

Wright & Lopez of Alabama and Communications Workers of America, AFL-CIO. Case 10-CA-15531

June 30, 1980

DECISION AND ORDER

**BY CHAIRMAN FANNING AND MEMBERS
PENELLO AND TRUESDALE**

Upon a charge and amended charge filed on February 26 and 29, 1980, respectively, by Communications Workers of America, AFL-CIO, herein called the Union, and duly served on Wright & Lopez of Alabama, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 10, issued a complaint on March 11, 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 14, 1979, following a Board election in Case 10-RC-11809, 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 December 21, 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 March 18, 1980, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On April 17, 1980, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on April 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 Notice To Show Cause.

¹ Official notice is taken of the record in the representation proceeding, Case 10-RC-11809, 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), enf'd, 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enf'd, 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), enf'd, 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

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 certain factual allegations of the complaint but attacks the validity of the Union's certification on the grounds that the Board erred in overruling its objections to the election in the underlying representation case. Respondent, in its response to the Board's Notice To Show Cause, further asserts that there are factual issues as yet unresolved which require a hearing for proper and complete adjudication. Counsel for the General Counsel, on the other hand, argues that there are no litigable matters warranting a hearing because the issues concerning the Union's certification were litigated and determined in the underlying representation case. We agree with the General Counsel.

A review of the record, including that of the representation proceeding, Case 10-RC-11809, indicates that the Union won the election conducted on August 9, 1979, pursuant to a Stipulation for Certification Upon Consent Election. The Employer, Respondent herein, filed timely objections to conduct affecting the results of the election, alleging that the Union made material misrepresentations during the election campaign at such time that the Employer had no reasonable opportunity to reply, that certain of these representations exceeded the bounds of legitimate campaign propaganda, and that the "laboratory conditions" necessary for a fair and impartial election were thereby destroyed. After investigation, during which both parties were afforded the opportunity to present evidence, the Regional Director issued, on September 28, 1979, his Report on Objections in which he concluded that Respondent's objections did not raise material or substantial issues of fact or law affecting the results of the election. Accordingly, he recommended that the objections be overruled and the Union certified.

Respondent thereafter filed exceptions to the Regional Director's report in which it asserted that certain of the Regional Director's findings and conclusions were contrary to the evidence and to controlling Board precedent. Respondent requested that the election be set aside and a new election directed or, in the alternative, that a hearing be held in order that further factual data might be obtained for the record. On December 14, 1979, the Board, after reviewing the record in the light of Respond-

ent's exceptions and brief, adopted the Regional Director's findings and recommendations and certified the Union.²

In the instant proceeding Respondent would thus appear to be attempting to litigate matters which were or could have been heard and determined in the representation proceeding. Specifically, with respect to the hearing contention, it is well established that parties do not have an absolute right to a hearing. It is only when the moving party presents a prima facie showing of "substantial and material issues" which would warrant setting aside the election that it is entitled to an evidentiary hearing.³ It is clear that, absent arbitrary action, this qualified right to a hearing satisfies all statutory and constitutional requirements.⁴ It is also clear that Respondent has made no such showing in the underlying representation proceeding or here before us.

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.⁵

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 Alabama corporation with offices and places of business located in Decatur,

² In agreeing with the Regional Director that the misrepresentations alleged in the Respondent's objections did not warrant setting the election aside, Member Penello so found for the reasons set forth in *Shopping Kart Food Market, Inc.*, 228 NLRB 1311 (1977), the principles of which he still adheres to. See his dissenting opinion in *General Knit of California, Inc.*, 239 NLRB 619 (1978).

³ *Modine Manufacturing Co.*, 203 NLRB 527 (1973), enfd 500 F.2d 914 (8th Cir. 1974); *E-Z Davies Chevrolet*, 161 NLRB 1380 (1966).

⁴ *Amalgamated Clothing Workers of America [Winfield Manufacturing Company, Inc.] v. N.L.R.B.*, 424 F.2d 818, 828 (D.C. Cir. 1970); *Gulf Coast Automotive Warehouse, Inc.*, 230 NLRB 881 (1977).

⁵ 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).

Huntsville, Sheffield, Florence, Jasper,⁶ and Cullman, Alabama, where it is engaged in construction work consisting of laying underground cable and conduit, building manholes, and erecting telephone poles. During the calendar year prior to the issuance of the complaint, a representative period, Respondent purchased and received in the State of Alabama goods valued in excess of \$50,000 directly from suppliers located outside the State of Alabama.

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

Communications Workers of America, 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 construction, production and maintenance employees, including mechanics, machine operators, truck drivers, and laborers employed by Wright & Lopez of Alabama out of its North Alabama Division, including its Decatur, Alabama, Huntsville, Alabama, Sheffield, Alabama, Florence, Alabama, Jasper, Alabama and Cullman, Alabama facilities, but excluding all roving-crew employees, technical and professional employees, office clerical employees, foremen, guards and supervisors as defined in the Act.

⁶ We note that Respondent denies in its answer to the complaint that it has a place of business located at Jasper, Alabama. However, in the Stipulation for Certification Upon Consent Election agreement executed by Respondent on July 16, 1979, which document is part of the record in this case, the appropriate collective-bargaining unit is described as including employees out of, *inter alia*, Respondent's Jasper, Alabama, facility; the commerce statement contained in that agreement likewise refers to Respondent's places of business as including Jasper, Alabama. Accordingly, we have included herein the geographic locations included in the commerce and appropriate unit stipulations contained in that document, noting that a finding as to whether or not Respondent has or had a place of business located at Jasper, Alabama, would not affect our conclusions that Respondent is engaged in commerce within the meaning of the Act or that it unlawfully refused to bargain with the Union. If Respondent does not maintain a place of business in Jasper, Alabama, it may move in an appropriate proceeding to amend the certification to reflect that fact.

2. The certification

On August 9, 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 10, 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 14, 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 17, 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 December 21, 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 December 21, 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. Wright & Lopez of Alabama is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Communications Workers of America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All construction, production and maintenance employees, including mechanics, machine operators, truckdrivers, and laborers employed by Wright & Lopez of Alabama out of its North Alabama Division, including its Decatur, Alabama; Huntsville, Alabama; Sheffield, Alabama; Florence, Alabama; Jasper, Alabama; and Cullman, Alabama facilities, but excluding all roving-crew employees, technical and professional employees, office clerical employees, foremen, 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 14, 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 December 21, 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 en-

gaged 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, Wright & Lopez of Alabama, Decatur, Huntsville, Sheffield, Florence, Jasper, and Cullman, Alabama, 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 Communications Workers of America, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

All construction, production and maintenance employees, including mechanics, machine operators, truck drivers, and laborers employed by Wright & Lopez of Alabama out of its North Alabama Division, including its Decatur, Alabama, Huntsville, Alabama, Sheffield, Alabama, Florence, Alabama, Jasper, Alabama and Cullman, Alabama facilities, but excluding all roving-crew employees, technical and professional employees, office clerical employees, foremen, 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 Decatur, Huntsville, Sheffield, Florence, Jasper, and Cullman, Alabama, facilities copies of the attached notice marked "Appendix."⁷ Copies of said notice, on forms provided by the

⁷ 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."

Regional Director for Region 10, 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 10, 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 Communications Workers of America, 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 construction, production and maintenance employees, including mechanics, machine operators, truck drivers, and laborers employed by Wright & Lopez of Alabama out of its North Alabama Division, including its Decatur, Alabama, Huntsville, Alabama, Sheffield, Alabama, Florence, Alabama, Jasper, Alabama and Cullman, Alabama facilities, but excluding all roving-crew employees, technical and professional employees, office clerical employees, foremen, guards and supervisors as defined in the Act.

WRIGHT & LOPEZ OF ALABAMA