The D & M Company, a division of The Baldt Corporation *and* Oil, Chemical and Atomic Workers International Union, AFL-CIO. Case 22-CA-3904

February 16, 1970

DECISION AND ORDER

BY CHAIRMAN MCCULLOCH AND MEMBERS BROWN AND JENKINS

On November 26, 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 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 considered the Trial Examiner's Decision, the exceptions and supporting brief, and the entire record in this case, and hereby adopts the Trial Examiner's findings, conclusions, and recommendations.

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 the Respondent, The D & M Company, A Division of The Baldt Corporation, Milltown, New Jersey, 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 Issue

CHARLES W. SCHNEIDER, Trial Examiner: The case arises on a motion for summary judgment filed by counsel for the General Counsel upon an admitted refusal by the Respondent to bargain with the certified Charging Union, the Respondent contending that it was improperly denied a hearing on its objections to the election in the related representation case and that the certification of the Union is therefore invalid.

The Representation Proceeding[1]

Upon a petition filed under Section 9(c) of the National Labor Relations Act (29 U.S.C.A. 159(c)) on March 6, 1969, by Oil, Chemical and Atomic Workers International Union, AFL-CIO, herein called the Union, and pursuant to a stipulation for certification upon consent election thereafter executed by the Union and D & M Company, a division of The Baldt Corporation, herein called the Respondent, and approved by the Regional Director on March 18, 1969, an election by secret ballot was conducted on April 10, 1969, among all production and maintenance employees employed by the Respondent at its Milltown, New Jersey, location during the payroll period ending midnight, Sunday, March 16, 1969, excluding office clerical employees, professional employees, watchmen, guards and supervisors as defined in the Act.

Of the approximately 213 eligible voters 198 cast valid ballots, of which 103 were for the Union; 92 were against the Union, 3 were challenged, and none were void. The challenges were not sufficient in number to affect the results of the election.

On April 17, 1969, the Respondent filed timely objections to conduct affecting results of the election. In brief, these objections alleged that union agents and protagonists engaged in conversations and electioneering among those employees waiting to vote at a time after the polls were scheduled to open but prior to actual opening. The objections further alleged threats to an employee by union protagonists, improper election propaganda from a discharged prounion employee, and manipulation of the Board's procedures in order to appeal to the sympathy of the Respondent's employees.

In accordance with the Board's Rules and Regulations, the Regional Director investigated the Respondent's objections and on May 21, 1969, issued his report on objections in which he recommended to the Board that the objections be overruled in their entirety and that the Union be certified as the exclusive bargaining representative of the employees in the appropriate unit. Thereafter on June 10, 1969, the Respondent filed timely exceptions to the Regional Director's report on objections with the Board in Washington, D.C., along with a brief in support thereof. The Respondent requested that the election be set aside, or in the alternative that a hearing be held on its objections.

On August 26, 1969, the Board issued a Decision and Certification of Representative in which it stated that it had considered the Regional Director's report on objections, the exceptions and brief, and the entire record in the case, and adopted the Regional Director's findings and recommendations. The Board further said that, in its opinion, the Respondent's exceptions raised "no material or substantial issues of fact or law which require reversal of the Regional Director's findings and recommendations or necessitate a hearing in this proceeding." Consequently the Board certified the Union as the bargaining representative of the employees in the appropriate unit.

[1] Official notice is taken of the record in the representation proceeding, Case 22-RC-4308, as the term "record" is defined in Sec. 102.68 and 102.69(f) of the National Labor Relations Board's Rules and Regulations and Statements of Procedure, Series 8, as amended See *LTV Electrosystems, Inc*, 166 NLRB No. 81, enfd 388 F.2d 683 (C A 4); *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.), *Intertype Co* v. *N L R B*, 401 F.2d 41 (C.A. 4); *Follett Corp*, *et al*, 164 NLRB No 47, enfd 397 F.2d 91 (C A 7), Sec 9(d) of the National Labor Relations Act.

The Unfair Labor Practice Case

On September 8, 1969, the Union filed the charge involved in the instant case in which it alleged that since on or about September 4, 1969, the Respondent had failed and refused to bargain with the Union.

On September 19, 1969, the General Counsel, by the Regional Director for Region 22, issued a complaint and notice of hearing alleging that Respondent had committed unfair labor practices in violation of Sections 8(a)(1) and (5) and 2(6) and (7) of the Act by refusing to bargain with the Union upon request. In due course, on September 29, 1969, the Respondent filed its answer to the complaint in which it admitted certain material allegations of the complaint but denied others. Thus, the Respondent admitted its refusal to bargain with the Union following the certification, but denied the representative status of the Union. The answer asserted specifically that the election was invalid and void by reason of conduct by the Union and union protagonists which interfered with a free choice by employees. Further the Respondent stated that the Board violated its rules and regulations and procedural due process in the representation case by (1) rejecting without a hearing the issues raised by the Respondent, (2) ignoring evidence, and (3) failing to consider the cumulative effect of incidents bearing on the validity of the election.

Under date of October 9, 1969, counsel for the General Counsel filed a motion for summary judgment and memorandum in support of motion for summary judgment, in which he contended that the pleadings, considered together with the official Board record in the representation proceeding, raise no issues requiring a hearing, and that therefore Respondent had no valid defense to the complaint

On October 10, 1969, I issued an Order to Show Cause on General Counsel's motion for summary judgment, returnable October 27, 1969, and subsequently extended to November 6, 1969, at the request of the Respondent and without objection. The Respondent has filed a response in opposition to General Counsel's motion. No other responses have been received.

Ruling on Motion for Summary Judgment

The Respondent opposes the motion for summary judgment for reasons stated hereinafter.

It is established Board policy, in absence of newly discovered or previously unavailable evidence or special circumstances 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.

The Respondent's contentions stated in its response to the order to show cause may be summarized as follows:

(1) That summary judgment is unusual and should be granted only where the objective facts and inferences to be drawn therefrom are so clear as to leave only a question of law to be resolved. Further, that summary judgment is not to be used where a state of mind, motive, or intent are involved.

(2) That summary judgment is not appropriate here for the reason that genuine issues were raised in the Respondent's objections to the election, which require hearing. Further, citing *N L R.B* v. *Harrah's Club*, 403 F.2d 865, 870 (C.A. 9), the Respondent states that the burden of determining whether substantial and material issues were decided without hearing in the representation case is on the Trial Examiner, and that the Board's rule against relitigation of representation issues does not prevent the Trial Examiner from determining whether genuine issues of fact exist requiring hearing.

(3) That the Board's findings of fact in ruling on the Respondent's objections to the election were erroneous; and that the Board found that there was no evidence to establish certain conduct relied upon by the Respondent, when in fact the Respondent had submitted specific evidence of such conduct.

These contentions do not bar the entry of summary judgment by a Trial Examiner

Admittedly summary judgment is an unusual procedure and is to be granted only where the facts are clear and there remains only the question as what conclusions of law are to be drawn. In the instant case the facts found by the Board are clear, and from those facts and the admissions of the Respondent it follows that the Respondent has failed to bargain with the representative of its employees. The Board's findings are binding on the Trial Examiner and may not be reviewed by him in the absence of new or previously unavailable evidence or specific circumstances — none of which are alleged here. I find no question as to state of mind, motive, or intent which would raise any factual issues requiring hearing If such questions had any bearing on disposition of the Respondent's objections to the election, they were necessarily resolved by the Board's dismissal of the objections. Accepting the Board's disposition of the representation case, there is no issue of motive, intent or state of mind relevant to the allegations of the complaint.

It is true that the opinion in the *Harrah's Club* case states that the Trial Examiner there had "authority to consider and decide whether there was a substantial and material issue of fact crucial to the determination of the propriety of certification of the election results." I am not persuaded, however, that the court was thereby declaring that the Board's Trial Examiners have a general and plenary authority to review the Board's decisions in related representation cases if they deem the decisions erroneous, or to ignore the Board's interlocutory orders in unfair labor practice cases. In the *Harrah's* case the Respondent sought permission of the Board during the hearing before the Trial Examiner to appeal a ruling of the Trial Examiner excluding evidence offered by the Respondent bearing on the merit of the objections to the election. The Board denied such permission and ultimately, in its final decision, affirmed the Trial Examiner's rulings.[4] If the portion of the *Harrah's Club*

[2] *Krieger-Ragsdale & Co., Inc.*, 159 NLRB 490, enfd. 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 (1941); NLRB Rules and Regulations, Sec 102.67(f) and 102.69(c).

[3] *O K Van and Storage, Inc.*, 127 NLRB 1537, enfd. 297 F 2d 74 (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 "

[4] *Harrah's Club, et al.*, 158 NLRB 758, 759

opinion referred to above is to be taken literally, as the Respondent suggests, the Trial Examiner would be free to review the Board's determinations in representation cases, and at liberty to disregard the Board's rulings on interlocutory appeals from orders of the Trial Examiner. I hesitate to ascribe such intent to the court. With all respect, I am compelled to observe that principles of orderly administration of the Act require that the Trial Examiner follow the precedents, policies, and orders of the Board applicable to the particular proceeding. Due process to the parties is assured in their right to request the Board for reconsideration, and thereafter to review of the Board's Decision in the court of appeals.[5]

The remaining contentions of the Respondent, that the Board's findings of fact were erroneous, and its restatement of positions previously advanced in the representation proceeding, are in effect reiteration of contentions already considered by or before the Board in the representation proceeding

Since the Respondent offers no new or previously unavailable evidence and no special circumstances are apparent, it is found that all material issues raised by the complaint have either been decided by the Board in the representation proceeding or are admitted by the Respondent. There thus being no matters requiring an evidential hearing, the motion for summary judgment is appropriate and is granted. Upon the record before me I 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 plant at 40 Washington Avenue, Milltown, New Jersey, herein called the Milltown plant, and is now and at all times material herein has been continuously engaged at said plant and at its service center in Simpsonville, South Carolina, in the manufacture, sale, and distribution of draw twist "pirns" and plastic sleeves and related products. Respondent's Milltown, New Jersey, plant is the only facility involved in this proceeding.

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, sold and distributed at said Milltown plant, products, goods and materials valued in excess of $50,000 of which, products, goods and materials valued in excess of $50,000 were shipped from said Milltown plant in interstate commerce directly to states of the United States other than the State of New Jersey.

Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) 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 production and maintenance employees employed by Respondent at its Milltown, New Jersey, location, excluding office clerical employees, professional employees, watchmen, 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 or about April 10, 1969, a majority of the employees of Respondent in the appropriate unit, by a secret-ballot election, designated and selected the Union as their exclusive representative for the purpose of collective bargaining with Respondent, and on or about August 26, 1969, the Board certified the Union as the exclusive collective-bargaining representative of the employees in said unit.

On or about September 4, 1969, the Union requested Respondent to bargain collectively in the appropriate unit, and on or about September 5, 1969, Respondent refused and continues to refuse to recognize and bargain with the Union in the appropriate unit.

By the refusal to bargain Respondent has engaged in unfair labor practices affecting commerce in violation of Sections 8(a)(5) and (1) and 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:

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 [6]

B. The D & M Company, a division of The Baldt Corporation, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Oil, Chemical and Atomic Workers International Union, AFL-CIO, as the exclusive collective-bargaining representative of the employees in the following appropriate bargaining unit:

All production and maintenance employees employed by Respondent at its Milltown, New Jersey, location, excluding office clerical employees, professional

[5] Apart from the Board's policy, referred to above and modified in the National Labor Relations Board's Rules and Regulations and Statements of Procedure, Series 8, as amended, Sec 102.67(f), forbidding the relitigation of representation issues in subsequent related unfair labor practice proceedings, the Board has repeatedly held that Trial Examiners must follow Board precedent until it is overruled by the Board or the Supreme Court (*Prudential Insurance Agents*, 119 NLRB 768, *Ranco Inc*., 109 NLRB 998, fn 8; *Lenz Co*., 153 NLRB 1399), even though there may be contrary authority in the court of appeals (*Iowa Beef Packers*, 144 NLRB 615). While failure of the Board to seek certiorari may constitute acquiesence by the Board to the court's view in that circuit, even though the Board may disagree with it (*Teamsters Local 390*, 119 NLRB 852; *Armco, Inc*., 155 NLRB 551), the Trial Examiner may not give significance to the Board's failure to seek certiorari (*Novak Logging Co*., 119 NLRB 1573; *Scherrer Co*., 119 NLRB 1587)

[6] The 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, enfd 350 F 2d 57 (C A 10).

employees, watchmen, guards, and supervisors as defined in the 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 Oil, Chemical and Atomic Workers International Union, AFL-CIO, 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 Milltown, New Jersey, copies of the attached notice marked "Appendix."[7] Copies of said notice on forms provided 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 maintained by the Respondent 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 receipt of this Recommended Order, what steps the Respondent has taken to comply herewith [8]

[7] In 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."

[8] 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 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 Oil, Chemical and Atomic Workers International Union AFL-CIO, as the exclusive collective-bargaining representative of all the following employees:

All production and maintenance employees employed at our Milltown, New Jersey, plant, excluding office clerical employees, professional employees, watchmen, guards, and supervisors as defined in the 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.

THE D & M COMPANY, A DIVISION OF THE BALDT CORPORATION
(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, Federal Building, 16th Floor, 970 Broad Street, Newark, New Jersey 07102, Telephone 201-645-2100.