

**Arizona Pork Products, Inc. and United Food and Commercial Workers Union, Local 99R, AFL-CIO, Case 28-CA-7343**

30 May 1986

**DECISION AND ORDER**

**BY MEMBERS JOHANSEN, BABSON, AND STEPHENS**

On 30 September 1983 Administrative Law Judge Richard J. Boyce issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

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, findings,<sup>1</sup> 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 Respondent, Arizona Pork Products, Inc., Phoenix, Arizona, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

<sup>1</sup> In its exceptions the Respondent defends its refusal to bargain with the Union solely on the basis of its contract with the Teamsters, the asserted validity of the first runoff election, and the allegedly inadequate assurance of ballot secrecy in Local 448's merger election. We agree with the judge, for the reasons set forth in his decision, that the Respondent's arguments lack merit. We therefore find that none of the defenses raised by the Respondent justifies its refusal to recognize and bargain with the Union.

In sec IV(A) of his decision, the judge incorrectly stated that the initial election in the underlying representation proceeding was held 10 June 1982. The election was held 4 June 1982.

*Jane Goldman, Esq.*, for the General Counsel.  
*Thomas J. Kennedy and Tibor Nagy, Esq. (Snell & Wilmer)*, of Phoenix, Arizona for the Respondent.

**DECISION**

RICHARD J. BOYCE, Administrative Law Judge. This matter was tried in Phoenix, Arizona, August 4, 1983. The charge was filed February 16, 1983, by United Food and Commercial Workers Union, Local 99R, AFL-CIO (Local 99R). The complaint issued March 11, was amended during the trial, and alleges that Arizona Pork Products, Inc (Respondent) has been in violation of Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) since January 24, 1983, by refusing to recognize Local 99R as the collective-bargaining representative of its production and maintenance employees.

Respondent asserts that it is under no duty to recognize Local 99R, arguing that Local 99R "is not a succes-

sor to . . . the union purportedly certified" by the NLRB to represent its employees; that it at relevant times has been party to a labor contract with another labor organization, Teamsters Local 83 (Teamsters) which "precludes collective-bargaining with [Local 99R] during the term of that contract"; and that the second runoff election resulting in the certification of Local 99R's purported predecessor, United Food and Commercial Workers Union, Local 448 (Local 448) "was contrary to law" and the first runoff election, in which Teamsters received a majority, "is valid."

**FINDINGS OF FACT**

**I. JURISDICTION**

Respondent is an Arizona corporation engaged in the proceeding and nonretail sale of pork products in Phoenix. Its annual sales directly to customers outside Arizona exceed \$50,000. Respondent is an employer engaged in and affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

**II. LABOR ORGANIZATION**

Local 99R is and has been a labor organization within the meaning of Section 2(5) of the Act. Local 448 was a labor organization within the meaning of that section until its merger into Local 99R as later described.

**III. THE ALLEGED MISCONDUCT**

**A. Facts**

On February 5, 1982, Local 448 petitioned the NLRB to conduct an election among Respondent's production and maintenance employees.<sup>1</sup> Later that same day, Respondent and Teamsters entered into a 3-year contract covering the employees embraced by the petition. The Regional Director, in his Decision and Direction of Election, rejected the contention advanced by Respondent and Teamsters, as an intervenor in the representation proceeding, that the contract was a bar to the processing of the petition. The Board denied their requests for review of the Decision and Direction of Election, observing that they "raise[d] no substantial issues warranting review."

An election, with both Local 448 and Teamsters on the ballot, followed on June 10. Because neither received a majority, a runoff election was held August 13. Teamsters received a majority, but the Regional Director sustained Local 448's objection that an inappropriate voter-eligibility date had been used in view of the substantial expansion of the complement since the first election. Respondent's request for review of the Regional Director's determination was denied by the Board on the ground that it "raise[d] no substantial issues warranting review."

A second runoff election was held December 17. A majority voted for Local 448; no objections were filed; and on December 28 Local 448 was certified as the Em-

<sup>1</sup> Case 28-RC-4087

ployer's bargaining representative.<sup>2</sup> The unit then consisted of about 80 employees.

Meanwhile, Local 448 had become united with Local 99R, the surviving entity carrying the name of the latter. Their respective parent organizations, Amalgamated Meat Cutters and Butcher Workmen of North America and Retail Clerks International Association, had merged in 1979, becoming the United Food and Commercial Workers International Union and making the two locals sister organizations under a common International constitution.

The merger, as it was called, of Locals 448 and 99R was preceded by elections in October 1982 among employees in the various bargaining units represented by the locals, members and nonmembers alike. The tally among Local 448-represented employees was 196 for an 16 against the merger; and, among those represented by Local 99R, 183 for and 3 against. Only a small fraction of those eligible to vote did so.<sup>3</sup> Employees of Respondent did not vote because Local 448's status as their representative was as yet unestablished. They apparently were not informed of the merger before the final NLRB election.

On October 29, in the aftermath of the merger elections, the presidents and the secretary-treasurers of the two locals executed a merger agreement; and, by letter to Local 448 dated December 1, the president and the secretary-treasurer of the parent International stated the International's approval of it, effective as of that date.

A ballot addressing the merger issue was mailed October 12 to each Local 448-represented employee of known whereabouts. With each ballot were two envelopes. One, a so-called carrier envelope, bore Local 448's address, the return address of the voter, and a line for the voter's signature, which had to be affixed to validate the ballot within. The other was for insertion of the ballot, after which it was to be sealed and in turn inserted in the carrier envelope for mailing. To ensure ballot secrecy, the inner envelopes were unmarked and were separated from the carrier envelopes before being opened.

Accompanying each ballot, as well, were a copy of the proposed merger agreement and a note from Local 448's president, Dennis Davison, stating:

Before you is the proposed Merger Document that would, if ratified merge your Local Union together with our sister U.F.C.W. Local 99R.

The purpose of the proposed merger is to strengthen our combined Locals with a merged membership of approximately 6,500 members. It would mean greater strength in collective-bargaining, and combined resources will generate more fre-

quent and effective service to the membership, as well as streamlining Local Union administration through the elimination of duplication.

Please read carefully the enclosed Merger Document and mark your ballot accordingly. *Ballots must be returned no later than OCTOBER 27, 1982.* Your Executive Board has recommended the merger and urges you to vote for its approval.

The returned ballots were tallied by Local 448 functionaries. There was no independent oversight.

On October 11, the day before the Local 448 ballots were sent out, meetings were held in Yuma, Phoenix, and Flagstaff during which copies of the merger document were distributed and officials of Local 448 discussed the contemplated action with those represented by it caring to attend. These meetings were preceded by notices posted between September 27 and October 2 in stores and plants where Local 448-represented employees work. Each notice stated that a merger referendum was to be conducted, that ballots would be mailed out October 12 and were to be returned not later than October 27th, and that the local's executive board had approved the merger agreement and recommended employee approval. Each notice further stated:

We do not have all bargaining unit employees' address, therefore, anyone desiring to vote on the merger without an address on file should contact the Union office immediately for a ballot and Merger Agreement.

The address and telephone number of Local 448 were then set forth.

The notices posted in the Phoenix and Flagstaff areas also stated that there would be meetings October 11, at designated locations and times, "to discuss the proposed merger." The notices posted in the Yuma area contained no such meeting notice, but a letter from the local mailed to the Yuma-area employees at the time of the postings contained that information.

Those represented by Local 99R voted not by mail, but during meetings at 11 different sites from October 18 to 28. The record is sparse regarding the procedure.<sup>4</sup>

The merger agreement provided, among other things, that the surviving organization would operate under the name of Local 99R; that the "separate existence of . . . Local 448 shall be terminated" as of the effective date of the merger (except that its executive board "shall thereafter remain in existence for the time necessary and for the sole purpose of carrying out" the merger agreement); that the existing bylaws of Local 99R would be the bylaws of the surviving organization; that all Local 448

<sup>2</sup> The Certification of Representative contains this unit description

All full-time and regular part-time production and maintenance employees and leadmen employed at the Employer's place of business located at 2600 South Seventh Avenue, Phoenix, Arizona, excluding all office clerical employees, hog handlers, hog buyers, foremen, guards and supervisors as defined in the Act.

It is concluded that this is an appropriate unit for purposes of the Act

<sup>3</sup> Although the record does not disclose the number of eligible voters, it does reveal that Local 448 had about 1000 members and Local 99R about 5500 at the time of the merger

<sup>4</sup> Dennis Davison, premerger president of Local 448 and secretary-treasurer of the merged entity, testified that the Local 99R constitution contained no provision for a mail ballot, that Local 99R followed its "customary and usual election procedure," that he believed copies of the merger document were distributed to Local 99R-represented employees either before or during the meetings in which they voted, and that he "would have to assume" that secret-ballot procedures were observed Davison seemingly was testifying from supposition rather than certain knowledge in these respects

"books, records, and all . . . real and personal property and . . . other assets . . . of whatever nature . . . shall be vested in" Local 99R; that Local 99R would "assume all obligations of" Local 448, "including collective-bargaining obligations"; and that all "bargaining rights and certifications" running to Local 448 had originally been named as party thereto."

The merger agreement also provided that "the dues structure for the former Local 448 members shall remain as it is," and "members in good standing of" Local 448 "shall become and remain members in good standing of the successor Local Union without payment of any initiation or transfer fee"; that the president of Local 99R "shall be the President and Executive Officer of" the surviving organization; that the president of Local 448 "shall become the Secretary-Treasurer"; that the secretary-treasurer of Local 99R "shall become Executive Vice President"; and that "the Executive Board of the successor Local . . . shall consist of the president, Recorder and 14 Vice Presidents from . . . Local 99R and the Secretary-Treasurer and 4 Vice Presidents from Local 448."

Davison credibly testified that, as secretary-treasurer of the surviving Local, his duties include "contract administration and contract negotiations," including grievance handling on behalf of employees formerly represented by Local 448; and that, as president of Local 448, he had "exactly the same" duties with regard to Local 448-represented employees.

By letter to Respondent dated January 18, 1983, Davison, as secretary-treasurer of Local 99R, requested contract negotiations concerning the employees covered by the certification that had issued in the name of Local 448. Respondent's lawyer rejected the request by letter dated January 24 stating:

It is our client's position that the contract they have with the Teamsters Union is a valid agreement which they intend to live up to and therefore they see no need for bargaining with your Union at this time.

#### B. Discussion

Respondent's challenges to Local 448's certification—that the underlying petition should have been dismissed because of Respondent's contract with Teamsters and that, in any event, the first runoff election, in which Teamsters received a majority, was valid, making the second runoff election "contrary to law"—are rejected. Those issues, having been raised and resolved in the representation proceeding, cannot be relitigated in this "related subsequent unfair labor proceeding," there being no newly discovered or previously unavailable evidence bearing on them.<sup>5</sup>

<sup>5</sup> Board Rules and Regulations, Sec 102 67(f) The Board defines the phrase "related subsequent unfair labor practice proceeding" to mean "an 8(a)(5) case based on certification in a representation proceeding." *Serv-U-Stores*, 234 NLRB 1143, 1144 (1978) See also *Escambia River Electric Cooperative*, 265 NLRB 973 (1982), *St Mary's Infant Home*, 255 NLRB 1139, 1140-1141 (1981); *General Marine Transport Corp.*, 238 NLRB 1372, 1376 (1978) The present case falls squarely within that definition

Respondent's remaining contention—that Local 99R "is not a successor to . . . the union purportedly certified" and thus is not entitled to the benefits of the certification—likewise is rejected. The Board has determined that the United Food and Commercial Workers International Union is "a continuation of" the two organizations from which it derived, "succeed[ing] to the representational rights of both unions."<sup>6</sup> The present merger agreement appears to be patterned after, or at least is substantially similar to, that governing the merger which created the parent international, beyond which Local 448's erstwhile president, as secretary-treasurer of the surviving local, continues to serve those formerly represented by Local 448 much as he did before. In addition, the procedure underlying approval of the merger agreement by the Local 448-represented employees plainly comported with the requisite standards of due process.<sup>7</sup>

It is concluded, therefore, that Local 99R, as constituted since December 1, 1982, is a continuation of Local 448 and the former Local 99R, properly succeeding to the representational rights of Local 448, including the certification on which Local 99R based its request that Respondent bargain.<sup>8</sup>

Respondent's rejection of that request consequently violated Section 8(a)(5) and (1) as alleged.

#### CONCLUSION OF LAW

By refusing to recognize and bargain with Local 99R, as found herein, Respondent violated Section 8(a)(5) and (1) of the Act.

On these findings of fact and conclusion of law and on the entire record, I issue the following recommended<sup>9</sup>

#### ORDER

The Respondent, Arizona Pork Products, Inc., Phoenix, Arizona, 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 United Food and Commercial Workers Union, Local 99R, AFL-CIO as the exclusive bargaining representative of its employees in the following appropriate unit:

All full-time and regular part-time production and maintenance employees and leadmen employed at the Employer's place of business located at 2600 South Seventh Avenue, Phoenix, Arizona; excluding all office clerical employees, hog handlers, hog

<sup>6</sup> *Warehouse Groceries Management*, 254 NLRB 252, 256 (1981)

<sup>7</sup> Compare *State Bank of India*, 254 NLRB 1108 (1982)

<sup>8</sup> That Respondent's employees did not vote on the merger issue does not invalidate this conclusion—"such participation or ratification is not required" *American Enka Co.*, 231 NLRB 1335, 1337 (1977)

<sup>9</sup> All outstanding motions inconsistent with this recommended Order are denied. 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

buyers, foremen, 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 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 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.<sup>10</sup>

(b) Post at its Phoenix, Arizona facility copies of the attached notice marked "Appendix."<sup>11</sup> Copies of the notice, on forms provided by the Regional Director for Region 28, 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.

<sup>10</sup> So that the employees in the appropriate unit will have the services of their chosen bargaining representative for the minimum time provided by law, the period of certification shall be construed as beginning on the date Respondent starts to bargain in good faith with Local 99R. *St Mary's Infant Home*, 255 NLRB 1139, 1142 (1982), *Mar-Jac Poultry Co.*, 136 NLRB 785, 786-787 (1962)

<sup>11</sup> 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.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with United Food and Commercial Workers Union, Local 99R, AFL-CIO as the exclusive bargaining representative of our employees in the following appropriate unit:

All full-time and regular part-time production and maintenance employees and leadmen employed at our place of business located at 2600 South Seventh Avenue, Phoenix, Arizona; excluding all office clerical employees, hog handlers, hog buyers, foreman, guards and supervisors as defined in the Act.

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 above-named Union, as the exclusive representative of all employees in the bargaining unit described above, with respect to rates, pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody the understanding in a signed agreement.

ARIZONA PORK PRODUCTS, INC.