American Wholesalers, Inc. *and* Textile Workers Union of America, AFL–CIO. Case 5–CA–7423

February 17, 1976

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND WALTHER

Upon a charge filed on July 31, 1975, by Textile Workers Union of America, AFL–CIO, herein called the Union, and duly served on American Wholesalers, Inc., herein called the Respondent, the Acting General Counsel of the National Labor Relations Board, herein the General Counsel, by the Regional Director for Region 5, issued a complaint on August 28, 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 June 6, 1975, following a Board election in Case 5–RC–8312, 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 July 7, 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 September 5, 1975, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On October 2, 1975, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on October 23, 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 to the complaint and its response to the Notice To Show Cause, Respondent admits the refusal to bargain, but attacks the propriety of the Union's certifications on the basis of its objections to unit scope and composition and to union conduct affecting the results of the election. Respondent also requests reconsideration by the Board of its decision in the underlying representation case and, further, contends that factual issues with respect to employee turnover require a hearing herein.

Review of the record herein, including the record in Case 5–RC–8312, reveals that, pursuant to the Regional Director's Decision and Direction of Election,[2] an election was conducted on February 9, 1973, which the Union won. Respondent filed timely objections to conduct affecting the results of the election, alleging, in substance, threats, harassment, misrepresentations, and a promised waiver of initiation fees. Thereafter, a hearing on the objections was directed by the Acting Regional Director.[3] Following the hearing, the Hearing Officer issued a Report on Objections with findings and recommendations in which he recommended overruling the objections in their entirety. Respondent, thereafter, filed timely exceptions to the Hearing Officer's report and a brief in support thereof. The Regional Director, in his Second Supplemental Decision and Certification of Representative, dated October 12, 1973, adopted the Hearing Officer's recommendations, overruled Respondent's objections in their entirety, and certified the Union. Respondent filed a request with the Board for review of the Regional Director's Second Supplemental Decision on the ground that, *inter alia*, prejudicial error resulted from the Hearing Officer's deferral of cross-examination of Respondent's witnesses. The Board, by telegraphic order dated De-

[1] Official notice is taken of the record in the representation proceeding, Case 5–RC–8312, 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] Following the Decision and Direction of Election, dated January 15, 1973, Respondent requested review thereof, contending the Regional Director erred in finding a single-plant unit appropriate and in excluding order clerks from those employee classifications eligible to vote The Board considered these contentions and, by telegraphic order of Febuary 6, 1973, denied Respondent's request as it raised no substantial issues warranting review.

[3] In his Supplemental Decision and Notice of Hearing, dated March 23, 1973, the Acting Regional Director directed a hearing on all of Respondent's objections with the exception of the objection based on the Union's promised waiver of initiation fees This objection was overruled in its entirety. Respondent, thereafter, requested review of the Acting Regional Director's Supplemental Decision and the Board, by telegraphic order of April 11, 1973, on its own motion, amended the Supplemental Decision and Notice of Hearing to provide for the receipt of all relevant evidence with respect to the initiation fee waiver objection.

cember 18, 1973, granted the request, and, on May 9, 1974, issued its Decision on Review [4] in which it concluded that the Hearing Officer's action constituted prejudicial error, and remanded the case for a hearing *de novo* on Respondent's election objections.

In accord with the Board's Decision, a *de novo* hearing was held on Respondent's objection. After the hearing, the Hearing Officer issued his Report on Objections and Recommendations in which he recommended overruling the objections in their entirety. Respondent, thereafter, excepted to the report basically on the grounds, *inter alia,* (1) that the Hearing Officer allowed the Union to refer to testimony from the first hearing on objections in cross-examining witnesses during the second such hearing, (2) that the Hearing Officer erroneously concluded that the election was not fatally tainted by the Union's coercive campaign conduct, and, (3) that the Hearing Officer failed to order a new election on the ground of alleged substantial employee turnover. The Board considered Respondent's exceptions and brief in support thereof and, on June 6, 1975, a Board panel of Members Fanning and Jenkins, with Member Kennedy dissenting, adopted the Hearing Officer's findings and recommendations and certified the Union.[5]

It thus appears that Respondent seeks to relitigate herein issues, relating to the unit, its election objections, and its report exceptions, which were raised and decided in the representation case. 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.[6]

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 [7] 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.[8] 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, a Maryland corporation, is engaged in the manufacture and wholesale distribution of mattresses, the cutting, binding, and wholesale distribution of carpeting, and the wholesale distribution of appliances at its Landover, Maryland, location. During the preceding 12 months, a representative period, Respondent sold and shipped, in interstate commerce, products valued in excess of $50,000 to points located outside the State of Maryland.

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

Textile Workers Union of America, 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:

[4] 210 NLRB 499 (1974).

[5] 218 NLRB No. 50 (1975)

[6] 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)

[7] In its answer and response to the Notice To Show Cause, Respondent contends special circumstances warrant reconsideration of the underlying representation case decision, citing the second Hearing Officer's allowance of the Union's use of testimony from the first hearing on objections and his conclusions as to election taint which are alleged to be erroneous and contrary to the weight of the evidence. We deny the request for reconsideration as the special circumstances alleged relate to issues which were raised, considered, and resolved in the representation case and which Respondent, in effect, seeks to relitigate herein.

[8] With respect to Respondent's contention that a hearing is required to investigate its allegations of substantial employee turnover which renders the election results unrepresentative of present employee sentiment, we find this contention to be without merit. Initially, we note that Respondent had raised this issue previously in its exceptions to the second Hearing Officer's Report on Objections and Recommendations. Further, it is well settled that, as the Union was selected by a majority of the unit employees, Respondent's obligation to bargain extends for 1 year from the date of the Union's certification, and employee turnover does not constitute "unusual circumstances" within the Supreme Court's decision in *Ray Brooks* v *N.L.R.B.*, 348 U.S. 96 (1954). *Georgetown Dress Corporation,* 217 NLRB No. 8 (1975); *Nichols-Homeshield, Inc.*, 214 NLRB No. 85 (1974). Where, as here, Respondent's factual allegations are not cognizable as a defense to a refusal-to-bargain charge, there are necessarily no substantial and material issues of fact to be determined, and a hearing is not required in such circumstances. See *Janler Plastic Mold Corporation,* 191 NLRB 162 (1971), *Crest Leather Manufacturing Corporation,* 167 NLRB 1085 (1967).

All production and maintenance employees, including truckdrivers, schedulers, production payroll clerks, production ticket sorter, log tag clerk, and cafeteria employees employed by Respondent at its Landover, Maryland, location, excluding office clerical employees, order clerks, payroll clerks, professional employees, guards, and supervisors as defined in the Act.

2. The certification

On February 9, 1973, 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 June 6, 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 June 11, 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 July 7, 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 July 7, 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 activites 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 Wholesalers, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Textile Workers Union of America, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees, including truckdrivers, schedulers, production payroll clerks, production ticket sorter, log tag clerk, and cafeteria employees employed by Respondent at its Landover, Maryland, location, excluding office clerical employees, order clerks, payroll clerks, 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 June 6, 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 July 7, 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 en-

gaged 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 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 Wholesalers, Inc., Landover, 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 Textile Workers Union of America, AFL–CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All production and maintenance employees, including truckdrivers, schedulers, production payroll clerks, production ticket sorter, log tag clerk, and cafeteria employees employed by Respondent at its Landover, Maryland, location, excluding office clerical employees, order clerks, payroll clerks, 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 Landover, Maryland, facility copies of the attached notice marked "Appendix." [9] 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 consectuive 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.

MEMBER WALTHER, dissenting:

I disagree with my colleagues' decision to grant the General Counsel's Motion for Summary Judgment. For many of the reasons stated by Member Kennedy in his dissenting opinion in the underlying representation proceeding,[10] I do not feel that the parties were afforded the *de novo* review which the Board had previously directed.[11] By permitting the Petitioner in the second hearing to cross-examine the Employer's witnesses on the basis of testimony given in the prior hearing, the Hearing Officer effectively perpetuated the procedural defects which the Board found in the first hearing.

For the foregoing reasons, I conclude that the legitimacy of the election has not been established, and the denial of a hearing by the granting of summary judgment only further compounds the error. Accordingly, I would deny the General Counsel's Motion for Summary Judgment.

[9] 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."

[10] *American Wholesalers, Inc.*, 218 NLRB No. 50 (1975).

[11] *American Wholesalers, Inc*, 210 NLRB 499 (1974).

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 Textile Workers Union of America, 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 de-

scribed 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 truckdrivers, schedulers, production payroll clerks, production ticket sorter, log tag clerk, and cafeteria employees employed by Respondent at its Landover, Maryland, location, excluding office clerical employees, order clerks, payroll clerks, professional employees, guards, and supervisors as defined in the Act.

AMERICAN WHOLESALERS, INC.