

Yuba Natural Resources, Inc. and Operating Engineers Local Union No. 3, International Union of Operating Engineers, AFL-CIO. Case 20-CA-19975

28 March 1986

DECISION AND ORDER

**BY CHAIRMAN DOTSON AND MEMBERS
DENNIS AND JOHANSEN**

Upon a charge filed by the Union on 31 October 1985,¹ the General Counsel of the National Labor Relations Board issued a complaint on 25 November against the Company, the Respondent, alleging that it has violated Section 8(a)(5) and (1) of the National Labor Relations Act.

The complaint alleges that on 26 September, following a Board election in Case 20-RC-15666, the Union was certified as the exclusive collective-bargaining representative of the Company's employees in the unit found appropriate. (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 24 October the Company has refused to bargain with the Union. On 9 December the Company filed its answer admitting in part and denying in part the allegations in the complaint.²

On 23 December the General Counsel filed a Motion for Summary Judgment. On 26 December 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 General Counsel filed an Amendment to the Motion for Summary Judgment on 3 January 1986. The Company 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

The Respondent's answer admits its refusal to bargain with the Union, but avers, as an affirmative

defense, that the Certification of Representative issued by the Board in Case 20-RC-15666 (not reported in Board volumes) was improper since the election held 4 November 1983 should have been set aside based on the conduct set forth in the Respondent's timely objections to the election. The Respondent's objections alleged that Supervisor Loren Gilmore had instigated the Union's organizing campaign and had, together with Clay Adamson, solicited, threatened, and coerced employees to vote for the Union. The General Counsel argues that these and all other material issues have previously been decided by the Board. We agree with the General Counsel.

The record, including the record in Case 20-RC-15666, reveals that the parties entered into a Stipulation for Certification Upon Consent Election which was approved by the Regional Director on 7 October 1983. On 4 November 1983 a secret-ballot election was held. The tally of ballots showed that of approximately 23 eligible voters, 12 cast ballots for, and 8 cast ballots against, the Union. There were three challenged ballots, which were not sufficient in number to affect the outcome of the election. On 14 November 1983, the Respondent filed timely objections to the election. A hearing was held on the objections on 11 and 12 January and 8 February 1984. In his report, dated 3 May 1984, the hearing officer recommended that the Respondent's objections be overruled and the election results certified. On 24 May 1984 the Respondent filed exceptions to the hearing officer's recommendations, and on 26 September the Board issued a Decision and Certification of Representative.

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 Company were or could have been litigated in the prior representation proceeding. The Company 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 re-examine the decision made in the representation proceeding. We therefore find that the Company has not raised any issue that is properly litigable in this unfair labor practice proceeding. Accordingly we grant the Motion for Summary Judgment.

¹ All dates refer to 1985 unless otherwise indicated

² The Respondent's motion for remand, dismissal, or consolidation with Case 20-CA-18716 is denied. The Respondent states that should a complaint issue on a pending charge in Case 20-CA-18716, it intends to litigate the status of an individual found in the underlying representation case not to be a supervisor. On that basis, it seeks to have this proceeding consolidated with that involving the pending charge. The supervisory status issue was fully litigated and resolved in the underlying representation case. Merely because evidence will be presented regarding an individual's supervisory status in another proceeding does not justify further delay in resolving this case.

The Respondent's motion to supplement the record is also denied, because the Board takes official notice of the transcripts and documents in the representation case.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Company, a Delaware corporation, is engaged in the production and sale of rock and aggregate products at its facility in Marysville, California. During the calendar year 1985, a representative period, the Respondent sold and shipped products, goods, and materials valued in excess of \$50,000 to customers located outside the State of California. 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 Certification*

Following the election held 4 November 1983, the Union was certified as the collective-bargaining representative of the employees in the following appropriate unit:

All production and maintenance employees employed by the Respondent at its Marysville, California, facilities, excluding employees employed by the Hammonton Company, office clerical employees, managerial employees, guards, and supervisors within the meaning of the Act.

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

B. *Refusal to Bargain*

Since 23 October the Union has requested the Company to bargain, and since 24 October the Company 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 24 October to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Company 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, Yuba Natural Resources Inc., Marysville, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Operating Engineers Local Union No. 3, International Union of Operating Engineers, 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 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 employed by the Respondent at its Marysville, California facilities, excluding employees employed by the Hammonton Company, office clerical employees, managerial employees, guards, and supervisors within the meaning of the Act.

(b) Post at its facility in Marysville, California, copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in

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"

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.

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 Operating Engineers Local Union No. 3, International Union

of Operating Engineers, AFL-CIO 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 employed by us at our Marysville, California facilities, excluding employees employed by the Hammonton Company, office clerical employees, managerial employees, guards, and supervisors within the meaning of the Act.

YUBA NATURAL RESOURCES, INC.