Ajax Magnethermic Corporation *and* United Steelworkers of America, AFL–CIO, CLC. Case 8–CA–10503

April 28, 1977

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS JENKINS AND MURPHY

Upon a charge filed on October 12, 1976, by United Steelworkers of America, AFL–CIO, CLC, herein called the Union, and duly served on Ajax Magnethermic Corporation, herein called the Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 8, issued a complaint and notice of hearing on November 23, 1976, and an amendment to the complaint and notice of hearing on December 15, 1976, 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, amendment to the 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, as amended, alleges in substance that on September 15, 1976, following a Board election in Case 8–RC–10074, 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 September 28, 1976, and that 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 December 2 and 22, 1976, Respondent filed answers to the complaint, and to amendment, respectively, admitting in part, and denying in part, the allegations in the complaint.

On January 21, 1977, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on February 8, 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 answers to the complaint, as amended, and in its response to the Notice To Show Cause Respondent denies in substance the material allegations of the complaint and asserts as an affirmative defense the ineligibility of the Union of representative status because "the election was conducted in an atmosphere which did not lend itself to a fair and unencumbered election" and therefore the certification was invalid and Respondent is relieved of its duty to bargain. Respondent further alleges that "because of changes in personnel and conditions, the Union does not presently represent a majority of the employees of the unit." The General Counsel asserts that Respondent's contention that the Union was improperly certified because of election irregularities was duly considered by the Board in its Decision and Certification of Representative. Respondent makes no claim that such alleged defenses are in fact newly discovered or based on previously unavailable evidence. Therefore, General Counsel argues that there exists no issue which would warrant a hearing before the Board.

Our review of the record herein, including the record in Case 8–RC–10074, discloses that pursuant to a Stipulation for Certification Upon Consent Election an election was conducted among the employees in the stipulated unit on October 30, 1975, which resulted in a vote of 31 votes for, and 30 against, the Union. Respondent filed timely objections which alleged in substance that (1) individuals acting as agents of the Union picketed Respondent's offices daily from the time of the filing of the petition until a week before the election and threatened and harrassed employees; and (2) union agents harrassed and threatened several employees "as to what would happen if the Union did not win the election." After investigation the Regional Director on December 18, 1975, issued his Report on Objections in which he found that the objections failed to raise substantial issues of either fact or law with respect to the election, and recommended that the objections be

[1] Official notice is taken of the record in the representation proceeding, Case 8–RC–10074, 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.

overruled and that a certification of representative in favor of the Union be issued.

On January 12, 1976, Respondent filed exceptions to the Regional Director's Report on Objections in which it essentially reiterated the allegations set forth in its objections and contended that the election should be set aside and a new election ordered. On September 15, 1976, the Board issued its Decision and Certification of Representative adopting the Regional Director's findings and recommendations.

On September 28, 1976, Respondent, in response to a request for bargaining by the Union, alleged that the certification was invalid and that the Union did not "represent a majority of the unit as presently constituted."

Respondent further stated that it did not recognize the Union as the bargaining agent for the employees in the appropriate unit. In response to the Notice To Show Cause,[2] Respondent argues that the General Counsel's Motion for Summary Judgment should be denied and that due process requires a hearing on the issues presented herein. Respondent further alleges that a hearing should have been directed to consider the objections to the conduct of the election filed by Respondent in Case 8–RC–10074. These objections were, however, raised and considered in the representation case and ruled upon there. Moreover, it is well settled that the parties do not have an absolute right to a hearing. Only when the objecting party presents a *prima facie* showing of "substantial and material" issues which would warrant the election being set aside does the right to an evidentiary hearing exist.[3] Absent arbitrary action, this qualified right to a hearing satisfies all statutory and constitutional requirements.[4] In this case, the Board fully considered Respondent's objections and exceptions and did not order a hearing, but rather adopted the Regional Director's recommendations that they be overruled.

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) of the Act is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[5]

Aside from the alleged loss of majority status of the Union, 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. Furthermore, we find no merit in Respondent's assertion that it is not obligated to bargain with the Union because it does not believe that the Union presently represents a majority of the unit employees due to changes in personnel and conditions. An employer's bargaining obligation extends for 1 year from the date of certification and employee turnover does not constitute "unusual circumstances" within the Supreme Court's decision in *Ray Brooks* v. *N.L.R.B.*, 348 U.S. 96 (1954). Consequently, a hearing on employee turnover is not warranted and Respondent's belief about the Union's loss of majority status is not a basis upon which it can lawfully refuse to bargain.[6] We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. We shall, accordingly, grant the Motion for Summary Judgment.[7]

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

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent, a Delaware corporation, is engaged in the manufacture and sale of induction heating and melting equipment at its sole facility located in Warren, Ohio. Respondent, in the course of conduct of its business operations, ships goods valued in excess of $50,000 directly to points located outside the State of Ohio.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material

[2] Although Respondent's response and brief to the General Counsel's Motion for Summary Judgment was mailed before the Board's Notice To Show Cause was issued a subsequent letter by Respondent dated February 11, 1977, indicated its intent that its response and brief serve as written cause as to why General Counsel's motion should be denied.

[3] *N.L.R.B.* v. *Modine Manufacturing Co.*, 500 F.2d 914 (C.A. 8, 1974).

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

[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).

[6] *Diamond Crystal Salt Company*, 222 NLRB 714 (1976), and cases cited in fn. 6 therein. *Williams Energy Company*, 218 NLRB 1080 (1975).

[7] In its answer to the complaint Respondent asserts, in effect, that it does not have sufficient knowledge or information "as to the Union's status as a labor organization." However, the Board, in its previously referred to Decision and Certification of Representative, found the Union to be a labor organization within the meaning of Sec. 2(5) of the Act and therefore that issue cannot be relitigated herein. *Teledyne, Landis Machine*, 212 NLRB 73 (1974). Respondent also denies that the Union requested bargaining commencing on or about September 20, and continuing to date. However, attached to the General Counsel's Motion for Summary Judgment are copies of correspondence between the Union and Respondent. By letter dated September 20, the Union requested negotiations, to which Respondent replied on September 28, that it "does not recognize the United Steelworkers of America as the bargaining agent" of its employees. Respondent has submitted nothing to controvert these documents, or their contents. Accordingly, we deem these allegations of the complaint to be true. *The May Department Stores Company*, 186 NLRB 86 (1970); *Carl Simpson Buick Inc.*, 161 NLRB 1389 (1966).

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 Steelworkers of America, AFL–CIO, CLC, 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 office clerical employees employed by Respondent at its location at 1745 Overland Avenue, N.E., Warren, Ohio, excluding all confidential employees and all professional employees, guards and supervisors as defined in the Act, and all other employees.

2. The certification

On October 30, 1975, 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 8 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[8] on September 15, 1976, 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 20, 1976, and 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 September 28, 1976, 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 September 28, 1976, 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. Ajax Magnethermic Corporation is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. United Steelworkers of America, AFL–CIO, CLC, is a labor organization within the meaning of Section 2(5) of the Act.
3. All office clerical employees employed by Respondent at its location at 1745 Overland Avenue, N.E., Warren, Ohio, excluding all confidential

[8] Although the unit description as certified by the Board did not contain the specification of Respondent's employees located at the above address in Warren, Ohio, it is implicit therein that the unit comprises such employees.

employees and all professional employees, guards and supervisors as defined in the Act, and all other employees, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since September 15, 1976, 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 September 28, 1976, 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, Ajax Magnethermic Corporation, Warren, Ohio, 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 Steelworkers of America, AFL–CIO, CLC, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All office clerical employees employed by Respondent at its location at 1745 Overland Avenue, N.E., Warren, Ohio, excluding all confidential employees and all professional employees, guards and supervisors as defined in the Act, and all other employees.

(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 offices and place of business in Warren, Ohio, copies of the attached notice marked "Appendix."[9] Copies of said notice, on forms provided by the Regional Director for Region 8, 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 8, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

[9] 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 United Steelworkers of America, AFL–CIO, CLC, 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 office clerical employees employed by Respondent at its location at 1745 Overland Avenue, N.E., Warren, Ohio, excluding all

confidential employees and all professional employees, guards and supervisors as defined in the Act, and all other employees.

AJAX MAGNETHERMIC CORPORATION