Allis Chalmers Corporation *and* International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (UAW). Case 13-CA-19918

September 30, 1980

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS JENKINS AND PENELLO

Upon a charge filed on May 14, 1980, by International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), herein called the Union, and duly served on Allis Chalmers Corporation, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 13, issued a complaint on June 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 March 27, 1980, following a Board election in Case 13-RC-15189 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 April 28, 1980, 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 June 23, 1980, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On July 11, 1980, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on July 22, 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.[2]

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 to the Notice To Show Cause, Respondent admits the refusal to recognize and bargain with the Union but denies that a majority of the unit employees selected the Union as their collective-bargaining representative. Further, in its answer to the complaint Respondent affirmatively asserts that: (1) the certification of the Union is invalid because the Regional Director erred in not properly investigating, sustaining, or granting a hearing on Respondent's objections which alleged numerous incidents of campaign misconduct sufficient to set aside the election and (2) the Board in considering the Employer's exceptions to the Regional Director's report may have failed to consider certain materials obtained by the Regional Director during the course of his investigation.[3] In its response to the Notice To Show Cause[4] Respondent asserts, *inter alia*, that the Board should revoke the Union's certification and remad the case for full evidentiary hearing or, alternatively, the Board should review the contents of the investigative file concerning the Employer's exceptions. The General Counsel contends that Respondent is attempting to relitigate issues which were or could have been decided in the underlying representation case. We find merit to the General Counsel's contention.

Our review of the record herein, including the record in Case 13-RC-15189, reveals that pursuant to a Stipulation for Certification Upon Consent Election, an election was conducted on August 31, 1979. Of the total number of votes cast, 96 were for the Union, 81 against, and there were 2 challenged ballots. On September 7, 1979, Respondent filed objections to conduct affecting the results of the election.

[1] Official notice is taken of the record in the representation proceeding, Case 13-RC-15189, 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.

[2] We hereby grant Respondent's motion to supplement its opposition to the General Counsel's Motion for Summary Judgment filed on September 24, 1980. We have considered the documents submitted and find that they do not affect the results.

[3] In support of this contention, Respondent relies on *Prestolite Wire Division v. N.L.R.B.*, 592 F.2d 302 (6th Cir. 1979), and *N.L.R.B. v. Cambridge Wire Cloth Co.*, 622 F.2d 1195 (4th Cir 1980).

[4] The Respondent has requested oral argument. This request is hereby denied as the record, Respondent's answer, and its response adequately present the issues and the positions of the parties.

On December 12, 1979, the Regional Director issued his Report on Objections in which he recommended that the Board overrule the objections in their entirety and that a Certification of Representative be issued to the Union. Respondent, on January 4, 1980, filed exceptions to the Regional Director's Report on Objections essentially reiterating its objections and arguing that the election should be set aside or alternatively the case should be remanded to the Regional Director for a hearing on the objections. On March 27, 1980, the Board issued a Decision and Certification of Representative in which it adopted the Regional Director's findings and recommendations.

Respondent contends that the Board's review of the Regional Director's Report on Objections was defective in that it did not have the entire investigative record before it when it adopted the findings and recommendations contained therein. In support thereof, Respondent, citing *Prestolite Wire Division, supra*, and *Cambridge Wire Cloth Co., supra*, argues that the Board should consider the entire record in the representation proceeding "presumably as supplemented by a proper hearing." We reject his contention inasmuch as we disagree with the holding of the courts in those two cases and respectfully decline to follow it.[5] Section 3(b) of the Act authorizes the Board to delegate to its regional directors its powers under Section 9, and places review of any such delegated action by a regional director within the Board's discretion. We find that it was a proper exercise of our discretion to adopt the regional director's decision in the underlying representation matter inasmuch as Respondent's exceptions thereto raised no substantial or material issues to warrant a hearing. This finding is supported by the Act's policy of expeditiously resolving questions concerning representation.[6]

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.[7]

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 diversified manufacturer and has facilities throughout the United States, including the Batavia, Illinois, facility which is the only facility involved herein. During the past fiscal year, a representative period, Respondent, in the course and conduct of its business operations has received goods and materials valued in excess of $50,000 at its Batavia, Illinois, facility directly from points located outside the State of Illinois.

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

International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America, (UAW), 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 warehouse employees and warehouse maintenance employees of the Employer now located at 1500 North Raddant Road, Batavia, Illinois, but excluding all office clerical employees, plant clerical employees, truck drivers, professional employees, guards, and supervisors as defined in the Act.

2. The certification

On August 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 13, designated the Union as their representative for the purpose of collective bargaining with Respondent.

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[5] *See Southwest Color Printing Corporation*, 247 NLRB No. 127 (1980).

[6] *Trustees of Boston University*, 242 NLRB 110 (1979).

[7] 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).

The Union was certified as the collective-bargaining representative of the employees in said unit on March 27, 1980, 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 April 8, 1980, 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 April 28, 1980, 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 April 28, 1980, 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. Allis Chalmers Corporation is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

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

3. All warehouse employees and warehouse maintenance employees of the Employer now located at 1500 North Raddant Road, Batavia, Illinois, but excluding all office clerical employees, plant clerical employees, truck drivers, professional employees, guards, and supervisors constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since March 27, 1980, 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 April 28, 1980, 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,

Allis Chalmers Corporation, Batavia, Illinois, 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 International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America, (UAW), as the exclusive bargaining representative of its employees in the following appropriate unit:

> All warehouse employees and warehouse maintenance employees of the Employer now located at 1500 North Raddant Road, Batavia, Illinois, but excluding all office clerical employees, plant clerical employees, truck drivers, professional employees, guards, and supervisors.

(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 Batavia, Illinois, facility copies of the attached notice marked "Appendix."[8] Copies of said notice, on forms provided by the Regional Director for Region 13 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 13, 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 International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (UAW), 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 warehouse employees and warehouse maintenance employees located at 1500 North Raddant Road, Batavia, Illinois, but excluding all office clerical employees, plant clerical employees, truck drivers, professional employees, guards and supervisors.

ALLIS CHALMERS CORPORATION

[8] 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."