Zeigler Coal Company *and* United Mine Workers of America. Case 14-CA-14695

July 6, 1981

DECISION AND ORDER

Upon a charge filed on February 12, 1981, by United Mine Workers of America, herein called the Union, and duly served on Zeigler Coal Company, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 14, issued a complaint on March 6, 1981, 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 and the 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 December 31, 1980, following a Board election in Case 14-RC-9306, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[1] and that, commencing on or about January 29, 1981, 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 Union has requested and is requesting it to do so. On March 18, 1981, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint. Respondent denies that the Union has requested Respondent to bargain and that Respondent has failed or refused to bargain with the Union as the exclusive collective-bargaining representative of its employees in the appropriate unit. Respondent also denies that it has committed any unfair labor practices.

On April 6, 1981, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on April 10, 1981, 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 a response to the Notice To Show Cause.

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

Ruling on the Motion for Summary Judgment

In opposing the General Counsel's motion, Respondent argues that the General Counsel has not satisfied his burden of establishing, by admissible evidence, that there is no genuine issue as to any material fact. Specifically, Respondent contends that the affidavit of union attorney Thomas Gumbel and the exhibits incorporated into that affidavit, submitted in support of the General Counsel's motion, are not admissible and that the affidavit, with exhibits, does not support a legal conclusion that Respondent refused to bargain with the Union. Respondent does not offer any affidavits or other evidence to raise any issues of fact, but contends only that the General Counsel had failed to satisfy the burden of proving facts that would support a summary judgment, considering that any inferences drawn from the underlying facts "must be viewed in the light most favorable to the party opposing the motion."[2]

In his affidavit, Gumbel states, *inter alia*, that he sent a mailgram to Respondent on January 29, 1981, in which he requested bargaining, confirming an earlier verbal request made by Union Representative Tony Kujawa. The mailgram is incorporated into the affidavit. Gumbel further stated in his affidavit that Kujawa forwarded the following letter, dated February 2, 1981, to Gumbel:

> Mr. Tony Kujawa
> International Board Member
> District 12
> United Mine Workers of America
> 800 Reisch Building
> Springfield, Illinois 62701
>
> Dear Tony:
>
> This will acknowledge receipt of Tom Gumbel's letter of January 29, 1981, in which he requested we commence negotiations with respect to the warehousepersons employed at out Zeigler #11 Mine. We are of the opinion that these warehouse persons are covered by Article II, Section (b) Exemption Clause, of our agreement with your union and that you have agreed not to seek to organize or ask recognition for such exempt employees during the life of said agreement.
>
> Since our agreement with your union is not subject to termination prior to March 28, 1981,

[1] Official notice is taken of the record in the representation proceeding, Case 14-RC-9306, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co. v. Penello*, 269 F.Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

[2] *U.S. v. Diebold, Incorporated*, 369 U.S. 654, (1962)

we suggest that the matter be reviewed after that date.

Very truly yours,

William Kuzman, Jr.
Vice President
Industrial and Employee Relations

Gumbel then stated in his affidavit that Respondent is continting to fail to meet with or bargain with the Union and that the Union has received no further response from Respondent.

Respondent asserts that the February 2, 1981, letter, purportedly sent by Respondent Vice President Kuzma, has not been properly authenticated and therefore does not constitute admissible evidence, and that its authenticity can be attested to only by either the sender or a party competent to identify the signature of the sender. Respondent does not assert that the letter is a forgery or that it had not been sent by Kuzma. Contrary to Respondent, we find that the letter is self-authenticating as a "reply letter" since Gumbel states in his affidavit that he sent the January 29, 1981, letter (mailgram) referred to in the February 2, 1981, letter and incorporates the January 29, 1981, letter in his affidavit.[3]

Respondent also attacks Gumbel's affidavits by asserting that it is not based on personal knowledge since Gumbel swore that the statements therein were "true to the best of memory, information, knowledge, and belief." In support of its contention that Gumbel's affidavit does not comply with the mandatory requirement of Rule 56 of the Federal Rules of Civil Procedure, Respondent cites *Automatic Radio Manufacturing Co., Inc.* v. *Hazeltine Research, Inc.*, 339 U.S. 827, 831 (1950), and *F. S. Bowen Electric Co., Inc.* v. *J. D. Hedin Construction Co., Inc.*, 316 F.2d 362, 364 (D.C. Cir. 1963). We find these cases to be distinguishable in that, on the basis of the entire affidavit, including the exhibits incorporated therein, it is clear that Gumbel had personal knowledge of all the key facts asserted, particularly that he sent the mailgram to Respondent requesting bargaining, and that the Union has received no further response to his request, other than the February 2, 1981, letter. We note that the January 29, 1981, request from Gumbel specified Gumbel as one of the parties Respondent should contact with regard to bargaining. Respondent makes no claim that it responded in any manner to the request.

On the basis of the foregoing and the entire record, we find that the Union requested Respondent to bargain on January 29, 1981, that Respondent's only reply was the February 2, 1981, letter, and that by such conduct Respondent has, since February 2, 1981, refused and failed to bargain with the Union in the appropriate unit. Thus, the General Counsel has satisfied the burden of proving by admissible evidence that there is no genuine issue as to any material fact, even with the evidence viewed in the light most favorable to Respondent.

Furthermore 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.[4]

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, and has been at all times material herein, a corporation duly organized under and existing by virtue of the laws of the State of Illinois. At all times material herein, Respondent has maintained its principal office and place of business in Chicago, Illinois, and a mining facility located in Coulterville, Illinois, herein called the Coulterville mining facility or Zeigler Mine #11. Respondent maintains other installations in the State of Illinois. Respondent is, and has been at all times material herein, engaged in the mining and nonretail sale of coal.

During the year ending February 28, 1981, which period is representative of its operations during all times material hereto, Respondent, in the course and conduct of its business operations, purchased and caused to be transported and delivered at its Coulterville mining facility, goods and materials valued in excess of $50,000, of which goods and materials valued in excess of $50,000 were

[3] *Purer & Company* v. *Aktiebolaget Addo*, 410 F.2d 871, 876 (9th Cir. 1969); *Winel* v. *U.S.*, 365 F.2d 646, 648 (8th Cir. 1966).

[4] See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

transported and delivered to its Coulterville mining facility in Coulterville, Illinois, directly from points lcoated outside the State of Illinois.

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

United Mine Workers of America is a labor organization within the meaning of Section 2(5) of the Act.

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 warehousepersons employed at the Employer's Zeigler Mine #11, *EXCLUDING* office clerical and professional employees, storekeeper, guards and supervisors as defined in the Act, and all other employees.

2. The certification

On December 19, 1980, 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 14, 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 December 31, 1980, 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 January 29, 1981, 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 February 2, 1981, 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 February 2, 1981, 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 (5th Cir. 1964), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

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

CONCLUSIONS OF LAW

1. Zeigler Coal Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. United Mine Workers of America is a labor organization within the meaning of Section 2(5) of the Act.

3. All warehousepersons employed at the Employer's Zeigler Mine #11, *EXCLUDING* office clerical and professional employees, storekeeper,

guards and supervisors as defined in the Act, and all other employees, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since December 31, 1980, 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 February 2, 1981, 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 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, Zeigler Coal Company, Coulterville, Illinois, 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 Mine Workers of America as the exclusive bargaining representative of its employees in the following appropriate unit:

> All warehousepersons employed at the Employer's Zeigler Mine #11, *EXCLUDING* office clerical and professional employees, storekeeper, guards and supervisors as defined in the Act, and all other employees.

(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 mining facility in Coulterville, Illinois, Zeigler Mine #11, copies of the attached notice marked "Appendix."[5] Copies of said notice, on forms provided by the Regional Director for Region 14, 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 14, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

[5] 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 United Mine Workers of America 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 warehousepersons employed at the Employer's Zeigler Mine #11, *EXCLUDING* office clerical and professional employees,

storekeeper, guards and supervisors, as defined in the Act, and all other employees.

ZEIGLER COAL COMPANY