WGAL-TV, Inc.[1] *and* Chauffeurs, Teamsters and Helpers, Local 771, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 4-CA-10667

June 27, 1980

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS JENKINS AND TRUESDALE

Upon a charge filed on November 29, 1979, by Chauffuers, Teamsters and Helpers, Local 771, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union, and duly served on WGAL Television, Inc., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 4, issued a complaint on December 27, 1979, 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 October 12, 1979, following a Board election in Case 4-RC-13421, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[2] and that, commencing on or about October 27, 1979, 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 January 4 and 30, 1980, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On February 28, 1980, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on March 7, 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

In its answer to the complaint and response and opposition to the Motion for Summary Judgment and Notice To Show Cause, Respondent admits the substantive allegations of the complaint, including the jurisdiction of the Board,[3] the appropriateness of the unit,[4] and the request and refusal to bargain, but attacks both the validity of the second election and the Union's certification on grounds previously raised in its objections in the underlying representation proceeding, Case 4-RC-13421. The General Counsel contends that Respondent does not offer any new evidence or plead any special circumstances herein, that it is attempting to relitigate issues decided in a representation proceeding, and that those issues may not be relitigated here. We agree.

Review of the record herein, including the record in the underlying representation proceeding, Case 4-RC-13421, reveals that, pursuant to a Stipulation for Certification Upon Consent Election, an election was conducted on December 21, 1978. Following the election, the Union filed objections to conduct affecting the results of the election, a hearing was held, and the Hearing Officer's Report on Objections recommended that the election be

[1] In its amended answer to the complaint herein filed on January 30, 1980, Respondent affirmatively states, *inter alia*, that as of August 15, 1979, WGAL-Television, Inc., was no longer used by Respondent as its corporate name. Respondent further stated that as a result of a sale of Respondent's assets to Pulitzer Publishing Co., Respondent is now known as WGAL-TV, Inc., a Delaware corporation, and is a wholly owned subsidiary of Pulitzer Publishing Co. In its memorandum in support of the Motion for Summary Judgment herein, General Counsel stipulated to the aforementioned facts concerning the changes. The caption herein has accordingly been amended to reflect the correct name of Respondent.

[2] Official notice is taken of the record in the representation proceeding, Case 4-RC-13421, 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.

[3] Respondent in its amended answer to the complaint asserted the name change and sale of assets adverted to in fn. 1, *supra*, and also admits that it annually purchased goods and services valued in excess of $10,000 directly from points outside the Commonwealth of Pennsylvania. Since Respondent in its answer and amended answer did not respond to or deny the remaining jurisdictional aspects of the complaint (which were agreed to in the Stipulation for Certification Upon Consent Election in Case 4-RC-13421), we shall deem those aspects of the complaint to be admitted by Respondent. See Sec. 102.20 of the Board's Rules and Regulations.

[4] The unit as alleged in the complaint and admitted appropriate in Respondent's answer accords with the unit as agreed upon in the Stipulation for Certification Upon Consent Election. While it appears that the unit described in the Board's Decision and Certification of Representative inadvertently referred to the unit initially petitioned for, the appropriate unit described *infra* is that agreed upon by the parties in the Stipulation for Certification Upon Consent Election, as alleged in the complaint and admitted in Respondent's answer.

set aside and that a new election be held. Respondent filed exceptions to the Hearing Officer's report. On July 2, 1979, the Board issued a Decision and Direction of Second Election,[5] adopting the recommendations of the Hearing Officer. Pursuant to the Board's Decision and Direction of Second Election, a second election was conducted on July 31, 1979, in which the Union received a majority of the votes cast. Respondent timely filed objections alleging that the Union had made misrepresentations to employees and that the Union, through agents, representatives, and/or adherents, made threats to employee voters. On August 21, 1979, the Regional Director issued a Report on Objections to Rerun Election recommending, *inter alia*, that the objections be dismissed and that a certification of representative be issued.[6]

On October 12, 1979, the Board issued a Decision and Certification of Representative[7] in Case 4-RC-13421 in which it adopted the Regional Director's findings, conclusions, and recommendations. In its response and opposition to the General Counsel's Motion for Summary Judgment and the Notice To Show Cause, Respondent again challenges the validity of the Union's certification, contends that the direction of second election was improper, and asserts that it was entitled to a hearing on its objections to conduct affecting the results of the second election.

It is thus clear that Respondent is attempting to relitigate herein issues which were raised and determined adversely to it in the underlying representation case. Moreover, it is well settled that the parties do not have an absolute right to a hearing. Only when the objecting party presents a *prima facie* showing of "substantial and material" issues which would warrant setting aside an election does the right to an evidentiary hearing obtain.[8] Absent arbitrary action, this qualified right to a hearing satisfies all statutory and constitutional requirements.[9] In this case, the Board fully considered Respondent's objections and exceptions and concluded that they did not raise material or substantial issues of fact or law which would warrant reversal of the Regional Director's recommendations, or warrant a hearing.[10]

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.[11]

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 WGAL-TV, Inc., is a Deleware corporation, a wholly owned subsidiary of Pulitzer Publishing Company, engaged in the operation of a commercial television broadcasting station in Lancaster, Pennsylvania. Annually Respondent, in the course and conduct of its operations described above, derived gross revenues in excess of $100,000 and, in the course and conduct of its operations described above, it annually purchases goods and services valued in excess of $10,000 directly from points 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

Chauffeurs, Teamsters and Helpers, Local 771, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, 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

[5] Not reported in volumes of Board Decisions.

[6] An erratum to the Report on Objections was issued by the Regional Director on August 23, 1979.

[7] See fn. 5, *supra*.

[8] *N.L.R.B. v. Modine Manufacturing Co.*, 500 F.2d 914 (8th Cir. 1974).

[9] *Amalgamated Clothing Workers of America [Winfield Manufacturing Co.] v. N.L.R.B.*, 424 F.2d 813, 828 (D.C. Cir. 1970).

[10] Decision and Certification of Representative, October 12, 1979, fn. 1.

[11] 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).

purposes within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time employees of WGAL-TV, Lancaster, Pennsylvania, in the engineering, production, news, and maintenance departments, including studio engineers, transmitter engineers, news-coordinator, news persons, anchor persons, news photographers, producers, artists, photographers, directors, production assistants, switcher persons, sound persons, audio/video/camera operators, prop persons, chief maintenance person, mail person/maintenance person, multilith operator/maintenance person, and maintenance persons, but excluding all other employees, sales employees, promotion employees, front office employees, guards and supervisors as defined by the Act.

2. The certification

On July 31, 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 4, 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 October 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 October 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 October 27, 1979, 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 October 27, 1979, 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. WGAL-TV, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Chauffeurs, Teamsters and Helpers, Local 771, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time employees of WGAL-TV, Lancaster, Pennsylvania, in the engineering, production, news, and maintenance departments, including studio engineers, transmitter engineers, news-coordinator, news persons, anchor persons, news photographers, producers, artists, photographers, directors, production assistants, switcher persons, sound persons, audio/video/camera operators, prop persons, chief maintenance

person, mail person/maintenance person, multilith operator/maintenance person, and maintenance persons, but excluding all other employees, sales employees, promotion employees, front office employees, 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 October 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 October 27, 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, WGAL-TV, Inc., Lancaster, 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 Chauffuers, Teamsters and Helpers, Local 771, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All full-time and regular part-time employees of WGAL-TV, Lancaster, Pennsylvania, in the engineering, production, news, and maintenance departments, including studio engineers, transmitter engineers, news-coordinator, news persons, anchor persons, news photographers, producers, artists, photographers, directors, production assistants, switcher persons, sound persons, audio/video/camera operators, prop persons, chief maintenance persons, mail person/maintenance person, multilith operator/maintenance person, and maintenance persons, but excluding all other employees, sales employees, promotion employees, front office employees, guards 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 Lancaster, Pennsylvania, facility copies of the attached notice marked "Appendix."[12] Copies of said notice, on forms provided by the Regional Director for Region 4, 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 4, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

[12] 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 Chauffeurs, Teamsters and Helpers, Local 771, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and

Helpers of America, 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 in the engineering, production, news, and maintenance departments, including studio engineers, transmitter engineers, news-coordinator, news persons, anchor persons, news photographers, producers, artists, photographers, directors, production assistants, switcher persons, sound persons, audio/video/camera operators, prop persons, chief maintenance person, mail person/maintenance person, multilith operator/maintenance person, and maintenance persons, but excluding all other employees, sales employees, promotion employees, front office employees, guards and supervisors as defined in the Act.

WGAL-TV, INC.