

Howard Johnson Company and International Union of Operating Engineers, Local 68, AFL-CIO. Case 22-CA-2961.

May 22, 1967

DECISION AND ORDER

BY CHAIRMAN McCULLOCH AND MEMBERS BROWN AND ZAGORIA

On March 6, 1967, Trial Examiner Charles W. Schneider issued his Decision in the above-entitled case, finding that the Respondent had engaged in and was engaging in certain unfair labor practices within the meaning of the National Labor Relations Act, as amended, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner including his granting of the General Counsel's motion for judgment on the pleadings, and Respondent's response to the Trial Examiner's order to show cause and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and brief, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.¹

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner and hereby orders that Respondent, Howard Johnson Company, Englewood, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

¹ On October 27, 1966, the Board denied the Employer's request for review of the Regional Director's Supplemental Decision and Order in Case 22-RC-3282 (not printed in NLRB volumes), the underlying representation proceeding in which the Union was certified. In addition to the reasons set forth by the Trial Examiner herein for rejecting the Respondent's argument that in that proceeding the Regional Director acted improperly in overruling the challenge to the ballot of Henry Kohler, which was based on his alleged supervisory status, we note that the record and the transcript of testimony in Case 22-RC-3282, of which we take official notice, show that the status and duties of Kohler were, in fact, fully litigated in that hearing. It is quite clear that

the Respondent presented evidence and argument with regard thereto and that it took the vigorous position that both Kohler and Victor Vary were rank-and-file employees who could not constitute a separate appropriate unit and their duties required that they be included in a single unit with all other rank-and-file employees. The testimony in that case, largely that of Respondent's vice president and present and past plant managers, shows clearly that Kohler and Vary work directly under the supervision of the plant manager without intermediate supervision, that Kohler did not possess any indicia of supervisory status, and that his relationship to Vary was that of a senior, more experienced employee to a junior, less experienced employee. In fact, Respondent's testimony was unequivocally to the effect that only its plant manager had the authority to exercise any of the supervisory functions normally considered in determining such status. Furthermore, the Respondent has not at any time asserted any additional facts which would justify the conclusion that Kohler is a supervisor.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

The Representation Proceeding

CHARLES W. SCHNEIDER, Trial Examiner: A petition was filed by International Operating Engineers Union, Local 68, AFL-CIO, herein called Local 68, on April 29, 1966,¹ in Case 22-RC-3282 for an election among all boiler and compressor room operating engineers employed at Respondent Howard Johnson's Englewood, New Jersey, plant.² A hearing was held thereon at which Local 68 contended that the two boiler and compressor room operating engineers comprised a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act, while Respondent asserted that its operations at the plant are so integrated as to require a finding that the only appropriate unit must consist of all production and maintenance employees. On June 9, a Decision and Direction of Election was issued by the Regional Director for Region 22 in which he found that the unit sought by Local 68 was appropriate and an election was directed accordingly. On June 17, counsel for Respondent filed with the Board a Request for Review of the Decision and Direction of Election. This was denied by the Board on July 1, on the ground that the request "raises no substantial issues warranting review."

On July 6, an election by secret ballot was conducted under the direction and supervision of the Regional Director for Region 22 among the employees in the unit found appropriate for the purposes of collective bargaining. Respondent thereupon challenged the two ballots cast, raising for the first time the objections that one of the individuals who voted, Henry Kohler, was a supervisor, and that another employee who voted, Victor Vary, was not in the unit and was not properly licensed to maintain the boilers at the Englewood, New Jersey, plant. The Regional Director, in a Supplemental Decision and Order dated August 1 overruled the challenges on the ground that the Respondent had an opportunity to make these arguments at the hearing or in its request for review but failed to do so. On August 9, counsel for Respondent filed a request for review of the Supplemental Decision and Order. This request was denied by the Board on

¹ Dates are for 1966 unless otherwise specified.

² Official notice is taken of the representation proceeding, *Howard Johnson Company, Case 22-RC-3282.*

October 27, 1966, as presenting "no substantial issues warranting review." The challenged ballots were opened and counted; the revised tally of ballots having shown that both employees had voted to be represented by Local 68, a certification of representative was issued to Local 68 on November 10, 1966.

The Complaint Case

On December 7, International Union of Operating Engineers, Local 68-68A, filed the unfair labor practice charge involved in the instant case in which it alleged that, since on or about November 22, the Respondent has refused to bargain with Local 68.

On December 21, the General Counsel, by the Regional Director for Region 22, issued the instant complaint alleging that the Respondent had committed unfair labor practices in violation of Section 8(a)(1) and (5) of the Act by refusing to bargain with Local 68 upon request.

In its answer filed on January 5, 1967, the Respondent admitted the filing and service of the charge, that Local 68 is a labor organization within the meaning of the Act, and the jurisdictional allegations of the complaint; but denied the appropriateness of the unit, that Local 68 was the certified exclusive collective-bargaining representative of the employees, that Local 68 requested to bargain collectively since on or about November 22, that the Respondent has refused to bargain collectively with Local 68 as the exclusive collective-bargaining representative of the employees in the unit found to be appropriate, and denied the commission of any unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

On January 20, 1967, counsel for the General Counsel filed a motion for summary judgment accompanied by a memorandum in support thereof with affidavit attached, contending that there is no genuine issue as to any material fact, and that therefore there is no necessity for a hearing.

On January 24, 1967, Trial Examiner Charles W. Schneider issued an order to show cause on motion for summary judgment. The parties were directed to show cause on or before February 8, 1967, subsequently extended to February 13, as to whether the motion for summary judgment should be granted.

On February 10, 1967, the Respondent filed a motion to amend answer to complaint, which I deem an amendment to the answer.³ Apart from argument in the motion, the effect of the amendment is to admit that Local 68 requested the Respondent to bargain after the certification and that the Respondent refused.

On February 13, 1967, the Respondent filed its response and memorandum brief to the General Counsel's motion for summary judgment. On February 20, 1967, counsel for the General Counsel filed a supplemental memorandum in support of the motion for summary judgment. This supplemental memorandum is rejected as not being a timely response to the order to show cause.

³ Respondent may amend its answer as a matter of right at any time prior to hearing Section 102.23 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, revised January 1, 1965.

⁴ *Pittsburgh Plate Glass Company v NLRB*, 313 U.S. 146, 162. And see Board's Rules, *supra*, 102.67(f).

"Denial of a request for review [of a decision by a Regional

Ruling on the Motion for Summary Judgment

In the amended answer and memorandum brief, Respondent avers that one of the two votes cast in the July 6 election was that of a supervisor, and that a majority of employees within the meaning of Section 2(3) have not designated or selected a representative; that the Board has ignored the mandate of Section 9(b) to resolve the dispute as to employee status and, without investigation though the issue was timely raised, has allowed the participation in a Board election of a supervisor in violation of Sections 9(a) and 14(a) of the Act, thus operating to deny Respondent due process rights. Respondent thus defends its refusal to bargain with Local 68 as due to the inappropriateness of the unit designated by the Regional Director and because Local 68 had not been designated by a majority of employees.

In the light of the admissions in the pleadings, and the prior rulings of the Board in the representation case, it is clear that the Respondent seeks to litigate in this unfair labor practice proceeding issues which have already been decided by the Board in the prior related representation case. It is established Board policy in a complaint case, in the absence of newly discovered or previously unavailable evidence, not to permit litigation of issues which were or could have been litigated in a prior related representation proceeding.⁴

This policy is applicable even though a formal hearing on objections to an election has not been provided by the Board. Such hearing is not a matter of right and a request for one is not granted unless substantial and material issues of fact are raised.⁵

The Respondent's election challenges were rejected by the Regional Director as an untimely raising, without proffered excuse, of arguments reasonably available at the time of the representation hearing, an action which the Board refused to review, and thus by operation of the Rules and Regulations affirmed.

The Trial Examiner has no authority to reexamine those dispositions or to question the Board's conclusions made on the existing record. There is no offer of previously unavailable or hitherto undiscovered evidence. The decisions of the Board in the matter therefore constitute, at this stage of the proceedings, the law of the case. *Krieger-Ragsdale & Company, Inc.*, 159 NLRB 490; *The Puritan Sportswear Corp.*, 159 NLRB 490; *The Puritan Sportswear Corp.*, 162 NLRB 13.

It follows that there are no factual issues litigable before a Trial Examiner and therefore no matter warranting hearing. Accordingly, the General Counsel's motion for summary judgment is granted, and I hereby make the following further:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

(a) The Respondent is, and has been at all times material herein, a corporation duly organized under, and existing by virtue of, the laws of the State of Maryland.

Director in a representation case] shall constitute an affirmation of the Regional Director's action which shall also preclude relitigating any such issues in any related subsequent unfair labor practice proceeding."

See also 102.69(c)

⁵ *O K Van and Storage, Inc.*, 127 NLRB 1537

(b) At all times material herein Respondent has maintained its principal office and place of business in the State of Maryland and has maintained various other places of business in the States of New York and New Jersey, including an ice cream manufacturing plant at 400 South Dean Street, Englewood, New Jersey, herein called the Englewood plant, and is now, and at all times material herein has been, continuously engaged at said Englewood plant in the manufacture, warehousing, and distribution of ice cream and related products. Respondent's Englewood plant is its only facility involved in this proceeding.

(c) In the course and conduct of Respondent's business operations during the preceding 12 months, said operations being representative of its operations at all times material herein, Respondent caused to be manufactured and distributed at said Englewood plant, products valued in excess of \$50,000, of which products valued in excess of \$50,000 were shipped from said Englewood plant in interstate commerce directly to States of the United States other than the State of New Jersey.

(d) 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.

II. THE LABOR ORGANIZATION INVOLVED

International Union of Operating Engineers, Local 68, AFL-CIO, is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

All boiler and compressor room operating engineers employed at Respondent's Englewood, New Jersey, plant, excluding office clerical employees, professional employees, all other 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. On July 6, 1966, a majority of the employees of the Respondent in the appropriate unit, by a secret-ballot election conducted under the supervision of the Regional Director for Region 22 of the Board, designated and selected Local 68 as their exclusive representative for the purposes of collective bargaining with Respondent, and on or about November 10, 1966, said Regional Director certified that Local 68 was the exclusive collective-bargaining representative of the employees in the said unit.

Under date of November 22, 1966, Local 68 requested the Respondent to bargain, and the Respondent declined to do so.

By thus refusing to recognize and bargain with the Union, the Respondent has refused to bargain collectively in violation of Section 8(a)(5) of the Act and has interfered with, restrained, and coerced its employees in violation of Section 8(a)(1) of the Act. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record in the case, and pursuant to Section 10(c) of the Act, I recommend that the Board issue the following:

ORDER

Howard Johnson Company, Englewood, New Jersey, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with International Operating Engineers Union, Local 68, AFL-CIO, as the exclusive collective-bargaining representative in the following appropriate bargaining unit: All boiler and compressor room operating engineers employed at Respondent's Englewood, New Jersey, plant, excluding office clerical employees, professional employees, all other employees, guards, and supervisors as defined in the Act.

(b) Interfering with the efforts of said Union to negotiate for or represent the employees in said appropriate unit as the exclusive collective-bargaining representative.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Upon request, bargain collectively with International Operating Engineers Union, Local 68, AFL-CIO, as the exclusive representative of the employees in the appropriate unit with respect to rates of pay, wages, hours of work, and other terms and conditions of employment, and embody in a signed agreement any understanding reached.

(b) Post at its Englewood, New Jersey, plant, copies of the attached notice marked "Appendix."⁶ Copies of said notice, on forms to be furnished by the Regional Director for Region 22, shall, after being duly signed by an authorized representative of the Respondent, be posted by the 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 the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 22, in writing, within 20 days from the receipt of this Decision, what steps it has taken to comply herewith.⁷

⁶ In the event that this Recommended Order is adopted by the Board, the words "a Decision and Order" shall be substituted for the words "the Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "a Decree of the United States Court of Appeals Enforcing an Order" shall be substituted for the words "a Decision and Order."

⁷ In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read "Notify the Regional Director for Region 22, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith."

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to the Recommended Order of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL NOT refuse to bargain collectively with International Operating Engineers Union, Local 68, AFL-CIO, as the exclusive bargaining representative of all the following employees:

All boiler and compressor room operating engineers employed at our Englewood, New Jersey, plant, excluding office clerical employees, professional employees, all other employees, guards, and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights under the Act.

WE WILL bargain collectively with the Union as the exclusive representative of these employees, and, if an understanding is reached, sign a contract with the Union.

HOWARD JOHNSON
COMPANY
(Employer)

Dated _____ By _____ (Representative) _____ (Title)

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 614 National Newark Building, 744 Broad Street, Newark, New Jersey 07102, Telephone 645-3088.