

A-1 King Size Sandwiches, Inc. and Hotel, Motel, Restaurant Employees & Bartenders Union, Local 737, AFL-CIO. Case 12-CA-8770

January 3, 1980

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS JENKINS
AND TRUESDALE

Upon a charge filed on August 24, 1979, by Hotel, Motel, Restaurant Employees & Bartenders Union, Local 737, AFL-CIO, herein called the Union, and duly served on A-1 King Size Sandwiches, Inc., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 12, issued a complaint on August 31, 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, 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 August 9, 1979, following a Board election in Case 12-RC-5641, 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 August 20, 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 September 11, 1979, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint, and stating certain affirmative defenses.

On October 10, 1979, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on October 16, 1979, 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

¹ Official notice is taken of the record in the representation proceeding, Case 12-RC-5641, 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.

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 acknowledges that it has refused to bargain with the Union. However, Respondent attacks the validity of the Board's certification of the Union as the exclusive bargaining representative of the employees in question on the grounds that the Board, in the underlying representation proceeding, acted illegally, arbitrarily, capriciously, and without effect in failing to direct a hearing on and in overruling Respondent's objections to conduct affecting the results of the election. The General Counsel argues that all material issues have been decided and that there are no litigable issues warranting a hearing. We agree with the General Counsel.

Review of the record herein, including the record in the representation proceeding, Case 12-RC-5641, establishes that pursuant to a Stipulation for Certification Upon Consent Election, approved by the Regional Director for Region 12 on April 2, 1979, an election was conducted on April 26, 1979. The tally was 32 votes for, and 19 votes against, the Union, with 1 challenged ballot. Thereafter, Respondent timely filed objections to conduct affecting the results of the election. Respondent's objections alleged in substance: (1) that, secretly and against Respondent's express instructions, one of its supervisors actively supported and aided the Union during the critical period prior to the election; (2) that this same supervisor, again in disobedience of Respondent's instructions, and in part as a result of the Union's inducement, attended two union campaign meetings during the critical period; and (3) that, unknown to Respondent and with the encouragement of the Union, this same supervisor actively campaigned on behalf of the Union, contrary to her promise to Respondent to actively support its position in opposition to the Union.

After investigating Respondent's objections, the Regional Director, on June 6, 1979, issued his Report on Objections, in which he concluded that Respondent's objections did not raise material and substantial issues which would either warrant a hearing thereon or warrant setting the election aside. Thus, the Regional Director recommended that Respondent's objections be overruled in their entirety.

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.

Thereafter, Respondent timely filed exceptions and a supporting brief to the Regional Director's Report on Objections. Therein, Respondent excepted to the Regional Director's failure to direct a hearing on the issues raised by the objections and his recommendation that those objections be overruled.

On August 9, 1979, the Board, after reviewing the record in light of Respondent's exceptions and supporting brief, issued its Decision and Certification of Representative,² in which it found that Respondent's exceptions raised no material or substantial issues of law or fact that would warrant either a hearing thereon or a reversal of the Regional Director's recommendations to overrule the objections. Thus, the Board adopted the Regional Director's findings and recommendations and certified the Union as the exclusive collective-bargaining representative of the employees in question.

As affirmative defenses against the complaint's allegations of unlawful refusal to bargain with the Union, and also in its response to the Notice To Show Cause, Respondent renews the contentions it earlier put forth in support of its objections and exceptions to the Regional Director's Report on Objections. Specifically, Respondent contends that the Board's certification of the Union is illegal and without effect because the fairness of the election upon which the certification is based was compromised by the allegedly objectionable conduct of Respondent's supervisor who, in the course of that conduct, was purportedly acting as an agent for and with the encouragement of the Union. Respondent argues that the Board erred in failing to find the supervisor's alleged conduct objectionable and in failing to set aside the election. Respondent also reasserts that the Regional Director's investigation of Respondent's objections was compromised and impeded by alleged threats made against employees by the Union's members or supporters, which alleged threats purportedly caused certain employees not to disclose to the Regional Director allegedly objectionable conduct on the part of the supervisor in question. Also, Respondent renews its contention that the Regional Director's investigation of Respondent's objections was inadequate because of his failure to interview all available employees whose names and statements were submitted to him by Respondent, and that the Board abused its discretion in not directing a hearing on Respondent's objections.

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

² Not reported in volumes of Board Decisions.

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).

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 now, and has been at all times material herein, a Florida corporation engaged in the business of manufacturing prepared foods, such as sandwiches and pies, at its facility located in Orlando, Florida. During the past 12 months, which is a representative period of time, Respondent sold and shipped prepared foods valued in excess of \$50,000 from its Orlando, Florida, facility directly to customers located outside the State of Florida.

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

Hotel, Motel, Restaurant Employees & Bartenders Union, Local 737, 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 employees employed as sandwich production workers, salad production workers, maintenance, custodial, sanitary workers, pie shop workers,

shuttle drivers and shipping helpers; but excluding office clerical employees, all other truck drivers, guards and supervisors as defined in the Act.

2. The certification

On April 26, 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 12, 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 August 9, 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 August 13, 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 August 20, 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 August 20, 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. A-1 King Size Sandwiches, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Hotel, Motel, Restaurant Employees & Bartenders Union, Local 737, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All employees employed as sandwich production workers, salad production workers, maintenance workers, custodial workers, sanitary workers, piishop workers, shuttle drivers, and shipping helpers; but excluding office clerical employees, all other truck-drivers, 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 August 9, 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 August 20, 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, A-1 King Size Sandwiches, Inc., Orlando, Florida, 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 Hotel, Motel, Restaurant Employees & Bartenders Union, Local 737, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

All employees employed as sandwich production workers, salad production workers, maintenance, custodial, sanitary workers, pie shop workers, shuttle drivers and shipping helpers; but excluding office clerical employees, all other truck drivers, 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 Orlando, Florida, facility, copies of the attached notice marked "Appendix."⁴ Copies of said notice, on forms provided by the Regional Director for Region 12, 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 12, 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 Hotel, Motel, Restaurant Employees & Bartenders Union, Local 737, 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 employees employed as sandwich production workers, salad production workers, maintenance, custodial, sanitary workers, pie shop workers, shuttle drivers and shipping helpers; but excluding office clerical employees, all other truck drivers, guards and supervisors as defined in the Act.

A-1 KING SIZE SANDWICHES, INC.