

267 NLRB No. 17

DJZ

D--9988
Fort Payne, AL

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

THE HEIL CO.

and

Case 10--CA--18816

UNITED STEELWORKERS OF
AMERICA, AFL--CIO

DECISION AND ORDER

Upon a charge filed on 16 December 1982 by United Steelworkers of America, AFL--CIO, herein called the Union, and duly served on The Heil Co., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Acting Regional Director for Region 10, issued a complaint on 30 December 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 9 November 1982 following a Board election in Case 10--RC--12463 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 29 November 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 10 January 1983 Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint. Respondent by way of an affirmative defense stated that the Union does not represent an uncoerced majority of the employees in the appropriate unit and that the election conducted on 10 September 1982 was unfairly affected by the conduct of the Union and its agents. Respondent further contends that its refusal to bargain is based on a good-faith doubt that the Union represents an uncoerced majority of Respondent's employees in the bargaining unit set forth below.

On 18 February 1983 counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on 28 February 1983 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

¹ Official notice is taken of the record in the representation proceeding, Case 10--RC--12463, 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.

Chairman Dotson did not participate in Case 10--RC--12463.

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.

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. Respondent denies, however, that it thereby violated Section 8(a)(5) and (1) of the Act, arguing that the Board improperly certified the Union. Respondent asserts that the Union does not represent an uncoerced majority of the employees in the appropriate unit and the election was 'unfairly' affected by conduct of the Union and its agents. Respondent asserts that its refusal to bargain is based on a good-faith doubt that the Union represents an uncoerced majority of its employees in the bargaining unit. Accordingly, it argues that the election should be set aside and a new election ordered. Further, if there is any question as to the factual basis for setting aside the election, the Employer requests a hearing to resolve affirmatively the issues. The General Counsel contends that Respondent is attempting to relitigate issues which were or could have been litigated in the related representation proceeding. We agree with the General Counsel.

Review of the record herein, including the record in Case 10--RC--12463, shows that, pursuant to a Stipulation for Certification Upon Consent Election approved by the Acting Regional Director on 30 July 1981, an election was conducted on 10 September 1981. The tally was 116 for, and 92 against, the Union; there were no challenged ballots. Respondent filed objections to conduct affecting the election on 16 September 1981. On 16 December 1981 the Acting Regional Director issued his Report on Objections recommending Respondent's objections be overruled and the Union be certified. The Board on 9 November 1982 issued its Decision and Certification of Representative wherein it adopted the Acting Regional Director's recommendations.² In its response to the Notice To Show Cause, Respondent contends that the certification is invalid because the Union injected religious bias into the election, made threats of physical harm, loss of jobs, positions and/or work function, and improperly offered to waive initiation fees.³ Respondent also

² We find no merit in Respondent's contention that the Union's certification is invalid, inter alia, because we retroactively applied Midland National Life Insurance Company, 263 NLRB No. 24 (1982). We have, in accordance with our usual practice, applied our new policy not only "to the case in which the issue arises," but also to "all pending cases in whatever stage." Deluxe Metal Furniture Company, 121 NLRB 995, 1006--07 (1958); and Midland National Life Insurance Co., supra at fn. 24.

As noted in the underlying representation case, Member Jenkins dissented in Midland National, but nonetheless would overrule Respondent's objection relating to the alleged misrepresentations on the standard set forth in General Knit of California, Inc., 239 NLRB 619 (1978).

³ N.L.R.B. v. Savair Manufacturing Company, 414 U.S. 270 (1973).

argues that a hearing should be held to resolve the issues. The sole issue raised by Respondent in its answer to the complaint is the validity of the certification in Case 10--RC--12463. Thus, it appears that Respondent is attempting to raise herein issues which were or could have been litigated in the prior representation case.

With respect to Respondent's contention that in certifying the Union the Board failed to review all of the evidence submitted to the Acting Regional Director, we note the Board has addressed this issue of the completeness of the record in representation cases in Summa Corporation d/b/a Frontier Hotel, 265 NLRB No. 46, sl. op., p. 3 (1982), in which it cited its newly revised regulation Section 102.69(g)(1)(ii), providing,

[T]he record in objections cases where no hearing is held consists of the objections which were filed, the regional director's report or decision, all documentary evidence, except statements of witnesses, relied upon by the regional director in his report or decision, any briefs or other legal memorandums submitted by the parties, and any other motions, rulings, or orders of the regional director.

It is clear, therefore, that failure to transmit statements of witnesses to the Board with the record in the representation case does not mean that the record before the Board was incomplete and does not invalidate the subsequent certification. Accordingly, we find without merit this contention of Respondent.

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, and deny Respondent's request for a hearing.

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 Wisconsin corporation with an office and place of business located at Fort Payne, Alabama, where it is engaged in the manufacture of refuse collection equipment. Respondent, during the past calendar year, which period is representative of all times material herein, sold and shipped from its Fort Payne,

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).

Alabama, facility finished products valued in excess of \$50,000 directly to customers located outside the State of Alabama.

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 Steelworkers of America, 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 production and maintenance employees employed by Respondent at its Fort Payne, Alabama, facility, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

2. The certification

On 10 September 1981 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 10, 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 9 November 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 24 November 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 29 November 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 29 November 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 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 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:

Conclusions of Law

1. The Heil Co. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. United Steelworkers of America, AFL--CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees employed by Respondent at its Fort Payne, Alabama, facility, but excluding all office clerical employees, professional 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 9 November 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 29 November 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, The Heil Co., Fort Payne, Alabama, 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 Steelworkers of America, AFL--CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

All production and maintenance employees employed by The Heil Co. at its Fort Payne, Alabama, facility, but excluding all office clerical employees, professional 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 Fort Payne, Alabama, facility copies of the attached notice marked "'Appendix.'"⁵ Copies of said notice, on forms provided by the Regional Director for Region 10, 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.

(c) Notify the Regional Director for Region 10, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D.C.

9 August 1983

Donald L. Dotson, Chairman

Howard Jenkins, Jr., Member

Don A. Zimmerman, Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD

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 Steelworkers 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 employed by us at our Fort Payne, Alabama, facility, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

THE HEIL CO.

(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, Marietta Tower, Suite 2400, 101 Marietta Street NW., Atlanta, Georgia 30323, Telephone 404--221--2886.