

**American Seaway Foods, Inc. and Office and Professional Employees International Union—Local No. 17, AFL-CIO. Case 8-CA-13938**

November 30, 1980

**DECISIONS AND ORDER**

BY MEMBERS JENKINS, PENELLO, AND  
ZIMMERMAN

Upon a charge filed on June 19, 1980, by Office and Professional Employees International Union—Local No. 17, AFL-CIO, herein called the Union, and duly served on American Seaway Foods, Inc., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 8, issued a complaint and notice of hearing on July 28, 1980, 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 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 May 2, 1980, following a Board election in Case 8-RC-12051, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;<sup>1</sup> and that, commencing on or about June 26, 1980, 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 August 7, 1980, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On September 8, 1980, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on September 10, 1980, 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 Notice To Show Cause entitled "Cross Motion to the National

Labor Relations Board for Summary Judgment." Respondent also filed a memorandum in support of its cross-motion and in 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 and its response to the Notice To Show Cause, Respondent essentially contests the validity of the Union's certification. Although Respondent admits its refusal to bargain, Respondent denies that it thereby violated Section 8(a)(5) and (1) of the Act. Specifically, Respondent contends that the Union should not have been certified because the Regional Director directed an election in an inappropriate unit. In the Motion for Summary Judgment, the General Counsel maintains that Respondent is attempting to relitigate the issues it raised in the related representation proceeding. We agree with the General Counsel.

Review of the record herein, including the record in Case 8-RC-12051, reveals that on February 27, 1980, after a hearing and the submission of briefs by the parties, the Regional Director issued a Decision and Direction of Election. On March 12, 1980, Respondent filed with the Board a request for review of the Decision and Direction of Election contending that the unit was inappropriate in that it improperly excluded office clerical workers at Respondent's Bedford Heights facilities. On March 24, 1980, the Board denied the request for review. An election was conducted on April 2, 1980, which resulted in a vote of 41 for, and 5 against, the Union. There were three challenged ballots, an insufficient number to affect the results of the election. On April 9, 1980, Respondent filed objections to the conduct of the election contending, in essence, that acts of union representatives and supporters had interfered with the exercise of the employees' freedom of choice. Respondent also contended that the election was conducted in an inappropriate unit. On May 2, 1980, the Regional Director issued a Supplemental Decision and Certification of Representative overruling Respondent's objections and certifying the Union. It thus appears that Respondent is attempting to raise herein issues which were raised and determined 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 al-

<sup>1</sup> Official notice is taken of the record in the representation proceeding, Case 8-RC-12051, 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.

leging 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.<sup>2</sup>

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. 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:

## FINDINGS OF FACT

### I. THE BUSINESS OF RESPONDENT

Respondent is, and has been at all times material herein, an Ohio corporation with an office and place of business located at Bedford Heights, Ohio, where it is engaged in the business of wholesale distribution of grocery and related products. Annually, during the course and conduct of its business operations, Respondent ships goods valued in excess of \$50,000 directly from its Bedford Heights facility to points located outside the State of Ohio.

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

Office and Professional Employees International Union—Local No. 17, AFL-CIO, 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 plant clerical employees employed by the Respondent at its Bedford Heights, Ohio facili-

ty, including freezer clerks, transportation clerks, collection and will call clerks, receiving office clerks, food service warehouse clerks, and Station 1 and Station 3 clerks, but excluding all office clerical employees, confidential employees, managerial employees, and all professional employees, guards, and supervisors as defined in the Act, and all other employees.

##### 2. The certification

On April 2, 1980, 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 8, designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on May 2, 1980, 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 7, 1980, again on May 6, 1980, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about June 26, 1980, 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 June 26, 1980, 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.

<sup>2</sup> 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).

## 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. American Seaway Foods, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Office and Professional Employees International Union—Local No. 17, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All plant clerical employees employed by Respondent at its Bedford Heights, Ohio, facility, including freezer clerks, transportation clerks, collection and will call clerks, receiving office clerks, food service warehouse clerks, and Station 1 and Station 3 clerks, but excluding all office clerical employees, confidential employees, managerial employees, and all professional employees, guards, and supervisors as defined in the Act, and all other employees, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since May 2, 1980, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about June 26, 1980, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive 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, American Seaway Foods, Inc., Bedford Heights, Ohio, 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 Office and Professional Employees International Union—Local No. 17, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

All plant clerical employees employed by the Respondent at its Bedford Heights, Ohio facility, including freezer clerks, transportation clerks, collection and will call clerks, receiving office clerks, food service warehouse clerks, and Station 1 and Station 3 clerks, but excluding all office clerical employees, confidential employees, managerial employees, and all professional employees, guards and supervisors as defined in the Act, and all other employees.

(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 facilities located at Bedford Heights, Ohio, copies of the attached notice marked "Appendix."<sup>3</sup> Copies of said notice, on forms provided by the Regional Director for Region 8, 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 8, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

<sup>3</sup> 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 refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Office Professional Employees International Union—Local No. 17, AFL-CIO, 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 plant clerical employees employed by the Employer at its Bedford Heights, Ohio facility, including freezer clerks, transportation clerks, collection and will call clerks, receiving office clerks, food service warehouse clerks, and Station 1 and Station 3 clerks, but excluding all office clerical employees, confidential employees, managerial employees, and all professional employees, guards and supervisors as defined in the Act, and all other employees.

AMERICAN SEAWAY FOODS, INC.