Westvaco Corporation d/b/a Westvaco Gauley Woodyard *and* United Paperworkers International Union, AFL–CIO. Case 9–CA–10245

October 21, 1976

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND PENELLO

Upon a charge and an amended charge filed on April 19 and May 26, 1976, respectively, by United Paperworkers International Union, AFL–CIO, herein called the Union, and duly served on Westvaco Corporation d/b/a Westvaco Gauley Woodyard, herein called the Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 9, issued a complaint and notice of hearing on June 4, 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 March 2, 1976, following a Board election in Case 9–RC–11103, 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 March 22, 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 June 14, 1976, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On July 12, 1976, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment and a memorandum in support thereof. Subsequently, on July 23, 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 with an attached affidavit.

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 attacks the validity of the Union's certification because the Board failed to sustain the challenge to the determinative ballot cast by an employee whose name was not on the voter eligibility list and because the determination of the eligibility date which the parties intended requires an evidentiary hearing.

Review of the record herein, including the record in Case 9–RC–11103, reveals that on July 28, 1975, the Union and the Respondent entered into a Stipulation for Certification Upon Consent Election, which was approved on July 30, 1975, by the Acting Regional Director, providing, *inter alia,* that the determinative payroll period for voter eligibility purposes would be the period ending July 22, 1975. Pursuant to the stipulation, an election was held on September 10, 1975, in the unit stipulated to be appropriate. The tally of ballots revealed 13 votes for the Union, 13 votes against, and 1 challenged ballot. The determinative challenged ballot was cast by an employee who began work with Respondent on July 16, 1975, and was challenged by the Board agent because the employee's name was not on the voter eligibility list submitted by Respondent which included all employees who were paid in the pay period ending July 15, 1975.[2] In support of the validity of the challenged ballot, the Union contended that the eligibility date should be July 22, 1975, as indicated in the stipulation, or, alternatively, July 29, 1975, which was the payroll period immediately preceding approval of the stipulation by the Acting Regional Director on July 30, 1975.

On November 11, 1975, after investigation, the Regional Director issued his Report on Election, Challenged Ballot and Recommendations to the Board, in which he stated it was clear that the parties stipulated that July 22, 1975, should be used for determining

[1] Official notice is taken of the record in the representation proceeding, Case 9–RC–11103, 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] Subsequent to the Stipulation for Certification Upon Consent Election, the Respondent discovered that there was no payroll period ending July 22, 1975 The list of eligible voters submitted by Respondent was compiled on the basis of the payroll period ending July 15, 1975, and Respondent contended this eligibility list was correct as the payroll period ending July 15, 1975, was the period immediately preceding the date on which the parties signed the stipulation

the eligibility date of the election. Accordingly, he concluded that, as the challenged employee was employed prior to that date, he was eligible to vote in the election, and recommended that the ballot be opened and counted. Subsequently, Respondent filed a timely appeal from the Regional Director's report and recommendations, contending that the challenged ballot was not valid as the proper eligibility date should be the payroll period ending July 15, 1975. Alternatively, Respondent requested a hearing in order to resolve the alleged substantial and material issues involved therein. The Board considered Respondent's submission and, on February 11, 1976, issued its Decision and Direction adopting the Regional Director's findings and recommendations and directing that the challenged ballot be opened and counted and that the appropriate certification be issued. Following the counting of the ballot, the revised tally of ballots revealed 14 votes cast for the Union and 13 votes against. Accordingly, on March 2, 1976, the Union was certified as the exclusive representative of an appropriate unit of Respondent's employees for purposes of collective bargaining.

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[4] in this unfair labor practice proceeding.[5] We shall, accordingly, grant the Motion for Summary Judgment.[6]

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

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

Respondent, a Delaware corporation, is engaged in logging, wood cutting, and wood processing at its Rupert, West Virginia, facilities. During the past 12 months, a representative period, Respondent had a direct inflow of goods and material, in interstate commerce, valued in excess of $50,000, which it purchased and received at its West Virginia facilities directly from points outside the State of West Virginia.

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

United Paperworkers International Union, 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:

> All heavy equipment operators, woodsmen and local truck drivers involved in the Employer's logging department of the Bleach Board Division in the vicinity of Rupert, West Virginia, excluding all employees of the Employer's Rupert, West Virginia, woodyard and its Rupert, West Virginia mechanical maintenance shop, office clerical employees, professional employees, guards and supervisors as defined in the Act.

[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] In its answer to the complaint, Respondent denies that it has refused to bargain in good faith with the Union. In this regard, we note that attached to the Memorandum in Support of Summary Judgment, as Exh. A, is a letter dated March 11, 1976, from the Union to Respondent requesting the Respondent to supply certain bargaining information and to advise when it will meet and begin negotiations. Also attached, as Exh. B, is Respondent's letter of March 22, 1976, which is a response to the Union's letter of March 11, 1976, stating, in substance, that Respondent saw no need to meet with the Union or to furnish the requested information as there is no proper basis for the Board's certification of the Union. As Respondent offers nothing to controvert the contents of those letters, we deem the complaint allegation concerning a refusal to bargain to be admitted to be true and we so find.

[5] By its direction to open and count the determinative ballot, the Board, in effect, found that the eligibility question did not raise substantial or material issues warranting a hearing. In these circumstances, Respondent's request for an evidentiary hearing herein is denied as it is established that no hearing is required where, as here, there are no properly litigable issues of fact to be resolved. *Alpers' Jobbing Company, Inc.*, 222 NLRB 817 (1976).

[6] In view of our decision herein, we find it unnecessary to rule on counsel for the General Counsel's motion to strike portions of Respondent's answer.

2. The certification

On September 10, 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 March 2, 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*[7] *and Respondent's Refusal*

Commencing on or about March 11, 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 March 22, 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 March 22, 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. Westvaco Corporation d/b/a Westvaco Gauley Woodyard is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. United Paperworkers International Union, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All heavy equipment operators, woodsmen and local truck drivers involved in the Employer's logging department of the Bleach Board Division in the vicinity of Rupert, West Virginia, excluding all employees of the Employer's Rupert, West Virginia, woodyard and its Rupert, West Virginia mechanical maintenance shop, office clerical employees, professional employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since March 2, 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 March 22, 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.

[7] As indicated in fn 4, *supra,* attached to counsel for the General Counsel's Memorandum in Support of Summary Judgment, as Exh A, is an uncontroverted letter dated March 11, 1976, from the Union to Respondent requesting certain bargaining information and the expected dates on which Respondent would be able to meet and begin negotiations Accordingly, although not alleged in the complaint, we find that the Union requested Respondent to bargain on or about March 11, 1976

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, Westvaco Corporation d/b/a Westvaco Gauley Woodyard, Rupert, West Virginia, 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 United Paperworkers International Union, AFL–CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All heavy equipment operators, woodsmen and local truck drivers involved in the Employer's logging department of the Bleach Board Division in the vicinity of Rupert, West Virginia, excluding all employees of the Employer's Rupert, West Virginia, woodyard and its Rupert, West Virginia mechanical maintenance shop, 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 Rupert, West Virginia, facilities 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 United Paperworkers International Union, 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 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 heavy equipment operators, woodsmen and local truck drivers involved in the Employer's logging department of the Bleach Board Division in the vicinity of Rupert, West Virginia, excluding all employees of the Employer's Rupert, West Virginia, woodyard and its Rupert, West Virginia mechanical maintenance shop, office clerical employees, professional employees, guards and supervisors as defined in the Act.

WESTVACO CORPORATION d/b/a WESTVACO GAULEY WOODYARD