Action Industries, Inc. t/a Action Home Center *and* Amalgamated Food Employees Union Local 590 a/w United Food and Commercial Workers International Union, AFL-CIO-CLC. Case 6-CA-14604

September 30, 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

Upon a charge filed on May 27, 1981, by Amalgamated Food Employees Union Local 590 a/w United Food and Commercial Workers International Union, AFL-CIO-CLC, herein called the Union, duly served on Action Industries, Inc. t/a Action Home Center, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 6, issued a complaint on June 29, 1981, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and the 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 on April 10, 1981, following a Board election in Case 6-RC-8877, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[1] and that, commencing on or about April 23, 1981, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On July 8, 1981, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On August 3, 1981, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on August 7, 1981, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to the Notice To Show Cause.

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 its answer to the complaint, Respondent admits its refusal to recognize and bargain with the Union but attacks the Union's certification contending that, because of improper inclusion of supervisory employees in the bargaining unit, improper conduct by the Union prior to the election, and improper application of the 24-hour rule, the January 27, 1981, election is invalid. For these reasons, Respondent claims it has no obligation to bargain with the Union. Respondent further contends that the pleadings in the instant case establish that substantial and material issues of fact exist and it would be denied due process if not allowed to present evidence at a hearing conducted by an administrative law judge. In his Motion for Summary Judgment, counsel for the General Counsel alleges that Respondent seeks to relitigate issues considered in the underlying representation case and that there are no factual issues warranting a hearing.

Our review of the record in this case, including the record in Case 6-RC-8877, reveals that, after a hearing and the submission of a brief by Respondent, the Acting Regional Director issued his Decision and Direction of Election on December 29, 1980, in which he found that the department heads, the head receiver, and the office manager were included in the bargaining unit of all full-time and regular part-time employees employed by Respondent at its Coraopolis, Pennsylvania, facility. Respondent did not file any request for review of the Acting Regional Director's Decision and Direction. In accordance with the Decision and Direction, an election was conducted on January 27, 1981, and the tally of ballots furnished the parties after the election showed 12 votes cast for, and 5 against, the Union. There were two challenged ballots and one void ballot, an insufficient number to affect the results. Respondent filed timely objections to the election alleging that certain prounion employees engaged in misrepresentations, exaggerations, and distortions of fact prior to the election, that the union held a meeting within 24 hours of the election, that the 24-hour rule precluded the Employer from responding to misstatements and distortions made by the Union at its meeting, and

[1] Official notice is taken of the record in the representation proceeding, Case 6-RC-8877, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co. v. Penello*, 269 F. Supp. 573 (D.C. Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

that the bargaining unit improperly included five supervisory employees.

After the investigation, the Regional Director on April 10, 1981, issued his Supplemental Decision and Certification of Representative in which he overruled the objections in their entirety. Respondent filed a timely request for review of the Regional Director's Supplemental Decision and Certification of Representative arguing, *inter alia*, that the Regional Director improperly failed to order a hearing on the issues raised by Respondent's objections. The request for review was denied on June 16, 1981, by telegraphic order of the Board.

On April 21 and June 24, 1981, the Union, by letter, requested, and is continuing to request, Respondent to bargain collectively with it as the exclusive collective-bargaining representative of Respondent's employees in the unit described above with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment. By letter dated April 23, 1981, Respondent informed the Union that it would not bargain until the Board acted upon Respondent's request for review. In its answer to the complaint, Respondent admits it has refused and is continuing to refuse to recognize and bargain with the Union for the purpose of collective bargaining in order to test the certification of the Union as exclusive bargaining representative of its employees. It thus appears that Respondent is attempting to raise issues in the present case which were raised in the underlying representation case.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[2]

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding.[3] We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

[2] See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

[3] Respondent has requested oral argument. This request is hereby denied as the record and the pleadings adequately present the issues and positions of the parties.

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent is and has been at all times material herein a Pennsylvania corporation with its principal office located in Cheswick, Pennsylvania, and various facilities located in Pennsylvania, Maryland, Ohio, and West Virginia, where it is engaged in the business of retail sales of hardware and related products. During the 12 months preceding May 1, 1981, a representative period, Respondent derived gross revenues in excess of $500,000, and purchased and received goods and materials valued in excess of $5,000 directly from suppliers located outside the Commonwealth of Pennsylvania.

We find, on the basis of the foregoing, 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

Amalgamated Food Employees Union Local 590 a/w United Food and Commercial Workers International Union, AFL-CIO-CLC, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Representation Proceeding*

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time employees employed by Action Industries, Inc. t/a Action Home Center at its Coraopolis, Pennsylvania, facility; excluding all guards, professional employees and supervisors as defined in the Act.

2. The certification

On January 27, 1981, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 6 designated the Union as their representative for the purposes of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit of April 10, 1981, and the Union continues to be

such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about April 21, 1981, and June 24, 1981, and at all times thereafter, the Union, by written request, has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all of the employees in the above-described unit. Commencing on or about April 23, 1981, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since April 23, 1981, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent, set forth in section III, above, occurring in connection with its 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)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

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

CONCLUSIONS OF LAW

1. Action Industries, Inc. t/a Action Home Center is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Amalgamated Food Employees Union Local 590 a/w United Food and Commercial Workers International Union, AFL-CIO-CLC, is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time employees employed by Action Industries, Inc. t/a Action Home Center at its Coraopolis, Pennsylvania, facility; excluding all guards, professional employees and supervisors as defined in the Act constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since April 10, 1981, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about April 23, 1981, and at all times thereafter, to bargain collectively with the above-named labor organization as the exlusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. 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, Action Industries, Inc. t/a Action Home Center, Coraopolis, Pennsylvania, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Amalgamated Food Employees Union Local 590 a/w United Food and Commercial Workers International Union, AFL-CIO-CLC, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All full-time and regular part-time employees employed by Action Industries, Inc. t/a Action Home Center at its Coraopolis, Pennsylvania, facility; excluding all guards, professional employees and supervisors as defined in the Act.

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

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

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Coraopolis, Pennsylvania, facility copies of the attached notice marked "Appendix."[4] Copies of said notice, on forms provided by the Regional Director for Region 6 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 6, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

APPENDIX

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

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Amalgamated Food Employees Union Local 590 a/w United Food and Commercial Workers International Union, AFL-CIO-CLC, as the exclusive representative of the employees in the bargaining unit described below.

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.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All full-time and regular part-time employees employed by Action Industries, Inc. t/a Action Home Center at its Coraopolis, Pennsylvania, facility; excluding all guards, professional employees and supervisors as defined in the Act.

ACTION INDUSTRIES, INC. T/A
ACTION HOME CENTER

[4] 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."