**Alterman Transport Lines, Inc., *and* Freight Drivers, Warehousemen and Helpers Local Union 390, an affiliate of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America** Case 12–CA–4860

January 22, 1971

## DECISION AND ORDER

BY MEMBERS FANNING, BROWN, AND JENKINS

Upon a charge duly filed on June 1, 1970, and served upon Respondent Alterman Transport Lines, Inc., on June 2, 1970, by Freight Drivers, Warehousemen and Helpers Local Union 390, an affiliate of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 12, issued a complaint on June 11, 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 upon the Respondent and the Charging Party.

With respect to the unfair labor practices, the complaint alleges that, on or about May 15, 1970, following a Board election, the Board certified the Union in Case 12–RC–2955 as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate[1] and that, commencing on or about May 19, 1970, and more particularly by letter dated May 26, 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 July 2, 1970, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint. Respondent further interposed certain affirmative defenses and requested that the hearing in Case 12–RC–2955 be reopened to allow the Respondent to present certain evidence. The Respondent has also filed separate motions in Case 12–RC–2955 to reopen the record therein.

On July 22, 1970, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment, contending that the Respondent's request to reopen the hearing in Case 12–RC–2955 was untimely, alleging that there were and are no issues of fact or law in dispute since all matters raised in the answer were considered and decided by the Board in the prior representation case, and submitting that the Board should therefore grant the Motion for Summary Judgment. Subsequently, the Board issued a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted, and an Order transferring the proceeding to the Board. On August 24, 1970, Respondent filed a response to Notice To Show Cause, and on September 24, 1970, the Charging Party filed a Brief in Opposition to Respondent's 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.

The Board has reviewed the entire record in this proceeding and makes the following

### Ruling on the Motion for Summary Judgment

Following a hearing before a Hearing Officer of the Board in the above-mentioned representation proceeding, the Board on August 15, 1969, issued its Decision and Direction of Election (178 NLRB No. 21), finding that the Respondent was engaged in commerce and the Union was a labor organization, both within the meaning of the Act, and finding appropriate, as more fully described hereinafter, a unit of local drivers, dockmen, and related categories at the Respondent's Miami, Florida, terminal. The Board rejected the Respondent's contention that a unit limited to the Miami terminal was inappropriate, and excluded from the appropriate unit certain employee categories which the Respondent sought to include therein. In the election held on September 4, 1969, a majority of the valid ballots were cast for the Union. The Respondent's objections to the election were held by the Board to be without merit and on May 15, 1970, the Board certified the Union as the collective-bargaining representative of the employees in the appropriate unit. The Union's subsequent request that the Respondent bargain with it was rejected by the Respondent in a letter dated May 26, 1970.

In its response to the Notice To Show Cause,[2] the Respondent defends its refusal to bargain on the

[1] Official notice is taken of the record in the representation proceeding Case 12–RC–2955 as the term "record" is defined in Sections 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 Company*, 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). Section 9(d) of the NLRA.

[2] In its answer to the complaint, the Respondent denies that it is engaged in commerce and that the Union is a labor organization. Those allegations are supported by the Board's findings in the representation proceeding, and the Respondent does not allege any matters not considered therein.

grounds (1) that the Board's unit determination was in error; (2) that the election was improperly conducted while a charge of unfair labor practices was pending against the Union; (3) that the Union engaged in conduct which interfered with the elections; (4) that the Respondent was improperly denied a hearing on its objections to the election, and subpenas in connection with such objections; and (5) that it has newly discovered and previously unavailable evidence bearing on the unit issue. It further asserts that there is no authority for the Board's summary judgment procedure.[3] In connection with its contentions concerning the objections and the unit, the Respondent has filed motions to incorporate in the record in Case 12–RC–2955 the record in Case 12–CB–1040, involving the above-mentioned charges against the Union, and to reopen the record in Case 12–RC–2955 to receive and consider the alleged newly discovered and previously unavailable evidence.

We reject the contention that the Board has no authority to utilize summary judgment procedures. We are cited to no case in which a court has refused enforcement of a Board order on the ground that the Board may not use summary judgment procedure. On the contrary, whenever the issue has been raised, the courts have uniformly upheld the Board's authority to utilize such procedure where there were no issues requiring an evidentiary hearing.[4]

With respect to the Respondent's other contentions, it is established Board policy, in the absence of newly discovered or previously unavailable evidence or special circumstances, not to permit litigation in an unfair labor practice case of issues which were or could have been litigated in the prior related representation proceeding.[5] Except for its contention regarding alleged newly discovered or previously unavailable evidence, the Respondent's other assertions in its Response to the Order To Show Cause are in essence reiterations of contentions raised in the representation proceeding. Relitigations of those matters or consideration of them by the Board are precluded under existing authority.

As for the pending Motion To Reopen Representation case in Case 12–RC–2955, the Respondent asserts it has newly and previously unavailable evidence that documents operational changes which the Respondent was forced to make at the Miami terminal as a direct result of strike activities by the Union. The changes which were instituted in November 1969 assertedly grew out of the Respondent's operational experiences during the Teamsters strike, which began in September 1968 and lasted for over a year. These changes, the Respondent asserts, have destroyed any community of interest which the Board relied upon in its Decision and Direction of Election in Case 12–RC–2955.

In support of its motion, the Respondent asserts that the Board's unit determination was erroneous; that the hearing transcript in Case 12–RC–3247, involving its Jacksonville, Florida, operations, contains information relevant to Respondent's overall operational scheme as well as to the Miami operations involved herein, and such evidence was not previously available or considered in this case; that the Board acted contrary to its established policy of not holding an election while unremedied unfair labor practice charges were pending; that the election was not held under "laboratory conditions" in view of affidavits in Respondent's possession which recount numerous episodes of violence and threats by the Union in the year preceding the election; and that the Regional Director erred in failing to issue certain investigative subpenas as requested by the Respondent and that such failure constituted a denial of due process.

It is clear that the changes in operations that the Respondent contends occurred as a result at the strike consist of nothing more than the assignment of some owner-operators to perform local delivery and pickup service on a permanent basis, and implementation of a proposed change in compensation for some hourly drivers so that they receive the same 20-cent payment per shipment received by the nonunit salaried drivers. However, there is no showing in support of the motion of how many owner-operators, not included in the unit, were assigned to local operations, and there was evidence in the representation proceeding that the Respondent had proposed a 20-cent payment for the hourly drivers.

We find, in view of all the circumstances, that there is no showing of such significant change in the Respondent's operations or in the duties of the employees in the unit as to warrant the reopening of the representation case.[6] Moreover, with the exception of its contention concerning the evidence adduced at the hearing in Case 12–RC–3247, the Respondent's remaining assertions in support of its Motion To Reopen Case 12–RC–2955 have all been

[3] The Respondent's contention that the Regional Director had no authority to transfer or refer the Motion for Summary Judgment to the Board for a ruling thereon is frivolous and clearly without merit

[4] See *Lyman Printing and Finishing Company*, 183 NLRB No. 105.

[5] See *Pittsburgh Plate Glass Company* v. *N L R B*, 313 U.S. 146, 162 (1941); N.L.R.B Rules and Regulations, Sections 102.67(f) and 102 69(c).

[6] Assuming, *arguendo*, that the duties of the owner-operators now performing local delivery and pickup service on a permanent basis have changed sufficiently to warrant their present inclusion in the certified unit, such accretion would not affect either the basic appropriateness of the certified unit, the Union's majority therein at the time of the election, or the ability of the parties to bargain in that unit; consequently, any unresolved doubt concerning the placement of such owner-operators is not a valid defense to the complaint. *The May Department Stores Company*, 186 NLRB No 17, fn. 5. As pointed out in *May*, other means exist for resolving any genuine issue concerning their unit placement

previously litigated at some prior stage of this proceeding As to the record in Case 12–RC–3247, the Respondent has indicated only that it seeks to introduce facts relating to driver compensation and proposed changes in the method of driver compensation, and that such facts were previously unavailable However, the record in this case indicates that these facts were also considered and litigated herein Accordingly, after having duly considered the matter, we deny the Respondent's Motion To Reopen Case 12–RC–2955 as it contains nothing not previously considered by the Board

The Respondent, on August 24, 1970, filed a Motion To Incorporate the Record in Case 12–CB–1040 into the record in Case 12–RC–2955 In support of its motion the Respondent submitted various exhibits including a copy of its exceptions to the Regional Director's Report on Objections to Election and Recommendations to the Board, its letters to the Regional Director with references therein to affidavits and statements contained in the file in Case 12–CB–1040, assertedly supporting the objections to election, and exhibits in support of the motion to show that the charges in Case 12–CB–1040 had merit and that the events therein are intertwined with the events of Case 12–RC–2955

As to the Respondent's letters and its exceptions to the Regional Director's Report overruling its objections to the election, the exceptions dealt extensively with the asserted violence that was also the basis for the charges filed in Case 12–CB–1040 As it is clear that these matters were previously before the Board when it affirmed the Regional Director's findings, we find that they furnish no support for the Respondent's motion

Although the Respondent contends that the charges in Case 12–CB–1040 had merit, those charges were settled when the Board, on March 3, 1970, approved a stipulation entered into between the Teamsters Locals 390 and 79 and the Respondent herein, in settlement of that case, which specifically provided that such stipulation did not constitute an admission that the respondents in that matter violated the Act Accordingly, as there is nothing in the record in Case 12–CB–1040 which can be given probative value herein, we deny the Respondent's motion to incorporate herein the record in Case 12–CB–1040

We find, in view of the foregoing, that the Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding We shall, therefore, grant the Motion for Summary Judgment

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

## Findings of Fact

### I THE BUSINESS OF THE RESPONDENT

The Respondent is a Florida corporation having its principal place of business at Miami, Florida, where it is engaged in the business of motor freight transportation It operates terminals at several cities outside the State of Florida It is licensed by the Interstate Commerce Commission and the Florida Railroad and Public Utilities Commission It annually derives gross revenues in excess of $50,000 from such interstate transportation

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

Freight Drivers, Warehousemen and Helpers Local Union 390, an affiliate of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act

### 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 hourly paid local and city pickup and delivery drivers, and dockmen, checkers, yardmen, hostlers and regular part-time dockmen employed at Respondent's Miami, Florida, terminal, excluding all general garage employees, shop employees, wash rack employees, office clericals, casual part-time dockmen, dock foremen, all other employees, guards, and supervisors as defined in the Act

##### 2 The certification

On September 4, 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 12, designated the Union as their representative for the purposes of collective bargaining with the Respondent On May 15, 1970, the Board certified the Union as the collective-bargaining representative of the employees in said unit, and the Union continues to be such representative

### B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about May 19, 1970, 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 May 19, 1970, and more particularly by letter dated May 26, 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 Union was duly certified by the Board as the collective-bargaining representative of the employees of Respondent in the appropriate unit described above in the Board's certification, and that the Union at all times since May 15, 1970, has been and now is the exclusive bargaining representative of all the employees in the aforesaid unit within the meaning of Section 9(a) of the Act. We further find that Respondent has, since May 19, 1970, refused to bargain collectively 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, have 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 signed 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. Alterman Transport Lines, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. Freight Drivers, Warehousemen and Helpers Local Union 390, an affiliate of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.
3. All hourly paid local and city pickup and delivery drivers, and dockmen, checkers, yardmen, hostlers, and regular part-time dockmen employed at Respondent's Miami, Florida, terminal, excluding all general garage employees, shop employees, wash rack employees, office clericals, casual part-time dockmen, dock foremen, 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.
4. Since May 15, 1970, 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 May 19, 1970, and more particularly by letter dated May 26, 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 the Respondent, Alterman Transport Lines, Inc, Miami, Florida, 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 Freight Drivers, Warehousemen and Helpers Local Union 390, an affiliate of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America as the exclusive bargaining representative of its employees in the following appropriate unit

All hourly paid local and city pickup and delivery drivers, and dockmen, checkers, yardmen, hostlers and regular part-time dockmen employed at Respondent's Miami, Florida terminal, excluding all general garage employees, shop employees, wash rack employees, office clericals, casual part-time dockmen, dock foremen, all other 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 Miami, Florida, terminal copies of the attached notice marked "Appendix"[7] Copies of said notice, on forms provided by the Regional Director for Region 12, 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 12, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith

[7] 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 with Freight Drivers, Warehousemen and Helpers Local Union 390, an affiliate of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, 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 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 hourly paid local and city pickup and delivery drivers, and dockmen, checkers, yardmen, hostlers and regular part-time dockmen employed at Respondent's Miami, Florida, terminal, excluding all general garage employees, shop employees, wash rack employees, office clericals, casual part-time dockmen, dock foremen, all other employees, guards, and supervisors as defined in the Act

ALTERMAN TRANSPORT
LINES, INC
(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, 51 SW First Avenue, Room 826, Federal Office Building, Miami, Florida 33130, Telephone 305–350–5391

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