

Pearson Candy Co., A Division of W. R. Grace & Co. and Bakery & Confectionery Workers International Union of America, Local 400, AFL-CIO. Case 31-CA-1966

December 24, 1970

DECISION AND ORDER

BY MEMBERS FANNING, BROWN, AND JENKINS

Upon a charge filed on July 17, 1970, by Bakery & Confectionery Workers International Union of America, Local 400, AFL-CIO, herein called the Union, and duly served on Pearson Candy Co., A Division of W. R. Grace & Company, herein called the Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 31, issued a complaint on July 31, 1970, 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, and notice of hearing before a Trial Examiner were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on September 9, 1969, following a second Board election in Case 31-RC-956 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 February 6, 1970, and 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 August 11, 1970, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint. The Respondent admits all of the factual allegations of the complaint, including its refusal to recognize and bargain with the Union, but contends that it is not obligated to bargain because the Union's certification is invalid by reason of the Regional Director's errors at the several stages of the underlying representation case.

On August 31, 1970, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment, supported by a brief, in which he contends that the Respondent's answer to the complaint raises no factual issues warranting a hearing,

and prays the Board to grant the Motion for Summary Judgment. Subsequently, on September 21, 1970, 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 powers in connection with this case 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 response the Respondent contends that the Regional Director's Report on Objections, dated April 30, 1969, was erroneous as he sustained the Union's objections to the first election conducted on December 10, 1968, and directed a second election. The Respondent also contends that the Regional Director erred in his Supplemental Report and Certification of Representative, dated September 9, 1969, in that he failed to sustain the Respondent's objections to the second election, failed to afford the Respondent an opportunity for a hearing on its objections, and certified the Union as the bargaining representative of the employees in the agreed-upon unit. Finally, the Respondent contends that the Regional Director erred in the Decision and Order Amending Certification issued on June 30, 1970, by depriving the Respondent of the right to a hearing and granting the Union's petition to amend its certification to reflect its current affiliation with the AFL-CIO.

For the reasons noted below we find the Respondent's several contentions to be without merit. On December 10, 1968, pursuant to an Agreement for Consent Election executed by the parties and approved by the Regional Director, a secret ballot election was conducted in which the Union failed to receive a majority of the valid votes cast, and thereafter filed timely objections. After an investigation, the Regional Director found that written material distributed by the Respondent to its employees on the day of the election contained threats and material misrepresentations which necessitated setting aside the election, and he directed that a second election be conducted. The Respondent filed with the Board a Request for Review, which the Board denied on May 14, 1969, on grounds that the election was

¹ Official notice is taken of the record in the representation proceeding, Case 31-RC-956 as the term "record" is defined in Secs 102.68 and 102.69(f) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938, enfd 388 F.2d 683 (C.A. 4,

1968), *Golden Age Beverage Co.*, 167 NLRB 151, *Intertype Co v Penello*, 269 F Supp 573 (D.C. Va., 1967), *Follett Corp.*, 164 NLRB 378, enfd 397 F.2d 91 (C.A. 7, 1968), Sec 9(d) of the NLRA

conducted under the terms of an Agreement for Consent Election, and the Board would not entertain an appeal from the Regional Director's actions taken pursuant to the Consent Agreement.

A second election was conducted on August 7, 1969, and the tally of ballots reflects that of 47 valid votes cast, 31 were cast for the Union, 14 were cast against the Union, and there were 2 challenged ballots not determinative of the results of the election. The Respondent filed timely objections alleging that the election was delayed for 1 hour and 15 minutes by reason of the failure of the Board's agent to appear at the time scheduled, and that shortly before the election the Union distributed a handbill containing numerous material misrepresentations, which were capitalized upon by the Union during the delay in the opening of the polls. After an investigation conducted pursuant to section 6 of the agreement for consent election, the Regional Director issued a Supplemental Report in which he found that the Union's handbill did not contain material misrepresentations and that the delay in the conduct of the election had not deprived any employee of an opportunity to vote. Accordingly, the Regional Director overruled the objections and certified the Union as the bargaining representative of the employees in the agreed-upon unit. Thereafter, the Respondent again filed a Request for Review with the Board, which the Regional Director chose to treat as a motion for reconsideration. After having afforded the Respondent the opportunity to provide additional evidence in support of its objections, the Regional Director denied the motion for reconsideration and affirmed the findings and conclusions set forth in his Supplemental Report and Certification.

On April 27, 1970, subsequent to its certification, the Union filed a petition in Case 31-AC-18, requesting the Regional Director to amend the certification to reflect the change in its affiliation from the International Brotherhood of Teamsters to the AFL-CIO. On June 30, 1970, the Regional Director, after issuance of a Notice To Show Cause to which the Respondent replied, issued a Decision and Order Amending Certification. On July 9, 1970, the Respondent filed an appeal with the Board contending that the action of the Regional Director in amending the certification was arbitrary and capricious, and by telegram dated July 30, 1970, the Board denied the appeal.

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) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.²

All issues raised by the Respondent in the instant unfair labor practice case were raised and determined in the prior representation proceeding, and the Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any such special circumstances exist herein to require the Board to examine any of the decisions made in the representation proceeding. Moreover, the issues in the representation proceeding were determined by the Regional Director pursuant to the Agreement for Consent Election, and we find no merit to the Respondent's arguments that the Regional Director's actions were either arbitrary or capricious.³ Accordingly, we find that the Respondent has not raised any issue properly litigable in this unfair labor practice proceeding. Accordingly, we shall grant the Motion for Summary Judgment.⁴

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

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent is engaged in the wholesale manufacture and distribution of candies and specialty items at its plant located in Culver City, California. The Respondent during the normal course and conduct of its business annually sells and ships directly to customers located outside the State of California products valued in excess of \$50,000, or annually purchases and receives goods and materials directly from suppliers located outside the State of California valued in excess of \$50,000.

We find, on the basis of the foregoing, that 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, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

Bakery & Confectionery Workers International Union of America, Local 400, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

² See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941), Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

³ *Mitchiyoshi Uyeda, d/b/a Uduco Manufacturing Company*, 164 NLRB 700.

⁴ In view of our finding that an evidentiary hearing is not required in

this proceeding, and as we have granted the Motion for Summary Judgment, we shall also grant the Charging Party's motion to revoke the subpoena served by the Respondent on the Regional Director for Region 31, which motion was transferred to the Board on August 25, 1970.

III. UNFAIR LABOR PRACTICES

A. *The Representation Proceeding*

1. The unit

The following employees of the Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

All candy manufacturing, stock, warehouse, wrapping and packing, and maintenance mechanic employees employed by the Employer at its plant located at 10101 Jefferson Boulevard, Culver City, California, excluding office clerical, salesmen, professional employees, guards and supervisors as defined in the Act.

2. The certification

On August 7, 1969, 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 31 designated the Union as their representative for the purpose of collective-bargaining with the Respondent. The Union was certified as the collective-bargaining representative of the employees in said unit on September 9, 1969, 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 12, 1969, and at all times thereafter, the Union has requested the 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 January 17, 1970, and continuing at all times thereafter to date, the 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 the Respondent has, since January 17, 1970, 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, has 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 sign 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; *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229, enfd. 328 F.2d 600 (C.A. 5), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421, enfd. 350 F.2d 57 (C.A. 10).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. Pearson Candy Co., A Division of W. R. Grace & Co., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Bakery & Confectionery Workers International Union of America, Local 400, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees of the Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act.

All candy manufacturing, stock, warehouse, wrapping and packing, and maintenance mechanic employees employed by the Employer at its plant located at 10101 Jefferson Boulevard, Culver City, California, excluding office clerical, salesmen, professional employees, guards and supervisors as defined in the Act.

4. Since September 9, 1969, 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 January 17, 1970, 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 Respondent, Pearson Candy Co., A Division of W. R. Grace & Co., 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 Bakery & Confectionery Workers International Union of America, Local 400, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

All candy manufacturing, stock, warehouse, wrapping and packing, and maintenance mechanic employees employed by the Employer at its plant located at 10101 Jefferson Boulevard, Culver City, California, excluding office clerical, salesmen, professional employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in 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 Culver City, California, plant copies of the attached notice marked "Appendix."⁵ Copies of said notice, on forms provided by the Regional Director for Region 31, 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 31, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

⁵ 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 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"

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 Bakery & Confectionery Workers International Union of America, Local 400, AFL-CIO, 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 candy manufacturing, stock, warehouse, wrapping and packing, and maintenance mechanic employees employed by the Employer at its plant located at 10101 Jefferson Boulevard, Culver City, California, excluding office clerical, salesmen, professional employees, guards and supervisors as defined in the Act.

PEARSON CANDY CO., A
DIVISION OF W. R.
GRACE & Co.
(Employer)

Dated _____
By _____
(Representative) (Title)

_____ days from the date of posting and must not be altered, defaced, or covered by any other material.

This is an official notice and must not be defaced by anyone.
This notice must remain posted for 60 consecutive

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Building, Room 12100, 11000 Wilshire Boulevard, Los Angeles, California 90024, Telephone 213-824-7351.