

Yellow Transportation Company, a Division of Yellow Cab Cooperative, Inc. and Raul Rodriguez. Case 20-CA-16274

October 29, 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

Upon a charge filed on May 27, 1981, by Raul Rodriguez, an individual, and duly served on Yellow Transportation Company, A Division of Yellow Cab Cooperative, Inc., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Acting Regional Director for Region 20, issued a complaint on June 10, 1981, 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 and the 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 3, 1981, following a Board election in Case 20-RC-15153, Independent Cab Drivers Association 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 20, 1981, 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 18, 1981, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint, and raising an affirmative defense.

On June 21, 1981, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on July 31, 1981, 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

¹ Official notice is taken of the record in the representation proceeding, Case 20-RC-15153, 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 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co. v. Penello*, 269 F.Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

thereafter filed a response to the 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 Respondent denied the allegations in the complaint that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, that the Union is a labor organization within the meaning of Section 2(5) of the Act, and that the unit is appropriate. Respondent denied these allegations on the grounds that the complaint merely stated legal conclusions and failed to state sufficient facts as to require an answer.² Respondent also denied that the Union was the exclusive representative of the unit employees. It further denied that it violated Section 8(a)(5) and (1) of the Act. Respondent admitted that during the calendar year ending December 31, 1980, it derived gross revenues in excess of \$500,000, and during the same period it purchased and received at its San Francisco location products, goods, and materials valued in excess of \$5,000 directly from points outside the State of California or from other enterprises located within the State each of which other enterprises had received the said products, goods, and materials directly from points outside the State. Respondent also admitted that the Union was certified as the exclusive representative for collective bargaining for the unit of employees described in paragraph 5 of the complaint. Respondent further admitted that on April 15, 1981, the Union requested it to bargain collectively with the Union as the exclusive representative of unit employees with respect to their rates of pay, wages, hours of employment, and other terms and conditions of employment, and that since April 20, 1981, Respondent has failed and refused to recognize and to bargain with the Union.

As an affirmative defense Respondent alleges that the Board's certification in Case 20-RC-15153 was invalid, unlawful, and improper for the reasons set forth in its objections to the election conducted in the underlying representation proceeding. Also in its answer and response to the Board's Notice To Show Cause Respondent asserts that because of

² In Case 20-RC-15153 Respondent stipulated that it is an employer engaged in commerce, that the Union is a labor organization, and that the unit, as described in the complaint, is appropriate.

the invalid certification it has never been obligated to bargain collectively and that the sole reason for its refusal to bargain is to obtain judicial review of the Board's certification.

Review of the record herein, including the record in Case 20-RC-15153, reveals that on September 9, 1980, Respondent and the Union entered into a Stipulation for Certification Upon Consent Election. As noted supra, Respondent stipulated that it is engaged in commerce within the meaning of Section 2(6) and (7) of the Act, that the Union is a labor organization, and that the unit, as described in paragraph 5 of the complaint, is appropriate.

Subsequently, on October 24, 1980, the employees in the unit voted in an election for the purpose of selecting a collective-bargaining representative. The tally of ballots showed 43 votes cast for, 34 cast against, the Union, and 77 challenged ballots, a sufficient number to affect the results of the election. On October 31, 1980, Respondent filed timely objections to conduct affecting the results of the election, alleging in substance that the Union engaged in deceptive campaign practices and interfered with the employees' free choice in the election. On December 29, 1980, the Acting Regional Director issued a "Report on Objections and Challenged Ballots" to the Board recommending that the Employer's objections be overruled in their entirety, and that 72 challenges be sustained. On April 3, 1981, the Board found no merit in Respondent's exceptions to the Acting Regional Director's recommendations, and certified the Union as the exclusive bargaining representative of all the employees in the unit. By mailgram dated April 15, 1981, the Union requested Respondent to bargain. On April 20, 1981, and at all times thereafter, Respondent admittedly has refused, and continues to refuse, to recognize and to bargain collectively in good faith with the Union as the exclusive collective-bargaining representative of the employees in the unit.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding which alleges 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. As noted supra, Respondent in its answer to the complaint denied that it is engaged in commerce within the meaning of the Act, that the Union is a labor organization, and that the unit is appropriate. In light of Respondent's stipulation in the underlying representation proceeding that it is an employer engaged in commerce within the meaning of the Act, that the Union is a labor organization, and that the unit described in paragraph 5

of the complaint is appropriate, it is apparent that Respondent is attempting to litigate issues which were or could have been raised in the underlying representation proceeding. This it may not do.³

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and 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 Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we find that Respondent, since on or about April 20, 1981, has violated Section 8(a)(5) and (1) of the Act by its refusal to bargain with the Union. We therefore 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 RESPONDENT

Yellow Transportation Company, A Division of Yellow Cab Cooperative, Inc., stipulated that it is a California corporation engaged in the taxicab business in San Francisco, California. During the past fiscal year, Respondent has received gross revenues in excess of \$100,000. During the same period, Respondent purchased items which originated outside the State of California valued in excess of \$10,000.

We find, on the basis of the foregoing, and upon the entire record in this proceeding, 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

Independent Cab Drivers Association 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 Respondent constitute a unit appropriate for collective-bargaining

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).

purposes within the meaning of Section 9(b) of the Act:

All cab driver employees employed by Respondent at its San Francisco, California location; excluding all other employees, lessees, guards and supervisors as defined in the Act.

2. The certification

On October 24, 1980, 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 20, designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on April 3, 1981, 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 April 15, 1981, and at all times thereafter, the Union has requested 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 20, 1981, and continuing at all times thereafter to date, 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 Respondent has, since April 20, 1981, 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 (5th Cir. 1964), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. Yellow Transportation Company, A Division of Yellow Cab Cooperative Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Independent Cab Drivers Association is a labor organization within the meaning of Section 2(5) of the Act.

3. All cab driver employees employed by Respondent at its San Francisco, California, location, excluding all other employees, lessees, 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 April 3, 1981, 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 20, 1981, 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 them in Section 7 of the Act, and thereby has en-

gaged 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 the Respondent, Yellow Transportation Company, A Division of Yellow Cab Cooperative, Inc., San Francisco, 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 Independent Cab Drivers Association as the exclusive bargaining representative of its employees in the following appropriate unit:

All cab driver employees employed by Respondent at its San Francisco, California location; excluding all other employees, lessees, 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 San Francisco, California, location copies of the attached notice marked "Appendix."⁴

⁴ 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."

Copies of said notice, on forms provided by the Regional Director for Region 20, 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 20, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

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 Independent Cab Drivers Association 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 cab driver employees employed by the Employer at its San Francisco, California location; excluding all other employees, lessees, guards and supervisors as defined in the Act.

YELLOW TRANSPORTATION COMPANY,
A DIVISION OF YELLOW CAB
COOPERATIVE, INC.