

Westinghouse Electric Corporation *and* International Union of Electrical, Radio and Machine Workers, Local 456, AFL-CIO. Case 22-CA-3685

May 19, 1970

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN McCULLOCH AND MEMBERS BROWN AND JENKINS

On June 30, 1969, the National Labor Relations Board issued its Decision in this proceeding, finding that Respondent had engaged in certain unfair labor practices in violation of Section 8(a)(5) and (1) of the National Labor Relations Act, as amended, and ordering Respondent to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.¹

Thereafter Respondent filed with the Court of Appeals for the Second Circuit a petition to review and set aside the Board's Order. The Board filed with the court a cross-application for enforcement of its Order.

Thereafter, the Supreme Court of the United States denied the Board's petition for certiorari in *Pepsi-Cola Buffalo Bottling Co. v. N.L.R.B.*, 396 U.S. 904 (November 6, 1969). Decision below 409 F.2d 676 (C.A. 2).

After the denial of the petition for certiorari, the Board moved the court of appeals for leave to withdraw the certified list of documents, pleadings and materials comprising the record of the proceeding to permit the Board to pass upon the controlling representation issue in conformity with the decision of the court of appeals in *Pepsi-Cola Buffalo Bottling Co.*, *supra*. The court of appeals entered an order granting the Board's motion.

Thereafter, the Board granted leave to the parties to file a statement of position respecting the issues. The Respondent, General Counsel, and Charging Party each filed a statement.

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

The Decision and Order issued in June 1969 was a grant of summary judgment finding that all issues raised by Respondent had been fully litigated in the related representation case.² The complaint in this case

arose out of Respondent's failure, after a hearing, to honor the Regional Director's decision and order clarifying bargaining unit.³ In his decision, the Regional Director had granted the Union's request to include systems and procedures analysts "A" and "B" in the bargaining unit. He found (1) that the disputed employees were technical employees with a close community of interest with the technical employees already in the unit and were not professional employees; (2) that they were not confidential employees; and (3) that they could be included in the bargaining unit by means of the unit clarification procedure.

As more fully set out in the Decision and Order in this case, Respondent filed a request for review. The Board denied review on the issues raised by the first two findings of the Regional Director, but granted it as to the third issue.

The Board issued its Decision on Review in which it affirmed the Regional Director's findings and found the disputed employees to be an accretion to the certified unit.

Respondent does not contend that the Regional Director erred in finding that the disputed employees were not confidential employees.

We have since made an independent review of the record of the hearing in the representation case from which we conclude that the Regional Director's other findings and conclusions, as set forth in his decision and order clarifying unit, were also correct in all respects. As the issues have been fully litigated and no newly discovered and previously unavailable evidence was offered by Respondent in its answer to the notice to show cause and memorandum in support of answer, and in its statement of position on remand, no further hearing is required. We therefore affirm the bargaining order previously issued.

SUPPLEMENTAL ORDER

Based on the foregoing, and the entire record in this case, the National Labor Relations Board hereby affirms its Order issued in this proceeding on June 30, 1969.

¹ 177 NLRB No 49

² Case 2-RC-8368 Decision and Direction of Elections, 116 NLRB 1545 Board Certification of the Union, December 10, 1956 Decision on Review, 173 NLRB 319 (October 24, 1968)

³ Case 22-UC-11

Frisch's Restaurants, Inc. and Truck Drivers, Chauffeurs and Helpers Local Union No. 100, an affiliate of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America Petitioner

Frisch's Restaurants, Inc., Petitioner and Truck Drivers, Chauffeurs and Helpers Local Union No. 100, an affiliate of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Cases 9-RC-8244 and 9-RM-569

May 19, 1970

DECISION ON REVIEW AND ORDER

BY MEMBERS FANNING, BROWN, AND JENKINS

On September 15, 1969, the Regional Director for Region 9 of the National Labor Relations Board issued his Decision and Direction of Election in the above-entitled proceeding, finding the Petitioner's requested unit of all warehouse department employees in the Employer's commissary continued to be appropriate for separate representation apart from other commissary employees. Thereafter, in accordance with National Labor Relations Board Rules and Regulations, Series 8, as amended, the Employer filed a timely request for review and a motion for stay of the election on the grounds that the Regional Director's unit finding constituted a departure from Board precedent and was clearly erroneous on substantial factual issues.

By telegraphic order dated October 8, 1969, the Board granted the request for review and stayed the election. Thereafter the Employer filed a brief on review.

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

The Board has reviewed the entire record in this case with respect to the issues under review, including the briefs, and makes the following findings:

On February 21, 1967, the Acting Regional Director for Region 9 issued a Decision and Direction of Election in Case 9-RC-7083 finding appropriate, in accord with the Petitioner's request, a unit identical to that which it now seeks.¹ The Regional Director, in finding the unit appropriate herein, relied on the Acting Regional Director's earlier determination, rejecting the Employer's contention that such decision was no longer controlling because of changed circumstances. The Employer asserts that he erred in rejecting this contention. We agree.

The Employer is engaged in the wholesale and retail distribution of food products and has various restaurant outlets in the States of Ohio, Indiana, Kentucky, and Florida. It services approximately 150 of these restau-

rants from a commissary located in Cincinnati, Ohio, the only operation involved herein.

Since the previous hearing in December 1966, the number of restaurants serviced by the commissary has increased by 35, or over 30 percent. However, the commissary services are performed by approximately the same number of employees. This has apparently been made possible by certain changes made in the operations of the various departments in the past 2 years to facilitate greater efficiency in the use of employees and space.²

In the 1967 decision, the Acting Regional Director described the duties of the warehouse department employees as follows:

[they] spend their entire time performing typical warehouse functions such as the unloading, receiving, moving and storing of merchandise, which are separate and distinct from those duties normally performed by the other employees. They unload merchandise received from suppliers which they stack on pallets and move, by electric mules, to a position on the receiving dock or to the storage area in the basement of the commissary. As the need arises, they move this merchandise from the basement to one of the other departments. They regularly perform work in the storage area of the commissary basement, stacking merchandise received from the suppliers. When it comes time to load the trucks, they place the merchandise on the conveyors leading from the basement to the dock area. They then check the merchandise ordered by the Employer's restaurant units, load such merchandise onto the trucks used to transport it, and move the trucks around to the dock. . . . Permanent or semi-permanent transfers of employees to or from the warehouse department are occasional. Only two transfers into, and seven out of, the warehouse department have occurred in the last three calendar years, with all seven employees from that department having gone into the truck drivers department, which, as noted heretofore, is a separately-represented unit. Temporary assignments of employees to or from the warehouse department are sporadic, with only five employees being temporarily assigned to that department during the past two calendar years, where they worked a total of only 51 hours; and with no employees being temporarily assigned out of that department, to work in other departments, during the same period of time. Although warehouse department employees may also have occasion to be in other departments for a few minutes of their time during the course of a day, this is primarily in connection with the performance of their regular warehouse

¹ The Board denied the Employer's request for review of that finding. An election was held in which the Petitioner failed to receive a majority of the valid ballots cast.

² At the time of the previous hearing, the Employer's commissary operations employed 73 employees, it now employs approximately 76, with the following number of employees in each department: bakery—14 (1 less), butcher—8 (2 less); produce—16 (3 more), soup and chili—3 (3 less), cleaning—6 (1 more); maintenance—7 (the same), cafeteria—2 (the same), warehouse—10 (2 less), and truckdrivers—11 (the same)

duties, such as the delivery of merchandise into or from these departments

Since that time, the Employer has decentralized storage by establishing storage areas adjacent to the various departments, shifting from warehouse employees to department personnel the tasks of moving and rotating merchandise from such storage areas to their work areas and of loading processed materials on moving equipment³ for transport to the dock area for subsequent loading onto the trucks, giving the warehouse department and the other commissary departments joint responsibility for rotating stored products between departments, and increasing both permanent and temporary assignments to other departments, with many warehousing tasks now being performed by either warehouse department employees or employees of other departments, depending upon availability at the time to do the work⁴ Except for the receiving clerk and the checker, all warehouse department employees and many of the other commissary employees are considered "utility" employees by the Employer because they may engage in general utility work within any department⁵ Warehouse department employees also regularly assist the cleaning department in the cleaning of trucks, assist the soup & chili department in the preparation of soft drink syrup, and assist the maintenance department in moving heavy machinery

The shipping and receiving dock is functionally the focal point for the entire commissary operation and is contiguous to almost all the commissary departments. The office of the commissary manager is located immediately adjacent to the dock, as is the employee entrance and timeclock used in common by all employees. All commissary employees, other than the truckdrivers, enjoy the same working conditions, facilities, and fringe benefits. The departments all have overlapping working hours.

Unlike the Regional Director, we believe the changes in the commissary operations since the 1967 decision

necessitate a different result herein. In the facts of this case, especially the integration of the shipping and receiving functions performed by warehouse department employees with the material-moving functions performed by other commissary department employees in production areas, and the degree of interchange shown to exist between these employees, we are unable to conclude that the requested employees possess sufficient functional distinctness to warrant a finding that they have a separate community of interest for bargaining purposes. We find, therefore, contrary to the Regional Director, that the warehouse department unit is inappropriate as too narrow in scope.⁶ Accordingly, as the Petitioner does not seek an election in a broader, appropriate unit, we shall dismiss both petitions herein.

ORDER

It is hereby ordered that the petitions filed herein be, and they hereby are, dismissed.

³ At present all departments use forklifts, pallet packs, dollies, hand trucks, and electric mules.

⁴ During the last year and 7 months there have been four permanent transfers of present employees between commissary departments and the warehouse. In the past year 30 percent of the complement of warehouse employees have spent over 30 partial shifts working in the bakery. In the 2 months preceding the hearing 80 percent of the warehouse employees worked in other departments for extended periods of time. An undisclosed proportion of this interchange of work has been performed on overtime.

⁵ The utility employees make up the great bulk of the commissary work force. They are distributed by departments as follows: 8 out of the 14 in the bakery; all 3 in the soup & chili department; approximately 13 of the 16 in produce; 6 of the 8 in the meat department; all 6 in the cleaning department; 1 dual function employee of the 2 in the cafeteria; and 8 of the 10 warehouse department employees, the others being plant clericals, the checker, and the receiving clerk.

⁶ See *Riker Laboratories*, 156 NLRB 1099, 1101.