

American Telecommunications Corporation, Electronic Division and Communications Workers of America, AFL-CIO, Case 21-CA-16586

September 29, 1978

DECISION AND ORDER

BY MEMBERS JENKINS, MURPHY, AND TRUESDALE

Upon a charge¹ filed on April 19, 1978, by Communications Workers of America, AFL-CIO, herein called the Union, and duly served on American Telecommunications Corporation, Electronic Division, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 21, issued a complaint² and notice of hearing against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing before an Administrative Law Judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on March 31, 1978, following a Board election in Case 21-RC-15328, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;³ and that, commencing on or about April 7, 1978, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the

¹ The charge was amended by the Union's Local No. 11580 on May 19 and by the Union on May 26.

² The Regional Director issued an order consolidating cases and a consolidated complaint on June 1, 1978, consolidating Case 21-CA-16586, here before the Board, with Case 21-CA-16565. The former case concerned charges alleging only a general refusal to bargain by Respondent on and after April 7, 1978, while the latter involved allegations of unlawful unilateral changes. The consolidated complaint contained provisions alleging both types of unlawful conduct. However, on June 26, 1978, the Regional Director issued an order severing the present case from Case 21-CA-16565. Consequently, the Motion for Summary Judgment - and thus the only matter here before the Board - concerns the allegations of the complaint that since on or about April 7, 1978, the Respondent has violated Sec. 8(a)(5) and (1) of the Act by refusing to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit. Our decision herein, therefore, in no way should be construed as reaching or passing on the allegations in the consolidated complaint relating to alleged unilateral changes.

³ Official notice is taken of the record in the representation proceeding, Case 21-RC-15328, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations and Statements of Procedure, Series 8, as amended. See *LTV ElectroSystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (C.A. 4, 1968); *Golden Age Beverage Company*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (C.A. 5, 1969); *Intertype Company v. Penello*, 269 F.Supp. 573 (D.C.Va., 1967); *Follett Corporation*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (C.A. 7, 1968); Sec. 9(d) of the NLRA, as amended.

Union has requested and is requesting it to do so. On June 9, 1978, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On July 17, 1978, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on July 25, 1978, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed no response to the Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the amended complaint, Respondent admits its refusal to bargain but denies that it thereby violated Section 8(a)(5) and (1) of the Act. Specifically, Respondent attacks the Union's certification on the basis that in the underlying representation proceeding the Union, through objectionable conduct, improperly gained a majority of the votes cast in the election therein; that thereafter the Regional Director for Region 21 erroneously certified the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit; and that therefore said election and subsequent certification were without legal effect.

Counsel for the General Counsel argues that the Respondent is attempting to relitigate the identical issues that were raised and determined by the Board in the underlying representation case. We agree.

A review of the record herein, including the record in Case 21-RC-15328, shows the following: On January 10, 1978, the Regional Director for Region 21 issued a Decision and Direction of Election.⁴ On February 10, 1978, an election by secret ballot was conducted among the employees in the appropriate unit. The tally of ballots showed that of approximately 500 eligible voters, 469 cast ballots, of which 248 were cast for Communications Workers of America, AFL-

⁴ The unit is:

All production and maintenance employees, shipping and receiving employees, lead personnel, assemblers, general helpers, inspectors, machine operators, material handlers, assembly technicians, assembly setup mechanics, electronic technicians, maintenance helpers, maintenance mechanics, inventory control clerks, quality control clerks, engineering technicians, and expeditors employed by the Employer at its facility located at 16960 Gale Ave., City of Industry, California; excluding all office clerical employees, professional employees, engineering department employees, guards, and supervisors as defined in the Act.

CIO, 9 were cast for Freighthandlers, Clerks & Helpers Local 357, I.B.T.C.W. & H. of A., and 164 were cast against participating labor organizations. There were 48 challenged ballots, a number insufficient to affect the results of the election.

On February 17, 1978, Respondent filed timely objections to conduct affecting the result of the election, and on March 30, 1978, the Regional Director issued a Supplemental Decision and Certification of Representative in which he overruled the Respondent's objections and certified the Union as the exclusive bargaining representative of all the employees in the appropriate unit.

By letter dated April 3, 1978, the Union requested that Respondent bargain collectively with respect to wages, hours, and other conditions of employment.⁵ By letter dated April 7, 1978, Respondent stated that it refused to do so, basing its refusal on the grounds that the February 10 election and the resulting action taken by the Regional Director in overruling all of its objections were invalid and that therefore it had no legal duty to recognize or deal with the Union in any way.

On April 12, 1978, Respondent filed with the Board a request for review of the Regional Director's Supplemental Decision and Certification of Representative, in which it sought to have the Board sustain its six objections and revoke the certification of the Union or, in the alternative, direct a hearing for the purpose of taking evidence on its objections not developed by the Regional Director.

On May 16, 1978, the Board denied the Respondent's request for review, finding that it raised no substantial issues which warranted review. In doing so, it determined that there were no issues of fact or law which warrant a hearing.⁶

Thus, the Respondent's answer to the complaint is limited in all essentials to repeating its contentions urged, but rejected, in the representation proceeding that because of the alleged union misconduct set forth

⁵ In its answer to the complaint, Respondent denies "generally and specifically" those allegations of the complaint that the Union by letter dated April 3, 1978, requested Respondent to bargain with it. However, a copy of the alleged union letter of April 3 was attached to the General Counsel's Motion for Summary Judgment, and Respondent does not contend that the letter was not authentic or that it did not receive the letter. Further, Respondent does not deny, as alleged in the complaint, that it sent a letter on April 7, 1978, refusing to bargain. Indeed, in the latter letter, Respondent acknowledges receipt of the Union's letter of April 3 in which it requested bargaining.

⁶ With respect to Objection 5 in the underlying representation case, we agree with the Regional Director's conclusion that such objection was not sustainable under the principles set forth in *Shopping Kart Food Market, Inc.*, 228 NLRB 1311 (1977). (Member Jenkins does not, however, rely on *Shopping Kart*.) Moreover, we note that the same result would be reached under *Hollywood Ceramics Company, Inc.*, 140 NLRB 221 (1962), inasmuch as Respondent (there, the employer) failed to make an affirmative showing - beyond bare allegations of falsity - that the data set forth in the Union's handbill constituted, in fact, a material misrepresentation.

in its objections the Union was not properly certified and that therefore its refusal to bargain with the Union was not unlawful. It thus appears that Respondent is at this time attempting, as the General Counsel contends, to raise again issues which were specifically considered and resolved by the Regional Director and the Board in the underlying representation case.

It is well settled that in the absence of newly discovered or 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 which were or could have been litigated in a prior representation proceeding.⁷

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent is a corporation engaged in the manufacture of communications equipment, with a plant located at 16960 Gale Avenue, City of Industry, California. Respondent annually purchases and receives goods and materials valued in excess of \$50,000 directly from customers located outside the State of California.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

Communications Workers of America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

⁷ See *Pittsburgh Plate Glass Company v. N.L.R.B.*, 313 U.S. 146, 162, (1941); Board's Rules and Regulations, Secs. 102.67(f) and 102.69(c).

III. THE UNFAIR LABOR PRACTICES

A. *The Representation Proceeding*

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

All production and maintenance employees, shipping and receiving employees, lead personnel, assemblers, general helpers, inspectors, machine operators, material handlers, assembly technicians, assembly setup mechanics, electronic technicians, maintenance helpers, maintenance mechanics, inventory control clerks, quality control clerks, engineering technicians, and expeditors employed by the Employer at its facility located at 16960 Gale Avenue, City of Industry, California; excluding all office clerical employees, professional employees, engineering department employees, guards, and supervisors as defined in the Act.

2. The certification

On February 10, 1978, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 21, designated the Union as their representative for the purpose of collective bargaining with Respondent. The Union was certified as the collective-bargaining representative of the employees in said unit on March 31, 1978, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about April 3, 1978, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about April 7, 1978, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since April 7, 1978, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit and that by such refusal Respondent has engaged in and is engaging in unfair labor practices

within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), *enfd.* 328 F.2d 600 (C.A. 5, 1964), *cert. denied* 379 U.S. 817 (1964); *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), *enfd.* 350 F.2d 57 (C.A. 10, 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. American Telecommunications Corporation, Electronic Division, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Communications Workers of America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees, shipping and receiving employees, lead personnel, assemblers, general helpers, inspectors, machine operators, material handlers, assembly technicians, assembly setup mechanics, electronic technicians, maintenance helpers, maintenance mechanics, inven-

tory control clerks, quality control clerks, engineering technicians, and expeditors employed by the Employer at its facility located at 16960 Gale Avenue, City of Industry, California; excluding all office clerical employees, professional employees, engineering department employees, guards, and supervisors as defined in the Act constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

4. Since March 31, 1978, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about April 7, 1978, and at all times thereafter to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed to them in Section 7 of the Act and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, American Telecommunications Corporation, Electronic Division, City of Industry, California, 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 Communications Workers of America, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

All production and maintenance employees, shipping and receiving employees, lead personnel, assemblers, general helpers, inspectors, machine operators, material handlers, assembly technicians, assembly setup mechanics, electronic technicians, maintenance helpers, maintenance mechanics, inventory control clerks, quality

control clerks, engineering technicians, and expeditors employed by the Employer at its facility located at 16960 Gale Avenue, City of Industry, California; excluding all office clerical employees, professional employees, engineering department employees, 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 in Section 7 of the Act.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Upon 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.

(b) Post at its facility located at 16960 Gale Avenue, City of Industry, California, copies of the attached notice marked "Appendix."⁸ Copies of said notice, on forms provided by the Regional Director for Region 21, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 21, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

⁸ In the event that 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

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Communications Workers of America, AFL-CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees

in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, 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. The bargaining unit is:

All production and maintenance employees, shipping and receiving employees, lead personnel, assemblers, general helpers, inspectors,

machine operators, material handlers, assembly technicians, assembly setup mechanics, electronic technicians, maintenance helpers, maintenance mechanics, inventory control clerks, quality control clerks, engineering technicians, and expeditors employed by the Employer at 16960 Gale Avenue, City of Industry, California, excluding all office clerical employees, professional employees, engineering department employees, guards, and supervisors as defined in the Act.

AMERICAN TELECOMMUNICATIONS CORPORATION, ELECTRONIC DIVISION