

Ace Doran Hauling & Rigging Company and Truck Drivers, Chauffeurs and Helpers Local Union No. 100, an Affiliate of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 9-CA-5949

June 23, 1971

DECISION AND ORDER

BY CHAIRMAN MILLER AND MEMBERS BROWN
AND JENKINS

Upon a charge filed on November 18, 1970, by Truck Drivers, Chauffeurs and Helpers Local Union No. 100, an affiliate of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union, and duly served on the Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 9, issued a complaint on January 6, 1971, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing before a Trial Examiner were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on August 10, 1970, following a Board election in Case 9-RC-8470 the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;¹ and that, commencing on September 28, 1970, again on October 12, 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 January 15, 1971, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint, and alleging certain affirmative defenses.

On March 12, 1971, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment, contending that the Respondent's answer to the complaint raises no litigable issues, and praying the Board to grant the Motion for Summary Judgment. Subsequently, on March 31, 1971, the Board issued an

order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to Notice To Show Cause, and a memorandum in support thereof.

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 proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

RULING ON THE MOTION FOR SUMMARY JUDGMENT

In its response to the Notice To Show Cause, just as in its answer to the complaint, the Respondent contends that the certification issued to the Union on August 10, 1970, is invalid by reason that the Regional Director erred in including independent contractors in the bargaining unit and by failing to find that the Blue Rock Road operation and the Kellogg Avenue operation are separate and distinct business entities and constitute separate bargaining units.² We find that the Respondent's contentions in these respects are identical to the contentions it raised, and which were litigated and decided in the underlying representation case, and, accordingly, must be dismissed for lack of merit.

The record in Case 9-RC-8470 reflects that on June 8, 1970, after a hearing in which the Respondent participated, the Regional Director issued his Decision and Direction of Election. Contrary to the contentions of the Respondent, the Regional Director found that the single owner-drivers and all nonowner-drivers operating equipment under lease to the Respondent were employees within the meaning of the Act, and not independent contractors. The Regional Director further found, again contrary to the contention of the Respondent, that the drivers employed at the Respondent's Kellogg Avenue terminal enjoyed duties, skills, working and employment conditions similar to the drivers at its Blue Rock Road terminal, and that the drivers at both locations were properly included in a single combined unit.

² In addition to its contentions concerning the alleged inappropriateness of the unit, the Respondent asserts in both its answer and response to the Notice To Show Cause that the Union's demand for bargaining would force the Respondent to enter into the Teamsters' "Central States Over The Road Agreement and Iron and Steel Addendum," thus causing the Respondent and the Union to violate the antitrust laws of the United States and Section 10(e) of the National Labor Relations Act. We find no merit in this assertion. In view of the Respondent's refusal to meet and bargain with the Union its assertions as to the subjects for bargaining are anticipatory and premature. Section 8(d) of the Act, moreover, requires that the Respondent meet with the Union at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment—but it does not require the Respondent to agree to any proposal or to make any concession.

¹ Official notice is taken of the record in the representation proceeding, Case 9-RC-8470 as the term "record" is defined in Secs. 102.68 and 102.69(f) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938, enfd. 388 F.2d 683 (C.A. 4, 1968); *Golden Age Beverage Co.*, 167 NLRB 151, *Intertype Co. v. Penello*, 269 F Supp. 573 (D.C. Va., 1967); *Follett Corp.*, 164 NLRB 378, enfd. 397 F.2d 91 (C.A. 7, 1968); Sec. 9(d) of the NLRB.

On June 19, 1970, the Respondent filed with the Board a request for review, supported by a brief in which it raised the same assertions, contentions, and arguments as it now advances in this unfair labor practice proceeding. By telegram dated July 15, 1970, the Board denied the Respondent's request on grounds that it raised no substantial issues warranting review. Upon our review of the record in this unfair labor practice proceeding and the record in Case 9-RC-8470, we adhere to that view and find no reason to disturb the findings and conclusions of the Regional Director.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.³

All issues raised by the Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and the Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. We shall, accordingly, 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 an Ohio corporation engaged in the business of contract machine and steel hauling and transports from its location at Blue Rock Road and Kellogg Avenue in the Cincinnati, Ohio, area. During the past 12 months, which is a representative period, the Respondent had gross revenues in excess of \$500,000, of which at least \$50,000 was derived from hauling services performed by the Respondent for customers located outside the State of Ohio.⁴

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

Truck Drivers, Chauffeurs and Helpers Local Union No. 100, 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. THE 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 single owner-drivers and all nonowner-drivers operating equipment under lease to the Employer, and all drivers operating the Employer's equipment out of its Blue Rock Road and Kellogg Avenue terminals of the Employer's Cincinnati, Ohio, operations, but excluding office clerical employees, guards, multiple owner-nondrivers, and all other supervisors as defined in the Act, and all other employees.

2. The certification

A majority of the employees of Respondent in said unit, in a secret mail ballot election conducted under the supervision of the Regional Director for Region 9, designated the Union as their representative for the purpose of collective bargaining with the Respondent. The Union was certified as the collective-bargaining representative of the employees in said unit on August 10, 1970, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

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

Commencing in September 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 September 28, 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.

³ See *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146, 162 (1941), Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

⁴ In its answer the Respondent seeks to controvert the allegations of paragraph 2(a) of the complaint by contending that it is also a common carrier of freight by motor vehicle and that its steel hauling operations at the Kellogg Avenue location are the sole responsibility of an independent contractor. On the basis of the record, including the record in Case 9-RC-8470, we find that the allegations of the complaint adequately describe the Respondent's business operations and, as its answer admits, the Respondent is engaged in commerce within the meaning of the Act.

Accordingly, we find that the Respondent has, since September 28, 1970, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the 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 (CA. 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. Ace Doran Hauling & Rigging Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Truck Drivers, Chauffeurs and Helpers Local Union No. 100, 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 single owner-drivers and all nonowner-drivers operating equipment under lease to the Employer, and all drivers operating the Employer's equipment out of

its Blue Rock Road and Kellogg Avenue terminals of the Employer's Cincinnati, Ohio, operations, but excluding office clerical employees, guards, multiple owner-nondrivers, and all other supervisors as defined in the Act, and all other employees, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since August 10, 1970, the above-named 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 September 28, 1970, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

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

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent, Ace Doran Hauling & Rigging Company, 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 Truck Drivers, Chauffeurs, and Helpers Local Union No. 100, 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 single owner-drivers and all nonowner-drivers operating equipment under lease to the Employer, and all drivers operating the Employer's equipment out of its Blue Rock Road and Kellogg Avenue terminals of the Employer's Cincinnati, Ohio, operations, but excluding office clerical employees, guards, multiple owner-nondrivers, and all other supervisors as defined in the Act, and all other employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of 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 Cincinnati, Ohio, terminals copies of the attached notice marked "Appendix."⁵ Copies of said notice, on forms provided by the Regional Director for Region 9, 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 9, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

CHAIRMAN MILLER, dissenting:

Because it appears to me that the Board erred, as a matter of law, in holding that persons situated similarly to those in *Greyvan Lines v. Harrison*, 156 F.2d 412 (C.A. 7, 1946), *affd.* 331 U.S. 704 (1947), and in *National Van Lines v. N.L.R.B.*, 273 F.2d 402 (C.A. 7, 1960), were employees, rather than finding them to be independent contractors as the law established in those cases would require, I respectfully dissent from my colleagues' decision to grant the Motion for Summary Judgment herein.

⁵ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively

concerning rates of pay, wages, hours, and other terms and conditions of employment with Truck Drivers, Chauffeurs and Helpers Local Union No. 100, 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 rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All single owner-drivers and all nonowner-drivers operating equipment under lease to the Employer, and all drivers operating the Employer's equipment out of its Blue Rock Road and Kellogg Avenue terminals of the Employer's Cincinnati, Ohio, operations, but excluding office clerical employees, guards, multiple owner-nondrivers, and all other supervisors as defined in the Act, and all other employees.

ACE DORAN HAULING
& RIGGING COMPANY
(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, Federal Office Building, Room 2407, 550 Main Street, Cincinnati, Ohio 45202, Telephone 513-684-3686.