

Western Microwave Laboratories, Incorporated and International Brotherhood of Electrical Workers, AFL-CIO, Local Union No. 786. Case 20-CA-5172

March 26, 1969

DECISION AND ORDER

BY CHAIRMAN McCULLOCH AND MEMBERS
FANNING AND BROWN

Upon a charge filed by International Brotherhood of Electrical Workers, AFL-CIO, Local Union No. 786, herein called the Union, the General Counsel for the National Labor Relations Board, by the Regional Director for Region 20, issued a Complaint and Notice of Hearing dated October 21, 1968, alleging that Western Microwave Laboratories, Incorporated, Respondent herein, had engaged in and was engaging in unfair labor practices 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 and complaint were duly served upon the Respondent and the Union.

With respect to the unfair labor practices, the complaint alleges that on or about July 30, 1968,¹ the Board certified the Union as the exclusive bargaining representative of the Respondent's employees in the unit found appropriate,² and that since August 12, the Respondent refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative, although the Union has requested it to do so. On October 30, 1968, Respondent filed its answer to the complaint admitting certain allegations of the complaint in whole or in part but denying the commission of the unfair labor practices alleged. It also alleged by way of certain "defenses" that (1) the Union electioneered at and near the polls before and during the election, by sending ineligible voters to vote, whose presence and language impaired the freedom of choice of and misled the voters, and by the presence of union officials in or near the area; (2) the Union electioneered and distributed literature, designed to influence the outcome of the election in favor of the Union to employees within 24 hours of the election; and (3) said distribution contained false and misleading information pertaining to the election issues designed to influence employees to vote for the Union. The Respondent also requested that the complaint be dismissed.

On December 18, 1968, the General Counsel filed with the Board a Motion for Summary Judgment, and a memorandum in support thereof submitting that the Respondent's answer raises no issues of fact or law, requiring a hearing, and moved the Board to

enter judgment against Respondent on the pleadings. Thereafter, on December 24, 1968, the Board, having duly considered the matter, issued an Order Transferring Proceedings to the Board and Notice to Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. On January 3, 1969, the Respondent filed its Answer to Show Cause Notice requesting the Board to deny the Motion for Summary Judgment, and in effect to set the matter down for a hearing to permit the Respondent to present evidence in support of its answer and defenses.

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 case, the Board makes the following:

RULING ON THE MOTION FOR SUMMARY JUDGMENT

The record establishes that pursuant to a Stipulation for Certification upon Consent Election executed by the Union and Respondent on April 22, and approved by the Regional Director for Region 20 on April 23, an election by secret ballot was conducted on May 21, under the direction and supervision of the Regional Director among the employees in a unit stipulated by the parties to be and hereinafter found appropriate.

Upon the conclusion of the balloting, the parties were furnished with a tally of ballots which showed that of approximately 92 eligible voters, 92 cast ballots, of which 46 were for and 42 against the Union, with 4 challenged ballots,³ which were sufficient in number to affect the results of the election. On May 24, the Respondent filed objections to conduct of election and to conduct affecting the results of the election. It contended that: (1) Over the objection of the Respondent the Board Agent permitted two "Union Representatives," Ruby Autrey and Elba Chavez, to enter the polling place, stand in the voting line, engage in extended conversations with eligible employees, and vote in the election; that neither Autrey nor Chavez were employees at the time nor were they on the eligibility list;⁴ and by their presence and actions each was able to and did, both directly and indirectly intimidate employees to vote in favor of the Union; and (2) that two ballots, one marked with an "O" and another marked with the word "Yes" should have been invalidated and not counted as valid votes for the Union.

¹Ruby Autrey and Elba Chavez were challenged by the Board Agent as their names did not appear on the voting eligibility list; and Herscher and La Favre were challenged by the Union on the ground that they were office clerical employees and as such excluded from the unit.

²On April 22, 1968, at an informal hearing in the Board's San Francisco Regional Office, the Union and Respondent agreed that Autrey and

³Except where otherwise noted all events occurred in 1968.

⁴Case 20-RC-8084 (not printed in NLRB volumes).

Thereafter on June 11, pursuant to an investigation of the challenged ballots, and objections filed by the Respondent, the Regional Director issued a Report on Objections and Challenged Ballots. He found, in accord with the preelection agreement of the parties, that Autrey and Chavez had been terminated before the eligibility date and that they had no reasonable expectation of reemployment within the foreseeable future. He therefore recommended that the challenges to their ballots be sustained. Under the circumstances he made no determination regarding the eligibility of Herscher and La Favre as their ballots would not affect the result. He further recommended that the objections of the Respondent be overruled by the Board and that the Board issue a certification of representative.

Concerning objection (1) he found that neither Chavez nor Autrey was authorized to act as representative or agent of the Union, that there was no evidence that either had been more active than other employees in the union campaign, except that Autrey had accompanied the International representative to the conference at which the election agreement was executed. In accounting for the fact that Autrey was permitted to vote a challenged ballot, the Regional Director found that when Autrey appeared at the polling place, she spoke only to the Board Agent and indicated that she was an employee at the time that the election campaign began. He reported further that there was conflicting testimony as to whether she had also said that she had been sent to vote by one of the Union agents. As to Chavez, the Regional Director found that she appeared to vote 5 minutes before the polls closed and that except for the two observers, there were no employees present in the voting area when she voted. As to exception (2) the Regional Director found that the Board agent counted as valid votes for the Union, a ballot on which the word "Yes" was written in the square where an "X" mark is ordinarily placed, and a second ballot which was marked with an "O" instead of an "X". He concluded that the markings on the ballots indicated clearly the intent of the voters and as the markings were not inherently such as to disclose the identity of the voters, he recommended that Respondent's objections be overruled.

On June 20, the Respondent filed with the Board exceptions, and brief, to the Regional Director's Report. The Respondent excepted to the Regional Director's finding that the appearance of ineligible voters in the polling area and voting was not a basis for voiding the election; to his finding concerning alleged improperly marked ballots and, in the circumstances, to his failure to pass on the challenged ballots of employees Herscher and La Favre. Although the Respondent asked that the

Regional Director's Report be set aside, that its objections be sustained and that another election be directed, it made no explicit claim that its exceptions raised substantial and material issues of fact requiring a hearing. On the contrary, it offered no evidence to controvert the Regional Director's factual finding, and its exceptions appear to have done no more than challenge the Regional Director's conclusions on the basis of the facts reported.

On July 30, 1968, the Board issued its Decision and Certification of Representative, in which it adopted the Regional Director's findings and recommendations and certified the Union as the exclusive bargaining representative of the Respondent's employees in the unit found appropriate. The Board held that the Respondent's exceptions raised no material or substantial issues of fact or law which would warrant reversal of the Regional Director's findings or recommendations or require a hearing. Respondent filed no motion for reconsideration of the Board's Decision and Certification of Representative.

In its Answer to the Show Cause Notice, the Respondent now, for the first time, claims that it is entitled to a hearing in order to present evidence to sustain its defenses to the complaint. It is firmly established that in a post-election representation proceeding, the objecting party in order to obtain a hearing must supply *prima facie* evidence, presenting "substantial and material factual issues" which would warrant setting aside the election.⁵ A hearing is required only where it is necessary to preserve a party's rights, consequently, if there is nothing to hear then a hearing is a "senseless and useless formality."⁶ Neither in the course of the Regional Director's investigation nor in its exceptions to the Board did the Respondent supply *prima facie* evidence presenting substantial and material issues which would warrant setting aside the election, nor did it make any tender of evidence sufficient to raise an issue of fact. Indeed, it merely challenged the validity of the conclusions drawn by the Regional Director from the facts disclosed by his investigation. We had no doubt of the validity of the Regional Director's conclusions when the matter was previously before us and, noting that Respondent presented no evidence to challenge the Regional Director's factual findings, we concluded in our decision of July 30, 1968, that Respondent's exceptions raised no material or substantial issues of fact or of law which would warrant the Board to set aside the election or direct a hearing.

In the present proceeding, the Respondent in its Answer to the Notice to Show Cause now claims that it is entitled to a hearing in order to present evidence to sustain the so-called defenses alleged in its answer to the complaint. Its contentions appear

Chavez were not eligible to vote. Their names were excluded from the list of eligible employees.

⁵N.L.R.B. v. O. K. Van Storage Inc., 297 F.2d 74, 75 (C.A. 5).

⁶N.L.R.B. v. Air Control Products of St. Petersburg Inc., 335 F.2d 245, 249 (C.A. 5).

to be: once a hearing is ordered, employees, under oath and free of the fear of Union reprisals, would supply the evidence Respondent now lacks. Respondent offers no proof that any employee had been intimidated by Union threats of reprisals against any employee who gave a statement to the Regional Director which was unfavorable to the Union's cause. The Respondent's contentions, it appears to us, are based entirely on unfounded speculation and cannot be considered the equivalent of the *prima facie* evidence that it must supply to show that material and substantial issues of fact exist in order to be entitled to a hearing.

The Respondent's answer, however, raises for the first time the claim that the Union improperly affected the outcome of the election by the distribution of false and misleading literature designed to influence the employees to vote for the Union and that it had no time to reply thereto. It attaches a copy of the alleged offending material to its Answer to the Notice to Show Cause.⁷ The leaflet apparently was distributed by the Union shortly before the election.⁸ Respondent claims that the leaflet did not come to its attention until after it had filed its answer, on October 30, and after it had received a notice of hearing dated October 21. It argues therefore that the material is newly discovered evidence. Respondent, however, sets forth none of the circumstances which led to the late discovery of this leaflet. We have considerable doubt, of course, whether the leaflet in question is newly discovered evidence, and are justified in rejecting it on that ground. Indeed, we are justified in rejecting the defense based thereon on the ground that it is essentially an objection to conduct alleged to have affected the outcome of the election. As an objection, it should have been filed within the 5 days provided therefor in the Board's Rules and Regulations.⁹ Moreover, even if we overlook the untimely interposition of an objection to the election or the inherent improbability of Respondent's claim that the leaflet came to its attention, after it had filed its answer in the present proceeding, although there appears to be a clear reference to such matter in the third of its defenses, and consider the leaflet on its merits, we find nothing in its language which can be said to constitute a misrepresentation of fact, or to suggest that a substantial and material issue of fact is raised requiring a hearing. The leaflet does no more than refer to benefits of Union membership and tells the employees, in effect, that they cannot have such benefits without being a member of this Union. Acting in the belief that some employees may be unwilling or unable to pay the cost of membership, in the form of monthly dues, it tells the employees that if they vote for the Union they will be able to bargain for higher hourly wages, which will more than cover the monthly dues payment. The sense of the language does not indicate that if the Union is chosen, only Union members will receive the benefits of Union

representation. All in all the leaflet can hardly be considered as more than conventional union campaign propaganda.¹⁰ On the record as a whole, we find no ground for setting aside the election or directing a hearing in this proceeding.

All other material issues having been previously decided by the Board or admitted by Respondent's answer to the complaint herein, there are no matters requiring a hearing before a Trial Examiner. Accordingly, the General Counsel's Motion for Summary Judgment is granted. On the basis of the record before it, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent is, and has been at all times material herein, a corporation duly organized and existing by virtue of the laws of the State of Virginia engaged in the manufacture of cable harness at its place of business at San Jose, California. During the past year, which period is representative of all material times herein, Respondent received goods valued in excess of \$50,000 from points outside the State of California.

Respondent admits, and we find, 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 purposes of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

International Brotherhood of Electrical Workers, AFL-CIO, Local Union No. 786, is a labor organization within the meaning of Section 2(5) of the Act.

⁷The leaflet in material part stated the following:

Brothers and Sisters:

Today, May 21, there will be an official election with a secret ballot at Western Microwave from 3:45 — 4:30 p.m. At this time you will decide if you want the benefits of union representation.

We have given you information to help make this very important decision. Now you know the benefits you can get **ONLY IF YOU ARE A MEMBER OF THE UNION**. You know that it will **NOT COST YOU ANYTHING TO JOIN** and that the small monthly dues will only be a tiny fraction of the **HOURLY WAGE INCREASE** that you yourselves — the workers — will be able to bargain for in your contract.

So now it's up to you. For better protection, dignity and justice for you and your family, mark an "X" in the box that says "YES".

⁸Insofar as the Respondent claims that the distribution of literature within 24 hours of the time an election is held is an interference with the election and cause for setting it aside, it is in error. See *Comfort Slipper Corporation*, 112 NLRB 183.

⁹Board Rules and Regulations, Series 8, as amended, Section 102.69. Cf. *National Container Corporation of Wisconsin*, 99 NLRB 1492, 1495; *Sears Roebuck and Co.* 115 NLRB 266, 270.

¹⁰In our opinion, *N.L.R.B. v. Trancoa Chemical Corp.*, 303 F.2d 456 (C.A.1), is completely distinguishable on its facts. There, the court found that the union representations were clearly false or half-truths, and they related to matters that were likely to mislead employees into voting for the Union. In the present case, we find no misrepresentation of fact in the Union's leaflet.

III. THE UNFAIR LABOR PRACTICES

A. *The Representation Proceedings*

1. The unit

At all material times herein the following employees at the Respondent's San Jose, California, plant, constitute a unit appropriate for collective bargaining within the meaning of the Act:

All production and maintenance employees including leadmen employed at the San Jose, California, operation of Western Microwave Laboratories, Incorporated, excluding office clerical employees, professional employees, guards and supervisors as defined in the Act.

2. The certification

On or about May 21, 1968, a majority of the employees of the Respondent in said unit, in a secret election conducted under the supervision of the Regional Director for Region 20, designated the Union as their representative for the purpose of collective bargaining with Respondent, and on July 30, 1968, 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 the Respondent's Refusal*

Commencing on or about August 9, 1968, and continuing to date, the Union has requested and is requesting 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 August 12, 1968, and continuing to date, the Respondent did refuse, and continues to refuse to bargain collectively with the Union as exclusive collective-bargaining representative 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 the Respondent in the appropriate unit described above in the Board's certification, and that the Union at all times since May 21, 1968, 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 August 12, 1968, refused to bargain collectively with the Union as the exclusive bargaining representative of its employees in the appropriate unit, and that by such refusal, the 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 acts of the Respondent set forth in section III, above, occurring in connection with its operations as described in section I, 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.

V. THE REMEDY

Having found that the Respondent has engaged 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 year of certification as beginning on the date the 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).

CONCLUSIONS OF LAW

1. Western Microwave Laboratories, Incorporated is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Brotherhood of Electrical Workers, AFL-CIO, Local Union No. 786, is a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees including leadmen employed at San Jose, California, operation of Respondent, but excluding office clerical employees, professional 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. On July 30, 1968, and at all times thereafter, the above-named labor organization has been the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about August 12, 1968, and at all times thereafter, to bargain collectively with

the above-named labor organization as the exclusive bargaining representative of all employees of the Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

6. By the aforesaid refusal to bargain, the Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees, in the exercise of rights guaranteed them in Section 7 of the Act, and has thereby 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, Western Microwave Laboratories, Incorporated, San Jose, California, 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 International Brotherhood of Electrical Workers, AFL-CIO, Local Union No 786, as the exclusive and duly certified bargaining representative of its employees in the following appropriate unit.

All production and maintenance employees including leadmen employed at the San Jose, California, operation of the Employer, excluding office clerical employees, 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 exercise of the rights guaranteed them by 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 San Jose, California, operation, copies of the attached notice marked "Appendix."¹¹ Copies of said notice, on forms provided by the Regional Director for Region 20, shall, after being duly signed by the Respondent's representative, be

posted by the 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 the Respondent to insure that said notices are not altered, defaced, or covered by any other material

(c) Notify said Regional Director for Region 20, in writing, within 10 days from the date of this Decision and Order, what steps have been taken to comply herewith.

¹¹In the event this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "a Decision and Order," the words "a Decree of the United States Court of Appeals Enforcing an Order"

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to a Decision and Order 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 International Brotherhood of Electrical Workers, AFL-CIO, Local Union No. 786, 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, including leadmen employed at our San Jose, California, operation, but excluding office clerical employees, professional employees, guards and supervisors as defined in the Act

WESTERN MICROWAVE
LABORATORIES,
INCORPORATED
(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, 13050 Federal Building, 450 Golden Gate Ave., Box 36047, San Francisco, California 94102, Telephone 415-556-3197.