

White Knight Manufacturing Company and Textile Workers Union of America, AFL-CIO, CLC. Case 15-CA-4249

March 31, 1972

DECISION AND ORDER

BY CHAIRMAN MILLER AND MEMBERS FANNING AND KENNEDY

Upon a charge filed on September 16, 1971, by Textile Workers Union of America, AFL-CIO, CLC, herein called the Union, and duly served on White Knight Manufacturing Company, herein called the Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 15, issued a complaint on October 1, 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 12, 1971, following a Board election in Case 15-RC-4589 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 September 7, 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 October 12, 1971, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On October 20, 1971, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on October 27, 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 failed to file a response to Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the Na-

tional Labor Relations Board has delegated its authority in 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, the Respondent denies the status of the Union as majority representative of its employees, contending that the conduct alleged in the objections to the election precluded a free and fair vote and that the Board failed to afford it the opportunity for a hearing thereon. The Respondent, in effect, raises the same arguments which it presented to the Board in its exceptions to the Regional Director's Report on Objections. We find no merit in the Respondent's contentions and arguments.

The election in Case 15-RC-4589, won by the Union, was conducted pursuant to a Stipulation for Certification Upon Consent Election. Following the election, the Respondent filed timely objections alleging, in substance, that (1) union officials and others threatened eligible employees who took positions against the Union, (2) unknown persons damaged an eligible employee's property because of his opposition to the Union, (3) union officials made deliberate misrepresentations to eligible employees, and (4) such conduct destroyed the laboratory conditions necessary for a fair and free election. In addition, the Respondent requested a hearing, if there was a factual basis for setting aside the election. After an investigation, the Regional Director issued and served upon the parties a Report on Objections in which he found that the Respondent's objections raised no material or substantial issues with respect to the election or conduct thereof, and recommended that the objections be overruled in their entirety and the Union certified.

The Respondent filed timely exceptions to the Regional Director's report. Having considered the entire record, including the Respondent's objections and exceptions and the Regional Director's report, the Board was of the opinion 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 would require a hearing. Accordingly, the Board certified the Union as the exclusive bargaining representative of the employees in the stipulated appropriate unit. The Respondent's answer in this unfair labor practice case raises the same issues, contentions, and arguments which it advanced in the underlying representation case, and which the Board had previously considered and denied.

¹ Official notice is taken of the record in the representation proceeding, Case 15-RC-4589, 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.

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.²

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

Respondent, an Alabama corporation, is engaged in the manufacture of hospital supplies at its plant on Lakeview Road, Ozark, Alabama. During the past 12 months, a representative period, the Respondent in the course and conduct of its business, purchased and received goods and materials valued in excess of \$50,000 directly from points outside the State of Alabama. During the same period, Respondent sold and shipped goods valued in excess of \$50,000 directly to points outside the State of Alabama.

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

Textile Workers Union of America, AFL-CIO, CLC 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 production and maintenance employees in the Respondent's Ozark, Alabama, plant, excluding office clerical employees, professional employees, plant guards and supervisors as defined in the Act.

2. The certification

On May 5, 1971, 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 15, 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 12, 1971, 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 August 23, 1971, and at all times thereafter, the Union has requested the Respondent to bargain collectively with it as the exclusive collectively-bargaining representative of all employees in the above-described unit. Commencing on or about September 7, 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 September 7, 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

² 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).

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. White Knight Manufacturing Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Textile Workers Union of America, AFL-CIO, CLC is a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees in the Respondent's Ozark, Alabama, plant, excluding office clerical employees, professional employees, plant 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 August 12, 1971, 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 September 7, 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, White Knight Manufacturing 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 Textile Workers Union of America, AFL-CIO, CLC as the exclusive bargaining representative of its employees in the following appropriate unit:

All production and maintenance employees in the Respondent's Ozark, Alabama, plant, excluding office clerical employees, professional employees, plant 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 Ozark, Alabama, plant, copies of the attached notice marked "Appendix."³ Copies of said notice, on forms provided by the Regional Director for Region 15, 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.

³ 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."

(c) Notify the Regional Director for Region 15, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

CHAIRMAN MILLER, dissenting:

I would not grant summary judgment here. In the underlying representation case this Board erred, in my view, in failing to grant a hearing on factually contested matters.

After the election, Respondent herein filed objections alleging that employees had been threatened with bodily harm because they were taking a position against the Union. One of the objections also alleged that an employee had been threatened by an anonymous telephone call in a manner suggesting that harm would befall him in some other manner than physical bodily harm, and that thereafter his car was defaced with an unidentified sticky substance.

The Regional Director overruled the objections and did not order a hearing on the ground that neither the threats nor the damage to the automobile were shown to have been attributable to agents of the Union, and on the further ground that an insufficient number of employees were affected by the alleged threats to generate an atmosphere of fear which would have impaired the voters' right of free choice.

In my opinion, neither ground was sufficient to support a dismissal of the alleged objectionable conduct without a hearing.

The courts have made clear that the "agency" test will not do in these matters. As the Court of Appeals for the First Circuit recently said in *Cross Baking Company, Inc. v. N.L.R.B.*, 453 F.2d 1346:

Von Dreden was the principal in-plant union advocate. The Board regards it important that she was not shown to be a paid union agent. The question, however, is not the culpability of the union, but whether an atmosphere of fear and coercion was created in fact. See *Home Town Foods, Inc. v. N.L.R.B.*, 5 Cir., 1967, 379 F.2d 241, 244; *Shoreline Enterprises of America, Inc. v. N.L.R.B.*, 5 Cir., 1959, 262 F.2d 933, 942. It does not follow that fear would be less effective if it had an unofficial origin. Indeed, we can visualize situations where it might be more effective. If union officials instigated violence, antiunion employees might gain adherents to get rid, once and for all, of a belligerent union by voting against it, whereas if the atmosphere was the product of co-employees, the rest of the employees might feel they were going to be left with a disagreeable situation whatever should happen in the election, and hence had best learn to live with it. In any event, we agree with the earlier position of the Board that, regardless of whether coercive acts are shown to be attributable to the union itself, "[t]he important fact

is that such conditions existed and that a free election was thereby rendered impossible." *Diamond State Poultry Co.*, 1953, 107 NLRB 3, 6.

There should, therefore, have been a hearing to determine the nature of the threats and the extent to which they were communicated to other employees, so that a determination could be made as to whether there was a sufficient effect on the atmosphere in which the election was conducted as to require that a second election be run under more desirable circumstances.

The election here was decided by four votes. This close margin makes it particularly imperative that we determine the nature and extent of conduct which may, at least, have tipped the scales by improper means.

While I am reluctant to make this determination here, when it was not made in the representation case itself, yet one of the functions of this unfair labor practice route to police our certifications is to safeguard due process by giving us an opportunity to again review whether our representation procedures have secured to all parties the rights the law provides. Here I believe we erred in not requiring a necessary hearing, and I would act now to cure that defect.

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 Textile Workers Union of America, AFL-CIO, CLC 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 production and maintenance employees in the Respondent's Ozark, Alabama, plant, excluding office clerical employees, professional employees, plant guards and supervisors as defined in the Act.

