Alpers' Jobbing Company, Inc. *and* Teamsters, Local Union No. 688, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 14–CA–8803

February 9, 1976

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND PENELLO

Upon a charge filed on September 19, 1975, by Teamsters, Local Union No. 688, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union, and duly served on Alpers' Jobbing Company, Inc., herein called the Respondent, the Acting General Counsel of the National Labor Relations Board, herein called the General Counsel, by the Regional Director for Region 14, issued a complaint on September 29, 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 August 4, 1975, following a Board election in Case 14–RC–7875, 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 August 27, 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 October 14, 1975, Respondent filed its answer to the complaint, with attached supplemental affidavits, admitting in part, and denying in part, the allegations in the complaint. Subsequently, Respondent filed an amended answer.

On November 10, 1975, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment and a brief in support thereof with appendices attached. Subsequently, on November 18, 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.

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 and amended answer to the complaint and response to the Notice To Show Cause, Respondent admits the request and refusal to bargain but in substance attacks the Union's certification on the basis of its election objections in the underlying representation case. Respondent further contends that the failure of the Board to grant a hearing on its objections deprived Respondent of due process and that it is entitled to a hearing on these issues. The General Counsel in his Motion for Summary Judgment and brief asserts that Respondent is attempting in this proceeding to relitigate matters decided in the prior representation case and this it may not do. We agree.

The record, including that in the representation Case 14–RC–7875, establishes that pursuant to a Stipulation for Certification Upon Consent Election an election was held on April 4, 1975. The revised tally of ballots issued May 16, 1975, showed 7 votes cast for the Union, 5 against, and 1 void ballot.[2] On May 19, 1975, Respondent filed objections to the election relating to the three challenged ballots, contending in substance that the absence of assistance for two voters, one illiterate, one both illiterate and non-English speaking, the failure to have a bilingual ballot (English and Yiddish), and the conduct of the union observer in challenging the three ballots precluded a fair and impartial election. After investigation, the Regional Director on June 9, 1975, issued his Report on Objections and Recommendations in which he recommended that Respondent's objections be overruled and that the Union be certified. Respondent filed exceptions to the Regional Director's report. On August 4, 1975, the Board, having considered the Regional Director's report, Respondent's exceptions thereto, and the entire record, adopted the

[1] Official notice is taken of the record in the representation proceeding, Case 14–RC–7875, 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] The tally issued after the election showed 6 votes for the Union, 3 against, 1 void, and 3 challenged ballots. Following an investigation, the Regional Director issued his Report on Challenged Ballots and Recommendations recommending that the challenges be overruled and the ballots be opened and counted. No exceptions to the Regional Director's report having been filed, the Board on May 5, 1975, adopted the Regional Director's recommendations, overruled the challenges directed that the ballots be opened and counted and a revised tally be served on the parties.

findings, conclusions, and recommendations of the Regional Director and certified the Union.

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]

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.

In this proceeding Respondent contends for the first time that due process entitled it to a hearing on its objections to the election. Prior to adopting the findings, conclusions, and recommendations of the Regional Director's Report on Objections and Recommendations, the Board considered the report, the Respondent's exceptions thereto, and the entire record in this case. By its adoption of the report recommending that Respondent's objections be overruled, the Board necessarily found that the objections raised no substantial or material issues warranting a hearing.[4] Further, it is well established that the parties do not have an absolute right to a hearing on objections to an election. It is only when the moving party presents a *prima facie* showing of substantial and material issues which would warrant setting aside the election that he is entitled to an evidentiary hearing. It is clear that, absent arbitrary action, this qualified right to a hearing satisfies the constitutional requirements of due process.[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 a Missouri corporation engaged in the warehousing and nonretail sale and distribution of shoes and related products at its 1419 Martin Luther King Drive and 1201 Cass Avenue facilities in St. Louis, Missouri. During the year ending December 31, 1974, a representative period, Respondent in the course and conduct of its business operations, manufactured, sold, and distributed at its St. Louis, Missouri, place of business, products valued in excess of $50,000 of which products in excess of $50,000 were shipped from said place of business to points located outside of the State of Missouri.

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

Teamsters, Local Union No. 688, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, 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 warehouse employees employed at the Respondent's St. Louis, Missouri, facilities, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

2. The certification

On April 4, 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 14, 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 4, 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] 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] *Madisonville Concrete Co., A Division of Corum & Edwards, Inc*, 220 NLRB No. 100 (1975); *Evansville Auto Parts, Inc.*, 217 NLRB No. 101 (1975).

[5] *GTE Lenkurt, Incorporated*, 218 NLRB No 139 (1975); *Heavenly Valley Ski Area, a California Corporation and Heavenly Valley, a Partnership*, 215 NLRB No. 129 (1974).

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

Commencing on or about August 7, 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 August 27, 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 August 27, 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. Alpers' Jobbing Company, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. Teamsters, Local Union No. 688, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.
3. All warehouse employees employed at the Respondent's St. Louis, Missouri, facilities, 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 August 4, 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 August 27, 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 Alpers' Jobbing Company, Inc., St. Louis, Missouri, 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 Teamsters, Local Union

No. 688, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All warehouse employees employed at the Respondent's St. Louis, Missouri, facilities, 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 St. Louis, Missouri, facilities, copies of the attached notice marked "Appendix." [6] Copies of said notice, on forms provided by the Regional Director for Region 14, 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.

[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."

(c) Notify the Regional Director for Region 14, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

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 Teamsters, Local Union No. 688, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, 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 warehouse employees employed at the Respondent's St. Louis, Missouri, facilities, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

ALPERS' JOBBING COMPANY, INC.