B. F. Goodrich Tire Company, a Division of the B. F. Goodrich Company *and* Chauffeurs, Teamsters, Warehousemen and Helpers Local Union No. 414, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 25–CA–6267

December 16, 1974

DECISION AND ORDER

BY CHAIRMAN MILLER AND MEMBERS FANNING AND JENKINS

Upon a charge filed on April 29, 1974, by Chauffeurs, Teamsters, Warehousemen and Helpers Local Union No. 414, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union, and duly served on B. F. Goodrich Tire Company, a Division of the B. F. Goodrich Company, herein called the Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 25, issued a complaint on May 28, 1974, 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 April 8, 1974, following a Board election in Case 25–RC–5467, 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 April 8, 1974, and more particularly on April 23, 1974, 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 5, 1974, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On June 17, 1974, counsel for the General Counsel filed directly with the Board a motion to strike portions of the Respondent's answer and Motion for Summary Judgment. On June 21, 1974, the Respondent filed a brief in opposition to the General Counsel's motions. Subsequently, on July 3, 1974, 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 brief with affidavit attached, as 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 in its briefs, the Respondent opposes the General Counsel's Motion for Summary Judgment on the grounds (1) that the election in the underlying representation proceeding was invalid because of the Union's preelection promise to waive initiation fees, and (2) that a hearing would establish that the employees in the stipulated unit were so closely related to or aligned with management as to be managerial employees who, under the recent Supreme Court decision in *N.L.R.B.* v. *Bell Aerospace Co., Division of Textron Inc.*, 416 U.S. 267 (1974), are not covered by the Act and that such coverage of the Act cannot be stipulated away. We find no merit in the Respondent's position.

Review of the record herein, including that in Case 25–RC–5467, shows that, pursuant to a Stipulation for Certification Upon Consent Election, an election was conducted on November 7, 1973, among the employees in the following stipulated unit: "All quality control men, draftsmen, tire construction technicians, senior lab technicians, and lab technicians . . . but excluding all senior production technicians, all senior quality control men, all office clerical employees, all guards, all professional employees and supervisors as defined in the Act, and all other employees." The election resulted in 18 votes cast for the Union, none for the Intervenor, and 15 against the participating labor organizations; there were no challenged ballots.

The Respondent filed a timely objection to the election alleging, in substance, that the Union made a preelection promise to unit employees that it would reduce the initiation fee if it won the election. After investigation, the Regional Director issued, on November 27, 1973, his Report on Objections in which he recommended that the objection be overruled upon authority of the Board's decision in *DIT-MCO Inc.* (163 NLRB 1019 (1967)), and that the Union be certified. The Respondent filed timely exceptions and supporting briefs, urging the Board to consider the exceptions in the light

[1] Official notice is taken of the record in the representation proceeding, Case 25–RC–5467, 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., 1957); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (C.A. 7, 1968); Sec. 9(d) of the NLRA.

of the recent Supreme Court decision in *N.L.R.B.* v. *Savair Mfg. Co.* (414 U.S. 270 (1973)), which overturned the Board's *DIT-MCO* decision. On April 9, 1973, the Board issued a Decision and Certification of Representative (209 NLRB No. 182) in which it overruled the Respondent's reduction of initiation fees objection, finding nothing in the Union's conduct objectionable under *Savair,* and accordingly certified the Union. It thus appears that the Respondent is attempting to relitigate an issue raised and determined adversely to it in the underlying 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.[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.

As indicated above, the Respondent also contends for the first time in this proceeding that a hearing would establish that all the employees in the unit are closely aligned with management and are therefore "managerial employees" excluded from the coverage of the Act under the Supreme Court decision in *Bell Aerospace,* and that, in order to find a violation, such coverage under the Act must first be established and cannot be stipulated away. We disagree.

As previously noted, the representation case election was conducted in the unit stipulated as appropriate by the parties. There were no challenged ballots. The Board has long held, with Supreme Court approval,[3] that postelection challenges will not be considered. The reasons for not permitting such challenges were fully explicated by the Supreme Court in the *A.J. Tower* case and they are fully applicable to the case at bar. Further, we do not see the relevance of the Supreme Court's *Bell Aerospace* decision to the instant case. In *Bell Aerospace,* the employer had contested the status of certain buyers prior to the election, a hearing had been held, and a Board decision had issued. The issue was thus timely presented to the Board for decision, and later to the court of appeals and the Supreme Court. In the present case, the Respondent, prior to the election, and even after it, never contested the status of the individuals in question until the instant unfair labor practice proceeding.

Nor can it be argued that the *Bell Aerospace* case so altered applicable Board precendent that the Respondent was misled into entering upon the stipulation in this proceeding by any precedent which has now been overturned. This Board, in the *Bell Aerospace* case, held that certain categories of managerial employees who, under established Board policy, would be excluded from rank-and-file bargaining units might nevertheless appropriately be represented in a separate unit so long as their positions were not of a type which held a potential for conflict of interest with respect to labor relations policies. The Supreme Court disagreed, holding that it was the intent of Congress to exclude from the protection of the Act the entire category of employees whom the Board has regarded as "managerial" under its traditional definition as persons who "formulate and effectuate management policies by expressing and making operative the decisions of their Employer."[4] Thus, the Board, in *Bell Aerospace,* did not purport to be changing the definition of "managerial employees" for purposes of exclusion from other bargaining units and its definition in that regard has remained unchanged.

Under these circumstances, any departure from our consistent precedent of refusing to entertain postelection challenges would be both unwise and unjustified. Respondent had full opportunity to assert that the quality control personnel here involved should have been excluded from the bargaining unit at the preelection stage and it had a further opportunity to challenge any of such personnel whom it believed to be "managerial" at the time of the voting. Instead, it stipulated that they were appropriately within the unit and entered no challenge to any ballot of any of the personnel whose status it now tardily seeks to litigate. To avoid unjustifiable delay in the effectuation of the purposes of our Act and to prevent dilution of the Board's firm, soundly based policy against postelection challenges, we shall require the Respondent to honor its stipulation and therefore, we must deny its request for a hearing to determine the status of the employees in question. Accordingly, we shall grant the General Counsel's Motion for Summary Judgment.

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

[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)

[3] *N.L.R.B* v *A.J. Tower Company*, 329 U.S. 324 (1946)

[4] *Palace Laundry Dry Cleaning Corporation*, 75 NLRB 320, 323 at fn 4 (1947), specifically cited with approval at fn 15 of the Supreme Court's opinion in *Bell Aerospace*

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

Respondent has maintained its principal office and place of business in New York, New York, and various other facilities in the States of the United States, including the plant involved herein at Woodburn, Indiana, where it is engaged in the manufacture, sale, and distribution of automotive tires and related products. During the past year, a representative period, the Respondent manufactured, sold, and distributed at said plant products valued in excess of $50,000 which were shipped from said plant to States other than the State of Indiana.

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

Chauffeurs, Teamsters, Warehousemen and Helpers Local Union No. 414, a/w 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*

a. 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 quality control men, draftsmen, tire construction technicians, senior lab technicians employed by the Employer at its plant at U.S. Highway 24 East, Woodburn, Indiana; but excluding all senior production technicians, all senior quality control men, all office clerical employees, all guards, all professional employees and supervisors as defined in the Act, and all other employees.

2. The certification

On November 1, 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 25 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 April 8, 1974, 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 November 21, 1973, and particularly on or about April 23, 1974, 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 April 8, 1974, and particularly on or about April 23, 1974, 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 April 8, 1974, and more particularly since April 23, 1974, 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, initmate, 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); *Com-*

merce 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. B. F. Goodrich Tire Company, a Division of the B. F. Goodrich Company, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Chauffeurs, Teamsters, Warehousemen and Helpers Local Union No. 414, a/w 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 quality control men, draftsmen, tire construction technicians, senior lab technicians employed by the Employer at its plant at U.S. Highway 24 East, Woodburn, Indiana; but excluding all senior production technicians, all senior quality control men, all office clerical employees, all guards, all professional employees and supervisors as defined in the Act, and all other employees, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since April 8, 1974, 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 April 8, 1974, and more particularly on or about April 23, 1974, 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, B. F. Goodrich Tire Company, a Division of the B. F. Goodrich Company, 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 Chauffeurs, Teamsters, Warehousemen and Helpers Local Union No. 414, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All quality control men, draftsmen, tire construction technicians, senior lab technicians employed by the Employer at its plant at U.S. Highway 24 East, Woodburn, Indiana; but excluding all senior production technicians, all senior quality control men, all office clerical employees, all guards, all professional employees and supervisors as defined in the Act, and all other employees.

(b) In any like or related manner interfering with, restraining, or coering 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 plant at Woodburn, Indiana, copies of the attached notice marked "Appendix."[5] Copies of said notice, on forms provided by the Regional Director for Region 25, 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 25 in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

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[5] 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 Chauffeurs, Teamsters, Warehousemen and Helpers Local Union No. 414, a/w 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 quality control men, draftsmen, tire construction technicians, senior lab technicians employed by the Employer at its plant at U.S. Highway 24 East, Woodburn, Indiana; but excluding all senior production technicians, all senior quality control men, all office clerical employees, all guards, all professional employees and supervisors as defined in the Act, and all other employees.

B. F. GOODRICH TIRE COMPANY, A DIVISION OF THE B. F. GOODRICH COMPANY