Westinghouse Broadcasting Company, Inc. (KDKA–TV, Channel 2) *and* Directors Guild of America, Inc. Case 6–CA–8216

August 28, 1975

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND PENELLO

Upon a charge filed on April 9, 1975, by Directors Guild of America, Inc., herein called the Union, and duly served on Westinghouse Broadcasting Company, Inc. (KDKA–TV, Channel 2), herein called the Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 6, issued a complaint on April 15, 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 March 19, 1975, following a Board election in Case 6–RC–6897, 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 April 4, 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 25, 1975, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint, and asserting affirmative defenses. The Respondent argues that the unit found appropriate by the Board includes supervisory and/or managerial positions, plus the election and the resulting certification of the Union are invalid.

On May 8, 1975, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment, submitting, in effect, that Respondent, by its answer to the complaint, seeks to relitigate issues which were raised and litigated in the underlying representation case. He moved, *inter alia,* that the Board strike all of Respondent's defenses set forth in its answer, and issue an appropriate order to remedy the violations found. Subsequently, on May 19, 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 "Memorandum in Opposition To Motion to Show Cause."

Respondent asserts, *inter alia,* that the Board should, by reopening the representation case record, by hearing on the instant complaint, or by oral argument, reexamine its representation case unit determination in light of industry practices and standards and the disruptive effects on station labor relations its decision will have. Respondent's requests are denied, as the positions of the parties are adequately set forth in their submissions in this matter, and in the representation proceeding.

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

By denials in its answer to the complaint, Respondent essentially attacks the Board's unit determination in the underlying representation case, and accordingly the validity of the certification of the Union as exclusive bargaining representative of the employees in that unit. By this assertion, the General Counsel contends that Respondent is attempting to relitigate the same issues which were raised and litigated in the representation proceeding and this it may not do.

The record in Case 6–RC–6897 shows that, following 3 days of hearings before a Board Hearing Officer on the status of the producer/directors, the case was transferred to the Board for decision. On January 28, 1975, the Board issued a Decision and Direction of Election[2] in which it concluded, *inter alia,* that the unit containing producer/directors was appropriate as they were neither supervisors nor managerial employees, and directed an election in that unit. In the election conducted March 6, 1975, the Union received a majority of the valid ballots cast and, in the absence of objections to conduct affecting the election results, the Union was certified by the Regional Director on March 19, 1975.

In its response to the Notice to Show Cause, Re-

[1] Official notice is taken of the record in the representation proceeding, Case 6–RC–6897, 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., 1967), *Follett Corp.,* 164 NLRB 378 (1967), enfd. 397 F 2d 91 (C A 7, 1968); Sec. 9(d) of the NLRA.

[2] 216 NLRB No. 64.

spondent also argues that the Board did not fully consider or evaluate the "managerial" status of the producer/directors, particularly in light of the decision of the Supreme Court in *Bell Aerospace*.[3] We find no merit in this contention. Respondent fully briefed the implications of that decision in its brief before the Board in the representation case, and the Board's Decision and Direction of Election fully details the bases leading to its conclusion that producer/directors did not exercise discretion in policy matters as would a truly managerial employee.[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.[6] We shall, accordingly, grant the Motion to Strike Respondent's defenses, and 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 located in New York, New York, and it is engaged in the operation of radio and television stations. The facility involved herein is Respondent's Group-W television facility known as KDKA–TV, Channel 2, located in Pittsburgh, Pennsylvania. During the 12-month period immediately preceding the issuance of the complaint in this proceeding, Respondent, in the course and conduct of its Pittsburgh, Pennsylvania, operation, derived a gross income in excess of $100,000, of which more than $50,000 was derived from the sale of air-time for the advertisement of national brand products manufactured by various companies, individuals, and enterprises and shipped to points outside the States in which they were produced. Further, the value of such goods and products exceeded $50,000.

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 and free lance producer/directors, and all associate producer/directors, excluding all other employees, guards, and supervisors as defined in the Act.

2. The certification

On March 6, 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 6 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 March 19, 1975, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

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[3] *N.L.R.B* v. *Bell Aerospace Company, Division of Textron, Inc*, 416 U.S. 267 (1974).

[4] Citing *General Dynamics Corporation, Convair Division, San Diego Operations*, 213 NLRB No. 124 (1974), wherein fn. 20 thereof the Board cites *Bell Aerospace, supra*, for current judicial approval of the definition of managerial employees.

[5] 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).

[6] In its answer, Respondent denies the allegations that the Union requested bargaining and that it refused. However, attached as exhibits to the General Counsel's motion are copies of letters dated March 26, 1975, and April 4, 1975, respectively, in which the Union requested that Respondent meet with it for the purpose of collective bargaining, and Respondent refused to do so. Neither these letters, nor their import, are controverted by Respondent in its Response to the Notice to Show Cause. Accordingly, we shall deem the allegations of the Union's request to bargain and the Respondent's refusal to be true and Respondent's denials thereof are stricken. *Schwartz Brothers, Inc*, 194 NLRB 150 (1971); *The May Department Stores Company*, 186 NLRB 86 (1970).

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about March 26, 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 April 4, 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 April 4, 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. (KDKA–TV, Channel 2), 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 and freelance producer/directors, and all associate producer/directors, excluding all other 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 March 19, 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 April 4, 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. (KDKA–TV, Channel 2), Pittsburgh, Pennsylvania, 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 representa-

tive of its employees in the following appropriate unit:

> All staff and freelance producer/directors, and all associate producer/directors, excluding all other 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 Pittsburgh, Pennsylvania, facility, copies of the attached notice marked "Appendix." [7] Copies of said notice, on forms provided by the Regional Director for Region 6, 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 6, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

[7] 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 exercises 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 and freelance producer/directors, and all associate producer/directors, excluding all other employees, guards, and supervisors as defined in the Act.

WESTINGHOUSE BROADCASTING COMPANY, INC. (KDKA–TV, CHANNEL 2)