

A. Duie Pyle, Inc. and Fraternal Association of Special Haulers Local Union 100. Case 4-CA-9026

June 29, 1978

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS JENKINS
AND TRUESDALE

Upon a charge filed on November 7, 1977, by Fraternal Association of Special Haulers Local Union 100, herein called the Union, and duly served on A. Duie Pyle, Inc., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 4, issued a complaint and notice of hearing on February 8, 1978, against Respondent, and, on March 29, 1978, an amendment to the complaint, 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, amendment to 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 29, 1977, following a Board election in Case 4-RC-12341, 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 October 17, 1977, 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 February 17, 1978, Respondent filed its answer to the complaint and on March 31, 1978, its answer to the amended complaint, admitting in part, and denying in part, the allegations in the complaint.

On April 11, 1978, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on April 24, 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, entitled "Statement in Opposition to Motion for Summary Judgment and Request for Oral Argument Before the Full Board."

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, amended complaint, and the Notice To Show Cause, Respondent essentially contests the validity of the Union's certification. Respondent argues that the unit is inappropriate, based upon its contention that certain individuals included in the unit, i.e., owner-operators of trucking equipment, are not employees within the meaning of the Act but, rather, are independent contractors. Respondent maintains that review of this case by the full Board would be particularly appropriate in order to resolve the employment status of owner-operators. In its memorandum in support of the Motion for Summary Judgment, the General Counsel contends that there are no issues requiring a hearing and that Respondent is attempting here to relitigate issues which were raised and determined in the underlying representation proceeding. We agree with the General Counsel.

Review of the entire record, including that in Case 4-RC-12341, discloses that, at the representation case hearing, Respondent contended that the unit sought by the petitioner therein² was inappropriate. The petitioner sought to represent a unit which included, among others, owner-operators of trucking equipment who leased their equipment to Respondent. Respondent claimed that the owner-operators were in fact independent contractors and not employees within the meaning of the Act. In his Decision and Direction of Election issued on April 29, 1977, the Regional Director found that the owner-operators were employees and were appropriately included in the unit sought by the petitioner. Respondent filed a request for review of the Regional Director's Decision, and brief in support thereof, in which it reiterated its unit contention based, in part, on the alleged failure of the Regional Director to consider relevant Board precedent. On June 2, 1977, the

¹ Official notice is taken of the record in the representation proceeding, Case 4-RC-12341, 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 (C.A. 4, 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d (C.A. 5, 1969); *Intertype Co. v. Penello*, 269 F.Supp. 573 (D.C.Va., 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (C.A. 7, 1968); Sec. 9(d) of the NLRA, as amended.

² General Teamsters, Chauffeurs, Helpers and Yardmen, Local 470, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, filed the petition in Case 4-RC-12341. The Fraternal Association of Special Haulers Local Union 100, the Union herein, intervened in the representation case hearing.

Board affirmed the Regional Director's Decision and Direction of Election based upon the lack of a Board majority for granting review.³

The election was held on June 5, 1977, and the tally of ballots furnished to the parties on that date showed that there were challenged ballots sufficient in number to affect the results of the election. On July 8, 1977, the Acting Regional Director issued a Supplemental Decision on Challenged Ballots and, on July 12, 1977, a revised tally of ballots issued which indicated the necessity for a runoff election. A runoff election was held on August 21, 1977, and the tally of ballots furnished on that date showed a majority of votes were cast for the Union. In the absence of objections to conduct affecting the results of the election, the Acting Regional Director issued a Certification of Representative on August 29, 1977, in which the Union was certified as the exclusive bargaining representative of employees in the unit found appropriate.

On December 1, 1977, Respondent submitted to the Board a motion for reconsideration. Respondent requested that the Board reconsider its previous actions in this case in light of the appointment of a new Board member⁴ who had not previously considered the issue involved herein and in view of the fact that its request for review had, in effect, been denied only because there was no Board majority in favor of granting review. By telegraphic order dated January 27, 1978, the entire Board granted Respondent's motion insofar as it requested the vote of the current five Board members on the underlying issue; a Board majority denied the motion in all other respects and affirmed the Regional Director's Decision and Direction of Election. It thus appears that Respondent is raising issues which had been raised and determined 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.⁵

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 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. Additionally, as the record and briefs submitted in the underlying representation proceeding adequately set forth the positions of the parties, we shall deny Respondent's request for oral argument.

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent is a Pennsylvania corporation with its corporate headquarters located in West Chester, Pennsylvania. Respondent is engaged in the interstate transportation of freight and commodities and operates a terminal located at Morrisville, Pennsylvania. During the preceding 12 months, a representative period, Respondent derived in excess of \$50,000 from its interstate transportation operations.

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

Fraternal Association of Special Haulers Local Union 100 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 owner-operators and non-owner operators of equipment leased by the owners to Respondent and employed by Respondent at its Morrisville, Pennsylvania terminal; excluding office clerical employees, guards and supervisors as defined in the Act.

2. The certification

On August 21, 1977, a majority of the employees

³ Former Member Peter D. Walther did not participate.

⁴ John C. Truesdale became a member of the Board following the resignation of former Member Walther.

⁵ 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).

Board affirmed the Regional Director's Decision and Direction of Election based upon the lack of a Board majority for granting review.³

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On December 1, 1977, Respondent submitted to the Board a motion for reconsideration. Respondent requested that the Board reconsider its previous actions in this case in light of the appointment of a new Board member⁴ who had not previously considered the issue involved herein and in view of the fact that its request for review had, in effect, been denied only because there was no Board majority in favor of granting review. By telegraphic order dated January 27, 1978, the entire Board granted Respondent's motion insofar as it requested the vote of the current five Board members on the underlying issue; a Board majority denied the motion in all other respects and affirmed the Regional Director's Decision and Direction of Election. It thus appears that Respondent is raising issues which had been raised and determined 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.⁵

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 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. Additionally, as the record and briefs submitted in the underlying representation proceeding adequately set forth the positions of the parties, we shall deny Respondent's request for oral argument.

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent is a Pennsylvania corporation with its corporate headquarters located in West Chester, Pennsylvania. Respondent is engaged in the interstate transportation of freight and commodities and operates a terminal located at Morrisville, Pennsylvania. During the preceding 12 months, a representative period, Respondent derived in excess of \$50,000 from its interstate transportation operations.

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

Fraternal Association of Special Haulers Local Union 100 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 owner-operators and non-owner operators of equipment leased by the owners to Respondent and employed by Respondent at its Morrisville, Pennsylvania terminal; excluding office clerical employees, guards and supervisors as defined in the Act.

2. The certification

On August 21, 1977, a majority of the employees

³ Former Member Peter D. Walther did not participate.

⁴ John C. Truesdale became a member of the Board following the resignation of former Member Walther.

⁵ 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).

of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 4, 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 29, 1977, 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 October 4, 1977, 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 17, 1977, 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 17, 1977, 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 (C.A. 5, 1964), *cert. denied* 379 U.S. 817 (1964); *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), *enfd.* 350 F.2d 57 (C.A. 10, 1965).

The Board, upon the basis of the foregoing facts and the entire record makes the following:

CONCLUSIONS OF LAW

1. A. Duie Pyle, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Fraternal Association of Special Haulers Local Union 100 is a labor organization within the meaning of Section 2(5) of the Act.

3. All owner-operators and non-owner operators of equipment leased by the owners to Respondent and employed by Respondent at its Morrisville, Pennsylvania, terminal; excluding office clerical employees, 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 29, 1977, 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 17, 1977, 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 to 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. Duje Pyle, Inc., West Chester, Pennsylvania, 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 Fraternal Association of Special Haulers Local Union 100 as the exclusive bargaining representative of its employees in the following appropriate unit:

All owner-operators and non-owner operators of equipment leased by the owners to Respondent and employed by Respondent at its Morrisville, Pennsylvania terminal; excluding office clerical employees, 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 Morrisville, Pennsylvania, terminal copies of the attached notice marked "Appendix."⁶ Copies of said notice, on forms provided by the Regional Director for Region 4, 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 4, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

⁶ 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 Fraternal Association of Special Haulers Local Union 100 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 owner-operators and non-owner operators of equipment leased by the owners to the Employer and employed by the Employer at its Morrisville, Pennsylvania terminal; excluding office clerical employees, guards and supervisors as defined in the Act.

A. DUJE PYLE, INC.