

**A. S. Horner, Inc. and New Mexico District Council
of Carpenters, AFL-CIO. Case 28-CA-5255**

November 8, 1979

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS PENELLO
AND TRUESDALE

Upon a charge filed on March 9, 1979, by New Mexico District Council of Carpenters, AFL-CIO, herein called the Union, and duly served on A. S. Horner, Inc., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Acting Regional Director for Region 28, issued a complaint and notice of hearing on April 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 to 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 January 16, 1979, following a Board election in Case 28-RC-3517, the Union was duly certified as the exclusive in the unit found appropriate;¹ and that, commencing on or about January 19, 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 April 16, 1979, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On April 25, 1979, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on May 1, 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 "Statement in Reply to the Notice To Show Cause and in opposition to the General Counsel's Motion for Summary Judgment." Respondent additionally filed a motion to remand and reopen the record and the General Counsel filed an opposition to the motion to remand

¹ Official notice is taken of the record in the representation proceeding, Case 28-RC-3517, 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.

and to the statement in reply 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 statement in reply to the Notice To Show Cause, Respondent contended that the certification of the Union in the underlying representation proceeding is invalid for the following reasons. First, Respondent argued that the Regional Director's failure to direct a hearing on its objections to the election was in error because the objections raised substantial factual issues warranting a hearing. As a corollary to this contention, Respondent also argued that the statements of witnesses taken by the Regional Office during the representation case investigation should now be made part of the current record as the representation case is now closed and the inclusion of such statements here would insure that the Board has before it a complete record upon which to determine the instant matter. Respondent further asserted that the Regional Director prejudiced Respondent's right of appeal in the representation proceeding by writing a Decision and Certification of Representation in lieu of a Report on Objections as the former limits consideration by the Board to the request for review procedure, an abbreviated form of review. Finally, Respondent contends that its initial failure to request review of the Regional Director's unit finding and voter eligibility formula set forth in his Decision and Direction of Election did not constitute a waiver of its right to later contest these findings as objections to the election.

In its motion to remand, Respondent argues that the record before the Board in this proceeding is presently incomplete as it does not contain the statements and affidavits of employees interviewed by the Regional Director in the investigation of the objections. Respondent seeks inclusion of these documents in the record.

In opposition to Respondent's various motions, the General Counsel argues that the import of Respondent's motion to remand is contrary to the Board's Rules and Regulations and its statement in opposition to the summary judgment motion is generally an attempt to relitigate issues already decided adversely to Respondent. We find merit in the General Counsel's position and we shall enter summary judgment against Respondent for reasons described below.

Our review of the record herein, including the rec-

ord in Case 28-RC-3517, reveals that on August 23, 1978, the Regional Director for Region 28 issued a Decision and Direction of Election in Case 28-RC-3517 in which he found appropriate a unit of all construction employees, including timekeepers, employed by Respondent in the State of New Mexico with various exclusions. In his decision, the Regional Director found, *inter alia*, that in view of the imminent completion of Respondent's construction activity near Costilla, New Mexico, no useful purpose would be served by directing an election in a unit limited to the employees involved therein, the unit initially sought by the Union. However, as the Union had indicated a willingness to proceed to an election in a statewide unit, a unit found appropriate by the Regional Director, an election in that unit was directed by the Regional Director provided that the Union submitted an adequate showing of interest in the broader unit. Respondent did not seek review of the Regional Director's decision. Thereafter, on September 22, 1978, pursuant to the Decision and Direction of Election, a secret-ballot election was conducted. The tally of ballots revealed that a majority of the valid ballots had been cast for the Union and that the one challenged ballot was not determinative. On September 19, 1978, Respondent timely filed objections to conduct affecting the results of the election. On November 14, 1978, the Regional Director issued a Supplemental Decision on Objections to Conduct Affecting the Results of the Election and Certification of Representative wherein he overruled the Employer's objections in their entirety and issued a Certification of Representative to the Union. Respondent's four objections alleged that (1) the Union had mischaracterized and misrepresented Board procedures; (2) the Union had improperly extended a waiver of initiation fees to eligible voters; (3) the unit in which the election was conducted was inappropriate; and (4) the Regional Director had used an inappropriate voter eligibility formula in his Decision and Direction of Election, resulting in the disenfranchisement of potential voters. The Regional Director overruled Objection 1, finding that the Union's statement did not constitute a misrepresentation under the Board's Decision in *Shopping Kart Food Market, Inc.*² The Regional Director also found Objection 2 without merit, noting that his investigation had failed to produce any evidence which indicated that the Union's offer to waive initiation fees was tied to the signing of an authorization card or becoming a member of the Union prior to the election. With respect to Objections 3 and 4, regarding the unit issue and voter eligibility formula, the Regional Director found these objections raised issues which were discussed in his

² 228 NLRB 1113 (1977).

Decision and Direction of Election and as to which Respondent had not sought review. Thereafter, he concluded that Respondent was precluded from raising these issues at this stage of the proceeding.

On December 5, 1978, Respondent filed a request for review of the Regional Director's Supplemental Decision, alleging that the Regional Director had erroneously overruled Respondent's four objections. On January 16, 1979, the Board, by telegraphic order, denied Respondent's request for review, but granted Respondent's motion, filed December 29, 1978, to stay the effective date of the certification and ordered that the certification would be effective as of January 16, 1979.³

We have reviewed the contentions raised by Respondent in this proceeding and find that they raise no issues warranting a stay of a grant of summary judgment. Respondent avers that a hearing is necessary to resolve key factual issues raised in Objection 1 involving allegedly misleading statements concerning the identity of the union or unions that would be participating in negotiations on behalf of the employees. Respondent unsuccessfully raised this argument in its request for review and we again find it without merit inasmuch as the Regional Director, in making this recommendation, assumed the facts as alleged by Respondent and nevertheless found the conduct unobjectionable. Respondent raises the same argument as previously raised and rejected in the representation proceeding with respect to Objection 2 involving an allegedly improper offer to employees to waive initiation fees. With respect to Respondent's request that statements of witnesses obtained by the Region during the representation case be incorporated into the instant unfair labor practice proceeding, we note that in a recent decision⁴ the Board was confronted with a similar request and denied it. The Board stated there "such material is not part of record in either an unfair labor practice case or its underlying representation case 'within the meaning of Sections 102.68 and 102.45(b) of the Rules and Regulations of the Board, nor are such documents [materials relating to the representation case] encompassed within the requirements of Section 9(d) of the Act.'" We reach the same conclusion here.⁶

With respect to Respondent's contention that the Regional Director limited Respondent's right of appeal by the manner in which he disposed of Respon-

³ In its telegraphic decision denying Respondent's request for review, the Board noted that Objection 1 did not constitute a misrepresentation under its recent decision in *General Knit of California, Inc.*, 239 NLRB 619 (1978). Member Penello indicated he would deny review under *Shopping Kart, supra*.

⁴ *Harvey Engineering & Manufacturing Corporation*, 240 NLRB 699 (1979).

⁵ *Id.* at fn. 1 and cases cited therein.

⁶ As noted, Respondent has also filed motion to remand and reopen the record to admit these statements into the record. For the reason discussed immediately above, Respondent's motion is hereby denied.

dent's objections, i.e., by a Supplemental Decision and Certification of Representative, we find that in rendering his decision the Regional Director proceeded in a manner authorized by Section 102.69(c) of the Board's Rules and Regulations, Series 8, as amended. We therefore find the Regional Director's action appropriate and not subject to collateral attack by Respondent. Furthermore, we note that Respondent was entitled to appeal the decision through the request for review procedure and, in fact, Respondent exercised that right.

Finally, we find that Respondent's failure to contest the Regional Director's unit determination and voter eligibility formula through the request for review procedure constituted a waiver of its right to appeal that finding in a subsequent proceeding. The preelection review process was the appropriate forum for raising such matters, and by neglecting to utilize it Respondent is precluded from asserting those issues now before us.⁷

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.⁸

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 a New Mexico corporation, engaged in the construction industry, and maintains its principal place of business in Littleton, Colorado. Respondent has been engaged in construction business at various locations in New Mexico including Costilla, Folsom, Tukumcari, and Mosquero. During the 12 months preceding the complaint's issuance, a period which is representative of its operations at all times

material herein, Respondent, in the course and conduct of its business, purchased goods and materials in excess of \$50,000 which were delivered to its place of business in New Mexico directly from locations outside the State of New Mexico.

We find, on the basis of the foregoing, that Respondent is, and has been at all times 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

New Mexico District Council of Carpenters, 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 employees including timekeepers, employed by Respondent in the State of New Mexico; excluding heavy equipment operators represented by another labor organization, job superintendents, general foreman, watchmen, and guards and supervisors as defined in the Act.

2. The certification

On September 22, 1978, 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 28 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 January 16, 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 January 19, 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 19, 1979, and continuing at all times thereafter to date, Respondent has refused, and con-

⁷ See, e.g., *Walnut Mountain Care Center*, 236 NLRB 284 (1978).

⁸ 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).

tinues 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 January 19, 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. S. Horner, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. New Mexico District Council of Carpenters, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All construction employees, including timekeepers, employed by Respondent in the State of New Mexico; excluding heavy equipment operators represented by another labor organization, job superintendents, general foreman, watchmen and 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 January 16, 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 purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about January 19, 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. S. Horner, Inc., Littleton, Colorado, 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 New Mexico District Council of Carpenters, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

All construction employees, including timekeepers, employed by Respondent in the State of New Mexico; excluding heavy equipment operators represented by another labor organization, job superintendents, general foreman, watchmen, and guards and supervisors within the meaning of 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 construction sites in New Mexico where Respondent is engaged in construction, including Costilla, Folsom, Tucumcari, and Mosquero, copies of the attached notice marked "Appendix."⁹ Copies of said notice, on forms provided by the Regional Director for Region 28, 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 28, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

⁹ 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 New Mexico District Council of Carpenters, 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 employees, including time-keepers, employed by the Employer in the State of New Mexico; excluding heavy equipment operators represented by another labor organization, job superintendents, general foreman, watchmen, and guards and supervisors within the meaning of the Act.

A. S. HORNER, INC.