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Warren Unilube, Inc. and Teamsters Local 667. Case 26-CA-23999

July 15, 2011

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS BECKER
AND HAYES

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed on April 1, 2011, the Acting General Counsel issued the complaint on April 21, 2011, alleging that the Respondent has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to bargain following the Union's certification in Case 26-RC-8616. (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 asserting affirmative defenses.

On May 12, 2011, the Acting General Counsel filed a Motion for Summary Judgment. On May 13, 2011, 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 filed a response. The Acting General Counsel filed a Motion to Strike and a response to the Respondent's response. The Respondent filed an opposition to the Acting General Counsel's motion.¹

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 denies its refusal to bargain² and contests the validity of the Union's certifica-

¹ The motion to strike is denied. The Acting General Counsel has failed to establish that the Respondent's initial failure to serve the other parties with its response to the Notice to Show Cause, which it corrected by providing copies of the document to the Acting General Counsel and the Charging Party when alerted of this error, prejudiced any party in any way.

² Paragraph 9 of the complaint alleges that the Respondent has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit. The Respondent's answer denies that the Union is the properly-certified exclusive collective-bargaining representative of the unit, and therefore denies the allegations of par. 9. However, the Acting General Counsel attached to his motion as Exh. 17 a letter dated March 30, 2011, from the Respond-

tion based on its objections to conduct alleged to have affected the results of the election in the representation proceeding.

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).³ Accordingly, we grant the Acting General Counsel's Motion for Summary Judgment.⁴

On the entire record, the Board makes the following

ent's attorney to the Union's attorney, which states that "the Company respectfully declines the union's request [to recognize and bargain with the Union] and will not meet for the purpose of negotiating a collective-bargaining agreement." The Respondent does not contest the authenticity of this letter. Accordingly, we find that there is no existing material issue of fact warranting a hearing regarding the Respondent's failure and refusal to recognize and bargain with the Union. The Respondent's answer also denies the allegations in complaint pars. 10 and 11. These paragraphs state, respectively, the legal conclusions that the Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees in violation of Sec. 8(a)(5) and (1) of the Act, and that the unfair labor practices of the Respondent affect commerce within the meaning of Sec. 2(6) and (7) of the Act. Accordingly, the Respondent's denials with respect to these allegations do not raise any material issues of fact to be litigated in this proceeding.

³ In its response to the Notice to Show Cause, the Respondent acknowledges that generally, in the absence of newly discovered or previously unavailable evidence or special circumstances, a respondent is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding. This principle is longstanding and endorsed by the Supreme Court. See *Pittsburgh Plate Glass Co.*, supra at 162. The Respondent argues, however, that such relitigation is warranted here because the facts in the prior representation proceeding establish that the Union's status of majority representative did not result from a free and fair election, citing *Sub-Zero Freezer Co.*, 271 NLRB 47, 47 (1984). *Sub-Zero* is one of a limited number of cases in which the Board has departed from the rule that, in a certification-testing unfair labor practice case, issues that had been presented to and decided by the Board in a prior, related representation case cannot be relitigated. Having reviewed the facts and arguments presented by the Respondent in its response to the Notice to Show Cause, we find no basis for departing from our longstanding rule or disturbing our Decision and Certification of Representative in the underlying representation case.

⁴ We therefore deny the Respondent's request that the complaint be dismissed with prejudice on all counts.

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, an Arkansas corporation, with an office and place of business in West Memphis, Arkansas, has been engaged in the blending and packaging of petroleum products.⁵

During the 12-month period ending March 31, 2011, the Respondent, in conducting its business operations described above, sold and shipped from its West Memphis, Arkansas facility goods valued in excess of \$50,000 directly to points outside the State of Arkansas, and purchased and received at the same facility goods valued in excess of \$50,000 directly from points outside the State of Arkansas.

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, Teamsters Local 667, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Certification*

Following a representation election held on November 5, 2010, the Board certified the Union on March 16, 2011, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

INCLUDED: All full-time and regular part-time employees, including production, plastics, blending, maintenance, warehouse, plant clericals, quality inspectors and truck drivers at the Respondent's West Memphis, Arkansas facility;

EXCLUDED: All office clerical employees, professional employees, quality control employees, house-keeping employees, temporary employees, guards and supervisors as defined in the Act.

The Union continues to be the exclusive collective-bargaining representative of the unit employees under Section 9(a) of the Act.

B. *Refusal to Bargain*

At all material times, Rusty Brown held the position of the Respondent's plant manager, and has been a supervisor of the Respondent within the meaning of Section

⁵ In its answer to the complaint, the Respondent admits the allegations of par. 2, except that it denies that "the blending and packaging of petroleum products" is a full and complete statement of its activities at its facility in West Memphis, Arkansas. However, the description of the Respondent's business is set forth in the Stipulated Election Agreement signed by the parties. We therefore find that the Respondent's denial does not raise any issue which warrants a hearing.

2(11) of the Act and an agent of the Respondent within the meaning of Section 2(13) of the Act.

At all material times, an unnamed attorney has been an agent of the Respondent within the meaning of Section 2(13) of the Act.

By letter dated March 22, 2011, the Union requested the Respondent to recognize and bargain with it as the exclusive collective-bargaining representative of the unit. Since about March 30, 2011, the Respondent has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit. We find that this failure and refusal constitutes an unlawful failure and refusal to recognize and bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing and refusing since March 30, 2011, to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the 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 recognize and 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, Warren Unilube, Inc., West Memphis, Arkansas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with Teamsters Local 667, as the exclusive collective-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, recognize and bargain with the Union as the exclusive collective-bargaining 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:

INCLUDED: All full-time and regular part-time employees, including production, plastics, blending, maintenance, warehouse, plant clericals, quality inspectors and truck drivers at the Respondent's West Memphis, Arkansas facility;

EXCLUDED: All office clerical employees, professional employees, quality control employees, house-keeping employees, temporary employees, guards and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in West Memphis, Arkansas, copies of the attached notice marked "Appendix."⁶ 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. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means.⁷ 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 its facilities 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 March 30, 2011.

(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 at-

testing to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. July 15, 2011

⁶ 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."

⁷ For the reasons stated in his dissenting opinion in *J. Picini Flooring*, 356 NLRB No.9 (2010), Member Hayes would not require electronic distribution of the notice.

Wilma B. Liebman,	Chairman
Craig Becker,	Member
Brian E. Hayes,	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 Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with Teamsters Local 667, as the exclusive collective-bargaining 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 listed above.

WE WILL, on request, recognize and bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following bargaining unit:

INCLUDED: All full-time and regular part-time employees, including production, plastics, blending, maintenance, warehouse, plant clericals, quality inspectors and truck drivers at our West Memphis, Arkansas facility;

EXCLUDED: All office clerical employees, professional employees, quality control employees, house-keeping employees, temporary employees, guards and supervisors as defined in the Act.

WARREN UNILUBE, INC.