Frito-Lay, Inc. *and* Sales Drivers & Dairy Employees, Local 166, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Charging Party. Case 31-CA-1183

June 30, 1969

DECISION AND ORDER

BY CHAIRMAN MCCULLOCH AND MEMBERS FANNING AND BROWN

On May 6, 1969, Trial Examiner Eugene E. Dixon issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices within the meaning of the National Labor Relations Act, as amended, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the 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 this case,[1] and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner to the extent consistent herewith.

As more fully set forth by the Trial Examiner, the present controversy arises out of a representation case. In *Frito-Lay, Inc.*, Case 31-RC-787,[2] the Regional Director for Region 31 on April 25, 1968, issued a Decision and Direction of Election in a unit consisting of "all driver-salesmen and warehousemen of the Employer employed in Area 4 of Region II of its Western Division in the Western Zone." On May 6, 1968, the Respondent filed a request for review of the Decision and Direction of Election on the grounds that the unit was inappropriate because it lacked administrative autonomy and geographic coherence. On May 22, 1968, the Board denied the request for review.

On June 7, 1968, the Union won a Board-conducted representation election. On June 14, 1968, the Respondent filed objections to the election, which the Regional Director, after due consideration, overruled, and on July 18, 1968, he issued a Supplemental Decision and Certification of Representative.[3] The Respondent did not request review.

On August 5, the Union requested the Respondent to bargain with it but the Respondent refused to do so. The Union then filed a charge, in Case 31-CA-1183, alleging that the Respondent had violated Section 8(a)(5). On September 6, 1968, the General Counsel issued a complaint. In the answer thereto, the Respondent denied the commission of any unfair labor practices and alleged that certain administrative changes which the Respondent had begun to institute on September 10, 1968, rendered the bargaining unit inappropriate.

On November 7, 1968, the General Counsel filed a motion for summary judgment, and on November 13 the Board issued an order transferring proceeding to the Board and a notice to show cause. In response to the show cause order, the Respondent reiterated its claim that it had begun to reorganize its operations pursuant to recommendations of a management consultant and had eliminated certain positions; hence the unit which was based on an administrative subdivision no longer in existence was not appropriate. On January 17, 1969, the Board issued an order denying motion for summary judgment and remanding proceeding to Regional Director for hearing before a Trial Examiner to determine whether or not the administrative changes made by the Respondent were sufficient to vitiate the Board's prior unit determination.

The Trial Examiner concluded on the basis of the record that the administrative changes did not render inappropriate the unit previously determined and that Respondent unlawfully refused to bargain.

The undisputed evidence shows that before its reorganization the Respondent's operations were divided into four geographic zones. The Zones in turn were divided into Divisions which were divided into Regions. The Regions were then divided into Areas which were further divided into Districts. In the underlying representation case herein involved, the Regional Director found appropriate a unit of warehousemen and driver-salesmen in Districts 4A, 4B, and 4C, comprising Area 4[4] of Region II,[5] relying in essential part on the fact that:

> . . . the unit sought by Petitioner conforms with an administrative unit of the Employer's organization [one Area] and the record discloses that each area manager has considerable autonomy in the day-to-day operations within his [A]rea, and further . . . no other labor organization presently seeks to represent the driver-salesmen on a [R]egional unit bases . . . .

[1] Respondent's request for oral argument is hereby denied, as the record, including the exceptions and briefs, adequately presents the issues and positions of the parties

[2] Not published in NLRB volumes

[3] Not published in NLRB volumes

[4] The salemen in this area operated out of six warehouses, the main Area warehouse in Bloomington, California, and five warehouses between 24 and 85 miles from Bloomington

[5] All driver-salesmen in Area 3 of Region II (the only other Area in the Region) operated out of the Respondent's warehouse in Glendora, California, which is 35 miles from the one in Bloomington

The record shows that Respondent's nationwide reorganization was undertaken on the recommendation of a management consultant firm on the basis of that firm's study of Respondent's organization—a study which was begun in the fall of 1967 before this proceeding was instituted. The record discloses that Respondent's restructuring was clearly not for the purpose of avoiding compliance with the Board's unit finding. Indeed, no one contends otherwise.

Respondent's reorganization completely eliminated the Areas as administrative subdivisions of the Regions and the positions of Area Manager. All direct authority which under the old organizational structure had been in part delegated to Area Managers, and in minor respects to District Managers, by Regional Managers, was returned to the Regional Managers. This was true of Area 4 in Region II. In addition, the change reduced the number of driver-salesmen and the amount of territory for which each Regional Manager was responsible[6] and lifted certain duties from the District Managers.

Notwithstanding the reorganizational changes the Trial Examiner concluded that the three-District unit was still appropriate. He reached this conclusion on a finding that the reorganizational changes did not affect the function and duties of the driver-salesmen who continued to work the same routes out of the same warehouses. He reasoned that while the Area level of supervision had in fact been eliminated and that while the Regional Manager now had the sole authority on hiring, firing, and allocation of routes, the Regional Manager had at all times exercised final authority in these matters. Since the supervisory or managerial functions remained substantially the same, despite the elimination of the Area Manager and, presumably, authority could be delegated to the District Managers, who remained, the Trial Examiner concluded that the changes were insufficient to vitiate the Board's prior unit determination.[7] We disagree with the Trial Examiner's conclusions.

It is true, of course, that once the General Counsel has shown the Union to have been certified and the subsequent request and refusal to bargain by the Respondent, the General Counsel has established a *prima facie* case of a violation of Section 8(a)(5) of the Act. The burden then shifts to the Respondent to establish that the circumstances upon which the underlying unit was found appropriate no longer exist and that the unit is therefore no longer appropriate.[8] This, we believe, the Respondent has done. It is evident that the essential factor which made a unit of three Districts appropriate, in a Region comprised of six Districts, was the Area Manager's "considerable autonomy in the day-to-day operations within his [A]rea," and it was for that reason that the Board denied review of the Regional Director's unit finding. But since it is clear that the administrative changes brought about by Respondent's reorganization of its operations eliminated the "considerable autonomy" of the Area Manager completely, the essential factor which made a unit of three Districts in an administrative and geographical grouping of six (now five) Districts is missing. There is nothing in the record to show that the employees in Districts 08, 09, and 10 enjoy a community of interest separate and apart from the employees in the remaining Districts in the Region. Nor can we say that the three Districts in question constitute a well defined and separate geographical unit. Thus, the Bloomington warehouse in Region II serving some of the employees in the three Districts involved herein (08, 09, and 10) is actually substantially closer to the Glendora warehouse, serving employees in the other two Districts (06 and 07) than it is to the other warehouses in Districts 08, 09, and 10 which the Union sought as part of the three-District unit. Under these circumstances, and particularly in light of the fact that the reorganization was undertaken for legitimate business purposes, and without intent to evade the Respondent's obligation under the certification, we find that the unit previously certified is no longer appropriate. Accordingly, we shall direct the Regional Director to vacate the certification issued in Case 31-RC-787. We further find that the Respondent did not violate Section 8(a)(5) of the Act by refusing to bargain collectively with the Union as the certified representative of the employees in an appropriate unit. We shall therefore dismiss the complaint.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the complaint herein be, and it hereby is, dismissed in its entirety.

It is hereby ordered that the Regional Director vacate the Certification of Representative issued on July 18, 1968, in Case 31-RC-787.

[6] With respect to Region II, in addition to the above changes one of the Districts formerly in Area 3 was eliminated. Further, Districts 4A, 4B, and 4C are now entitled Districts 08, 09, and 10 and the two Districts formerly in Area 3 are now entitled Districts 06 and 07.

[7] In recognition of the fact that there were no longer any subdivisions called Areas, and that the Districts had been renumbered, the Trial Examiner changed the unit description to conform with the new nomenclature, to wit, "all driver-salesmen and warehousemen of the employer employed in Districts 08, 09, and 10 of Region II of its western division in the western zone. . ."

[8] See, e.g., *Cutter Laboratories*, 116 NLRB 260; *The Borden Company*, 127 NLRB 304, *National Dairy Products Corp.*, 127 NLRB 313, *S S Kresge Company*, 169 NLRB No. 61.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

EUGENE E. DIXON, Trial Examiner: This proceeding brought under Section 10(b) of the National Labor

Relations Act, as amended (61 Stat. 136), herein called the Act, was heard at Los Angeles, California on March 11, 1969 pursuant to due notice. A complaint, issued by the Regional Director for Region 31 (Los Angeles, California), on behalf of the General Counsel of the National Labor Relations Board (herein called the General Counsel and the Board), on September 6, 1968, and based upon charges filed by Sales Drivers & Dairy Employees, Local 166, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (herein called the Union or the Charging Party), on August 23, 1968, alleged that Frito-Lay, Inc., Respondent herein, had engaged in and was engaging in unfair labor practices in violation of Section 8(a)(1) and (5) of the Act by refusing to bargain collectively with the Union as the duly designated bargaining representative of the employees in an appropriate unit.

In its duly filed answer, Respondent denied the commission of any unfair labor practices questioning the appropriateness of the unit as found by the Board and alleging that it had declined to bargain with the Union "in order to test the applicability of certain recent Board and court decisions on the appropriateness of bargaining units to the Company's sales organization and operations."

Upon the entire record in the case and from my observation of the witnesses I make the following:

FINDINGS OF FACT

1. Respondent's Business

Respondent is a Delaware corporation engaged in the manufacture and distribution of food products with sales distribution facilities throughout Continental United States. The principal products manufactured and sold are corn chips, potato chips, pretzels, bacon rinds, dip mixes, Doritos, Cheetos, and similar products. Respondent has manufacturing plants and other facilities within the State of California including warehouses located at Bloomington, Glendora, Victorsville, Barstow, South Gate, Beaumont, Palm Springs, and Indio. In the course and conduct of its business operations Respondent annually makes sales directly in interstate commerce in excess of $50,000. At all times material Respondent has been an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION

Sales Drivers & Dairy Employees, Local 166, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America at all times material herein has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

Background

The unfair labor practice complaint here arose out of a prior representation proceeding — Frito-Lay, Inc., Case 31-RC-787. The Union filed the representation petition in that case on March 18, 1968. A hearing on the petition was held on April 3 and on April 25 the Regional Director for Region 31 issued a Decision and Direction of Election. A request for review was filed by Respondent on May 6 and denied by the Board on May 22. A majority of the unit employees[1] selected the Union as their bargaining representative. Objections were filed by Respondent on June 14 which were overruled by the Regional Director who issued the supplemental decision and certification of representative on July 18 certifying the Union as the exclusive bargaining representative in the above unit.

On August 5 the Union made a demand of Respondent for recognition and bargaining. Respondent refused to bargain and the 8(a)(5) charge was filed by the Union on August 23. The complaint issued September 6. As indicated Respondent's answer denied the commission of any unfair labor practices maintaining that administrative changes made after the certification rendered the bargaining unit inappropriate.

On November 1 the General Counsel filed a motion for summary judgment with the Board. On December 4, Respondent filed its response to the Board's order to show cause why the motion for summary judgment should not be granted alleging, *inter alia* that because of administrative changes made in its sales organization since the Union was certified the bargaining unit was no longer appropriate. On January 17, 1969, the Board issued an order denying the motion for summary judgment and ordered a hearing before a Trial Examiner "for the purpose of adducing evidence limited to the sole issue of whether or not the aforesaid administrative changes made by Respondent are sufficient to vitiate the Board's prior unit determination."

The Administrative Changes

Respondent has in recent years experienced a rapid growth into a National organization primarily through acquisitions. The acquired companies were allowed to retain substantial autonomy and to operate under their former methods and procedures as separate "profit center" divisions reporting to Respondent's National headquarters in Dallas. Prior to 1969 for purposes of distribution and administration Respondent's operations were divided into four geographic zones covering the entire Country. The zones in turn were divided into Divisions, which were further divided into Regions. The Regions in turn were divided into Areas which were further divided into Districts, the latter being the lowest organizational unit. Under this setup, the various organizational units were headed in the order of importance as follows: Zones were headed by a vice president and general manager; Divisions by a vice president and general manager, division sales manager, Regional sales managers, area sales managers and finally, the lowest unit, district sales managers.

At the time of the Representation hearing Respondent had 11 such Divisions including the western division within which this case developed. Because of a lack of uniformity in operations and problems of control and communication between Dallas and the Divisions, Respondent in 1967 asked the McKinsey Company to informally evaluate the Respondent's organization and structure at the same time that it was studying its pricing structure and distribution methods.

[1] The unit found to be appropriate was all Driver-Salesmen & Warehousemen of the employer employed in Area 4 of Region II of its western division in the western zone, but excluding all other employees, office clerical employees, guards, and supervisors as defined in the Act

In January 1968, McKinsey recommended a complete study of Respondent's administrative structure. Such a study was undertaken by McKinsey from January through May 1968, at which time McKinsey recommended discontinuance of the "profit center" form of organization in favor of organization on a functional basis — i.e., the various functions in the field, e.g., sales, manufacturing, employee relations, etc., reporting directly to Dallas. McKinsey also recommended at that time changes in the sales organization below the Division levels. In this connection the elimination of the Area as an administrative subdivision was recommended along with the consequent elimination of the position of Area sales manager whose functions would be consolidated in the Regional sales manager. This would tend to alleviate communication and control problems and at the same time reduce the number of driver-salesmen and the amount of territory for which each Regional manager was responsible.

McKinsey's recommendations were weighed by Respondent for about two months and in July placed into effect down through its Divisional level. As for the recommendations pertaining to the field sales organization below the Division level, Respondent asked McKinsey for further information. The report on this request, based on a study in Respondent's Great Lakes Zone was submitted to Respondent during the last week in August. After review and numerous modifications by Respondent it was approved on September 10 for implementation.

The changes thus approved were: (1) elimination of the Areas as an administrative subdivision with corresponding elimination of the position of area sales manager; (2) consolidation in the Regional sales manager of the functions previously performed by Area sales managers, with a corresponding increase in the concentration of responsibility and authority in the Regional sales manager; (3) reduction in the number of Driver-salesmen and the amount of territory for which each Regional sales manager was responsible; and (4) relieving District sales managers from certain duties and responsibilities which had previously occupied their time thus freeing them to perform their primary responsibilities of training and aiding driver-salesmen and promotion-related activities.

Prior to the foregoing administrative changes, the Sales Manager of Region II had under his supervision two Area Sales Managers who were in charge of Areas 3 and 4, respectively. Each Area Sales Manager had three District Sales Managers under him — Area 3 having Districts 3A, 3B, and 3C, and Area 4 having Districts 4A, 4B, and 4C. The unit as found by the Board was made up of the 24 salesmen operating in the three Districts of Area 4 working out of warehouses located at Bloomington, Indio, Palm Springs, Beaumont, Barstow, and Victorsville, California. Respondent objected in the R case to the unit on the grounds that the salesmen in Area 3 working out of the Glendora Warehouse (located 35 miles from the Bloomington warehouse) serviced routes "geographically contiguous, in numerous instances," with territories serviced by unit salesmen working out of the Bloomington warehouse and should have been included in the unit.

The implementation of the McKinsey recommendations in Region II eliminated the two area sales managers and eliminated one of the Districts formerly under Area 3. Thus the Region II Sales Manager was now in charge of five districts instead of six which were now designated as District 6, 7, 8, 9 and 10 — Districts 8, 9, and 10 formerly having been Districts 4A, 4B and 4C.

Although one district was eliminated from Region II, the geographic area originally covered by the unit finding is still of the same. The same warehouses are involved and the same number of salesmen, 24, are still working in Districts 8, 9, and 10 as were working in Districts 4A, 4B, and 4C, and there has been no change in their duties, working conditions, or compensation. Although the reorganization authorized three extra salesmen to be used as relief salesmen throughout the entire Region, at the time of the complaint hearing no such extras had been hired.

Contentions and Conclusions

The General Counsel and the Union contend (1) that the evidence presented by Respondent in the Complaint case was not newly discovered or previously unavailable and thus Respondent should not be permitted to attack the determination made in the Representation proceeding and (2) that in any event, the evidence adduced by Respondent was not "sufficient to vitiate the Board's prior unit determination."

It would appear that I am foreclosed by the Board's Order from consideration of (1) above. As for (2) above, however, I am inclined to agree with the General Counsel and the Charging Party. Clearly "the evidence . . . does not establish a change in either the operation, scope or composition of the unit." Nor does it, in my opinion, show such changes in the managerial and supervisory setup as would significantly effect the employees in the bargaining unit. Respondent claims that after the reorganization the hiring, firing, performance appraisal, and promotions of salesmen and the realignment of routes was all centered in the Regional manager whereas formerly he delegated some of these functions or shared them with the Area or District managers. While the Regional manager may now have some added responsibility in these respects, there is no doubt that prior to the reorganization he had ultimate responsibility for all of them just as he does now. Nevertheless, he still has the District managers to rely on if necessary. Thus it would appear that the only real change in the unit setup is the elimination of the Area level of supervision between the District level and the Regional level. In my opinion none of the changes described by Respondent are sufficient "to vitiate the Board's prior unit determination."[2] I so find. Thus it follows that by refusing to recognize and bargain with the Union as the collective-bargaining agent of the employees in the above unit Respondent has violated Section 8(a)(5) 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 the operations of Respondent as set forth 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.

[2]The unit description of course should now conform to the nomenclature applied to the Districts as reorganized. Accordingly, I find the appropriate unit now to be described as including all Driver-Salesmen and warehousemen of the employer employed in Districts 8, 9, and 10 of Region II of its western division in the western zone, but excluding all other employees, office clerical employees, guards, and supervisors as defined in the Act

V. THE REMEDY

Having found that Respondent has engaged in unfair labor practices prohibited by Section 8(a)(1) and (5) of the Act, I shall recommend that it be ordered to cease and desist therefrom and take the usual affirmative action designed to effectuate the policies of the Act.

Upon the basis of the foregoing findings of fact and upon the entire record herein, I make the following:

CONCLUSIONS OF LAW

1. Frito-Lay, Inc., is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. Sales Drivers and Dairy Employees, Local 166, 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 Driver-Salesmen and Warehousemen of the Respondent employed in Districts 8, 9, and 10 of Region II of its western division in its western zone, but excluding all other employees, office clerical employees, guards, and supervisors as defined in the Act, constitute an appropriate bargaining unit within the meaning of Section 9(b) of the Act.
4. By refusing to bargain in good faith with the above Union as the representative of the employees in the above bargaining unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.
5. The aforesaid unfair labor practices affect 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 Frito-Lay, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively in good faith with the Charging Party as to wages, hours and other terms and conditions of employment covering employees in the unit herein found to be appropriate.

(b) In any like or related manner interferring with, restraining or coercing employees in the exercise of the rights guaranteed under Section 7 of the Act.

2. Take the following affirmative action which appeared necessary and appropriate to effectuate the policies of the Act:

(a) Upon request, bargain collectively with the Charging Party as the representative of its employees in the appropriate unit in good faith and in sincere effort to reach agreement and embody in a written and signed memorandum any understanding so reached.

(b) Post at its various warehouses located in Area 4 of Region II of its western division in its western zone, copies of the attached notice marked "Appendix."[3] Copies of said notice to be furnished by the Regional Director for Region 31, shall, after being duly signed by a representative of the Respondent, be posted by it immediately upon receipt 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 such 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 receipt of this Decision, what steps Respondent has taken to comply herewith.[4]

IT IS FURTHER RECOMMENDED that unless, within the aforesaid 20-day period the Respondent notify the Regional Director in writing that it will comply with the Order recommended herein, the National Labor Relations Board issue an Order requiring Respondent to take the action recommended.

[3] 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 the 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."

[4] In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read "Notify the Regional Director, in writing, within 10 days from the date of this Order, what steps the 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 Sales Drivers & Dairy Employees, Local 166, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the exercise of the rights guaranteed them in Section 7 of said Act.

WE WILL upon request, bargain with the above-named Union, as the exclusive bargaining representative of all the employees in the bargaining unit described below with respect to rates of pay, wages, hours of employment, and other conditions of employment, and if an understanding is reached, embody such an understanding in a signed agreement.

The bargaining unit is comprised of all Drivers-Salesmen and Warehousemen employed in Districts 8, 9 and 10 of Region II of our Western Division in our Western Zone, but excluding all other employees, office clerical employees, guards, and supervisors as defined in the Act.

FRITO-LAY, 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, 10th Floor Bartlett Building, 215 West Seventh Street, Los Angeles, California 90014, Telephone 213-688-5850.