Wrape Forest Industries, Inc. *and* United Furniture Workers of America, AFL–CIO. Case 26–CA–6952

February 21, 1978

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS JENKINS AND PENELLO

Upon a charge and first amended charge filed on November 10 and 16, 1977, respectively, by United Furniture Workers of America, AFL–CIO, herein called the Union, and duly served on Wrape Forest Industries, Inc., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 26, issued a complaint and notice of hearing on November 18, 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 19, 1977, following a Board election in Case 26–RC–5533, 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 August 3, 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 November 28, 1977, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On December 12, 1977, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on December 22, 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, entitled "Opposition to Motion for Summary Judgment and Motion to Dismiss Complaint."

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 attacks the validity of the Union's majority status and certification on the grounds that three irregularly marked ballots were not counted against the Union. The General Counsel contends, in effect, that the challenged ballots issue was litigated in the underlying representation Case 26–RC–5533 and thus may not be relitigated herein. We agree with the General Counsel.

Review of the record in Case 26–RC–5533 reveals that the tally of ballots in the August 3, 1977, election[2] showed that there were 84 votes cast for and 79 against the Union, and that there were 4 void ballots and 7 challenged ballots which were sufficient to affect the election results. Respondent filed timely objections alleging (1) that three irregularly marked ballots should not have been voided and should have been counted as "no" ballots; and (2) that, because of irregular marking of the *Excelsior* list, one voter may have voted twice or an ineligible voter may have cast a ballot. After investigation, the Regional Director on September 14, 1977, issued his Supplemental Decision and Order in which he sustained the challenge to one ballot, deferred resolution of another challenge until the disposition of the unfair labor practice Case 26–CA–6573, and overruled, in accord with the stipulation of the parties, the challenges to the remaining five challenged ballots which he ordered opened and counted. In addition, the Regional Director overruled the objections finding (1) that as to the three irregularly marked "no" ballots, the voters' intent on two of the ballots was not clearly indicated and therefore they were void, and the third "no" ballot was void because it bore the voter's name; and (2) that there was no evidence presented that any employee voted more than once or that any ineligible employee attempted to vote. After the opening and counting of the 5 ballots, the revised tally showed that there were 85 votes cast for and 83 against the Union, with 1 undetermined challenged ballot.

[1] Official notice is taken of the record in the representation proceeding, Case 26–RC–5533, 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.

[2] Respondent's request for review of the Regional Director's Decision and Direction of Election, in which he permitted four individuals alleged to be supervisors to vote under challenge, was denied by the Board as raising no substantial issues warranting review.

Respondent filed with the Regional Director timely objections to the revised tally reiterating its position as to the validity of the three "no" ballots. On September 22, 1977, the Regional Director issued his Second Supplemental Decision, Order, and Certification of Representative overruling Respondent's objections, which he found represented a request for reconsideration of the original objections that had been previously overruled. Accordingly, he certified the Union. Respondent filed with the Board a timely request for review (entitled "Exceptions") of the Regional Director's Second Supplemental Decision in which it again argued in detail that the three "no" ballots were valid and should have been counted against the Union. On October 6, 1977, the Board denied the request as raising no substantial issues warranting review. Respondent filed a Request for Reconsideration reiterating its position as to the three "no" ballots and, in the alternative, seeking an evidentiary hearing thereon. On November 7, 1977, the Board denied the motion for reconsideration as it contained nothing not previously considered. It thus appears that Respondent is attempting again to raise herein issues which were litigated and resolved 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.[3]

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.[4] Accordingly, we shall 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 corporation doing business in the State of Arkansas with plants located at 2200 East Seventh Street, Little Rock, Arkansas, and at 1729 Cantrell Road, Little Rock, Arkansas, where it is engaged in the manufacture of furniture parts and kitchen cabinet door parts. During the past 12 months, Respondent purchased and received at its Little Rock, Arkansas, locations products valued in excess of $50,000 directly from points located outside the State of Arkansas and, during the same period of time, Respondent sold and shipped from its Little Rock, Arkansas, locations products valued in excess of $50,000 directly to points located outside the State of Arkansas.

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

United Furniture Workers of America, 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 production and maintenance employees employed at the Employer's locations at 2200 East Seventh Street, Little Rock, Arkansas, and at 1729 Cantrell Road, Little Rock, Arkansas, excluding all local truckdrivers, over-the-road truckdrivers, sales personnel, office clerical employees, guards and supervisors as defined in the Act.

2. The certification

On August 3, 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 26, 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 19, 1977, and the Union

[3] 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).

[4] In its answer to the complaint, Respondent denies the allegation that on August 3, 1977, the Union requested, and Respondent refused, to bargain. However, it does admit in its answer that on October 7, 1977, the Union requested bargaining; that on November 7, 1977, the Union requested certain information of Respondent; and that on November 7, 1977, it refused to bargain because the Union was not properly certified. Accordingly, we find that the Union requested bargaining on November 7, 1977, and Respondent refused to bargain on the same date.

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 7 and November 7, 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.

Accordingly, we find that Respondent has, since on or about 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 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.

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. Wrape Forest Industries, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. United Furniture Workers of America, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.
3. All production and maintenance employees employed at the Employer's locations at 2200 East Seventh Street, Little Rock, Arkansas, and at 1729 Cantrell Road, Little Rock, Arkansas, excluding all local truckdrivers, over-the-road truckdrivers, sales personnel, 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 19, 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 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, Wrape Forest Industries, Inc., Little Rock, Arkansas, 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 United Furniture Workers of America, AFL–CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All production and maintenance employees employed at the Employer's locations at 2200 East Seventh Street, Little Rock, Arkansas, and at 1729 Cantrell Road, Little Rock, Arkansas, excluding all local truckdrivers, over-the-road truckdrivers, sales personnel, 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 Little Rock, Arkansas, locations copies of the attached notice marked "Appendix."[5] Copies of said notice, on forms provided by the Regional Director for Region 26, 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 26, 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 United Furniture Workers of America, 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 production and maintenance employees employed at the Employer's locations at 2200 East Seventh Street, Little Rock, Arkansas, and at 1729 Cantrell Road, Little Rock, Arkansas, excluding all local truckdrivers, over-the-road truckdrivers, sales personnel, office clerical employees, guards and supervisors as defined in the Act.

WRAPE FOREST
INDUSTRIES, INC.

[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."