

Aaron Brothers Corp. and Teamsters, Automotive Workers Local 495, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America. Case 31-CA-5614

April 30, 1976

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND PENELLO

Upon a charge filed on September 22, 1975, by Teamsters, Automotive Workers Local 495, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, herein called the Union, and duly served on Aaron Brothers Corp., herein called the Respondent, the Acting General Counsel of the National Labor Relations Board, herein called General Counsel, by the Regional Director for Region 31, issued a complaint and notice of hearing on October 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 September 4, 1974, following a Board election in Case 31-RC-3083 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 September 17, 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 November 4, 1975, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On December 22, 1975, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on January 2, 1976, 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 response to the Notice To Show Cause, Respondent admits all operative factual averments of the complaint but denies the majority status of the Union and the validity of the certification on the basis of its objections to the election and the Board's refusal to utilize its subpoena powers to investigate such objections or to grant Respondent a hearing on its objections. The General Counsel contends that since all material issues have been previously decided by the Board or admitted in Respondent's answer to the complaint there are no issues requiring a hearing and that summary judgment is, therefore, appropriate. We agree with the General Counsel.

An examination of the entire record, including the record in Case 31-RC-3083, reveals that in an election conducted on April 4, 1975, pursuant to a Stipulation for Certification Upon Consent Election of approximately 16 eligible voters 15 cast ballots, of which 14 were for the Union, 1 was against the Union, and none was challenged. Respondent filed timely objections to the Union's conduct affecting the results of the election, alleging, in substance, that the Union had campaigned within 100 feet of the polling booth; that employees who demonstrated pronoun attitudes stood in groups in the polling area and directed epithets to prospective voters; that the Union promised employees that if they signed authorization cards or voted for the Union customary initiation fee and dues would be waived; that the Union cannot fairly represent employees because its officers, agents, and employees are not representative of minority groups and its international does not have officers, agents, and employees representative of minority groups. After an investigation, the Regional Director issued on June 13, 1975, a Report on Objections in which he concluded that they raised no substantial or material issues which warrant setting aside the election; that they be overruled in their entirety; and that the Union be certified. Respondent filed a timely request for review of the Regional Director's report, requesting a hearing on the objections. On September 4, 1975, the Board issued its Decision and Certification of Representative in which it

¹ Official notice is taken of the record in the representation proceeding. Case 31-RC-3083, 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), enf.d. 388 F.2d 683 (C.A. 4, 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enf.d. 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), enf.d. 397 F.2d 91 (C.A. 7, 1968); Sec. 9(d) of the NLRA.

adopted the findings 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.²

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.

With its answer to the complaint, Respondent submitted an application for taking of depositions which was denied by an order of the Regional Director, dated November 10, 1975. Respondent thereafter requested special permission to appeal from the Regional Director's order denying its application to take depositions. In a telegraphic communication of December 5, 1975, the Board denied Respondent's request for special permission to appeal. In its response to the Notice To Show Cause, Respondent argues (1) that the General Counsel's Motion for Summary Judgment is premature because a hearing on the issues dealing with its election objections must first be held; and (2) that the Regional Director's authority delegated under Section 102.30 of the Board's Rules and Regulations to rule on applications for depositions violates the Administrative Procedure Act (5 U.S.C. §551) and due process by commingling prosecution and adjudication functions. On appeal to the Board from the Regional Director's conclusion that its objections raised no substantial and material issues which warranted setting aside the election the Respondent requested a hearing thereon. In adopting the Regional Director's report, the Board found that there were no issues requiring a hearing. Further, considering the Administrative Procedure Act in the light of the provisions of our Act, we do not find that the delegation to Regional Directors to consider, in the first instance, applications for depositions with a subsequent appeal to the Board either offends the Administrative Procedure Act or due process. Accordingly, we shall grant the General Counsel's Motion for Summary Judgment.

² 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).

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

Respondent is a California corporation with its office and principal place of business in Los Angeles, California, where it operates a chain of art supply stores. Respondent annually purchases and receives goods and services valued in excess of \$50,000 directly from suppliers located outside the State of California. Respondent annually derives gross revenues in excess of \$500,000.

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

Teamsters, Automotive Workers Local 495, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & 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, including truckdrivers employed by Respondent at its store located at 940 Orange Drive, Los Angeles, California; but excluding all other employees, including office clerical 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 31 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 4, 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 September 8, 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 September 17, 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 September 17, 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 appropri-

ate 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. Aaron Brothers Corp., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Teamsters, Automotive Workers Local 495, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. All warehouse employees, including truckdrivers, employed by Respondent at its store located at 940 Orange Drive, Los Angeles, California; but excluding all other employees, including office clerical 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 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 September 17, 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 Re-

lations Board hereby orders that Respondent, Aaron Brothers Corp., Los Angeles, 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 Teamsters, Automotive Workers Local 495, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, as the exclusive bargaining representative of its employees in the following appropriate unit:

All warehouse employees, including truckdrivers, employed by Respondent at its store located at 940 Orange Drive, Los Angeles, California; but excluding all other employees, including office clerical 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 office and plant at 900 Orange Drive, Los Angeles, California, copies of the attached notice marked "Appendix."³ Copies of said notice, on forms provided by the Regional Director for Region 31, 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 31, in writing, within 20 days from the date of this Order,

what steps have been taken to comply herewith.

³ 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 Teamsters, Automotive Workers Local 495, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & 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, including truckdrivers, employed by Respondent at its store located at 940 Orange Drive, Los Angeles, California; but excluding all other employees, including office clerical employees, guards, and supervisors as defined in the Act.

AARON BROTHERS CORP.