

The Asbury Graphite Mills, Inc. and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Teamsters Local No. 538. Case 6-CA-19315

15 December 1986

DECISION AND ORDER

BY MEMBERS JOHANSEN, BABSON, AND STEPHENS

Upon a charge filed by the Union 10 July 1986, the General Counsel of the National Labor Relations Board issued a complaint 25 July 1986 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 5 June 1986, following a Board election in Case 6-RC-9667, 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 30 June 1986, the Company has refused to bargain with the Union. On 4 August 1986 the Company filed its answer admitting in part and denying in part the allegations in the complaint.

On 29 August 1986 the General Counsel filed a Motion for Summary Judgment. On 3 September 1986 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 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 Company's answer admits that on 5 June 1986 the Regional Director certified the Union as the exclusive bargaining representative of the employees in the bargaining unit. However, the Company alleges that the Regional Director erred in conducting the 23 May 1986 election. It contends that the petitioned-for unit was not an appropriate unit due to the lack of a substantial and representative complement of employees. In this regard, the Company alleges that only half of the current employees were engaged in production and maintenance work and the remainder were engaged in construction work at the time of the Regional Director's Decision and Direction of Election.

The General Counsel argues that all material issues have been decided previously.¹ We agree with the General Counsel.

The record, including the record in Case 6-RC-9667, reveals that an election was held 23 May 1986. The tally of ballots shows that seven votes were cast for the Union, six votes were cast against the Union; there were no challenged ballots. As no objections to the election were filed, the Regional Director issued the certification of representative on 5 June 1986.

On 19 June 1986 the Union requested the Company to bargain. Since about 30 June 1986, and more particularly, by letter dated 1 July 1986 the Company declined to recognize the Union so as to "test the validity" of the 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,² 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.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Company, a New Jersey corporation, is engaged in the production and nonretail sale and distribution of graphite and related products at its fa-

¹ A request for review of the Regional Director's Decision and Direction of Election was filed on 29 April 1986 by the Company and was denied by the Board on 23 May 1986.

² The Respondent, in its response to the Notice to Show Cause, asserted that it has hired four production and maintenance employees since the election. Assuming arguendo the validity of the Respondent's assertion, this subsequent hiring of employees does not create an issue that warrants a hearing. In his Decision and Direction of Election, the Regional Director considered the possibility that the Respondent would hire more employees. Nonetheless, the Regional Director found that a substantial and representative complement of employees was employed by the Respondent at the time of the issuance of the Decision and Direction of Election.

cility in Kittanning, Pennsylvania, where it annually purchases and receives products, goods, and materials valued in excess of \$50,000 directly from points outside the Commonwealth of Pennsylvania. 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 23 May 1986, the Union was certified 5 June 1986 as the collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time production and maintenance employees employed by the Employer at its Kittanning, Pennsylvania, facility; excluding all office clerical employees, and guards, professional employees 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*

Since 19 June 1986 the Union has requested the Company to bargain, and since 30 June 1986 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 30 June 1986 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 will 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 will 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, The Asbury Graphite Mills, Inc., Kittanning, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Teamsters Local No. 538, 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 full-time and regular part-time production and maintenance employees employed by the Employer at its Kittanning, Pennsylvania, facility; excluding all office clerical employees, and guards, professional employees and supervisors as defined in the Act.

(b) Post at its facility in Kittanning, Pennsylvania, copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 6, 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.

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 International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Teamsters Local No. 538, 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 full-time and regular part-time production and maintenance employees employed by the Employer at its Kittanning, Pennsylvania, facility; excluding all office clerical employees, and guards, professional employees and supervisors as defined in the Act.

THE ASBURY GRAPHITE MILLS, INC.