

**American Optical Corporation, Contact Lens Division
and Optical Technicians and Workers Union Local
505, Service Employees International Union, AFL-
CIO. Case 20-CA-10009**

July 10, 1975

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND PENELLO

Upon a charge filed on February 28, 1975, by Optical Technicians and Workers Union Local 505, Service Employees International Union, AFL-CIO, herein called the Union, and duly served on American Optical Corporation, Contact Lens Division, herein called the Respondent, the General Counsel of the National Labor Relations Board, by the Acting Regional Director for Region 20, issued a complaint on March 31, 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 December 27, 1974, following a Board election in Case 20-RC-11872, 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 29, 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 April 11, 1975, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint, and alleging an affirmative defense.

On April 25, 1975, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment, asserting, in effect, that Respondent, by its answer to the complaint, was attempting to relitigate issues raised and litigated in the underlying representation case. Subsequently, on May 5,

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. On June 5, 1975, the General Counsel filed opposition to Respondent's response to the 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 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

Respondent's opposition in this matter, as set forth in its answer to the complaint and response to the Notice To Show Cause, centers on the Board's finding that the individual casting the determinative ballot in the representation election was a supervisor within the meaning of the Act and sustaining a challenge to her ballot on this basis. Respondent asserts that the Board erred in this determination for the reasons set forth in its brief in support of its exceptions to the Hearing Officer's report in that proceeding, and because the status of the challenged voter as a temporary supervisor has not been resolved. Further, Respondent urges that a preelection agreement concerning the challenged voter's eligibility to vote should control.

Review of the record, including that of the representation case, 20-RC-11872, indicates that an election was conducted on April 19, 1974, pursuant to a Stipulation for Certification Upon Consent Election, in which the result was 2 votes to 1 in favor of the Union, with a determinative challenged ballot. The Union filed timely objections to conduct affecting the results of the election. On May 14, 1974, the Regional Director issued his report on objections and challenged ballot in which he dismissed the objections because no evidence had been submitted in support thereof, and ordered a hearing on the issues raised by the challenged ballot. On June 3, 1974, the Board, absent exceptions to this report, adopted the Regional Director's recommendations.

After a hearing, the Hearing Officer issued a report on challenged ballot on July 31, 1974, finding, *inter alia*, that the challenged voter was a supervisor and recommending that the challenge be sustained. Respondent filed timely exceptions to this report, assigning error to the Hearing Officer's determinations in several respects, and arguing, *inter alia*, that the voter's supervisory duties, if any, were temporary. On December 27, 1974, the Board issued a Decision and

¹ Official notice is taken of the record in the representation proceeding, Case 20-RC-11872, 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.

Certification of Representative, adopting the Hearing Officer's findings, conclusions, and recommendations, noting in footnote 1 the basis for its adoption of the Hearing Officer's conclusion that the voter was a supervisor, and certifying the Union.

From the foregoing, it appears that Respondent raised and fully litigated in the representation case the challenged voter's supervisory status, including the alleged temporary status.

With regard to the preelection agreement concerning the eligibility of the challenged voter, Respondent attaches a letter dated April 2, 1974, from a Board agent which mentions that the Union had assured that it would not question the inclusion of the challenged individual and would not challenge her eligibility to vote. Respondent basically asserts that this preelection agreement should be controlling on the voter's eligibility. We do not agree. While the Board favors and with some exceptions gives effect to preelection eligibility agreements,² it is settled that such agreements cannot be controlling when the inclusion of a certain employee contravenes the Act or established Board policies.³ Inasmuch as the voter challenged herein was challenged on the basis of being a supervisor, and her status as such was subsequently established, it would contravene the Act to permit her to vote in the election, and hence the preelection agreement is not controlling.

Further, although Respondent was clearly aware of this agreement well before the election, it did not allude to it or raise it as an issue in the representation proceeding before the Board. Instead, it now offers it at this late date, approximately a year after the election, as a factor in determining the eligibility of the challenged voter. In these circumstances, we are not disposed to reconsider our rulings in the representation case on the basis of this evidence, and allow Respondent to relitigate matters it could have raised and litigated therein.⁴

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.⁵

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 is a Delaware corporation with a place of business in San Francisco, California, and has been engaged in the manufacture of optical goods, supplies, and equipment at various facilities throughout the United States. During the past year, Respondent, in the course and conduct of its business operations, purchased and received at its facilities in the State of California goods valued in excess of \$50,000 which were shipped to it from sources located outside the State of California. During the same period, Respondent sold and shipped from its facilities in the State of California goods and products valued in excess of \$50,000 directly to purchasers located outside the State of California.

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

Optical Technicians and Workers Union Local 505, Service Employees International Union, 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 con-
Rules and Regulations of the Board, Secs 102.67(f) and 102 69(c)

² *Norris-Thermador Corporation*, 119 NLRB 1301 (1958); *Fisher-New Center Company*, 184 NLRB 809 (1970).

³ *Fisher-New Center Company*, *supra*.

⁴ Member Penello agrees that the asserted preelection agreement concerning the eligibility of the challenged individual is not entitled to any weight, but relies solely on the failure of the Respondent to raise this issue in the representation proceeding or to offer the now proffered letter of April 2, 1974. Accordingly, he finds it unnecessary to consider whether the claimed preelection eligibility agreement is binding under *Norris-Thermador Corporation*, 119 NLRB 1301 (1958). Cf. *Banner Bedding, Inc.*, 214 NLRB No. 139 (1974).

⁵ See *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146, 162 (1941);

stitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

All contact lens production employees of the Employer at its 560 Sutter Street, San Francisco, California, contact lens division operation; excluding all other employees, office clerical employees, managerial employees, sales personnel, guards, and supervisors as defined in the Act.

2. The certification

On April 19, 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 20 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 27, 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 January 16, 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. Commencing on or about January 29, 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 January 29, 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. American Optical Corporation, Contact Lens Division, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Optical Technicians and Workers Union Local 505, Service Employees International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All contact lens production employees of the Employer at its 560 Sutter Street, San Francisco, California, contact lens division operation; excluding all other employees, office clerical employees, managerial employees, sales personnel, 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 27, 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 January 29, 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, American Optical Corporation, Contact Lens Division, San Francisco, California, 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 Optical Technicians and Workers Union Local 505, Service Employees International Union, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

All contact lens production employees of the Employer at its 560 Sutter Street, San Francisco, California, contact lens division operation; excluding all other employees, office clerical employees, managerial employees, sales personnel, 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 560 Sutter Street, San Francisco, California, location copies of the attached notice marked "Appendix."⁶ Copies of said notice, on forms provided by the Regional Director for Region 20, after being duly signed by Respondent's representative, shall be posted by Respondent immedi-

ately 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 20, 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 Optical Technicians and Workers Union Local 505, Service Employees International Union, 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 contact lens production employees of the Employer at its 560 Sutter Street, San Francisco, California, contact lens division operation; excluding all other employees, office clerical employees, managerial employees, sales personnel, guards, and supervisors as defined in the Act.

AMERICAN OPTICAL CORPORATION,
CONTACT LENS DIVISION