San Lorenzo Lumber Co., Inc. *and* General Teamsters, Packers, Food Processors and Warehousemen Local No. 912, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America. Case 32–CA–535

March 15, 1978

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS PENELLO AND MURPHY

Upon a charge filed on November 14, 1977, by General Teamsters, Packers, Food Processors and Warehousemen Local No. 912, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, herein called the Union, and duly served on San Lorenzo Lumber Co., Inc., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Acting Regional Director for Region 32, issued a complaint on November 25, 1977, 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 September 23, 1977, following a Board election in Case 20–RC–14099, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[1] that, commencing on or about November 7, 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; and that, commencing on or about November 7, 1977, and at all times thereafter, Respondent has refused to furnish information requested by the Union regarding names, job descriptions, and rates of pay of employees in the appropriate bargaining unit, which information is necessary for collective bargaining. On December 1, 1977, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint and asserting as an affirmative defense that the Board, on September 3, 1977, erroneously issued a Decision and Certification of Election.

On December 15, 1977, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on December 29, 1977, 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 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 answer to the complaint and response to the Notice To Show Cause, Respondent basically contends that the certification of the Union in the underlying representation case is invalid on the basis of its objections therein and that due process of law requires that a hearing be conducted in this proceeding.

Our review of the record herein, including the record in Case 20–RC–14099, reveals that, pursuant to a Stipulation for Certification Upon Consent Election, an election was conducted on April 27, 1977, and resulted in a 26-to-17 vote in favor of the Union with 1 challenged ballot. Respondent filed timely objections to conduct affecting the results of the election. The objections alleged in substance that during the critical period the Union threatened, coerced, and restrained employees and actively solicited and obtained support from supervisors. In support of these objections, Respondent presented affidavits of Turner and Engelund, alleged by Respondent to be supervisors. On July 20, 1977, the Regional Director issued her Report on Objections in which she found that the prounion activities of the alleged supervisors did not impair the employees' freedom of choice in the election or constitute interference which would warrant setting aside the election. The Regional Director also found there was no evidence to support Respondent's contention that the Union threatened, coerced, and restrained employees. Accordingly, she recommended that the objections be overruled and a certification of representative be issued to the Union.

Respondent filed timely exceptions to the Regional Director's Report on Objections reiterating its objec-

[1] Official notice is taken of the record in the representation proceeding, Case 20–RC–14099, 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 26 (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.

tions and asserting that the report must be declared null and void because the representation case was processed by the Regional Director at a time when unfair labor practice charges alleging violations of Sections 8(a)(1) and (2) and 8(b)(1)(A) were pending. On September 23, 1977, the Board issued a Decision and Certification of Representative in which it certified the Union after adopting the Regional Director's findings and recommendations. The Board thereby found in effect not only that Respondent's objections did not warrant overturning the election, but also that Respondent's exception concerning the pending unfair labor practice charges was without merit.

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]

Except as follows, 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.

However, Respondent has raised various procedural issues, contending, in substance, (1) that the Board's summary judgment procedure is contrary to procedural due process, (2) that Respondent has a statutory right to a hearing, (3) that Respondent's "requests for review" were not considered by a quorum of the Board, and (4) that due process of law requires that a hearing be conducted since there are substantial and material issues of fact related to the validity of the election.

At the outset, we reject Respondent's contention (1) that the Board's summary judgment procedure is contrary to procedural due process. We are cited to no case in which a court has refused enforcement of a Board order on the ground that the Board may not use summary judgment procedure. On the contrary, whenever the issue has been raised, the courts have uniformly upheld the Board's authority to utilize such procedure where there were no issues requiring an evidentiary hearing.[3] With respect to (2) and (4) above, it is well established that parties do not have an absolute right to a hearing on objections to an election. It is only when the moving party presents a *prima facie* showing of "substantial and material issues" which would warrant setting aside the election that he is entitled to an evidentiary hearing.[4] It is clear that, absent arbitrary action, this qualified right to a hearing satisfies all statutory and constitutional requirements.[5] Finally, we reject Respondent's contention (3) above, since the decision in Case 20–RC–14099 adopting the Regional Director's report was considered by a three-member panel of the Board pursuant to Section 3(b) of the Act and resulted from their personal participation and was their decision.[6]

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, a California corporation with its principal place of business in Santa Cruz, California, is engaged in the retail and nonretail sale of lumber and building products. During the 12-month period immediately preceding the issuance of the complaint and notice of hearing in this proceeding, Respondent derived gross revenues in excess of $500,000. During the same period Respondent purchased goods or services in excess of $5,000 which originated outside the State of California.

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

General Teamsters, Packers, Food Processors and Warehousemen Local No. 912, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

[2] 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).

[3] See *Lyman Printing and Finishing Company, a Division of M. Lowenstein & Sons*, 183 NLRB 1048 (1970), and cases cited therein.

[4] *Farah Manufacturing Company, Inc.*, 203 NLRB 543 (1973); *Modine Manufacturing Company*, 203 NLRB 527 (1973).

[5] *Amalgamated Clothing Workers of America [Winfield Manufacturing Company, Inc.]* v. *N.L.R.B.*, 424 F.2d 818, 828 (C.A.D.C., 1970).

[6] See *KFC National Management Company*, 214 NLRB 232, fn. 3; *The Prudential Insurance Company of America*, 215 NLRB 66 (1974).

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 employees employed at the Respondent's Santa Cruz, California, facility; excluding yard foreman, assistant yard foreman, relatives of the sole shareholder (Michael Butcher, Robert W. Butcher, David Leonard, Michael Gerig), office clerical employees, guards and supervisors as defined in the Act.

2. The certification

On April 27, 1977, 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 20, 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 September 23, 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 31, 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 November 7, 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. Further, the Union has requested that Respondent supply it with information, regarding names, job descriptions, and rates of pay, which is necessary for collective bargaining; and, since on or about November 7, 1977, Respondent has failed and refused to supply the requested information.

Accordingly, we find that Respondent has, since November 7, 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 to supply information requested by the Union, which information is necessary for collective bargaining, and that, by such refusals, 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, supply the requested information and 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. San Lorenzo Lumber Co., Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. General Teamsters, Packers, Food Processors and Warehousemen Local No. 912, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.
3. All full-time and regular part-time employees employed at the Respondent's Santa Cruz, California, facility; excluding yard foreman, assistant yard foreman, relatives of the sole shareholder (Michael Butcher, Robert W. Butcher, David Leonard, Michael Gerig), 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 September 23, 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 November 7, 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 refusing on or about November 7, 1977, to supply information requested by the Union regarding names, job descriptions, and rates of pay, which information is necessary for collective bargaining, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) of the Act.

7. By the aforesaid refusals 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.

8. 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, San Lorenzo Lumber Co., Inc., Santa Cruz, California, 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 General Teamsters, Packers, Food Processors and Warehousemen Local No. 912, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All full-time and regular part-time employees employed at the Respondent's Santa Cruz, California, facility; excluding yard foreman, assistant yard foreman, relatives of the sole shareholder (Michael Butcher, Robert W. Butcher, David Leonard, Michael Gerig), office clerical employees, guards and supervisors as defined in the Act.

(b) Refusing to supply the aforesaid labor organization with information necessary for collective bargaining, including the names, job descriptions, and rates of pay of unit employees.

(c) 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) Upon request, supply the above-named labor organization with information necessary for collective bargaining including the names, job descriptions, and rates of pay of unit employees.

(c) Post at its Santa Cruz, California, facility copies of the attached notice marked "Appendix."[7] Copies of said notice, on forms provided by the Regional Director for Region 32, 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.

(d) Notify the Regional Director for Region 32, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

[7] 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 General Teamsters, Packers, Food Processors and Warehousemen Local No. 912, International Brotherhood of Teamsters, Chauffeurs, Ware-

housemen & Helpers of America, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT refuse to supply the above-named Union with information necessary for collective bargaining, including the names, job descriptions, and rates of pay of unit employees.

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 full-time and regular part-time employees employed at our Santa Cruz, California, facility; excluding yard foreman, assistant yard foreman, relatives of the sole shareholder (Michael Butcher, Robert W. Butcher, David Leonard, Michael Gerig), office clerical employees, guards and supervisors as defined in the Act.

WE WILL, upon request, supply the above-named Union with information necessary for collective bargaining, including the names, job descriptions, and rates of pay of unit employees.

SAN LORENZO LUMBER CO., INC.