Giant Markets, Inc. d/b/a Warehouse Foods Price Cutter *and* United Food and Commercial Workers Union, Local 464A, a/w United Food and Commercial Workers International Union, AFL-CIO, CLC. Case 22-CA-9953

August 21, 1980

DECISION AND ORDER
BY MEMBERS JENKINS, PENELLO, AND TRUESDALE

Upon a charge filed on May 6, 1980, by United Food and Commercial Workers Union, Local 464A, a/w United Food and Commercial Workers International Union, AFL-CIO, CLC, herein called the Union, and duly served on Giant Markets, Inc., d/b/a Warehouse Foods Price Cutter, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 22, issued a complaint and notice of hearing on May 19, 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 April 22, 1980, following a Board election in Case 22-RC-8047, 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 28, 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 May 30, 1980, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On June 18, 1980, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on June 24, 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 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

Respondent's answer, in substance, attacks the validity of the Union's certification on the basis of the unit determination in the underlying representation case, which, it claims, was erroneous. The General Counsel argues that all material issues have previously been decided. We agree with the General Counsel.

Our review of the record herein, including the record in Case 22-RC-8047, reveals that on January 29, 1980, the Regional Director for Region 22 issued a Decision and Direction of Election finding appropriate a unit consisting of essentially all meat department employees at Respondent's Ledgewood, New Jersey, store. Thereafter, Respondent timely requested review of the Decision, contending that the Regional Director's unit determination was erroneous, and that there was a contract bar to the election. On February 26, 1980, the Board denied Respondent's request for review, and an election was conducted on April 10, 1980, among the employees in the unit found appropriate. The tally of ballots showed that, of approximately eight eligible voters, eight cast valid ballots for, and none against, the Union. No ballots were cast for the intervening labor organization, the Giant Markets Employees' Association, and there were no challenged ballots. No objections to the election were filed, and, on April 22, 1980, the Union was certified as the bargaining representative of the employees in the unit found appropriate.

Respondent in its answer denies that the Union is a labor organization within the meaning of Section 2(5) of the Act. At the hearing in Case 22-RC-8047, Respondent stipulated to the labor organization status of the Union. Accordingly, in his Decision and Direction of Election the Regional Director found the Union to be a labor organization within the meaning of Section 2(5) of the Act, and Respondent did not request review of this determination. We therefore find that Respondent's denial of this allegation of the complaint raises no issue warranting a hearing.

Respondent also denies that the Union requested it to bargain and that it refused to do so. Attached to and made a part of the General Counsel's Motion for Summary Judgment is a copy of a

[1] Official notice is taken of the record in the representation proceeding, Case 22-RC-8047, 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.

letter dated April 15, 1980, addressed to Respondent's attorney and purporting to be a request by the Union for bargaining. Also attached to and made a part of the General Counsel's Motion for Summary Judgment is a copy of a letter dated April 28, 1980, purporting to be from Respondent's attorney, acknowledging receipt of the April 15 letter and declining to bargain with the Union. In its response to the General Counsel's motion, Respondent does not controvert the contents or receipt of the Union's letter of April 15, 1980, or demonstrate any grounds for questioning its authenticity. Nor does Respondent deny that it sent the April 28, 1980, letter to the Union. In light of these facts, we find that the April 15, 1980, letter requesting bargaining was sent to Respondent, that Respondent in turn sent the April 28, 1980, letter to the Union, and that therefore there is no issue of fact justifying a hearing.

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. 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 Giant Markets, Inc., d/b/a Warehouse Foods Price Cutter, is a Pennsylvania corporation engaged in the retail sale of food and related products at its principal office and place of business in Scranton, Pennsylvania, and at various other retail stores in the States of Pennsylvania, New York, and New Jersey. Respondent's Ledgewood, New Jersey, store is the only facility involved in this proceeding. During the 12 months preceding issuance of the complaint, a representative period, Respondent, in the course and conduct of its business operations, derived gross revenue in excess of $500,000. During the same period, Respondent shipped and transported products valued in excess of $50,000 from its place of business in interstate commerce directly to States of the United States other than the State of New Jersey, and received goods valued in excess of $50,000 which were transported to its place of business in interstate commerce directly form States of the United States other than the State of New Jersey.

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

United Food and Commercial Workers Union, Local 464A, 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 meat department employees, including the meat department head, employed by Respondent at its Ledgewood, New Jersey, store, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act, and all other selling and non-selling employees.

2. The certification

On April 10, 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 22, 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 April 22, 1980, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

[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).

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

Commencing on or about April 15, 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 April 28, 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 April 28, 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.

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. Giant Markets, Inc. d/b/a Warehouse Foods Price Cutter is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. United Food and Commercial Workers Union, Local 464A, 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 meat department employees, including the meat department head, employed by Respondent at its Ledgewood, New Jersey, store, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act, and all other selling and nonselling employees, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since April 22, 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 April 28, 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, Giant Markets, Inc. d/b/a Warehouse Foods Price Cutter, Ledgewood, New Jersey, 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 United Food and Commercial Workers Union, Local 464A, 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 meat department employees, including the meat department head, employed by Respondent at its Ledgwood, New Jersey, store, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act, and all other selling and non-selling 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 Ledgewood, New Jersey, store copies of the attached notice marked "Appendix."[3] Copies of said notice, on forms provided by the Regional Director for Region 22, 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 22, 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 United Food and Commercial Workers Union, Local 464A, 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 meat department employees, including the meat department head, employed by us at our Ledgewood, New Jersey, store, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act, and all other selling and non-selling employees.

GIANT MARKETS, INC. D/B/A WAREHOUSE FOODS PRICE CUTTER

[3] 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 Relations Board."