American Can Company *and* Teamsters Local 651, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America Case 9–CA–10045

June 9, 1976

DECISION AND ORDER

BY MEMBERS JENKINS, PENELLO, AND WALTHER

Upon a charge filed on February 11, 1976, by Teamsters Local 651, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union, and duly served on American Can Company, herein called the Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 9, issued a complaint on March 12, 1976, 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 January 14, 1976, following a Board election in Case 9–RC–10977 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 February 6, 1976, 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 or about March 30, 1976, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint

On April 29, 1976, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment Subsequently, on May 4, 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 the Notice To Show Cause, entitled Statement in Opposition to Motion for Summary Judgment

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 response, the Respondent denies the validity of the Union's certification as exclusive bargaining representative of the unit employees, basically contending (1) that on the basis of its objections the representation election should have been set aside because of the absence of the requisite laboratory conditions and (2) that it had been denied a fair hearing and thereby deprived of due process by the failure to consider alleged threats to company witnesses The General Counsel contends that the Respondent's answer does not raise litigable issues requiring a hearing and that a summary judgment is appropriate We agree with the General Counsel

Review of the record herein, including that in the representation proceeding, Case 9–RC–10977, establishes that the Union won the election among the employees in the stipulated unit conducted on April 25, 1975, pursuant to a Stipulation for Certification Upon Consent Election The Respondent filed timely objections to the conduct of the election alleging, in substance, that (1) the physical voting arrangements and the general atmosphere of confusion and coercion interfered with the secrecy of the ballot and with the voters' freedom of choice, (2) there were numerous threats and acts of violence by union members and adherents against employees opposed to the Union, (3) union members and representatives made material misrepresentations of fact, (4) there was damage to company property and to property of employees who opposed the Union, and (5) the Union made promises of benefits, including the reduction or waiver of initiation fees or dues, to influence employees Thereafter, the Regional Director directed a hearing on the issues raised by the Respondent's objections At the hearing before the Hearing Officer, the Respondent withdrew its objections alleging material misrepresentations and promises of benefits but sought to litigate the issue of the Union's alleged threats against employees, if they testified at the objections hearing These threats were the subject of the

[1] Official notice is taken of the record in the representation proceeding Case 9–RC–10977, 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, as amended

Respondent's unfair labor practice charge against the Union in Case 9–CB–3026 [2]

On October 17, 1975, the Hearing Officer issued his report and recommendations in which he (1) gave no consideration to the allegations in Case 9–CB–3026 because the hearing was a wholly inappropriate forum in which to litigate the issues arising therefrom, (2) concluded that the Respondent had failed to sustain the burden of proof implicit in its objections, and, accordingly, (3) recommended that the objections be overruled in their entirety and the Union be certified The Respondent filed exceptions, with a supporting brief, to the Hearing Officer's report, reiterating its objections and asserting that the Hearing Officer improperly failed to consider the allegations that union officials had threatened witnesses testifying for the Respondent and that the fact of these threats confirmed that there was a course of conduct designed to intimidate employees Accordingly, the Respondent requested that the case be remanded for new credibility findings and new findings of fact with respect to the effect of threats and violence on the election itself On January 16, 1976, the Board issued a Decision and Certification of Representative in which it adopted the Hearing Officer's findings and recommendations and specifically stated that "Upon consideration of the entire record, we do not find that the requisite laboratory conditions of a Board election were lacking herein" Accordingly, it certified the Union as the exclusive representative of all the employees in the stipulated appropriate unit [3]

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 [4]

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 its answer and response, the Respondent also contends that it was denied a fair hearing on its objection and thereby deprived of due process because of the failure to consider the Union's threats to the Respondent's witnesses [5] We find no merit in this contention Basically, this issue was raised by the Respondent in the underlying representation proceeding and decided therein by the Board Further, it is well established that a party is entitled to a hearing only when it presents a *prima facie* showing of substantial and material issues warranting a hearing In adopting the findings and recommendations of the Hearing Officer and specifically concluding that the record did not establish the absence of the requisite laboratory conditions of a Board election, the Board, in effect, found that there were no substantial or material issues warranting a hearing [6] Accordingly, we shall grant the Motion for Summary Judgment [7]

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

FINDINGS OF FACT

I THE BUSINESS OF THE RESPONDENT

Respondent, a New Jersey corporation, is engaged in the manufacture and sale of wax-coated paper cups at its Lexington, Kentucky, plant During the past 12 months, a representative period, Respondent had a direct outflow of goods, in interstate commerce, valued in excess of $50,000, which it sold and caused to be shipped from its Lexington, Kentucky, plant directly to points located outside the State of Kentucky

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 651, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act

[2] On October 3 1975 the Respondent filed a request to appeal from the Regional Director s refusal to consider the charge in Case 9–CB–3026 upon which he had decided to issue a complaint, as blocking the processing of the underlying representation proceeding, Case 9–RC–10977 On October 10, 1975, the Board denied the request

[3] Because of an inadvertent error, the Board, on January 21 1976 issued an Order Correcting Decision and Certification of Representative to reflect the correct description of the appropriate unit to which the parties had stipulated

[4] 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)

[5] The Respondent also alleges that on March 22, 1976 the Regional Director advised that he was accepting a unilateral settlement agreement of the complaint issued in Case 9–CB–3026

[6] *Blackman Uhler Chemical Division—Synalloy Corporation* 223 NLRB 827 (1976)

[7] In view of our determination herein, we find it unnecessary to rule upon the General Counsel s request to strike as sham the Respondent's affirmative defenses alleged in its answer

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 hourly rated production, maintenance, and warehousing employees employed by the Employer at its manufacturing facility on Harbison Road, Lexington, Kentucky, and at its outside warehouse at One Manchester Street, Lexington, Kentucky, including jitney driver leadmen, excluding all other employees, office and plant clericals, professional employees, technical employees, watchmen, guards, and supervisors as defined in the Act

2 The certification

On April 25, 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 9, 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 January 14, 1976, as clarified on January 21, 1976, 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 19, 1976, 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 February 6, 1976, 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 February 6, 1976, 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 Can Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act

2 Teamsters Local 651, affiliated with the 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 hourly rated production, maintenance, and warehousing employees employed by the Employer at its manufacturing facility on Harbison Road, Lexington, Kentucky, and at its outside warehouse at One Manchester Street, Lexington, Kentucky, including jitney driver leadmen, excluding all other employees, office and plant clericals, professional employees, technical employees, watchmen, 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 January 14, 1976, 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 February 6, 1976, 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 Can Company, Lexington, Kentucky, 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 651, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive bargaining representative of its employees in the following appropriate unit

> All hourly rated production, maintenance, and warehousing employees employed by the Employer at its manufacturing facility on Harbison Road, Lexington, Kentucky, and at its outside warehouse at One Manchester Street, Lexington, Kentucky, including jitney driver leadmen, excluding all other employees, office and plant clericals, professional employees, technical employees, watchmen, 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 manufacturing facility on Harbison Road and its outside warehouse, both in Lexington, Kentucky, copies of the attached notice marked "Appendix."[8] Copies of said notice, on forms provided by the Regional Director for Region 9, 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 9, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith

[8] 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 Local 651, affiliated with the 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 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 hourly rated production, maintenance, and warehousing employees employed by the Employer at its manufacturing facility on Harbison Road, Lexington, Kentucky, and at its outside warehouse at One Manchester Street, Lexington, Kentucky, including jitney driver leadmen, excluding all other employees, office and plant clericals, professional employees, technical employees, watchmen, guards, and supervisors as defined in the Act

AMERICAN CAN COMPANY