

A-1 Sheet Metal Works, Inc. and Sheet Metal Workers' International Association, Local Union No. 127, AFL-CIO. Case 1-CA-10406

June 27, 1975

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND
PENELLO

Upon a charge filed on January 23, 1975, by Sheet Metal Workers' International Association, Local Union No. 127, AFL-CIO, herein called the Union, and duly served on A-1 Sheet Metal Works, Inc., herein called the Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 1, issued a complaint on February 27, 1975, 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 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 September 24, 1974, following a Board election in Case 1-RC-13063 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 December 13, 1974, 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 18, 1975, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint, and setting forth affirmative defenses.

On April 7, 1975, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on April 22, 1975, 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 entitled "Respondent's Showing of Cause Why the General

Counsel's Motion for Summary Judgment Should Not be Granted."

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, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint, Respondent denies its status as an employer and the Union's status as a labor organization within the meaning of the Act, the conduct of the election, and the Union's majority status and certification as a result thereof. Affirmatively, Respondent asserts that the Union's majority status and certification are invalid, based on evidence, newly discovered or unavailable at the time of the hearing in the representation case, which has a bearing on the results in that proceeding. In its response to the Notice to Show Cause, Respondent reasserts its contention concerning the newly discovered evidence in more detail and attaches exhibits in support of this contention.

Review of the record, including that of the representation proceeding, indicates that following an election² conducted on February 1, 1974, in which the Union received a majority of the votes cast, Respondent filed timely objections to conduct affecting the results of the election. Respondent alleged that (1) the Union offered to waive its initiation fee for employees who signed membership authorization cards before the election, and (2) by the above and other acts the Union had interfered with a free choice in the election. Following investigation, the Regional Director issued a Supplemental Decision on Objections on March 15, 1974, finding no merit in Objection 2, and that Objection 1 involved issues requiring credibility determinations which should be made on the basis of a record developed at a hearing. After the hearing on April 29, 1974, the Hearing Officer issued his Report on Objections on June 4, 1974, finding, *inter alia*, that the Union's agent had advised employees that there would be no initiation fees for current employees, and that there was no evidence that the waiver of fees was used to induce any employee to sign an authorization card. He further found that the Union agent had not misrepresented the waiver of initiation

¹ Official notice is taken of the record in the representation proceeding, Case 1-RC-13063, 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 The election was conducted pursuant to a Decision and Direction of Election issued by the Regional Director on January 2, 1974, in which it was found, *inter alia*, that on the basis of facts set forth therein the Respondent was an employer engaged in commerce and the Union a labor organization within the meaning of the Act.

fees, but had stated policy on the basis of his experience, and that whether or not the Union acted *ultra vires* is not material to whether the waiver was proper. On these bases, he recommended that Respondent's Objection 1 be overruled. Respondent filed timely exceptions to this report assigning error to several of the Hearing Officer's determinations. On September 24, 1974, the Regional Director issued his Second Supplemental Decision on Objections in which he adopted the Hearing Officer's findings, conclusions, and recommendations and certified the Union. Respondent then requested review of this decision by the Board, again asserting that the Hearing Officer had erred. On November 13, 1974, the Board denied Respondent's request for review as it raised no substantial issues warranting review.

As noted above, Respondent offers evidence which it asserts was unavailable at the time of the hearing in the representation case. This evidence consists of alleged copies of contracts between the Union and other employers which contain provisions whereby the particular employer is to deduct, *inter alia*, initiation fees from the wages of employees so desiring. By these documents, Respondent essentially seeks to raise issues concerning the testimony of a union agent at the representation case hearing to the effect that employees of one of these employers pay no initiation fee. We note that approximately a year has elapsed since the representation case hearing, during a substantial portion of which Respondent was before the Regional Director or the Board litigating issues involving the Union's offer to waive initiation fees. Respondent makes no showing that, through the exercise of due diligence, it could not have produced these documents in those proceedings and litigated this matter. Moreover, the statement of the Union agent made at the hearing, subsequent to the offer to waive fees and the election, has no bearing on the validity of the offer itself made prior to the election during the organizational campaign. In these circumstances, we are not disposed to disturb our rulings in the representation case as a result of Respondent's alleged previously unavailable evidence or order a hearing thereon in this proceeding.

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

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 With regard to Respondent's lack of knowledge of the filing and service of the charge in its answer, we note that the record herein contains the unfair labor practice charge with its filing date as well as a form indicating

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 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 a Massachusetts corporation with its principal office and place of business at 919 Hartford Turnpike (Route 20) in the city of Shrewsbury, county of Worcester, Commonwealth of Massachusetts, where it is and at all times material hereto has been engaged in the manufacture, sale, and distribution of sheetmetal fabrications and related products. In the course of its business during the past year, Respondent purchased materials valued in excess of \$50,000, which it received directly from sources outside the Commonwealth of Massachusetts.

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

Sheet Metal Workers' International Association, Local Union No. 127, 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:

service thereof by registered mail, and a return receipt therefor signed by Respondent's agent. Absent any controverting evidence we find that the charge was filed and service thereof was effected on Respondent, as alleged in the complaint.

All production and maintenance employees including truck drivers, shipping and receiving employees employed at the Employer's Shrewsbury, Massachusetts, location, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

2. The certification

On February 1, 1974, 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 1 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 September 24, 1974, 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 November 16, 1974, 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 December 13, 1974, 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 December 13, 1974, 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. A-1 Sheet Metal Works, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. Sheet Metal Workers' International Association, Local Union No. 127, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.
3. All production and maintenance employees including truck drivers, shipping and receiving employees employed at the Employer's Shrewsbury, Massachusetts, location, excluding all office clerical employees, professional 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 September 24, 1974, 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 December 13, 1974, 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 A-1 Sheet Metal Works, Inc., Shrewsbury, Massachusetts, 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 Sheet Metal Workers, International Association, Local Union No. 127, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

All production and maintenance employees including truck drivers, shipping and receiving employees employed at the Employer's Shrewsbury, Massachusetts, location, excluding all office clerical employees, professional 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 Shrewsbury, Massachusetts, location copies of the attached notice marked "Appendix."⁵ Copies of said notice, on forms provided by the Regional Director for Region 1, after being duly signed by Respondent's representatives, 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 1, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

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 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 Sheet Metal Workers' International Association, Local Union No. 127, 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 production and maintenance employees including truck drivers, shipping and receiving employees employed at the Employer's Shrewsbury, Massachusetts, location, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

A-1 SHEET METAL
WORKS, INC.