Contractors Association for many years. This agreement requires that the Union be the source of referrals of employees to employment on request of a contractor.

In July 1987, Ebasco Constructors, Inc., a wholly owned subsidiary of Enserch Corporation (a member of the New Jersey National Contractors Association), became a party with Respondent Local 825 to the local New Jersey area pre-hire construction industry collective-bargaining agreement between the Local and that Association for the period July 1, 1987 to June 30, 1990.

Article X provided that the agreement covered work at a ``federally designated hazardous waste site'' in Bridgeport, New Jersey, commonly called a Super Fund site, in addition to the normal construction type of work. Article III detailed the hiring hall procedures and required all employers party to the agreement to seek to obtain their jobsite employees through the Local 825 hiring hall, advising the hall of the work to be performed and any ``special skills or abilities'' required for such employees. Article III also provides that the hiring hall must

. . . maintain an open employment list for the employment of workmen. Such list shall be established and . . . shall not be based on, or in any way affected by union membership, bylaws, rules, regulations, constitutional provisions, or any other aspect or obligation of union membership, policies or requirements.

The local area construction agreement set forth the job classifications and pay rates, as well as the fringe benefits, for the normal types of construction industry jobsite employees and jobsite equipment operators who typically work on construction jobs, but it did not have job classification for positions such as ``board operators,'' ``utility operators,'' or ``I&E technicians'' and there were no specific classifications or rates of pay applicable to the control or operation of an incinerator plant or a ``thermal destruction facility'' such as that involved in this instance for the ``super fund'' toxic cleanup.

There was, however, a need for front end loader operators (as well as a need for mechanics), that otherwise were covered in the classifications.

This specific New Jersey project involved digging up many acres of contaminated dirt, sludge, and other contaminated materials, transporting them to a thermal destruction plant erected on the site, disintegrating the material in kilns or ovens, and transporting the resulting ashes for burying on the property.

In the fall of 1989, during the third year of the 1987-1990 agreement, Ebasco entered into a project labor agreement with Local 825 and two other labor union locals (Teamsters Local 676 and Laborers Local 172) for the project. The project labor agreement was to remain in effect for the duration of the project and contained a no-strike pledge, a union-shop requirement, and a requirement that hiring be made through their respective hiring halls, unless the hiring halls could not provide employees with the required skills.

After being awarded the contract, Ebasco subcontracted to another company, Ensco, the work of erecting and operating the thermal destruction facility. Ensco, which had no labor agreement with any union, hired and utilized about 50 employees at the site. These including ``board operators'' who operated the control room computers which ran the disintegration equipment, and I&E technicians (then classified as utility operators), who calibrated and maintained control room and plant equipment and mechanics and others who operated small front end loaders, as well as general laborers. It paid these employees between \$10.50 per hour and \$17.50 per hour (with the board and utility operators apparently receiving the higher rate) but provided its employees with no medical coverage or other benefits. During the 3-year period that Ensco operated the facility, the board operators occasionally were used to help the mechanics repair the plant's equipment and to operate equipment like the Bobcats or small front end loaders to remove ash from the kilns during outages when they could not perform their usual duties.

In October 1992, a dispute arose between Ensco and the Corps of Engineers, the facility was shut down and the Ensco employees were laid off. In November 1992, Ebasco terminated its contract with Ensco and took over operation of the facility with its own employees hired for that purpose.

Ebasco's project head, Michael Fitzgerald, then notified the Unions on the site of the Ensco termination and his decision to have Ebasco take over the operation of the thermal facility. He asked Local 825 to negotiate an addendum to their project labor agreement to cover the operations of the thermal facility using Ebasco employees. The Union's negotiator sought to have all employees hired through Local 825's hiring hall, just as Ebasco did in order to secure the on-site employees to work ``outside'' the thermal facility under the project labor agreement. As the Union was not aware of the necessary skills for a board operator or I&E technician, Fitzgerald explained that Local 825's hiring hall could not refer any employees with the skills required or even a mechanic already conversant in TDF equipment; and that such classifications did not exist under the local area agreement. The Union wanted employees to be hired from the hall and trained, but Fitzgerald took the position that he did not have time to train board operators, I&E technicians, and all needed mechanics from scratch and that he preferred to hire some of the former Ensco employees. The Union ultimately agreed with Fitzgerald, who interviewed and then hired 11 former Ensco employees for those jobs between late-December 1992, and early-January 1993, namely Carl Barker, Joseph Burt, Robert Gavin, Clyde Martin Jr., Charles Moore, Zachary Brown, Thurman Brown, David Cradic, Garrett West, Charles MacDonald, and James Dean, (plus 8 laborers whose jobs were covered by Laborers Local 172). Those hired constituted all of Ebasco's board operators and I&E technicians and they joined Local 825 subsequent to their employment.

None of the former Ensco employees hired by Fitzgerald held themselves out as being an experienced or professional front end loader operator or heavy equipment operator; and they sought only the same board operator, I&E technician or mechanical jobs that they had performed previously and Fitzgerald determined that none of the 11 were skilled loader operators or loader/mechanics that could serve both the loader operator and mechanic functions as needed.

An issue that arose in the negotiations of the Addendum concerned the rates of pay for the various classifications. There was no dispute between Fitzgerald and the Union that the loader operators and loader/mechanics, those to be obtained from the hiring hall, would be paid the ``B'' rate since the ``outside'' loader operators who worked on the jobsite beyond the thermal facility received that same rate.

The Union initially took the position that everyone--including the board operators, the technicians, and even the mechanics not skilled in operating the loaders--should receive the same ``B'' rate. Fitzgerald would not agree because he expected that the project would be over in 12 or 18 months and that he would not need to hire any replacements for the 11 employees initially hired as he expected that they would all stay for the duration. He also assumed that all 11 would be pleased to be hired because they were all out of work and because they would receive sizable wage increases along with the medical coverage and other fringe benefits of the local area construction agreement. Fitzgerald asserted, in substance, that the board operator and I&E technician jobs did not justify the same ``B'' rate he had to pay for ``B'' rated loader operators and loader/mechanics.

The Union ultimately agreed with Fitzgerald that the board operators and I&E technicians would be classified at the ``C'' rate that was in effect in 1989 in the local area construction agreement when the project labor agreement was executed, namely \$19.72 per hour, fixed for the duration of the project, (then assumed to be 12 to 18 months).

The Addendum drafted by Ebasco set forth ``minimum wage rates'' for the Local 825-covered classifications as follows:

	Ebasco Hired*	From Hall**
Board Operator	19.72	B. Rate
Utility Operator	19.72	B. Rate
Loader Operator	--	B. Rate
30-Ton Crane	--	A. Rate if over
.....		1-hour shift

* Ebasco hourly rates are for the duration of the job.

** In accordance to the Bros. Project Agreement.

Ebasco did not hire any loader operators or crane operators formerly employed by Ensco. These were traditional construction industry classifications and such employees were obtained from the hiring hall under the local area agreement and the Project Labor Agreement.

Both Fitzgerald and the Union understood that ``Ebasco Hired'' simply meant the 11 former Ensco employees hired as board operators, I&E technicians, and mechanics (the latter two being the ``utility operators'' in the addendum). Although Fitzgerald had not expected to replace them before the project was completed, Ebasco later hired replacement board and utility operators off the street, and applied the ``Ebasco Hired'' rate to them.

On October 11, 1994, Foster Wheeler Environmental Corp. purchased Enserch and began providing the services at the site. From about October 11, 1994 to about March 8, 1995, Foster Wheeler and the Union maintained and abided by the Enserch project labor agreement and addendum. On March 8, 1995, Foster Wheeler and the Union entered into a new addendum which eliminated the language in the earlier agreements which provided on its face that employees hired from the Union's hiring hall would make more than employees not hired from the hiring hall. From about March 8, 1995 until the summer of 1995, the wage system continued in practice, and no employee hired directly by the Employers received the B rate that was applied to all employees hired from the union hall.

Fitzgerald's expectations regarding the length of the project turned out to be incorrect and it continued on into January 1996. During this period five replacement board operators or technicians-mechanics were hired off the street between July, 1993 and April, 1995, as the hiring hall still did not have any such ``board operators'' or ``I&E Technicians'' to refer namely: Stephen Thomas, a former Ensco board operator (July 1993); Don Nolan (June 1994), Douglas Prindle (October 1994), Bruce Kates (January 1995), and Randy Pollock (April 1995). Bruce Kates was a member of Local 825 at the time he was so hired as an I&E mechanic; he did not come to the thermal facility from the hiring hall, and was paid the same rate (then up to \$20.62) per hour despite his union membership; as he was not a loader operator. All five of these off-the-street hires were paid by the \$19.72 and/or \$20.62-per-hour rate, the latter becoming effective August 29, 1994. When hiring them off the street, Fitzgerald, and his supervisor did not seek individuals who were professional loader operators or loader/mechanics and none of these five were or held themselves qualified front end loader operators or loader/mechanics.

Between January 1993 and October 1995, the employer obtained 22 ``B``-rated loader operators and loader/mechanics from the hiring hall. Joseph Martinez (January 1993); Joe Pompilio, John Callazzo, Jerry Allen (January 1994), Bob Barclay, Terrence Kenny, Michael Foster, Dan Fanelli, John Lloyd (the lead engineer of Local 825), Scott Tiver, Curt Somerson, Dirk Eggink, John Lynch (who also had a black seal license), Mike Mannon, James Glasgow, F. Burg, R. Dawson, A. Seiss, B. Goldsborough, H. Ross, T. Freeman, and Maurice Shaffer. Each of these individuals was obtained from the hiring hall on request from the employer with loader operator or loader/mechanic qualifications for ``versatility and flexibility.'' Some of these individuals had been requested by the employer directly from the hiring hall for the thermal facility, while others had been requested for ``outside'' work under the project labor agreement and were later transferred by the employer to the thermal facility payroll.

Two of these 22 become board operators, but for different reasons. Joseph Martinez had been a prior employee from an earlier Ebasco job; and he was a seasoned mechanic as well as an experienced loader operator. On January 22, 1993 he was requested as a loader/mechanic and went to work at the facility as a loader/mechanic. Later, the employer discovered that Martinez was skilled with computers and that he wanted to change jobs and work in the control room as a board operator for his primary work. He was reassigned to be a board operator, but was not reduced in pay from the ``B'' rate he had been receiving because the Company felt that he could use Martinez as a loader/mechanic when the plant was shut down for repairs or maintenance. (Martinez thereafter was used on some occasions as a loader/mechanic.)

Jerry Allen had prior experience with incineration plants and had been a managerial supervisor at one or more such plants. He also had been a board operator, mechanic, and loader operator and was a friend of an Ebasco supervisor, Jimmy Lewis, who suggested to Allen that he send a resume to the company. He was interviewed and sent to the hiring hall. The company then contacted the hall and requested Allen by name for the thermal facility. Allen was referred from the hall, as a loader operator or loader/mechanic and once he arrived he was assigned work as a board operator, but also was used at times as a loader operator and mechanic and was paid the ``B'' rate.

Two of the original eleven Ensco employees hired by Fitzgerald at the \$19.72-per-hour rate as board operators and utility operators, Martin and Moore, demonstrated that they had other special qualifications and attributes. Martin had a ``black seal'' steam boiler license needed at the facility as there is a legal requirement that a licensed boiler operator be on site when the thermal boiler is operative. Martin was designated as ``the operator in charge'' of the waste heap boiler and given a \$23.07 rate of pay (higher than he had previously received but still less than the ``B'' rate of pay). Moore was a superior mechanic and also was elevated to the \$23.07-per-hour pay rate (the Company was free to raise their rate of pay because the pay rates set forth in the agreements were ``minimum'' rates only). Also, Maurice Schaffer (one of the loader/mechanics hired from the Local 825 hiring hall) was paid the ``B'' rate because he was an experienced loader/mechanic with the skills requested by the Company. He largely functioned as a mechanic but also drove the loaders at times.

After Enserch took over from Ebasco, the Union requested that the project labor agreement and the thermal facility addendum be reexecuted in the name of Enserch Environmental Corporation and in May and July 1994, both were reexecuted by Local 825 and Enserch. The only pertinent change was the term ``Ebasco Hired'' being changed to ``Enserch Hired'' in the thermal facility addendum's wage provision.

After August 29, 1994 when Foster Wheeler bought all of the stock of Enserch, the Union requested that the project labor agreement and the thermal facility addendum be reexecuted in the latter's name and a few months later those agreements were reexecuted with some other changes. In the wage and benefit provision, the former reference to the wages and benefits being set forth in addenda to the project labor agreement was changed to such being paid ``at the rates established in the local union collective bargaining agreements.'' The wage rate/job classification provision was revised to eliminate the reference to ``utility operator'' and substitute the ``I&E technician'' at the minimum \$20.62 hourly rate, and the ``operator mechanic''--the loader/mechanics referred to herein--at the minimum ``B'' rate per hour. The reference to the board operator classification was continued, with those in that classification to receive the minimum of \$20.62 per hour. In all, the reference to ``Enserch Hired'' and ``From Hall'' was completely eliminated, but the elimination of the reference to hiring did not result in anyone's rate

of pay being changed (technicians continued to be paid the same \$20.62 rate, board operators the same \$20.62 or \$23.07 rate, and the loader operators and loader/mechanics the same ``B'' rate). The change in the language was the result of a meeting with the Regional Director of Region 4 concerning the charges filed in the instant case.

Charges were filed by several employees after they learned that Martinez, Allen, and Maurice Schaffer were being paid the higher ``B'' rate, but were assigned the same normal work as they were assigned-- Martinez, and later Allen, as board operators, and Schaffer as a mechanic. In substance, they complained that they did not have equal wages, particularly because of their prior experience and familiarity in operating the thermal facility.

DISCUSSION

This case presents the straightforward legal issue of whether the Union violated Section 8(b)(1)(A) and (2) of the Act by maintaining and abiding by a series of contract clauses and practices and understandings, pursuant to which employees referred to the site by the Union through the union hall were paid a higher wage rate than employees hired directly by the employer. The Respondent accurately points out that despite the presentation of somewhat related ``background'' type information, this proceeding does not involve issues related to the local Union's duty of fair representation, the need for any ratifications by bargaining unit employees, the propriety of the local Union's hiring hall practices, or the relative classification of job skills or qualifications as they pertain to the wage rates for various job titles as reflected in Respondent's Exhibit No. 4 (the rate of wages and job classifications effective under the applicable collective-bargaining agreement).

In deciding whether the provisions of a collective-bargaining agreement violate the prohibition against discrimination based on union membership status, the Board, in Electrical Workers Local 1212 (WPIX, Inc.), 288 NLRB 374, 376 (1988) said:

Section 8(a)(3) prohibits ``discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization'' Provisos to the section permit limited union-security agreements. Application of the section to the specific contract clause at issue requires us to determine, first, whether the clause treats employees differently with respect to an employment condition on the basis of union membership and, second, whether that different treatment encourages union membership. If the answer to both questions is yes, we must then determine whether the differential treatment that tends to encourage union activity is justified by the policies of the Act.

In the latter case, the labor agreement expressly provided for a 2-year leave of absence without loss of seniority for employees serving as full-time union officials, but elsewhere provided only a 6-month leave of absence with loss of seniority for other purposes. The Board found that while these provisions did treat employees differently on the basis of union-related considerations, they did not tend to encourage employees to become active unionists so that they might be selected to take temporary union jobs and the decision did not reach the ``justification'' issue.

In the instant case it appears that the bargaining agreement language in question ``Ebasco Hired''--``From Hall'' and the separate rates of pay of \$19.72 (the ``C'' rate), and ``B'' Rate, respectively, is not really a matter of different treatment but is an issue of job classification.

Here, after the demise of Ensco, the original subcontractor and operator of the thermal facility, the new project agreement between the employer and the Union gave the former Ensco employees a chance to regain their former jobs as board operators or utility operators/I&E technicians (at an increase in pay), with a new entity that had a preexisting collective-bargaining obligation and which had taken over the operating functions performed on a nonunion predecessor,

Although the bargaining agreement contains dozens of job classifications placed into skill/pay levels ranging from Class ``A'' to Class ``E,'' it did not have two of the four specific classifications involved herein (loader and crane operators were listed while board

operators and utility operators/technicians were not).

In hindsight, it is apparent that the Union and employer might have avoided the instant allegations if they had established new classifications, however, the agreement did contain the following clause:

It is understood that the classifications listed hereunder are not all inclusive and ALL AND SIMILAR TYPES of equipment are included herein at applicable rates of pay by reference hereto in all types of construction.

Here, some of the ``C'' rate classifications included such titles as asphalt plant engineer, batchers (batching plant and crusher on site), belt conveyor systems, mechanics, and maintenance utility man, as well as front end loaders (1 yard or over but less than 2 yards). As also noted above, loader operator of equipment 2 yards or over were under the ``B'' rate.

In effect, the new project agreement between the employer and the Union merely classified the board operator, utility operator/technical jobs at the class ``C'' level, gave those jobs to the employees of the predecessor nonunion company who wished to take them. And, in accordance with the employers requirements, it also provided that subsequent new hires could be more broadly qualified (as class ``B'' loader operators), so that the employer could have greater flexibility in its utilization of employees.

The former employees of the predecessor company who accepted a job offer were not disadvantaged by being placed at the equivalent of a ``C'' rate classification and the project agreement did not ``encourage'' employees to become members of the Union (to be hired) through the ``Hall,'' because they were not qualified class ``B'' loader operators and it was the ``C'' rate equivalent job classification and not union membership that made the distinction. Moreover, as pointed out by the Respondent, joining Local 825 did not mean they had to receive the ``B'' rate thereafter and this is not a case where nonunion employees in a bargaining unit were treated differently than the union members in the same unit as the union-security provisions in the instant labor agreements required everyone to become a member (tender the initiation fee and dues) of the local and joining Local 825 resulted in no wage-rate benefit.

The use of the terms ``Ebasco (or Enserch) Hired'' and ``From Hall'' did not refer to the wage differential being based on union status, membership, or activity or the lack thereof, but only referred to their prior employment status and their being rehiring directly by the employer rather than through the hiring hall (with it being recognized that the hiring hall did not have persons in the job classifications board operators, utility operators/technicians to refer).

The words ``From Hall'' plainly referred to Local 825's hiring hall, a hiring hall established under and governed by written regulations set forth in the local area construction agreement which mandated that job seekers be referred from the hall with the skills demanded by the employer, if possible, but without regard to any form of union membership or union status.\3\ The Hall was an open hiring hall, one that refers nonunion as well as unionized job seekers. Thus, ``From Hall'' is not the equivalent of ``unionized,'' and ``Ebasco (or Enserch) Hired'' is not the equivalent of nonunion.

\3\During the period when referrals were made (with the exception of Jerry Allen, who was requested by name because of his unique experience), 21 of the 22 individuals obtained from the hall to work at the facility were loader operators or loader mechanics who were requested not by name but rather by their ``B'' classification as individuals who were qualified loader operators and loader mechanics. In response to the employer's request Allen also was a qualified loader operator; that he was assigned to be a board operator as he was a prior supervisor and was a friend of another facility supervisor.

Only Allen and Joseph Martinez, a loader operator who worked at the facility as a loader operator before seeking reassignment as a board operator, were paid the ``B'' rate while working as board operators. All of the other board operators and technicians employed at the facility were either those formerly employed by Ensco or those hired off the street. All of the I&E Technicians were similarly either former Ensco Technicians or hired off the street. Only Maurice Schaffer and he was hired from the hiring hall to fill a loader/mechanic slot as he was qualified loader operator as well as a mechanic was paid the ``B'' rate whereas the former Ensco mechanics hired by Ebasco were not skilled

loader operators.

Under these circumstances, I cannot find that the General Counsel has persuasively shown that the terms and practices of and under the agreement between the employer and the Union provided for or resulted in different treatment of employees on the basis of their union membership and, accordingly, I find that the provision of the agreement between the employer and the Union distinguish only between job classifications and do not create a distinction based on union membership.

A similar conclusion would be reached regarding the second WPIX test, supra, if it were to be considered it necessary to reach this step and to consider whether ``different treatment'' encourages union membership.

Here, as pointed out by the Respondent, the asserted wage dichotomy did not encourage membership in Local 825. Specifically, employee Bruce Kates was a member of Local 825 when he was hired off the street to be an I&E technician. His union membership resulted in no higher rate of pay or any other benefit than was accorded to any other I&E technician who was not a member of Local 825 when hired. Union membership was not necessary to obtain job referrals from the hiring hall. The only way the board operators and I&E technicians could have obtained the higher rate of pay was to become qualified loader operators or loader/mechanics at the hiring hall for those skills.

Here, the wage structure provision did not promote union membership (the union-security provision did that, and the instant complaint does not attack the union-security provision). The job classification/wage-rate distinction ``provided no objective basis for employees to feel `encouraged' to join the Union,' and thus were shown to be the proper result of contract negotiations.

Here, the fact that the employer chose to reach a settlement with the Board over allegations based on the same contractual provision is not relevant to or controlling of the allegations fully litigated in the complaint herein. Accordingly, I find that it is unnecessary to reach the third step and I find that under all the circumstances shown, the General Counsel has failed to show that the Respondent restrained or coerced employees in the exercise of their Section 7 rights in violation of Section 8(b)(1)(A), or that it caused the employer to discriminate against their employees in violation of Section 8(b)(2) of the Act, as alleged.

CONCLUSIONS OF LAW

1. Enserch Environmental Corporation, Foster Wheeler Environmental Corporation, and Foster Wheeler USA Corporation are single employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Respondent Union is a labor organization within the meaning of Section 8(a)(1) and 2(5) of the Act

3. The Respondent is not shown to have engaged in conduct violative of the Act as alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended\4\

\4\If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order 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.

ORDER

The complaint is dismissed in its entirety.

Dated, Washington, D.C. June 7, 1996.