

**Westinghouse Learning Corporation (Indiana) and
Local No. 4, International Union, United Plant
Guard Workers of America. Case 25-CA-3412**

December 16, 1969

DECISION AND ORDER

**BY CHAIRMAN McCULLOCH AND MEMBERS
JENKINS AND ZAGORIA**

On October 24, 1969, Trial Examiner Charles W. Schneider issued his Decision in the above-entitled proceeding, finding that 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, Respondent filed exceptions to the Trial Examiner's Decision together with 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 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 the brief, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

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, Westinghouse Learning Corporation (Indiana), Edinburg, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

THE REPRESENTATION PROCEEDING¹

CHARLES W. SCHNEIDER, Trial Examiner: Pursuant to a stipulation for certification upon consent election executed by Westinghouse Learning Corporation

¹Official notice is taken of the record in the representation proceeding, Case 25-RC-3905, as the term "record" is defined in Section 102.68 and 102.69(f) of the Board's rules (Rules and Regulations and Statements of Procedure, National Labor Relations Board, Series 8, as amended). See *LTV Electrosystems, Inc.*, 166 NLRB No. 81, enfd. 388 F.2d 683 (C.A. 4,

(Indiana), the Respondent, and Local No. 4, International Union, United Plant Guard Workers of America, of the Union, and approved by the Regional Director of 25 of the National Labor Relations Board on November 8, 1968, an election under the supervision of the Regional Director was held on November 20, 1968 among employees of the Respondent in an appropriate unit hereinafter described. Of the 22 eligible voters, 13 voted for the Union, 8 voted against the Union, and 1 ballot was challenged by the Union.

On November 25, 1968, the Respondent filed timely objections to the election alleging coercive conduct by union officials and other persons precluding a free choice by employees in the election. The Respondent therefore requested that the election be set aside. An administrative investigation of the objections was conducted by the regional office. All parties submitted evidence in support of their positions. No formal hearing was held on the objections.

On January 2, 1969, the Acting Regional Director issued his report on objections and recommendations to the Board, in which, after a recitation of evidence, the Acting Regional Director found the Respondent's objections to the election not to be sustained. He thereupon recommended to the Board that the objections be overruled and that the Union be certified as the collective-bargaining representative.

On January 22, 1969, the Respondent filed with the Board in Washington, D.C., exceptions to the Acting Regional Director's report and recommendations, along with a supporting brief.

On May 12, 1969, the Board issued a decision and certification of representative in which the Board, in sum, accepted the Acting Regional Director's conclusions as to the Respondent's objections and certified the Union as the collective-bargaining representative in the appropriate unit. The Board said in part,

Upon the entire record in this case, including the Employer's exceptions to the Acting Regional Director's Report, and the Employer's brief in support thereof, the Board finds:

* * * * *

5. We conclude that the Employer's exceptions raise no material or substantial issues of fact or law which would warrant reversal of the Acting Regional Director's findings, conclusions and recommendations, or require a hearing.

THE UNFAIR LABOR PRACTICE CASE

On June 3, 1969, the Union filed the instant charge alleging, *inter alia*, that since the certification the Respondent had refused to bargain with the Union. On July 17, 1969, the General Counsel, by the Regional Director for Region 25 issued a Complaint and Notice of Hearing alleging that the Respondent had committed unfair labor practices in violation of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act by refusing to bargain with the Union on request.

In due course the Respondent filed an answer and amended answer in which it admitted substantial allegations of the complaint, denying only allegations in paragraph 5(b) and 5(c) of the complaint which asserted

Golden Age Beverage Co., 167 NLRB No. 24, enfd. 415 F.2d 26 (C.A. 5); *Intertype Co. v. Penello*, 269 F. Supp. 573 (D.C. Va., 1967); *Intertype Co. v. N.L.R.B.*, 401 F.2d 41 (C.A. 4); *Follett Corp.*, 164 NLRB No. 47, enfd. 397 F.2d 91 (C.A. 7); Section 9(d) of the National Labor Relations Act.

that the majority of the Respondent's employees had freely selected the Union as their collective-bargaining representative and that the Union had been validly certified as such representative, and allegations in other paragraphs of the complaint to the effect that the Respondent had engaged in unfair labor practices by refusing to bargain with the Union.

On August 25, 1969, Counsel for the General Counsel filed a motion to strike portions of Respondent's answer and motion for summary judgment. The General Counsel's motion requested (1) that the Respondent's denial of paragraphs 5(b) and 5(c) of the complaint be stricken on the ground that the Board had determined the issue of the Union's representative status and that the Respondent's denials in that connection were therefore "sham"; and (2) that summary judgment be entered for the reason that all material facts are either established by the official record or admitted. On August 29, 1969, I issued an order to show cause on the General Counsel's motions returnable September 15, 1969, subsequently extended to September 30, 1969. Thereafter the Respondent filed a memorandum in opposition to General Counsel's motion for summary judgment and to strike. No other responses to the order to show cause have been received.

RULING ON MOTION FOR SUMMARY JUDGMENT

The Respondent admits its refusal to bargain with the Union. Its position is that its objections to the election and its request for hearing thereon were improperly overruled or denied, that the Union consequently has not been legally designated by the employees as their collective-bargaining representative, and that the certification of the Union as such representative therefore is invalid. More specifically the Respondent contends that the Regional Director did not consider material portions of the Respondent's evidence, and further that he acted upon evidence *ex parte* and improperly made credibility findings. The Respondent also states that in the absence of a hearing it cannot be said that the issues raised by its objections have been litigated. It further asserts (citing in this connection *Pepsi-Cola Buffalo Bottling Co. v. N.L.R.B.*, 409 F.2d 676), that even if litigated the issues have not been resolved by the Board, for the reason that the Board did not review the findings of the Regional Director, and the certification is therefore faulty as a matter of law. In addition the Respondent contends that the Board's failure to review the Regional Director's Decision was in derogation of the stipulation and agreement of the parties, which provided that objections to the election would be determined by the Board and not by the Regional Director, and that for this reason also the Union has not been properly certified. In summary the Respondent's position is that it has raised substantial and material issues which were not litigated or reviewed in the representation case and thus require hearing, which to this point has been denied.

I have concluded that the Respondent's contentions may not be sustained by me.

It is established Board policy, in absence of newly discovered or previously unavailable evidence not to permit litigation before a trial examiner in a complaint case of issues which were or could have been litigated in a prior related representation proceeding.² This policy is applicable even though no formal hearing on objections has been provided by the Board. Such a hearing is not a matter of right unless substantial and material issues are

raised.³ The Board has determined that the Respondent's objections presented no such issues here.

It is true that the Respondent contends that the issues were not litigated or reviewed in the representation case. However, upon this record I do not find that contention sustained. Certainly the issues were presented for determination, first to the Acting Regional Director in the form of the objections and supporting material submitted to him by the Respondent, and later to the Board in the exceptions which the Respondent filed to the Acting Regional Director's Report and Recommendations disposing of objections. The Board's Decision purported to pass on them. It is therefore found that the issues raised by the Respondent's objections to the election were litigated in the representation case within the meaning of the Board's procedures. In any event, actual litigation of an issue in a representation case is not required in order to preclude litigation of that issue in a subsequent related unfair labor practice proceeding. It is enough that the issue could have been raised in the representation case. Cf. Section 102.67(f) of the Board's rules.

We come then to the contention that the Board neither decided the objections issues nor reviewed the Regional Director's findings on them.

The Board's rules authorize the Board in the case of a stipulation for certification upon consent election to determine whether exceptions to the Regional Director's report on objections raise substantial and material issues. Thus, Section 102.69(e) of the Rules provides, in part, as follows:

[If] . . . it appears to the Board that such exceptions do not raise substantial and material issues with respect to the conduct or results of the election, the Board may decide the matter forthwith upon the record, or may make other disposition of the case. If it appears to the Board that such exceptions raise substantial and material factual issues, the Board may direct the regional director or other agent of the Board to issue and cause to be served on the parties a notice of hearing on said exceptions before a hearing officer.

In its Decision and Certification of Representative the Board specifically found that the Respondent's exceptions raised "no material or substantial issues of fact or law which would . . . require a hearing." The Board therefore appears to have acted in accordance with the authority provided in Section 102.69(e) and to have decided the case, as required by the stipulation.

With respect to the Respondent's contention that the Board did not review the Regional Director's findings and conclusions, it is to be noted that the Board's Decision states that the Board made its findings "upon the entire record in this case." This is to be interpreted as a statement that the Board considered all the evidence in the

²*Krieger-Ragsdale & Co., Inc.*, 159 NLRB 490, enf'd. 379 F.2d 517 (C.A. 7), cert. denied 389 U.S. 1041, *N.L.R.B. v. Macomb Pottery*, 376 F.2d 450 (C.A. 7), *Howard Johnson Company*, 164 NLRB No. 121; *Metropolitan Life Insurance Company*, 163 NLRB No. 71 See *Pittsburgh Plate Glass Co v. N.L.R.B.*, 313 U.S. 146, 162, NLRB Rules and Regulations, Section 102.67(f) and 102.69(c).

³*O'K Van and Storage, Inc.*, 127 NLRB 1537, enf'd. 297 F.2d 74 (C.A. 5) See *Air Control Window Products, Inc.*, 355 F.2d 245, 249 (C.A. 5) "If there is nothing to hear, then a hearing is a senseless and useless formality." See also *N.L.R.B. v. Bata Shoe Co.*, 377 F.2d 821, 826 (C.A. 4), ". . . there is no requirement, constitutional or otherwise, that there be a hearing in the absence of substantial and material issues crucial to determination of whether NLRB election results are to be accepted for purposes of certification"

record, as well as the findings and recommendations of the Regional Director. This would appear to constitute a review of the Regional Director's action. The *Pepsi-Cola* case, being based on the premise that the Board had not reviewed the Regional Director's findings there, is consequently inapplicable here. But even if the Board has not reviewed the Regional Director's action, the Trial Examiner has no authority to disregard the Board's certification. If there has been error the Respondent may request the Board for reconsideration and in the event of adverse decision the Respondent may present its contentions to the Circuit Court on a petition for review or enforcement of any subsequent Board order.

In sum, then, it is found that the Board has concluded on the basis of the record that the Respondent's Objections did not raise material and substantial issues requiring hearing, that all issues raised by the objections have been litigated and resolved in the representation case, that the Board reviewed the evidence, the record, and the findings and recommendations of the Regional Director and that such action complied with the Act and the requirements of the stipulation for certification upon consent election. At this stage of the proceeding these determinations by the Board are the law of the case. It follows that the Union has been properly certified as the representative of the employees, that the Respondent has raised no unresolved matters requiring an evidentiary hearing, and that the Respondent's admitted refusal to bargain with the Union is a violation of the Act. The motion of Counsel for the General Counsel for summary judgment is therefore appropriate and is granted. However, the motion of counsel for the General Counsel to strike portions of the Respondent's answer relating to paragraph 5(b) and 5(c) of the Complaint is denied. Since those portions of the Answer take issue with the conclusion that the Union is the legal representative of the employees in the appropriate unit, they must stand if the Respondent is to have an issue to contest before the Board and the Courts. They are therefore not sham issues. Without such denials the Respondent would have nothing to litigate, or any ground to oppose summary judgment. That a pleading may not be substantiated by the evidence is not a ground for striking it in the absence of a final unreviewable judgment on the subject of the pleading. Upon the record before me I therefore grant the motion for summary judgment, deny the motion to strike portions of the Answer, and make the following further:

FINDINGS AND CONCLUSIONS

I. THE BUSINESS OF THE RESPONDENT

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 Delaware.

At all times material herein, Respondent has maintained its principal office and place of business at Edinburg, Indiana, herein called the facility, and is, and has been at all times material herein, continuously engaged at said facility in the business of operating and managing the Atterbury Job Corps Center.

During the past year, a representative period, Respondent in the course and conduct of its business operations, purchased, transferred, and delivered to its facility, goods and materials valued in excess of \$50,000.00 which were transported to said facility directly from States other than the State of Indiana.

Respondent is now, 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

The Union 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 security patrolmen employees of Respondent employed at the Atterbury Job Corps Center in Edinburg, Indiana, excluding office clerical, food service, maintenance, custodial, and warehouse employees, technical and all other employees, professional employees, sergeants, chiefs, captains, and other 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 November 20, 1968, a majority of the Respondent's employees in the appropriate unit designated and selected the Union as their bargaining representative by secret ballot election, and on May 12, 1969, the Board certified the Union as such representative. Since May 27, 1969, the Respondent has refused to bargain with the Union as collective-bargaining representative in the appropriate unit. By such action the Respondent has engaged in unfair labor practices 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 and conclusions, pursuant to Section 10(c) of the Act, I recommend that the Board issue the following:

RECOMMENDED ORDER

A. For the purpose of determining the duration of the certification, the initial year of certification shall be deemed to begin on the date the Respondent commences to bargain in good faith with the Union as the recognized exclusive bargaining representative in the appropriate unit.⁴

B. Westinghouse Learning Corporation (Indiana), its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Local No. 4, International Union, United Plant Guard Workers of America, as the exclusive collective-bargaining representative of the employees in the following appropriate bargaining unit:

All security patrolmen employees of Respondent employed at the Atterbury Job Corps Center in Edinburg, Indiana, excluding office clerical, food service, maintenance, custodial, and warehouse employees, technical and all other employees, professional employees, sergeants, chiefs, captains, and other supervisors as defined in the National Labor

⁴The purpose of this provision is 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. See *Mar-Jac Poultry Co.*, 136 NLRB 785, *Commerce Co., d/b/a Lamar Hotel*, 140 NLRB 226, 229, 328 F.2d 600 (C.A. 5), cert denied 379 U.S. 817. *Burnett Construction Co.*, 149 NLRB 1419, 1421, 350 F.2d 57 (C.A. 10).

Relations Act

(b) Interfering with the efforts of said Union to negotiate for or represent employees as such 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 Local No. 4, International Union, United Plant Guard Workers of America, as the exclusive representative of all the employees in the appropriate unit with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, and embody in a signed agreement any understanding reached.

(b) Post at its place of business in Edinburg, Indiana, copies of the attached notice marked "Appendix"⁵ Copies of said notice on forms provided by the Regional Director for Region 25, shall, after being duly signed by an authorized representative of the Respondent, be posted by the Respondent immediately upon receipt thereof and maintained by the Respondent for a period of 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 25, in writing, within 20 days from receipt of this recommended Order what steps the Respondent has taken to comply herewith.⁶

⁵In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the Board, the findings, conclusions, recommendations, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and order, and all objections thereto shall be deemed waived for all purposes. In the event that the Board's 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 be changed to read "Posted pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

⁶In the event that these recommendations are adopted by the Board, this provision shall be modified to read "Notify the Regional Director for Region 25, in writing, within 10 days from the receipt of this order what steps the Respondent has 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 with Local No. 4, International Union, United Plant Guard Workers of America, as the exclusive collective-bargaining representative of all the following employees

All security patrolmen employees employed at our Atterbury Job Corps Center in Edinburg, Indiana, excluding office clerical, food service, maintenance, custodial, and warehouse employees, technical and all other employees, professional employees, sergeants, chiefs, captains, and other supervisors as defined in the National Labor Relations Act

WE WILL NOT interfere with the efforts of the Union to negotiate for or represent employees as exclusive collective-bargaining representative

WE WILL bargain collectively with the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit, and if an understanding is reached we will sign a contract with the Union

WESTINGHOUSE
LEARNING CORPORATION
(INDIANA)
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone

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.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 614 IATA Center, 150 West Market Street, Indianapolis, Indiana 46204, Telephone 317-633-8921