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265 NLRB No. 114

D--9553
Hicksville, NY

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

WE TRANSPORT, INC.,
TOWNE BUS CORP.

and

Case 29--CA--9850--2

LOCAL LODGE 447, INTERNATIONAL
ASSOCIATION OF MACHINISTS AND
AEROSPACE WORKERS, AFL--CIO

DECISION AND ORDER

Upon a charge filed on July 21, 1982, by Local Lodge 447, International Association of Machinists and Aerospace Workers, AFL--CIO, herein called the Union, and duly served on We Transport, Inc., Towne Bus Corp., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 29, issued a complaint on August 17, 1982, 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 in substance that on June 29, 1982, following a Board

election in Case 29--RC--5672, 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 July 27, 1982, 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 August 25, 1982, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On September 1, 1982, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on September 10, 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 a 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.

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[1] Official notice is taken of the record in the representation proceeding, Case 29--RC--5672, 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.

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

Ruling on the Motion for Summary Judgment [2]

In his Motion for Summary Judgment, the General Counsel argues that Respondent has not raised an issue which is properly litigable in an unfair labor practice proceeding and merely seeks to relitigate issues in the representation case already decided by the Board.

In its response to the Notice To Show Cause, Respondent raises the argument, not raised in the representation proceeding, that the presumption of a single-location unit should not apply to its operations because it is providing a public service and New York State policy prohibits fragmentation of bargaining units among employees engaged in providing such public services. Respondent further contends that the General Counsel has not sustained its burden of proving that a single-location unit excluding drivers is appropriate.

Our review of the record herein, including the record in Case 29--RC--5672, discloses that the Regional Director for Region 29 issued a Decision and Direction of Election on April 26, 1982. Thereafter, Respondent filed a request for review of

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[2] Respondent has moved that the Board suspend processing its Notice To Show Cause pending a final determination of the merits of the charges in Case 29--CA--9965 filed by the Union alleging additional violations by Respondent of Sec. 8(a)(1), (3), (4), and (5). Respondent contends that such a deferral is necessary to ''prevent duplicative and piecemeal litigation.'' The General Counsel opposes Respondent's motion, stating that Respondent's contention is without merit since there are no litigable issues presented in this case. Respondent's motion is denied.

the Regional Director's Decision and Direction of Election, and the Board, on May 24, 1982, denied the request for review on the ground that it raised no substantial issues warranting review. An election was conducted on May 28, 1982. The tally of ballots showed 14 votes cast for, and 4 votes against, the Union, with 3 challenged ballots. On June 29, 1982, the Regional Director for Region 29 issued a Certifiction of Representative, certifying the Union as the collective-bargaining representative of the unit found appropriate.

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.[3]

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 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.

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[3] 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).

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

Findings of Fact

I. The Business of Respondent

Respondent is a New York corporation with a principal office and place of business at 42 East Carl Street, Hicksville, New York, and a place of business at 260 North Third Avenue, Bay Shore, New York, where it is engaged in providing school bus transportation. In the course and conduct of its business operations, Respondent purchases and receives at its facilities fuel, oil, tires, and parts valued in excess of $50,000 directly from points outside the State of New York.

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

Local Lodge 447, International Association of Machinists and Aerospace Workers, AFL--CIO, 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 full-time and regular part-time mechanics, mechanics helpers, body men, body men helpers, pump boys and parts men employed by the Respondent at its facilities located at 42 East Carl Street, Hicksville, excluding all other employees, bus drivers, office clerical employees, guards and supervisors as defined in the Act.

2. The certification

On May 28, 1982, 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 29, 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 June 29, 1982, 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 July 12, 1982, 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 July 27, 1982, 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 July 27, 1982, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of

> All full-time and regular part-time mechanics, mechanics helpers, body men, body men helpers, pump boys and parts men employed by the Respondent at its facilities located at 42 East Carl Street, Hicksville, excluding all other employees, bus drivers, office clerical employees, guards and supervisors as defined in the Act.

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On May 28, 1982, 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 29, 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 June 29, 1982, 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

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Accordingly, we find that Respondent has, since July 27, 1982, 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 We Transport, Inc., Towne Bus Corp., 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. We Transport, Inc., Towne Bus Corp., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local Lodge 447, International Association of Machinists and Aerospace Workers, AFL--CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time mechanics, mechanics helpers, body men, body men helpers, pump boys and parts men employed by Respondent at its facilities located at 42 East Carl Street, Hicksville, New York, excluding all other employees, bus drivers, office clerical 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 June 29, 1982, 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 July 27, 1982, 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, We Transport, Inc., Towne Bus Corp., Hicksville, New York, 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 Local Lodge 447, International Association of Machinists and Aerospace Workers, AFL--CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

All full-time and regular part-time mechanics, mechanics helpers, body men, body men helpers, pump boys and parts men employed by the Respondent at its facilities located at 42 East Carl Street, Hicksville, excluding all other employees, bus drivers, office clerical 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 Hicksville, New York, office copies of the attached notice marked ''Appendix.''[4] Copies of said notice, on

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[4] 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.''

> All full-time and regular part-time mechanics, mechanics helpers, body men, body men helpers, pump boys and parts men employed by the Respondent at its facilities located at 42 East Carl Street, Hicksville, excluding all other employees, bus drivers, office clerical 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 Hicksville, New York, office copies of the attached notice marked ''Appendix.''[4] Copies of said notice, on

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forms provided by the Regional Director for Region 29, 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 29, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D.C. December 15, 1982

John R. Van de Water, Chairman

John H. Fanning, Member

Don A. Zimmerman, 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

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Local Lodge 447, International Association of Machinists and Aerospace Workers, 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 full-time and regular part-time mechanics, mechanics helpers, body men, body men helpers, pump boys and parts men employed by the Employer at its facilities located at 42 East Carl Street, Hicksville, excluding all other employees, bus drivers, office clerical employees, guards and supervisors as defined in the Act.

WE TRANSPORT, INC., TOWNE BUS CORP.

(Employer)

Dated ---------- By ----------
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 16 Court Street, Fourth Floor, Brooklyn, New York 11241, Telephone 212--330--2862.