

Western Temporary Services, Inc. and The Classic Company, Inc. and Indiana Joint Board, Retail Wholesale and Department Store Union, AFL-CIO. Cases 25-CA-16549 and 25-CA-16550

10 February 1986

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS
DENNIS AND JOHANSEN

On 31 December 1984 Administrative Law Judge William A. Gershuny issued the attached decision. The Respondents filed exceptions and supporting briefs. The General Counsel filed a brief in support of the administrative law judge's decision.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,¹ findings,² and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondents, Western Temporary Services, Inc., and The Classic Company, Inc., Ft. Wayne, Indiana, their officers, agents, successors, and assigns, shall take the action set forth in the Order.

¹ The Respondents excepted, *inter alia*, to the judge's granting of the General Counsel's motion to strike certain of the Respondents' denials from their individual answers, granting the General Counsel's Motion for Summary Judgment and determining that certain issues were *res judicata* because previously determined by the Board in the underlying representation case (25-RC-7862). They argue that they were denied due process during the representation proceedings by the lack of adequate notice to them of an amendment to the petition naming them as joint employers and thus, by virtue of this irregularity, the matters determined by the Board therein are not *res judicata* with respect to the instant proceeding. We have carefully considered the record as a whole and affirm the decision of the judge. Specifically, we find that over 2 weeks prior to the amendment to the petition and hearing in the underlying representation case, the General Counsel issued a complaint alleging the Respondents as joint employers. Additionally, while Western Temporary Services in its answer to the instant complaint contends that it has never exercised control over The Classic Company's labor relations, it admits therein that The Classic Company controls the wages, hours, and working conditions of Western's employees working for Classic—thus admitting the joint employer status of the two companies. Classic was present at the representation case hearing and presented evidence through individuals employed by Classic and Western, *inter alia*, regarding the relationship between Classic and Western, the referral of employees from Western to Classic, and the control exercised by each over the employees involved. Therefore, we reject the Respondents' claims of lack of due process and find that the Respondents had adequate opportunity to litigate all relevant issues in the underlying representation case proceeding and thus all issues raised by the Respondents here are *res judicata*.

² The Classic Company filed a request for review with the Board on the underlying Regional Director's Decision and Direction of Election as well as the Supplemental Decision therein.

Walter Steele, Esq., for the General Counsel.
George T. Dodd, Esq., of Fort Wayne, Indiana, for Respondent Western Temporary.
J. Michael O'Hara, Esq., and *Thomas M. Kimbrough, Esq.*, of Fort Wayne, Indiana, for Respondent Classic.

DECISION

STATEMENT OF THE CASE

WILLIAM A. GERSHUNY, Administrative Law Judge. A hearing was conducted in Fort Wayne, Indiana, on December 17, 1984, on a consolidated complaint issued August 24, 1984, alleging that Respondents, as joint employers, have failed and refused, in violation of Section 8(a)(1) and (5) of the Act, to bargain with the Charging Party, which was certified on June 28, 1984, as exclusive bargaining representative of all full-time and part-time production employees at Respondent Classic's Fort Wayne facility.

On the entire record, including my observation of witness demeanor, I make the following

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. JURISDICTION AND LABOR ORGANIZATION

The consolidated complaint alleges, each Respondent admits, and I find that each Respondent is an employer subject to the Act and that the Charging Party is a labor organization within the meaning of Section 2(5) of the Act.

II. UNFAIR LABOR PRACTICE

Through this unfair labor practice proceeding, Respondents intend to seek appellate review, otherwise unavailable to them, of Board procedures and determinations in a prior representation proceeding, Case 25-RC-7862.

That case was initiated on October 18, 1982, with the filing of a petition by the Union seeking to represent "all full time and part time employees" (excluding clericals, guards, supervisors, and technical employees) of the Classic Company (Classic) at its Fort Wayne facility. On November 17, Classic was given notice that a hearing on the petition would be conducted on November 30. By letter dated November 29, 1 day before the hearing, Classic and Western Temporary Services, Inc. (Western) were given notice of an amended petition designating Classic and Western as joint employers and enlarging the unit to include "employees jointly employed" by Classic and Western. Classic first received knowledge of the amendment at the November 30 hearing and its motion for a continuance was denied. Western received no actual knowledge of its joinder prior to November 30 and, accordingly, it made no appearance at the hearing. One of its managers, however, was present at the 1-day hearing as a prospective witness for Classic.

On February 2, 1983, the Regional Director issued a decision rejecting due process contentions and finding that Classic and Western were joint employers.¹

An election was conducted on March 4, 1983, with 27 votes cast for the Union, 16 against, and 44 challenged ballots. On Classic's request for review, the Board by telegraphic order of August 23, 1983, granted review for the issue of inclusion of such temporaries in the unit and denied review on all other issues. By telegraphic order of January 4, 1984, the Board directed that only the "part time" employees supplied by Western who worked at least an average of 4 hours per week during the 6-month period immediately preceding the election eligibility date were eligible to vote.

Thereafter on February 29, 1984, the Regional Director issued a Supplemental Decision ordering that ballots of those eligible part-time employees be counted; on March 9, 1984, Classic sought review of that decision; on May 23, 1984, the Board denied review; on June 22, 1984, a second tally of ballots showed 42 votes for the Union, 12 against, and 17 nondeterminative challenged ballots; and on June 28, 1984, a Certificate of Representation was issued.

Thereafter, each Respondent rejected a July 2, 1984 demand for bargaining and this unfair labor practice proceeding followed.

On October 1, 1984, the General Counsel filed with the Board a Motion for Summary Judgment and a motion to strike Respondents' answers, contending that all relevant issues have been determined in the representation proceeding, that Respondents may not litigate in an unfair labor practice proceeding issues which were or could have been litigated in the prior case and that no hearing is necessary on the consolidated complaint because of the absence of any factual issue. By Order of October 11, the Board denied the motions because of the existence of factual issues (otherwise unidentified) and remanded the case for hearing.

At the December 17 hearing, the General Counsel renewed its motion to strike from Respondents' individual answers denials that Respondents were joint employers obligated to bargain with the Union about the designated unit which included certain temporary employees furnished to Classic by Western. Because such issues were

previously determined by the Board in the representation case and are res judicata here, the motion was granted from the bench.

The General Counsel also renewed its motion for judgment on the pleadings. Briefs were waived and oral argument was heard. Jurisdiction and rejection of a bargaining demand having been admitted; issues of joint employment, unit description and lack of due process having been determined finally by the Board in Case 25-RC-7862; the fact and rate of temporary employee turnover at the Fort Wayne facility subsequent to that determination being immaterial to Respondents' duty to bargain; and the pleadings raising no other factual issue, the General Counsel's motion for judgment must be granted.

REMEDY

Having found that Respondents have violated Section 8(a)(5) and (1) of the Act, the Board will order them 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 unit employees are accorded the services of their selected bargaining agent for the period provided by law, the Board will construe the initial period of the certification as beginning the date Respondents begin 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).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²

ORDER

The Respondents, Western Temporary Services, Inc., and The Classic Company, Inc., Fort Wayne, Indiana, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Indiana Joint Board, Retail Wholesale and Department Store Union, AFL-CIO 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 bargaining unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

¹ To avoid further delays in the disposition of this case, Western was permitted to adduce the following uncontroverted evidence at the December 17 unfair labor practice hearing. That R. E. Nelson & Associates, Inc., its franchisee in the Fort Wayne area, maintains a pool of qualified clerical and light industrial employees and dispatches them on order to its large number of employer clients, including Classic; that Western pays each employee an hourly rate which it establishes based on skill and market conditions and makes all payroll deductions; that it provides workmen's compensation coverage and an optional medical insurance plan, the cost of the latter being born by the employee; that it bills each employer on the basis of a flat hourly rate, which includes its costs and profit; that from late 1982, when it first began to provide temporary light industrial employees to Classic, through early December 1984, the date of the hearing, Western furnished Classic with more than 300 such temporaries, not more than 35 of whom worked at Classic's facility during any given pay period; that many also were assigned by Western to other employers in the area; and that temporaries may, and often do, reject job assignments. The General Counsel's motion to strike this testimony and to reject supporting exhibits was granted on the asserted grounds that the evidence was irrelevant and did not constitute newly discovered evidence.

² If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Post at their Fort Wayne, Indiana facilities copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondents' authorized representative, shall be posted by the Respondents 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 Respondents 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.

³ 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 Indiana Joint Board, Retail Wholesale and Department Store Union, AFL-CIO as the exclusive bargaining representative of the employees in the following bargaining unit:

All full time and part time employees of the Classic Corporation at its Fort Wayne, Indiana facility, including employees employed jointly with Western Temporary Services, Inc., and all shipping and receiving, trophy, embroidery, art, retail, screenprint manual and screenprint automatic employees; but excluding all office clerical employees, technical employees, guard and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Sec. 7 of the Act.

WE WILL, on request, bargain with the Union as exclusive representative of the bargaining unit employees on terms and conditions of employment and; if an understanding is reached, embody the understanding in a signed agreement.

WESTERN TEMPORARY SERVICES, INC.
AND THE CLASSIC COMPANY, INC.