

Abtex Beverage Corporation and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, Teamster Local Union 47. Case 16-CA-8156

March 12, 1979

DECISION AND ORDER

Upon a charge filed on October 23, 1978, by the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, Teamster Local Union 47, herein called the Union, and duly served on Abtex Beverage Corporation, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 16, issued a complaint and notice of hearing on November 6, 1978, 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 25, 1978, following a Board election in Case 16-RC-7573, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate¹ and that commencing on or about October 9, 1978, 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 November 14, 1978, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On November 20, 1978, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on November 30, 1978, 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.

Upon the entire record in this proceeding, the

¹ Official notice is taken of the record in the representation proceeding, Case 16 RC 7573, as the term "record" is defined in Secs. 102.68 and 106.69(g) of the NLRB Rules and Regulations and Statements of Procedure, Series 8, as amended. See *ITV 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 NLR Act, as amended.

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 that it has declined to recognize the Union as the exclusive bargaining representative of its employees. However, Respondent Board incorrectly decided the underlying representation case, the *Abtex Beverage Corporation*, 237 NLRB 1271 (1978). Counsel for the General Counsel asserts that there are no matters warranting a rehearing 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 herein, including the record in Case 16-RC-7573, discloses that, pursuant to a Decision and Direction of Election by the Regional Director, an election was conducted on November 5, 1977, and the tally of ballots furnished the parties after the election showed eight votes for and eight votes against the Union, with one challenged ballot. Neither party filed objections to conduct affecting the results of the election. On December 16, 1977, the Regional Director in his report on challenged ballots recommended that the challenged ballot be considered a "Yes" ballot, that a revised tally of ballots be served upon the parties, and that a certification based thereon be issued. The Employer filed timely exceptions to this report. The Board adopted the Regional Director's findings and recommendation and certified the Union on August 25, 1978. Subsequently, on or about September 29, 1978, the Union requested that Respondent meet for purposes of collective bargaining. On October 9, 1978, Respondent refused, in writing, to bargain with the Union on the grounds that the Union was improperly certified.

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.²

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 proper-

² See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

ly 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, a Texas Corporation, is engaged in the bottling and canning of soft drinks and during the past 12-month period has purchased products valued in excess of \$50,000 from directly outside the State of Texas.

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.³

II. THE LABOR ORGANIZATION INVOLVED

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, Teamster Local Union 47, 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 unit⁴

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

All road drivers employed by the Employer at its facility in Abilene, Texas; excluding all mechanics, production and maintenance employees, office clerical employees, salesmen, professional employees, guards, watchmen and supervisors as defined in the Act.

2. The certification

On November 5, 1977, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director of Region 16, 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 25, 1978, 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 September 29, 1978, 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 October 9, 1978, 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 October 9, 1978, 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.

³ Respondent in its answer stated that it neither admitted nor denied the allegation that Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Sec. 2(6) and (7), asserting that it is without information or knowledge concerning the same and that such allegations constitute a conclusion of law. We find the jurisdictional facts admitted by Respondent sufficient to sustain this allegation.

⁴ Respondent's answer is silent with respect to the unit alleged as appropriate in the complaint. Under Sec. 102.20 of the Board's Rules and Regulations, Series 8, as amended, the allegation is deemed to be admitted as true.

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. Abtex Beverage Corporation is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, Teamster Local Union 47, is a labor organization within the meaning of Section 2(5) of the Act.

3. All road drivers employed by the Employer at its facility in Abilene, Texas; excluding all mechanics, production and maintenance employees, office clerical employees, salesmen, professional employees, guards, watchmen 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 25, 1978, 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 October 9, 1978, 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, Abtex Beverage Corporation, Abilene, Texas, 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 Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, Teamster Local Union 47, as the exclusive bargaining representative of its employees in the following appropriate unit:

All road drivers employed by the Employer at its facility in Abilene, Texas; excluding all mechanics, production and maintenance employees, office clerical employees, salesmen, professional employees, guards, watchmen 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 650 Colonial Drive, Abilene, Texas, location, copies of the attached notice marked "Appendix."⁵ Copies of said notice, on forms provided by the Regional Director for Region 16, 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 16, in writing, within 20 days from the date of this Order,

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."

what steps have been taken to comply herewith.

MEMBERS JENKINS AND MURPHY, dissenting:

In the underlying representation case, we would not have issued a certification of representative for the reasons set forth in our dissenting opinion therein.⁶ Therefore, contrary to our colleagues, we would deny the General Counsel's Motion for Summary Judgment and would, instead, dismiss the complaint.

⁶ 237 NLRB 1271 (1978). Specifically, we would have found the determinative challenged ballot therein to be void and thus would have certified the results of the election.

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 Inter-

national Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, Teamster Local Union 47, 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 road drivers employed by the Employer at its facility in Abilene, Texas; excluding all mechanics, production and maintenance employees, office clerical employees, salesmen, professional employees, guards, watchmen and supervisors as defined in the Act.

ABTEX BEVERAGE CORPORATION