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Werthan Packaging Inc. and Paper, Allied-Industrial, Chemical and Energy Workers International Union, AFL-CIO, CLC. Case 26-CA-20117-1

May 17, 2001

DECISION AND ORDER

BY CHAIRMAN HURT GEN AND MEMBERS LIEBMAN AND TRUESDALE

Pursuant to a charge filed on February 15, 2001,¹ the Acting General Counsel of the National Labor Relations Board issued a complaint on March 7, 2001, alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union's request to bargain following the Union's certification in Case 26-RC-8041. (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); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint, and alleging affirmative defenses.

On April 12, 2001, the Acting General Counsel filed a Motion for Summary Judgment. On April 17, 2001, 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 did not file 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 answer the Respondent admits its refusal to bargain, but contends that the Union was not properly certified as the bargaining representative.² In the underlying

¹ The Respondent's answer states that it is "without sufficient knowledge or information to form a belief as to the truth or veracity of the" complaint allegations concerning the filing and service of the charge. The Acting General Counsel, however, has attached as exhibits to his motion a copy of the charge, a letter serving the charge, and the affidavit of service of the charge. The Respondent has not challenged the authenticity of these documents. Accordingly, we find that the Respondent's denials in this regard do not raise any issue of fact warranting a hearing.

² The Respondent's answer also denies the appropriateness of the certified unit, that on April 13, 2000, a representation election was conducted in this unit, and that on January 31, 2001, the Union was certified by the Board as the collective-bargaining representative of the unit employees. In the underlying representation proceeding, however, the appropriateness of the unit was fully litigated, and the Respondent's contentions regarding the exclusion of certain individuals and job classifications from the unit were considered and disposed of by the Board. Further, exhibits attached to the Acting General Counsel's motion establish that the election was conducted, and the Union was certified, on the dates alleged in the complaint. Accordingly, the Respondent's

representation proceeding, the Board overruled the Respondent's objection to the election.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any 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 representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.³

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a corporation with an office and place of business in Nashville, Tennessee, has been engaged in the manufacture of flexible packaging.

During the calendar year ending December 31, 2000, the Respondent, in conducting its business operations described above, sold and shipped from the Respondent's facility goods valued in excess of \$50,000 directly to points located outside the State of Tennessee, and purchased and received at its facility goods valued in excess of \$50,000 directly from points located outside the State of Tennessee.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(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.⁴

denials regarding these matters do not raise any issues warranting a hearing.

The Respondent's answer also asserts as affirmative defenses that the complaint fails to state a claim on which relief can be granted, and that this proceeding is barred by the doctrines of laches, unclean hands, res judicata, and collateral estoppel. The Respondent has not offered any explanation or evidence to support these bare assertions. Thus, we find that the Respondent's affirmative defenses are insufficient to warrant denial of the Acting General Counsel's Motion for Summary Judgment in this proceeding. See *Circus Circus Hotel*, 316 NLRB 1235, fn. 1 (1995).

³ The Respondent's requests that the complaint be dismissed and that it be awarded costs and attorneys' fees and such other relief as is deemed just and proper are therefore denied.

⁴ In its answer, the Respondent states that it has insufficient knowledge or information to admit or deny the truth of the complaint allegation that the Union is a labor organization within the meaning of Sec. 2(5) of the Act. This is an issue that the Respondent could have raised in the representation proceeding, but it did not do so. Rather, during the initial hearing in the representation case, the Respondent stipulated to the labor organization status of the Union. Accordingly, we find that the Respondent is precluded from litigating the matter in this proceeding. See *Biewer Wisconsin Sawmill*, 306 NLRB 732 fn. 1 (1992), and *Wickes Furniture*, 261 NLRB 1062, 1063 fn. 4 (1982).

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Certification*

Following the election held April 13, 2000, the Union was certified on January 31, 2001, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All production and maintenance employees including group leaders, lead persons, truck drivers and plant clerical employees employed by Werthan Packaging, Inc. at its Nashville, Tennessee facility, excluding all office clerical employees, confidential employees, professional employees, human resource assistants, sales representatives, customer service representatives, graphics coordinator, marketing manager, process planner, guards and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. *Refusal to Bargain*

By letter dated February 5, 2001, the Union requested the Respondent to recognize and bargain, and since about February 13, 2001, the Respondent has failed and refused to do so. We find that this failure and refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By refusing on and after February 13, 2001, 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 the 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, Werthan Packaging Inc., Nashville, Tennessee, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Paper, Allied-Industrial, Chemical and Energy Workers International Union, AFL-CIO, CLC, 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 including group leaders, lead persons, truck drivers and plant clerical employees employed by Werthan Packaging, Inc. at its Nashville, Tennessee facility, excluding all office clerical employees, confidential employees, professional employees, human resource assistants, sales representatives, customer service representatives, graphics coordinator, marketing manager, process planner, guards and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in Nashville, Tennessee, copies of the attached notice marked "Appendix."⁵ Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by the Respondent's authorized representative, shall be posted by the Respondent 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. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 13, 2001.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. May 17, 2001

Peter J. Hurtgen,

Chairman

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."

Wilma B. Liebman, Member

John C. Truesdale, Member

(SEAL) 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 Paper, Allied-Industrial, Chemical and Energy Workers International

Union, AFL-CIO, CLC, 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 exercise 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 including group leaders, lead persons, truck drivers and plant clerical employees employed by us at our Nashville, Tennessee facility, excluding all office clerical employees, confidential employees, professional employees, human resource assistants, sales representatives, customer service representatives, graphics coordinator, marketing manager, process planner, guards and supervisors as defined in the Act.

WERTHAN PACKAGING, INC.