Westinghouse Broadcasting Company, Inc. (WJZ–TV, Channel 13) *and* Directors Guild of America, Inc. Case 5–CA–7122

June 19, 1975

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND PENELLO

Upon a charge filed on February 5, 1975, by Directors Guild of America, Inc., herein called the Union, and duly served on Westinghouse Broadcasting Company, Inc. (WJZ–TV, Channel 13), herein called the Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 5, issued a complaint on February 26, 1975, 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 an Administrative Law Judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on January 16, 1975, following a Board election in Case 5–RC–8865 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 February 3, 1975, 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 March 10, 1975, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint, and asserting affirmative defenses thereto. Respondent argues that the unit found appropriate by the Board includes managerial and/or supervisory positions, thus the election and resulting certification of the Union are invalid.

On March 14, 1975, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment, asserting that the Respondent, by its answer, is attempting to relitigate issues raised and resolved in the underlying representation proceeding. Subsequently, on April 2, 1975, the Board issued an order transferring the proceeding before it and a notice to show cause why the General Counsel's motion should not be granted. Respondent filed a memorandum in opposition to the notice to show cause, asserting that the Board should allow litigation of the complaint or reopen the record in Case 5–RC–8865 for the submission of further briefs and the presentation of oral argument, and, because of the impact of its decision on the television broadcasting industry, for the introduction of evidence of industry practice. Respondent also argues that the Board failed to fully evaluate credible evidence and to truly consider the managerial status of the producer/directors in light of the Supreme Court's decision in *N.L.R.B.* v. *Bell Aerospace Company, et al.*, 416 U.S. 267 (1974).

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding,[2] the Board makes the following:

Ruling on the Motion for Summary Judgment

As noted above, Respondent basically asserts that the Board erred in several respects in its unit determination in the representation proceeding, and argues that the Board should receive evidence concerning industry practice and the effect the Board's decision may have thereon, either by reopening the representation case record or by litigation of the instant complaint.

The record in Case 5–RC–8865 indicates that, following the hearing before a Hearing Officer, the proceeding was transferred to and continued before the Board. At the hearing and before the Board, Respondent argued, *inter alia*, that the producer/directors were managerial and/or supervisory positions, and that the Supreme Court's decision in *N.L.R.B.* v. *Bell Aerospace Company, et al., supra*, required a finding that these individuals were managerial employees, thus their inclusion in the unit would be inappropriate. On November 26, 1974, the Board issued a Decision and Direction of Elections[3] finding that the producers/directors were not supervisors and not managerial and that the unit sought by the Union which included producer/directors was appropriate and directing an election therein. On January 8, 1975, an election was conducted which

[1] Official notice is taken of the record in the representation proceeding, Case 5–RC–8865, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (C.A. 4, 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (C.A. 5, 1969); *Intertype Co.* v. *Penello*, 269 F Supp 573 (D.C. Va., 1957); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (C.A. 7, 1968); Sec. 9(d) of the NLRA.

[2] Respondent's request that oral argument be held is denied as the General Counsel's motion and the Respondent's memorandum in opposition to the notice to show cause adequately present the positions of the parties.

[3] 215 NLRB No. 26.

resulted in a 5 to 0 vote in favor of the Union. On January 16, 1975, the Regional Director in the absence of objections certified the Union.

From the foregoing it appears that the issues surrounding the managerial and/or supervisory status of producer/directors were fully litigated in the underlying representation proceeding, including the application of the Supreme Court's decision in *Bell Aerospace Company* thereto. Respondent was provided a full opportunity to present evidence before the Hearing Officer and brief its position to the Board. Respondent makes no showing that it could not have presented evidence on the aspects of the case it now argues require a hearing. It does not assert that such evidence is newly discovered or was unavailable for introduction in that proceeding. In these circumstances, we are not disposed now, approximately a year after the representation case hearing, to consider such evidence, either by reopening the representation case record or as introduced at a hearing before an Administrative Law Judge on the instant complaint.

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.[4]

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.[5] 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 is an Indiana corporation with its principal offices in New York, New York, and is engaged in the operation of a television station at its Television Hill, Baltimore, Maryland, location. During the preceding 12 months, a representative period, Respondent had gross sales in excess of $100,000. During the same period, Respondent received in interstate commerce income from the advertising of national brand products.

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

Directors Guild of America, Inc., 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 staff producer/directors and all others doing the work of directors, excluding all others."

2. The certification

On January 8, 1975, 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 5 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 January 16, 1975, 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 January 20, 1975, 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. Com-

[4] 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).

[5] In its answer to the complaint, Respondent denies the allegations that the Union requested bargaining and it refused to bargain. However, attached to the General Counsel's motion as exhibits are copies of correspondence between the Union and Respondent. By letter dated January 20, 1975, the Union suggested arranging a mutually convenient time to meet and discuss signing a collective-bargaining agreement. By letter dated February 3, 1975, Respondent advised the Union that, until the status of the producer/directors was established, it was respectfully declining to enter into collective-bargaining negotiations with the Union. Respondent has not controverted these documents, or their content. Accordingly, we deem these allegations of the complaint to be true, and so find. *Teledyne, Landis Machine*, 212 NLRB 73 (1974); *The May Department Stores Company*, 186 NLRB 86 (1970); *Carl Simpson Buick, Inc.*, 161 NLRB 1389 (1966).

mencing on or about February 3, 1975, 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 February 3, 1975, 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 (1962); *Commerce Company d/b/a Lamar Hotel,* 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (C.A. 5, 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Company,* 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (C.A. 10, 1965).

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

CONCLUSIONS OF LAW

1. Westinghouse Broadcasting Company, Inc. (WJZ–TV, Channel 13), is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Directors Guild of America, Inc., is a labor organization within the meaning of Section 2(5) of the Act.

3. All staff producer/directors and all others doing the work of directors, excluding all others, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since January 16, 1975, 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 February 3, 1975, 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, Westinghouse Broadcasting Company, Inc. (WJZ–TV, Channel 13), Television Hill, Baltimore, Maryland, 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 Directors Guild of America, Inc., as the exclusive bargaining representative of its employees in the following appropriate unit: "All staff producer/directors and all others doing the work of directors, excluding all others."

(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 Television Hill, Baltimore, Maryland, facility copies of the attached notice marked "Appendix."[6] Copies of said notice, on forms provided by the Regional Director for Region 5, 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 5, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

[6] 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 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 Directors Guild of America, Inc., 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 staff producer/directors and all others doing the work of directors, excluding all others."

WESTINGHOUSE BROADCASTING COMPANY, INC. (WJZ–TV, CHANNEL 13)