

Westvaco, Virginia Folding Box Division and Bellwood Printing Pressmen Assistants and Specialty Workers Local Union No. 670. Case 5-CA-15155

27 February 1984

DECISION AND ORDER

**BY CHAIRMAN DOTSON AND MEMBERS
ZIMMERMAN AND HUNTER**

Upon a charge filed by the Union 28 February 1983, the General Counsel of the National Labor Relations Board issued a complaint on 24 March 1983 against the Respondent, alleging that it has violated Section 8(a)(5) and (1) of the National Labor Relations Act.

The complaint alleges that on 18 October 1982, following issuance of the Acting Regional Director's Decision, Order, and Clarification of Certification in Case 5-UC-173 the Union was certified as the exclusive collective-bargaining representative of the Respondent's utilities technician employees in the unit so clarified.¹ (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g), amended Sept. 9, 1981, 46 Fed.Reg. 45922 (1981); *Frontier Hotel*, 265 NLRB 343 (1982).) The complaint further alleges that since 16 February 1983 the Respondent has refused to bargain with the Union. On 5 April 1983 the Respondent filed its answer admitting in part and denying in part the allegations in the complaint.

On 25 April 1983 the General Counsel filed a Motion for Summary Judgment. On 28 April 1983 the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

In its answers to the complaint and motion the Respondent contends, inter alia, that the evidence it presented in Case 5-UC-173 established that the utilities technicians should be excluded from the existing bargaining unit because they are technical employees; that they do not desire to be represent-

ed by the Union; that the instant proceedings are barred by the operation of the 6-month statute of limitations period as set forth in Section 10(b); and that the Board's denial of its request for review in the UC case denied it due process.

The General Counsel contends that the Respondent is improperly seeking to relitigate issues which were raised and decided in the underlying representation case. We agree with the General Counsel.

Review of the record including the record in Case 5-UC-173 shows that pursuant to a petition for unit clarification filed by the Union on 1 September 1982 seeking clarification of the bargaining unit to include the Company's utilities technicians, a hearing was held and the Regional Director issued his Decision, Order, and Clarification of Certification finding that the utilities technicians were not technical employees and including them in the existing unit. On 1 November 1982 the Respondent filed with the Board a request for review of the Regional Director's decision in which it advanced some of the same arguments made here. On 5 January 1983² the Board denied the request for review.³ On 9 February by letter, the Union requested and continues to request that the Respondent meet with it for purposes of collective bargaining regarding the utilities technicians. The Union received no response from the Respondent and on 28 February filed the instant charge.

With respect to the Respondent's contention that the utilities technicians are technical employees, the Regional Director found that these employees were responsible for operating, monitoring, and troubleshooting the Respondent's solvent recovery process (SRP), a mechanical procedure which allows the Respondent to filter out and recover used solvents from the emissions of its gravure printing process. The Regional Director also found that these employees spend 75-80 percent of their time in the SRP activity with the remainder of their worktime spent in monitoring the boilers and other utility equipment used in the printing process and cleaning up the boiler room. In addition if the utilities technicians have problems that require repair work, a shift maintenance leadman (a unit employee) comes in and this occurs on an average of once a day. Unit electricians work in both areas and have had the SRP process explained to them. The Regional Director determined that these employees were not technicals because they received only 4 months' on-the-job training; no previous experience was required; there is no degree, license, or regis-

¹ The Respondent and the Union have been parties to successive collective-bargaining agreements since December 1958. The most recent agreement is effective from 13 April 1981 through 13 April 1984 and covers wages, hours, and terms and conditions of employment for the following bargaining unit: All production and maintenance employees employed at Respondent's four Richmond, Virginia plants, excluding office clerical employees, guards, watchmen, professional employees and supervisors as defined in the Act.

² All dates are 1983 unless indicated otherwise.

³ Member Hunter dissented and would have granted review. Chairman Dotson notes that he did not participate in the underlying representation case.

tration requirement; and these employees exercise no independent judgment in performing their jobs. Therefore the Regional Director concluded that these employees should be included in the existing unit since there was a sufficient community of interest with unit employees, their jobs are a part of the production process, and they work the same shifts as, and receive pay comparable to, other unit employees. The Respondent has not submitted any new evidence to contradict the above findings.

With respect to the Respondent's assertion that the utilities technicians do not desire representation by the Union, we find that factor is not dispositive here. Moreover, we find that the evidence submitted by the Company to support its contention consists of an unattested memorandum ostensibly signed by the utilities technicians stating that they do not want union representation.

With respect to the Respondent's 10(b) argument, we note that the instant charge was filed on 28 February, approximately 12 days after the Company refused to bargain pursuant to the Union's request. This charge is thus well within the 6-month statute of limitations. Further withdrawal of the Union's charge in Case 5-CA-14513 on 14 August 1982 does not affect this proceeding because, although the parties are the same, the allegations contained in Case 5-CA-14513 concerned events which occurred before the unit clarification proceeding and the Respondent's February refusal to bargain. Therefore we find that this proceeding is not barred by Section 10(b) of the Act. See *Seligman & Associates*, 240 NLRB 110, 115 (1979).

We also find the Respondent's contention that it was denied due process lacking in merit. The Respondent participated in the hearing in the underlying representation proceeding and thereafter fully availed itself of the Board's review procedures. Thus, we can find no evidence that the Company was denied due process.

On the merits the Respondent has denied paragraphs 9, 10, and 11 of the complaint which allege that the Respondent violated the Act by refusing to bargain with the Union. We find conclusive proof of the Respondent's refusal in its letter of 15 March to Board Agent Small wherein the Respondent stated, inter alia, "[T]he Company has determined to seek judicial review of the Regional Director's determination in Case 5-UC-173 . . . and . . . [T]he Company believes that . . . it has no duty to bargain with the Union concerning this classification."⁴ Moreover we find that these statements coupled with the Respondent's actions establish that the Respondent is attempting in this pro-

ceeding to relitigate issues fully litigated and finally determined in the representation proceeding.

It is well settled that in the absence of newly discovered and 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 that were or could have been litigated in a prior representation proceeding. See *Pittsburgh Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941); Secs. 102.67(f) and 102.69(c) of the Board's Rules and Regulations.

All issues raised by the Respondent were or could have been litigated in the prior representation proceeding. As noted above the Respondent does not assert any relevant newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any issue that is properly litigable in this unfair labor practice proceeding. Accordingly we grant the General Counsel's Motion for Summary Judgment and we deny Respondent's Motion for Summary Judgment and/or Dismissal.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a Delaware corporation, engages in the manufacture and nonretail sale and distribution of printed folding cartons at its facilities in Richmond, Virginia, where it annually sold and shipped products valued in excess of \$50,000 to States other than the Commonwealth of Virginia. We find that the Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Representation Proceeding*

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 production and maintenance employees and utilities technicians employed at the Company's Richmond, Virginia plants; excluding office clerical employees, guards, watchmen,

⁴ G.C. Exh. 6.

professional employees, and supervisors, as defined in the National Labor Relations Act, as amended.

On 31 December 1958 in Case 5-RC-2625 the Union was certified as the exclusive bargaining representative of employees of the Respondent. On 5 January 1983 in Case 5-UC-173 the Board clarified the certification in Case 5-RC-2625 by specifically including the classification of utilities technicians in the above appropriate unit. The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. Refusal to Bargain

Since 9 February 1983 the Union has requested the Respondent to bargain, and since 16 February the Respondent has refused. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

By refusing on and after 16 February to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, Westvaco, Virginia Folding Box Division, Richmond, Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with the Bellwood Printing Pressmen, Assistants and Specialty Workers, Local Union No. 670, as the exclusive bargaining

representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All production and maintenance employees and utilities technicians employed at the Company's Richmond, Virginia plants; excluding office clerical employees, guards, watchmen, professional employees and supervisors as defined in the National Labor Relations Act, as amended.

(b) Post at its facility in Richmond, Virginia, copies of the attached notice marked "Appendix."⁵ Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

MEMBER HUNTER, dissenting:

I dissent from the grant of summary judgment in this case. In the underlying representation proceeding I would have granted review of the Regional Director's decision to accrete utility technicians into the production and maintenance unit. The Board majority denied review, however, and accordingly the record was not examined by the Board to determine whether the resulting unit was appropriate. In my view, the question whether the unit is appropriate continues, and therefore, I would deny summary judgment at this time.

⁵ If 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

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with Bellwood Printing Pressmen, Assistants and Specialty Workers, Local Union No. 670, as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exer-

cise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

All production and maintenance employees and utilities technicians employed at the Company's Richmond, Virginia plants; excluding office clerical employees, guards, watchmen, professional employees and supervisors as defined in the National Labor Relations Act, as amended.

WESTVACO, VIRGINIA FOLDING BOX
DIVISION