Whitney Museum of American Art *and* Local 259, United Automobile, Aerospace and Agricultural Implement Workers of America. Case 2–CA–16663

January 24, 1980

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS PENELLO AND TRUESDALE

Upon a charge filed on August 20, 1979, by local 259, United Automobile, Aerospace and Agricultural Implement Workers of America, herein called the Union, and duly served on Whitney Museum of American Art, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 2, issued a complaint and notice of hearing on September 6, 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 admistrative 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 July 25, 1979, following a Board election in Case 2–RC–18237, 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 28, 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 14, 1979, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

Thereafter, on October 9, 1979, the General Counsel filed directly with the Board in Washington, D.C., a Motion for Summary Judgment and Issuance of Decision and Order, and Petition for Summary Judgment and Issuance of Decision and Order, with exhibits attached. The General Counsel submits, in effect, that the denials set forth in Respondent's answer raise no issues which have not been litigated and determined by the Board in the underlying representation proceeding, Case 2–RC–18237, and that there are no issues to be determined by a hearing. He, therefore, petitions: (1) that the denials contained in Respondent's answer be deemed to have been litigated and determined in Case 2–RC–18237, and that such determinations are binding on Respondent in this case; (2) that a finding be made that Respondent has admitted all other allegations contained in the complaint; (3) that a finding be made that Respondent violated Section 8(a)(5) and (1) of the Act; (4) that prior to, and without the necessity of, a hearing, the Board issue a Decision and Order against Respondent, containing findings of fact and conclusions of law, in accordance with the allegations of the complaint, and remedying the unfair labor practices so found; and (5) that such other, further, and different relief be granted as may be appropriate and proper. Subsequently, the Board, on October 16, 1979, 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 memorandum in opposition to the Motion for Summary Judgment.

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

It its answer to the complaint, Respondent admits its refusal to bargain and contends that the Board's certification of the Union is invalid, that the Union has never represented an uncoerced majority of its employees in an appropriate unit. In this regard, Respondent, in substance, argues that the Board issued the certification without an articulated basis for rejecting Respondent's opposition to its issuance; and that the certification issued without adherence to Board precedent, and without a hearing, all in violation of Respondent's fifth amendment due process rights and the Board's own rules and regulations. It argues that for these reasons the certification was unlawful, arbitrary, and capricious, rendering the certification a nullity. Respondent also avers in its opposition to the Motion for Summary Judgment that the Union unlawfully conferred substantial and meaningful economic benefits and other inducements on the eligible voters, made material misrepresentations to them, and engaged in other deceptive campaign practices. Respondent further contends its refusal to bargain was in good faith and it contests the effects on commerce of its refusal to bargain.

[1] Official notice is taken of the record in the representation proceeding, Case 2–RC–18237, 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 Electrosystem, 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.

The General Counsel contends that Respondent is improperly seeking to relitigate issues which were or could have been raised and decided in the underlying representation proceeding. We agree with the General Counsel.

Review of the record herein, including the record in Case 2–RC–18237, reveals that on January 30, 1979, in the representation proceeding, the Union filed a petition seeking to represent certain of Respondent's employees. On February 14, 1979, the Regional Director for Region 2 approved a Stipulation for Certification Upon Consent Election executed by the Union and Respondent. On March 15, 1979, the election was conducted by the Regional Director for Region 2, among the employees in the stipulated unit. The tally of ballots was 12 for, and 9 against, the Union. On April 27, 1979, after an investigation of Respondent's timely filed objections, the Regional Director issued a Report on Objections and Recommendations finding no merit in Respondent's objections and recommending that the Union be certified as the exclusive collective-bargaining representative of the employees in the appropriate unit, noted herein, Respondent subsequently filed exceptions to the said report and a brief and memorandum in support thereof with the Board in Washington, D.C. On July 25, 1979, the Board issued a Decision and Certification of Representative in which, upon consideration of the record in view of the exceptions and briefs, it adopted the Regional Director's findings and recommendations. Thereafter, Respondent filed a motion for reconsideration and on August 31, 1979, the Board issued an order denying the motion as untimely filed and, additionally, as lacking in merit. Respondent now contends that it was denied due process by the Board's refusal to hold a hearing in the underlying representation case, on the matter of its objections. It also argues that substantial and genuine issues of material fact exist.

It is well established that a party is not entitled to a hearing on objections absent a showing of substantial and material issues.[2] Here it is implicit that the Board, in adopting the Regional Director's Report on Objections and Recommendations, found that no hearing was warranted. Further, the Board has held, with judicial approval, that evidentiary hearings are not required in unfair labor practice cases and summary judgment cases where, as here, there are no substantial or material facts to be determined.[3] It thus appears that Respondent is attempting to relitigate issues raised and resolved in the underlying representation case.

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.[4]

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

At all times material herein, Respondent, a New York corporation, with an office and place of business in the city and State of New York, has been engaged in the operation of a private, nonprofit educational museum and library. Annually, Respondent, in the course and conduct of its business operations described above, derived gross revenues in excess of $1 million, and during the same period of time it purchased and received museum products, goods, and materials valued in excess of $50,000 directly from points outside the State of New York.

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

Local 259, United Automobile, Aerospace and Agricultural Implement Workers of America, is a labor organization within the meaning of Section 2(5) of the Act.

[2] *National Beryllia Corporation*, 222 NLRB 1289 (1976), and cases cited therein.

[3] *Handy Hardware Wholesale, Inc.*, 222 NLRB 373 (1976), and cases cited therein.

[4] 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).

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 office clerical employees employed by the Employer at 945 Madison Avenue, New York, New York, but excluding all professionl employees, guards, employees represented by other labor organizations, all other employees, and supervisors as defined in the Act.

2. The certification

On March 15, 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 2, 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 July 25, 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 July 30, 1979, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all employees in the above-described unit. Commencing on or about August 28, 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 28, 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. Whitney Museum of American Art is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. Local 259, United Automobile, Aerospace and Agricultural Implement Workers of America, is a labor organization within the meaning of Section 2(5) of the Act.
3. All full-time and regular part-time office clerical employees employed by the Employer at 945 Madison Avenue, New York, New York, but excluding all professional employees, guards, employees represented by other labor organizations, all other employees, 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 July 25, 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 28, 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 Laboar Relations Board hereby orders that the Respondent, Whitney Museum of American Art, New York, New York, 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 Local 259, United Autombile, Aerospace and Agricultural Implement Workers of America, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All full-time and regular part-time office clerical employees employed by the Employer at 945 Madison Avenue, New York, New York, but excluding all professional employees, guards, employees represented by other labor organizations, all other employees, 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 945 Madison Avenue, New York, New York, premises copies of the attached notice marked "Appendix."[5] Copies of said notice, on forms provided by the Regional Director for Region 2, 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 2, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

[5] 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 Local 259, United Automobile, Aerospace and Agricultural Implement Workers 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 guranteed 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 office clerical employees employed by us at 945 Madison Avenue, New York, New York, but excluding all professional employees, guards, employees represented by other labor organizations, all other employees, and supervisors as defined in the Act.

WHITNEY MUSEUM OF AMERICAN ART