J-Wood/A Tappan Division *and* Amalgamated Clothing and Textile Workers Union, AFL-CIO-CLC. Case 6-CA-14781

September 17, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

Upon a charge filed on August 3, 1981, by Amalgamated Clothing and Textile Workers Union, AFL-CIO-CLC, herein called the Union, and duly served on J-Wood/A Tappan Division, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 6, issued a complaint on September 30, 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 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 that on March 24, 1981, following a Board election in Case 6-RC-8788, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[1] and that, on or about May 26, 1981, Respondent unilaterally changed the work hours of the unit employees without providing prior notice to the Union and without affording the Union an opportunity to negotiate and bargain as the exclusive representative of Respondent's employees. On October 8, 1981, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On April 23, 1982, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on April 29, 1982, 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 an answer to the Motion for Summary Judgment which has been considered as a response to the Notice To Show Cause for purposes of this proceeding.

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 complaint, Respondent admits its refusal to bargain with the Union, but denies that the Union is the properly certified exclusive collective-bargaining representative of the employees in the unit described below.

Our review of the record herein, including the record in Case 6-RC-8788, reveals that on June 6, 1980, the Union filed a petition seeking to represent certain employees of Respondent. The parties executed a Stipulation for Certification Upon Consent Election which was approved by the Regional Director for Region 6 on July 3, 1980.

On August 8, 1980, a secret-ballot election was conducted among Respondent's employees in the following appropriate unit:

> All production and maintenance employees, including truckdrivers and group leaders employed by Respondent at its J-Wood Division located in Milroy, Pennsylvania; excluding office clerical employees, watchmen and guards, professional employees and supervisors as defined in the Act.

The tally of ballots was 32 for, and 31 against, the Union.[2] On August 15, 1980, Respondent timely filed objections to conduct affecting the results of the election, alleging in substance that: (1) employees were subjected to threats of reprisal by the Union and/or its agents unless they voted for the Union, and (2) the Union distributed a letter to Respondent's employees in which the level of support for the Union at another employer's facility was materially misrepresented, thereby violating the standards set forth in *Hollywood Ceramics Company, Inc.*, 140 NLRB 221 (1962), and *General Knit of California, Inc.*, 239 NLRB 619 (1978). On December 3, 1980, after a complete investigation of the objections, the Regional Director for Region 6 issued a Report on Objections in which he recommended that the Board overrule the objections and certify the Union. On December 16, 1980, Respondent filed exceptions to the Regional Director's report in which it contended, *inter alia*, that a hearing on the objections was warranted. On

[1] Official notice is taken of the record in the representation proceeding, Case 6-RC-8788, 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 *I.T.T. 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] There were no challenged or void ballots.

March 24, 1981, the Board adopted the Regional Director's findings and recommendations and certified the Union as the exclusive collective-bargaining representative of the employees in the unit described above.[3]

In support of its "Answer to Motion for Summary Judgment," Respondent merely reiterates the contentions which it raised in Case 6-RC-8788, and admits that the Regional Director and the Board have previously ruled on those contentions.

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.[5] 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

At all times material herein, Respondent, an Ohio corporation, with an office and place of business located in Milroy, Pennsylvania, has been engaged in the manufacture and nonretail sale of custom kitchen cabinets, bathroom vanities, and shelving. During the 12-month period ending August 31, 1981, which period is representative of its operations during all times material hereto, Respondent, in the course and conduct of its business operations, sold and shipped from its Milroy, Pennsylvania, facility products, goods, and materials valued in excess of $50,000 directly to points outside the Commonwealth of Pennsylvania.

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

Amalgamated Clothing and Textile Workers Union, AFL-CIO-CLC, 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 production and maintenance employees, including truckdrivers and group leaders employed by Respondent at its J-Wood Division located in Milroy, Pennsylvania; excluding office clerical employees, watchmen and guards, professional employees and supervisors as defined in the Act.

2. The certification

On August 8, 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 6, designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the exclusive collective-bargaining representative of the employees in the unit described above on March 24, 1981, and the Union continues to be such exclusive representative within the meaning of Section 9(b) of the Act.

B. *Respondent's Refusal To Bargain*

On or about May 26, 1981, Respondent unilaterally, without notice to the Union, changed the work hours of the employees in the unit described above.

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[3] Not reported in bound volumes of Board Decisions.

[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).

[5] In making this finding, we note the recent Third Circuit Court of Appeals decision in *N.L.R.B.* v. *ARA Services, Inc.*, 678 F.2d 435 (1982), in which the court ruled that the Board erred in failing to conduct an evidentiary hearing on the employer's objection to an election which raised substantial and material factual issues, and which *prima facie* warranted setting aside the election. Even assuming, *arguendo*, that the facts alleged in Respondent's objections herein are true, including the allegation that employee William Ross served on the plant organizing committee, we do not believe that the facts presented by Respondent establish a *prima facie* case for setting aside the election. Specifically as to the objection involving the alleged threats of reprisals, there is insufficient evidence to find, *prima facie*, that the employees who allegedly made the threatening statements were agents of the Union. See *Firestone Steel Products Company, a Division of Firestone Tire and Rubber Company*, 235 NLRB 548 (1978). In this context, we cannot conclude that the alleged threats created such an atmosphere of fear or violence as to have impaired the employees' freedom of choice in the election. Accordingly, we reiterate that Respondent's objection fails to raise a substantial and material factual issue. We similarly find no merit in the objection related to the allegedly misleading letter.

Accordingly, we find that Respondent has, since May 26, 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.[6]

In order to ensure 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:

[6] We note that, even though the complaint alleges only that Respondent violated the Act by unilaterally changing its employees' work hours without giving notice to and bargaining with the Union, our Order, consistent with our broad remedial authority under the Act, will direct that Respondent shall bargain with the Union with respect to rates of pay, wages, hours, and all other terms and conditions of employment. See *V. Pangori & Sons, Inc., etc.*, 248 NLRB 405 (1980).

Further, we note that, by letter dated May 5, 1981, Respondent, in response to the Union's request for bargaining, declined to bargain with the Union.

CONCLUSIONS OF LAW

1. J-Wood/A Tappan Division is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Amalgamated Clothing and Textile Workers Union, AFL-CIO-CLC, is a labor organization within the meaning of Section 2(5) of the Act.

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

> All production and maintenance employees, including truckdrivers and group leaders employed by Respondent at its J-Wood Division located in Milroy, Pennsylvania; excluding office clerical employees, watchmen and guards, professional employees and supervisors as defined in the Act.

4. Since March 24, 1981, 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 unilaterally changing, without prior notice to or bargaining with the Union, the work hours of the employees in the unit described above, 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 action, 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, J-Wood/A Tappan Division, Milroy, Pennsylvania, 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 Amalgamated Clothing and Textile Workers Union, AFL-CIO-CLC, as the exclusive bargaining representative of its employees in the following appropriate unit:

All production and maintenance employees, including truckdrivers and group leaders employed by Respondent at its J-Wood Division located in Milroy, Pennsylvania; excluding office clerical employees, watchmen and guards, professional employees and supervisors as defined in the Act.

(b) Unilaterally changing, without prior notice to or bargaining with the Union, the work hours of the employees in the unit described above.

(c) 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) 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, or other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Upon request by the Union, rescind the unlawful changes made in employee work hours on May 26, 1981, and reinstate the work hours which were in effect before such unlawful changes were made.

(c) Post at its Milroy, Pennsylvania, facility copies of the attached notice marked "Appendix."[7] Copies of said notice, on forms provided by the Regional Director for Region 6, 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 ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 6, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

[7] 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."

We are of the opinion that the policies of the Act will best be served if the notice that Respondent is required to sign and post also includes an introductory paragraph explaining to employees their rights under the Act, and by what process their rights have been upheld.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Amalgamated Clothing and Textile Workers Union, AFL-CIO-CLC, as the exclusive representative of the employees in the following appropriate bargaining unit:

All production and maintenance employees, including truckdrivers and group leaders employed by us at our J-Wood Division located in Milroy, Pennsylvania; excluding office clerical employees, watchmen and guards, professional employees and supervisors as defined in the Act.

WE WILL NOT unilaterally change the work hours of our employees in the bargaining unit described above.

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.

WE WILL, upon request by the Union, rescind the changes made in employee work hours on or about May 26, 1981, and reinstate the work hours which were in effect before such unlawful changes were made.

J-WOOD/A TAPPAN DIVISION