Al Landers Dump Truck, Inc., and Dump Trucks, Inc. *and* International Brotherhood of Painters and Allied Trades, AFL–CIO. Case 12–CA–5131

July 23, 1971

DECISION AND ORDER

BY CHAIRMAN MILLER AND MEMBERS BROWN AND JENKINS

Upon a charge filed on March 22, 1971, by International Brotherhood of Painters and Allied Trades, AFL–CIO, herein called the Union, and duly served on Al Landers Dump Trucks, Inc., and Dump Trucks, Inc., herein called the Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 12, issued a complaint on April 9, 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 December 22, 1970, following a Board election in Case 12–RC–3700 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 or about January 6, 1971, 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 April 21, 1971, Respondent filed its answer and amendment to answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On May 7, 1971, counsel for the General Counsel filed directly with the Regional Director a Motion to Strike Portions of Respondent's Answer and for Summary Judgment, and by order of the same date, the Regional Director referred the motion to the Board. Counsel for the General Counsel contends that Respondent's answer and amendment to answer raise no issue litigable in the instant unfair labor practices proceeding and requests the Board to grant the Motion for Summary Judgment. Subsequently, on May 17, 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, called Answer to Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this 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 answer to the complaint and in its response to the Notice to Show Cause, the Respondent raises the issues as to the Board's jurisdiction over the Respondent and the propriety of the truckdriver unit found appropriate in Case 12–RC–3700. Accordingly, it contends that the Motion for Summary Judgment should not be granted. We find no merit in these contentions.

The record in the aforesaid representation case shows that, after a hearing in which the Respondent participated, the Regional Director issued on November 16, 1970, his Decision and Direction of Election in which he found, *inter alia,* that the Respondent Companies, Al Landers Dump Trucks, Inc., and Dump Trucks, Inc., constituted a single employer whose more than $50,000 local purchases of fuel, originating outside the State of Florida, were sufficient to meet the Board's jurisdictional standard. He also found that the truckdrivers were employees of the Respondent, and not independent contractors, and that they, with the customary exclusions, constituted an appropriate unit.

In its letter of November 19, 1970, the Respondent questioned the Regional Director's inclusion of Federal excise taxes and Florida gasoline taxes in his computation of the amount of local purchases of out-of-state fuel upon which he based his finding that the Respondent met the Board's jurisdictional standard. By letter dated November 23, 1970, the Regional Director advised the Respondent that, since the Board includes taxes with respect to a sale as a part of cost in determining an employer's gross volume of business, the inclusion of taxes was not cause to change his jurisdictional finding.

On November 25, 1970, the Respondent filed with the Board a Request for Review of the Regional Director's Decision raising the questions of jurisdiction and of unit. While in effect conceding that there

[1] Official notice is taken of the record in the representation proceeding, Case 12–RC–3700 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 NLRA.

might be some Board authority for the inclusion of Federal excise taxes, the Respondent argued that the Florida gasoline tax was strictly a consumer tax, not part of the purchase price of gasoline by a dealer, and, if proper allowance were made for such tax, the Respondent's local purchases of out-of-state fuel would be somewhat less than the $50,000 required by the Board's jurisdictional standard. The Respondent also argued that it did not have any truckdriver employees, that all truckdrivers referred to the construction companies were independent contractors, and that the Regional Director had misconstrued the evidence before him and the application of the Florida Public Service Commission Regulations. On December 9, 1970, the Board, with Chairman Miller dissenting, denied review as raising no issues warranting review.[2]

Thereafter, pursuant to the Regional Director's Decision and Direction of Election in Case 12–RC–3700, an election by secret ballot was conducted on December 11, 1970, among the employees in the appropriate truckdriver unit, a majority of whom designated the Union as their representative for the purposes of collective bargaining with the Respondent, and on December 22, 1970, the Regional Director certified the Union to that effect.

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.[4]

The Respondent also generally denies the allegations of the complaint that the Union requested the Respondent to bargain in December 1970, January 1971, February 1971, and on March 5, 1971, although its answer admits that it refused to bargain because of improper requests to bargain. To support the allegations in the complaint that the Union, on March 5, 1971, orally and in writing, requested the Respondent to meet and bargain collectively concerning wages, hours, and working conditions of the employees in the certified unit, and to controvert the Respondent's denials, counsel for the General Counsel attached to his Motion for Summary Judgment a letter dated March 5, 1971, in which the Union purported to request the Respondent to set a date "to continue in good faith our Collective Bargaining Agreement Negotiation as stipulated by the National Labor Relations Act." In its response to the Notice to Show Cause, the Respondent neither alludes to nor seeks to controvert the March 5, 1971, written request and, therefore, this request stands admitted.[5] However, while conceding, as it did in its answer, that it has refused to bargain, the Respondent contends that the request for bargaining was improper in that the Union failed to request that the Respondent bargain only concerning alleged employees in the appropriate unit and that the Union demanded bargaining on matters other than rates of pay, wages, hours of employment, and other terms and conditions of employment. We find no merit in this contention. The Board and the courts have repeatedly held that a valid request to bargain need not be made in any particular form, or in *haec verba,* so long as the request clearly indicates a desire to negotiate and bargain on behalf of the employees in the appropriate unit concerning wages, hours, and other terms and conditions of employment.[6] While the letter of March 5 may not have been artistically or technically worded or stated, under the circumstances herein, particularly the fact that the Board had just recently certified the Union under the Act as the exclusive bargaining representative of the employees in the appropriate truckdriver unit, we find that the March 5, 1971, letter was a sufficiently clear and proper request to bargain which the Respondent unlawfully refused to honor.[7] We shall, accordingly, grant the Motion for Summary Judgment.

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

[2] With respect to the inclusion of Federal, state, and local taxes in computing an employer's gross volume of business in determining the applicability of the Board's jurisdictional standards, see *Arne Falk, Inc.,* 161 NLRB 1458, 1462, fn. 3, and cases cited therein.

[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 to the complaint, the Respondent also denies that it supplies truckdrivers for construction concerns or leases trucks and drivers to various construction firms, that Dump Trucks, Inc., and Al Landers Dump Truck, Inc., constitute a single employer within the meaning of the Act, that the Union is a labor organization, and that since December 22, 1970, the Union has been the exclusive representative of the employees in the appropriate unit. All of the issues raised by these denials were determined in the representation proceeding in Case 12–RC–3700, and, accordingly, they are not litigable in the instant unfair labor practice proceeding.

[5] *The May Department Stores Company,* 186 NLRB No 17, and *Carl Simpson Buick, Inc.,* 161 NLRB 1389.

[6] *Columbian Enameling & Stamping Co., Inc.,* 306 U.S. 292 (1939). *N.L.R.B.* v. *Southeastern Rubber Mfg Co.,* 213 F.2d 11 (C.A. 5); *N.L.R.B.* v. *Dallas Concrete Co,* 212 F.2d 98 (C.A. 5); *Welcome-American Fertilizer Co.,* 169 NLRB 862; *Bay Standard Products Mfg. Co.,* 167 NLRB 340, citing *Joy Silk Mills, Inc.* v. *N.L.R.B.,* 185 F.2d 732, 741 (C.A.D.C.), cert. denied 341 U.S. 914; *M. Koppel Company,* 166 NLRB 375.

[7] *M. Koppel Co., supra.*

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent, Florida corporations, with its principal places of business in Miami, Florida, is engaged in the business of providing trucking services for construction firms, and, from the same office, operates as truck brokerage companies, leasing trucks and drivers to various construction firms. The Respondent Companies constitute a single employer within the meaning of the Act.

During the past fiscal year, the Respondent has provided brokerage services for various construction firms valued in excess of $50,000. During this same period, the Respondent has purchased goods and materials valued in excess of $50,000 from Florida suppliers who received such goods and materials directly from outside the State of Florida.

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

International Brotherhood of Painters and Allied Trades, AFL–CIO, 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 truckdrivers employed by the Respondent at its Miami, Florida, place of business, but excluding office clerical employees, guards, and supervisors as defined in the Act.

2. The certification

On December 11, 1970, a majority of the employees of Respondent in said unit, in a secret ballot election conducted under the supervision of the Regional Director for Region 12 designated the Union as their representative for the purpose of collective bargaining with the Respondent. The Union was certified as the collective-bargaining representative of the employees in said unit on December 22, 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 on or about March 5, 1971, 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 March 5, 1971, and continuing at all times thereafter to date, the Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that the Respondent has, since March 5, 1971, 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 Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785; *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229, enfd. 328 F.2d 600 (C.A. 5), cert. denied 379

U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421, enfd. 350 F.2d 57 (C.A. 10).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. Al Landers Dump Truck, Inc., and Dump Trucks, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. International Brotherhood of Painters and Allied Trades, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.
3. All truckdrivers employed by the Respondent at its Miami, Florida, place of business, but excluding office clerical employees, guards, and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.
4. Since December 22, 1970, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.
5. By refusing on or about March 5, 1971, 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, Al Landers Dump Truck, Inc., and Dump Trucks, Inc., 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 International Brotherhood of Painters and Allied Trades, AFL–CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

All truckdrivers employed by the Respondent at its Miami, Florida, place of business, but excluding office clerical 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 in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Miami, Florida, place of business copies of the attached notice marked "Appendix."[8] Copies of said notice, on forms provided by the Regional Director for Region 12 after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 12, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

CHAIRMAN MILLER, dissenting:

As I would have granted review to consider the issue of the drivers' alleged independent contractor status, I would not grant the General Counsel's Motion for Summary Judgment.

[8] In the event that the Board's 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 International Brotherhood of Painters and Allied Trades, 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 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 truckdrivers employed by the Respondent at its Miami, Florida, place of business, but excluding office clerical employees, guards, and supervisors as defined in the Act.

AL LANDERS DUMP TRUCK, INC., AND DUMP TRUCKS, INC.
(Employer)

Dated By
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Room 706, Federal Office Building, 500 Zack Street, Tampa, Florida 33602, Telephone 813–228-7227.