Winburn Tile Manufacturing Company *and* Oil, Chemical and Atomic Workers International Union, AFL-CIO. Case 26-CA-8245

June 25, 1980

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS PENELLO AND TRUESDALE

Upon a charge filed on January 24, 1980, by Oil, Chemical and Atomic Workers International Union, AFL-CIO, herein called the Union, and duly served on Winburn Tile Manufacturing Company, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 26, issued a complaint on February 5, 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 December 12, 1979, following a Board election in Case 26-RC-6008, 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 January 17, 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 February 12, 1980, Respondent filed its answer to the complaint admitting in part, and denying in part, the matters alleged therein and raising certain affirmative defenses.

On March 28, 1980, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on April 4, 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.

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

Our review of the record herein reveals that on July 3, 1979, an election in Case 26-RC-6008 was conducted pursuant to a Stipulation for Certification Upon Consent Election resulting in 61 votes for, and 57 against, the Union, with 1 void and 8 challenged ballots remaining, which were sufficient in number to affect the results of the election. Thereafter, the Regional Director for Region 26, after an investigation into the matter, issued, on August 26, 1979, his report recommending that five of the eight challenged ballots, including those of Albert James, Jr., and Harvey Hall, be sustained and that the challenges to two other ballots be overruled. With respect to the remaining challenged ballot, that of Aubrey Bean, the Regional Director found the evidence concerning his eligibility to be conflicting, but found it unnecessary to conduct a hearing into the matter inasmuch as his vote, in view of his other findings, was no longer determinative. Respondent thereafter filed exceptions to the Regional Director's findings and recommendations concerning the challenged ballots of James, Hall, and Bean.

On December 12, 1979, the Board issued a Decision and Certification of Representative in the above case in which it adopted the Regional Director's findings and recommendations in their entirety and concluded that Respondent's exceptions raised no material or substantial question of fact or issues of law which would warrant a hearing or reversal of the Regional Director's findings or recommendations. Accordingly, the Board certified the Union as the collective-bargaining representative of the employees in the appropriate unit.

In its answer to the complaint, Respondent admits certain factual allegations alleged therein, including its refusal since January 17, 1980, to recognize and bargain with the Union[2] which has been certified as the collective-bargaining representative of the employees in the appropriate unit described in the complaint. However, in its answer to the complaint and in its response to the Motion

[1] Official notice is taken of the record in the representation proceeding, Case 26-RC-6008, 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.

[2] The Union, by certified mail, requested that Respondent bargain with it as the exclusive representative of the employees in the unit found appropriate by the Board.

for Summary Judgment, Respondent asserts that the Board and the Regional Director erred in refusing to grant a hearing on the question of whether James and Harvey were, as found, supervisors as defined in the Act, and on the challenge to Bean's ballot. Consequently, it argues that the Certification of Representative issued by the Board on December 12, 1979, was "clearly erroneous and improper" and that it therefore did not violate Section 8(a)(5) and (1) of the Act, as alleged.

By its assertions, and more specifically by its denials, in whole or in part, of the allegations of the complaint and the arguments propounded in the response, Respondent is attempting to relitigate the same issues which it raised in the representation proceeding in Case 26-RC-6008.

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.[3]

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 an Arkansas corporation engaged in the manufacture of tile at its Little Rock, Arkansas, plant. During the past 12 months, a representative period, Respondent sold and caused to be shipped from its Little Rock, Arkansas, facility, goods and materials valued in excess of $50,000 directly to points and places located outside the State of Arkansas. During this same period, Respondent, in the course and conduct of its business, purchased and caused to be delivered to its Little Rock, Arkansas, facility various products, goods, and materials valued in excess of $50,000 directly from points and places located outside the State of Arkansas.

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

Oil, Chemical and Atomic Workers International Union, 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 production and maintenance employees, including quality control employees and Sample Department employees, employed at the Employer's Little Rock, Arkansas, location, excluding all office clerical employees, professional employees, salesmen, watchmen, guards and supervisors as defined in the Act.

2. The certification

On July 3, 1979, 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 26, 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 December 12, 1979, 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 December 18, 1979, 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 January 17, 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.

[3] 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).

Accordingly, we find that Respondent has, since January 17, 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 Winburn Tile Manufacturing Company 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. Winburn Tile Manufacturing Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Oil, Chemical and Atomic Workers International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees, including quality control employees, and Sample Department employees, employed at the Employer's Little Rock, Arkansas, location, but excluding all office clerical employees, professional employees, salesmen, watchmen, guards 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 December 12, 1979, 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 January 18, 1979, 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, Winburn Tile Manufacturing Company, Little Rock, Arkansas, 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 Oil, Chemical and Atomic Workers International Union, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All production and maintenance employees, including quality control employees and Sample Department employees, employed at the Employer's Little Rock, Arkansas, location, but excluding all office clerical employes, professional employees, salesmen, watchmen, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the ex-

ercise 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 Little Rock, Arkansas, facility copies of the attached notice marked "Appendix."[4] Copies of said notice, on forms provided by the Regional Director for Region 26, 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 26, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

[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."

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 Oil, Chemical and Atomic Workers International Union, 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 production and maintenance employees, including quality control employees and Sample Department employees, employed at the Employer's Little Rock, Arkansas, location, but excluding all office clerical employees, professional employees, salesmen, watchmen, guards, and supervisors as defined in the Act.

WINBURN TILE MANUFACTURING COMPANY