Sanitary Laundry, Inc. *and* **Communications Workers of America, AFL-CIO** Case 28-CA-1640

September 16, 1968

DECISION AND ORDER

BY CHAIRMAN MCCULLOCH AND MEMBERS FANNING AND JENKINS

On May 22, 1968, Trial Examiner Louis S. Penfield issued his Decision in the above-entitled proceeding, finding that Respondent had engaged in and was engaging in certain unfair labor practices 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 reviewed the rulings of the Trial Examiner made at the hearing 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 brief, and the entire record in the 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, Sanitary Laundry, Inc., Albuquerque, New Mexico, 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

LOUIS S. PENFIELD, Trial Examiner: This proceeding was initiated by a charge filed on January 10, 1968, by Communications Workers of America, AFL-CIO, herein called the Union, alleging that Sanitary Laundry, Inc., herein called Respondent, had engaged in unfair labor practices in violation of Section 8(a)(1) and (5) of the Act. Thereafter the General Counsel of the National Labor Relations Board, herein called the Board, acting through the Acting Regional Director of Region 28, issued a complaint and notice of hearing dated February 15, 1968. Copies of the charge, the complaint, and notice of hearing were duly served upon the Respondent.

The complaint alleges in substance that on December 11, 1967, the Union was duly certified as the statutory representative of Respondent's employees, that thereafter on or about December 19, 1967, it requested that Respondent bargain with it as such representative, and that at all times thereafter Respondent refused to do so, and that such conduct is violative of Section 8(a)(1) and (5) of the Act. On February 15, 1968, Respondent filed its answer to the complaint, in which it admitted in part, and denied in part, the allegations contained therein, and requested that the complaint be dismissed.

On March 11, 1968, counsel for the General Counsel filed a Motion for Summary Judgment and Issuance of Trial Examiner's Decision. Pursuant to the provisions of the Board's Rules and Regulations, Series 8, as amended, Section 102.25, the motion was referred for ruling to me. On March 13, 1968, I, by telegraphic order, directed Respondent to file a statement in writing setting forth reasons, if any there were, why the motion of the General Counsel should not be granted and the Trial Examiner's Decision issued as requested. On March 22, 1968, Respondent filed its response to Motion for Summary Judgment, and at the same time filed an amended answer to the complaint and a copy of a motion for reconsideration in Case 28-RC-1544 which it had lodged with the Board on the same date. Inasmuch as the alleged refusal to bargain rests on the validity of the certification in Case 28-RC-1544, the Trial Examiner by a telegraphic order accorded all parties an opportunity to file with him a further statement following the Board's ruling on Respondent's motion for reconsideration setting forth the significance of such ruling as it related to the General Counsel's motion for summary judgment. Thereafter on April 22, 1968, the Board issued its order denying Respondent's motion for reconsideration in Case 28-RC-1544, and on May 3, 1968, both the General Counsel and Respondent filed with the Trial Examiner statements relating to the General Counsel's motion for summary judgment.

The Trial Examiner having duly considered the record in this proceeding as it presently exists, including the complaint, the answer and amended answer, the pertinent rulings of the Board in Case 28-RC-1544, and the responses of Respondent and the General Counsel to the General Counsel's motion for summary judgment, hereby rules as follows on such motion:

In its original answer Respondent admits the jurisdictional, the labor union, the unit, and the refusal-to-bargain allegations of the complaint. In its answer and amended answer Respondent acknowledges that an election was conducted

under Board auspices, and thereafter that the Board certified the Union as the statutory representative of its employees. However, Respondent attacks the validity of the election which resulted in the certification, and asserts as a defense for its refusal to bargain that the Union was not thereby lawfully chosen as the statutory representative of its employees, and thus that there arose no duty to bargain on Respondent's part. More particularly, Respondent asserts that the Board acting pursuant to the terms of a stipulation for certification upon consent election ruled "contrary to existing law, contrary to legal precedent in Board and court cases, and contrary to . . . the facts" when it set aside the results of an election initially conducted on January 12, 1967, wherein a majority of those voting voted against representation by the Union. Respondent further asserts that even if it be assumed that the Board might validly have directed a second election, it again acted improperly when it failed to sustain Respondent's exceptions to the Regional Director's Report and Recommendations that the Union be certified as a result of such second election. Respondent asserts that the Board erred in not finding that such exceptions raised substantial issues of law and fact, and further erred in not directing a hearing on the issues but by thereafter certifying the Union as the statutory representative of the employees. The Board's alleged error in these respects was the subject of a motion for reconsideration filed by Respondent on January 22, 1967, wherein it asked the Board to reconsider its views of the facts and its conclusions as to the applicable law. On February 8, 1968, Respondent's motion to reconsider was denied by the Board stating that "it contained nothing not previously considered by the Board, and does not raise any substantial issues of law or fact that warrants reversal of the Board's Supplemental Decision and Certification of Representative."

Respondent's amended answer adopts all matters in its original answer and alleges that "it has discovered new evidence to support its objections filed with the Regional Director pertaining to the second election held on June 15, 1967." Such alleged newly discovered evidence purports to establish "several additional employees being threatened with loss of their jobs if they did not vote for the Union" with such evidence purporting to come from previously unknown witnesses. Concurrently with filing its amended answer, Respondent filed with the Trial Examiner its initial response to the General Counsel's motion for summary judgment and filed with the Board its second motion for reconsideration in Case 28–RC–1544. The amended answer, the response, and the second motion for reconsideration each set forth the same alleged newly discovered evidence, and each raises the issue that there never had been, but that there should be, a hearing on this and all other issues of law or fact which Respondent had asserted during the course of the representation proceeding. The Board in denying Respondent's second motion for reconsideration on April 22, 1968, noted that in denying the first such motion it had set forth that "it contains nothing not previously considered by the Board and does not raise any substantial issues of law or fact that warrant reversal of the Board's Supplemental Decision and Certification of Representative" nor "does the motion raise issues of fact or credibility warranting a hearing in this matter." The Board goes on to note that Respondent in this second motion for reconsideration adopted by reference and realleged all the matters in its earlier motion, only asserting additionally that "Respondent has come into possession of new evidence which was previously unknown and unavailable." The Board states that in its opinion "the matters set forth in the motion are in the nature of a more specific offer to prove the very matters raised originally by the employer's objections in its first Motion for Reconsideration." The Board thereupon denied the motion "as it contains nothing not previously considered by the Board."

Following the Board's denial of Respondent's second motion for reconsideration, Respondent filed with the Trial Examiner its additional response to General Counsel's motion for summary judgment. In this Respondent asks that I consider matters in its answer and amended answer, and its first response, pointing out that it had never had a hearing on any of the issues thereby raised. Respondent reiterates the errors of the Board in all of its rulings in the representation case, urging that it now be granted a hearing on what it describes as newly discovered evidence. Rspondent, however, does not present anything which differs from those matters it had theretofore pressed before the Board in exceptions and motions for reconsideration in the representation case. Thus, I have before me nothing which was not encompassed in material heretofore submitted to the Board and found by the Board insufficient to warrant a reversal of its prior rulings, or even to warrant the conduct of a hearing.

It is well established that in the absence of newly discovered or previously unavailable evidence parties will not be permitted to litigate issues in a complaint case which were, or could have been, litigated in a prior related representation proceeding.[1] It is equally well established that where all material issues have either been previously decided by the Board, or are admitted in the pleadings, a hearing is not required as a matter of due process.[2]

[1] *Pittsburgh Plate Glass Co* v *N L R B*, 313 U S 146, 162, *Collins and Aikman Corporation*, 160 NLRB 1750, *The Puritan Sportswear Corp.*, 162 NLRB 13, *Excelsior Laundry*, 167 NLRB 455

[2] *Bufkor-Pelzner Division, Inc*, 169 NLRB 998, *E-Z Davies Chevrolet*, 161 NLRB 1380, 1383–84, and *Carl Simpson Buick, Inc*, 161 NLRB 1389, both enforced by the United States Court of Appeals for the Ninth Circuit in a Decision issued April 26, 1968, for which a citation is not presently available

The instant case reaches me in a posture in which all issues raised by the proceeding either stand uncontroverted or have previously been resolved by the Board in the related representation proceeding. While Respondent objects to the rulings of the Board in the representation case, and insists the Board to have been in error, it offers no new specific issues which must be litigated. In *E-Z Davies Chevrolet, supra*, the Board in granting the General Counsel's motion for a summary judgment states the following:

> An evidentiary hearing is not a matter of right where there is nothing that a trier of fact may determine. Neither we nor courts are bound to "hear" what is legally insignificant. We have held, also with court approval, that the party objecting to an election must furnish specific evidence which *prima facie* warrants setting aside the election. [*Orleans Manufacturing Company*, 120 NLRB 630, and cases cited therein at fn. 5.] Having failed in the representation proceedings to provide such evidence, the Respondent now argues before us that our failure to order a hearing will preclude it from offering "additional" evidence. However, it nowhere specifically sets forth what this "additional" evidence is to be. The rule of *Orleans Manufacturing Company, supra*, would go for naught were we to allow a party objecting to an election, who has once failed to satisfy the specific evidence requirement, to gain a hearing in an unfair labor practice proceeding by an offer of evidence which has not even satisfied the initial criteria.
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> Apart from its failure specifically to designate what evidence it wishes to adduce at a hearing, Respondent does not, as it must at this particular state of these proceedings, assert or contend that it is prepared to present newly discovered or previously unavailable evidence, the availability of which might conceivable require a hearing to be held.
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> Turning to Respondent's due process argument, it is well settled that where only immaterial evidence is sought to be adduced or where there is no genuine or material issue of fact, the right to a "full hearing" is satisfied if the court *or agency* provides the party an opportunity to present their respective viewpoints prior to a disposition on matters of law. In *Fay Charles* v. *Douds* [172 F.2d 720, 725 (C.A. 2)], the Second Circuit held that neither our Act nor the Constitution mandates a hearing where there is no issue to decide. Procedural regularity is not an end in itself, but only a means of defending subsequent interests; and, the court held, "where, as here, the evidence on one side is unanswerable, and the other side offers nothing to match or qualify it, the denial of a trial invades no constitutional privilege."
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> For all these reasons we conclude that our refusal to allow the introduction of what is called "additional evidence" by Respondent offends no statutory or constitutional right. Admittedly, the issues which Respondent seeks to raise in the instant proceeding relate to the correctness of the Board's disposition of Respondent's Objections to the Election. There is no allegation that special circumstances exist herein which would require the Board to reexamine the determination which it made in the representation proceeding. Inasmuch as the Respondent has already litigated these issues, it has not raised any issue which is properly triable in the instant unfair labor practice proceeding.

I deem the foregoing rationale, which was affirmed by the court of appeals, to be controlling on the issues as they come before me in the instant case. Since it appears that the Respondent here seeks no more than to litigate issues either admitted by the pleadings, or resolved by the Board in the representation hearing, there is presented to me no matter which requires a hearing before a Trial Examiner. Accordingly, the General Counsel's motion for a summary judgment is appropriate and is hereby granted.

Upon the basis of the record heretofore described, I hereby make the following:

FINDINGS OF FACT

1. Respondent is a New Mexico corporation with its principal place of business located in Albuquerque, New Mexico, where it is engaged in the business of providing laundry and drycleaning services. During the 12-month period preceding issuance of the complaint, Respondent did a gross business in excess of $500,000. During the same period Respondent purchased goods and materials for use in its business valued in excess of $50,000 from suppliers within the State of New Mexico. Such supplies and materials originated outside the State of New Mexico.[3] Respondent admits, and I find, that Respondent is, and has been at all times material, an employer whose business affects commerce within the meaning of Section 2(6) and (7) of the Act.

2. Communications Workers of America, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

[3] Respondent in its answer denied the General Counsel's allegation of direct inflow, but conceded the volume and indirect inflow so as to meet Board jurisdictional criteria

3. As found in the representation proceeding, and as Respondent admits, I find the following unit to be appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All production and maintenance employees, routemen, and janitors employed by Sanitary Laundry, Inc., and its subsidiary Rutledge Linen Supply, Inc., at its Albuquerque, New Mexico, plants; excluding retail outlet employees, office clerical employees, guards, and supervisors as defined by the Act.

4. I find that in a Board-conducted election held on or about June 15, 1967, a majority of the employees of Respondent in the unit described in paragraph 3, above, selected the Union as their exclusive collective-bargaining representative as defined by Section 9(a) of the Act. I further find that on or about December 11, 1967, the Board certified the Union as such bargaining representative.

5. Respondent admits, and I find, that on or about December 19, 1967, the Union requested, and is now requesting, that Respondent bargain with it as the statutory representative of its employees.

6. Respondent admits, and I find, that since December 19, 1967, Respondent has refused, and continues to refuse, to bargain collectively with the Union as such statutory representative.

Accordingly, I find that inasmuch as the Union at all times since December 11, 1967, has been the duly certified collective-bargaining representative of Respondent's employees in an appropriate unit, and inasmuch as Respondent at all times since December 19, 1967, refused to bargain collectively with it as such representative, Respondent has thereby engaged in and is now engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act. I further find such conduct to have interfered with the rights guaranteed by Section 7 of the Act and thereby to be violative of Section 8(a)(1) of the Act.

The acts of Respondent set forth above, occurring in connection with its operations as described above, have a close, intimate, and substantial relation 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.

Having found that Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act, I shall recommend 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 described above, and, if an understanding is reached, embody such understanding in a signed agreement.

CONCLUSIONS OF LAW

Upon the basis of the foregoing findings of fact and upon the entire record in this proceeding, as it came before me, I make the following conclusions of law:

1. Sanitary Laundry, Inc., is, and has been at all material times, an employer engaged in a business affecting commerce within the meaning of Section 2(2) and 2(7) of the Act.

2. Communications Workers of America, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By refusing to bargain with the Union as the statutory representative of its employees, as found above, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

4. By the same conduct Respondent has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed by Section 7 of the Act, and thereby has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact, and conclusions of law, and upon the entire record in this proceeding, I recommend that Respondent, Sanitary Laundry, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning wages, hours, and other terms and conditions of employment with the Union as the exclusive bargaining representative of its employees in the unit described above.

(b) In any like or related manner interfering with, restraining, or coercing employees in the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

(a) Upon request, bargain with the Union as the exclusive representative of all employees in the above-described 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 Albuquerque, New Mexico, place of business copies of the attached notice marked "Appendix."[4] Copies of said notice, on forms provided by the Regional Director for Region 28, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon

[4] In the event that this Recommended Order is adopted by the Board, the words "a Decision and Order" shall be substituted for the words "the Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "a Decree of the United States Court of Appeals Enforcing an Order" shall be substituted for the words "a Decision and Order"

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 28, in writing, within 20 days from the receipt of this Decision, what steps have been taken to comply herewith.[5]

[5] In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read "Notify said Regional Director, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith."

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to the Recommended Order of a Trial Examiner of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that.

WE WILL NOT refuse to bargain collectively with Communications Workers of America, 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 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 production and maintenance employees, routemen, and janitors employed by Sanitary Laundry, Inc., and its subsidiary Rutledge Linen Supply, Inc., at its Albuquerque, New Mexico, plants; excluding retail outlet employees, office clerical employees, guards, and supervisors as defined by the Act.

SANITARY LAUNDRY, INC.
(Employer)

Dated By

(Representative) (Title)

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.

If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 5500 Gold Avenue, Room 7011, P. O. Box 2146, Albuquerque, New Mexico 87101, Telephone 247–0311, Ext. 2556.