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267 NLRB No. 171

D--9954
Senatobia and
Clarksdale, MS

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

PEPSI-COLA BOTTLING COMPANY
OF COLUMBUS

and

Case 26--CA--10141

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN AND HELPERS OF
AMERICA, LOCAL 1196

DECISION AND ORDER

Upon a charge filed on 24 March 1983¹ by International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 1196, herein called the Union, and duly served upon Pepsi-Cola Bottling Company of Columbus, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 26, issued a complaint on 4 April 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.

¹ Unless otherwise indicated, all dates refer to 1983.

With respect to the unfair labor practices, the complaint alleges in substance that on 8 February, following a Board election in Case 26--RC--6543,² the Union was duly certified as the exclusive collective-bargaining representative of the employees of Mid-South Beverages, Inc., in the unit found appropriate; that Respondent is the successor corporation to Mid-South for the purposes of the Act; and that, commencing on or about 11 March, 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 17 April Respondent filed its answer to the complaint and thereafter, on 20 May, its amended answer, admitting in part, and denying in part, the allegations in the complaint, and raising certain 'affirmative defenses.'

On 7 June counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on 16 June, 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.

² Official notice is taken of the record in the representation proceeding, Case 26--RC--6543, 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); Inertype 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.

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 amended answer, Respondent, a successor employer,³ admits that it has refused to bargain with the Union, but alleges as an affirmative defense that the unit herein is inappropriate. Specifically, Respondent submits that because account managers and sales trainers, who it contends are supervisors, were included in the unit, the certification of the Union as the exclusive bargaining representative of the employees was improper.

Our review of the record, including Case 26--RC--6543, reveals that, on 13 December 1982, the Union filed a petition seeking to represent certain employees of Mid-South Beverages, Inc., the predecessor to Respondent. The Union sought a unit that would include account managers and sales trainers. Mid-South asserted, inter alia, that all account managers and sales

³ Respondent admits in its answer that it is a successor, and the record does not indicate any substantial change in the nature of the operations or the employee complement at each facility.

trainers were supervisors and, accordingly, they should be excluded from the unit. Following a hearing, the Regional Director for Region 26 issued his Decision and Direction of Election in which he found that the employees in question were not supervisors within the meaning of Section 2(11) of the Act.

On 21 January Mid-South filed with the Board a request for review of the Regional Director's decision. In accord with Section 102.67(g) of the National Labor Relations Board Rules and Regulations, Series 8, as amended, and pending a decision on the request for review, an election was held on 10 February. The tally of ballots reveals that of approximately 20 eligible voters 11 votes were cast for, and 9 against, the Union. There were no challenged ballots. Thereafter, on 18 February the Regional Director certified the Union as the exclusive representative of Mid-South's employees. Subsequently, on 5 April the Board denied Mid-South's request for review as raising no substantial issues warranting review.

The record in the instant case establishes further that on 14 February the Union formally requested that Mid-South recognize it and engage in collective bargaining. Mid-South refused, stating that it believed the designated unit was inappropriate because it included supervisors and advised the Union that, in any event, Respondent would soon succeed it as the employer. On 28 February following certification but before the Board's denial of the request for review, the Union sent a letter to Respondent's president requesting that Respondent commence bargaining. On 5 March Respondent purchased the assets of Mid-

South and began operating the Senatobia and Clarksdale facilities. Thereafter, by letter dated 11 March, Respondent replied that it refused to recognize and bargain with the Union because "the certified unit is inappropriate as it contains supervisory personnel."

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.

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).

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

Findings of Fact

I. The Business of Respondent

Respondent Pepsi-Cola Bottling Company of Columbus, a corporation with offices and places of business in Senatobia and Clarksdale, Mississippi, is engaged in the bottling of soft drinks. Based on its operations since on or about 5 March 1983, when it commenced operations, Respondent, in the course and conduct of its business, will annually sell and ship from its Senatobia and Clarksdale, Mississippi, facilities products, goods, and materials valued in excess of \$50,000 directly to points outside the State of Mississippi, and will annually purchase and receive at these facilities products, goods, and materials valued in excess of \$50,000 directly from points outside the State.

Respondent admits and 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

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 1196, 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:

Delivery merchandisers, unloaders, warehousemen, vending mechanics, account managers and sales trainers employed at Respondent's Senatobia and Clarksdale, Mississippi, facilities, excluding office clericals, guards and supervisors as defined by the Act.

2. The certification

On 10 February 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 26, 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 18 February 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 5 March 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 11 March, 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 11 March, 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 Pepsi-Cola Bottling Company of Columbus, 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. Pepsi-Cola Bottling Company of Columbus is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 1196, is a labor organization within the meaning of Section 2(5) of the Act.
3. Delivery merchandisers, unloaders, warehousemen, vending mechanics, account managers and sales trainers employed at the Employer's Senatobia and Clarksdale, Mississippi, facilities, excluding office clericals, 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 18 February 1983, 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 11 March 1983, 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, Pepsi-Cola Bottling Company of Columbus, Senatobia and Clarksdale, Mississippi, 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 International Brotherhood of Teamsters, Chauffeurs,

Warehousemen and Helpers of America, Local 1196, as the exclusive bargaining representative of its employees in the following appropriate unit:

Delivery merchandisers, unloaders, warehousemen, vending mechanics, account managers and sales trainers employed at the Employer's Senatobia and Clarksdale, Mississippi, facilities, excluding office clericals, guards and supervisors as defined by 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 Matthews Drive, Senatobia, Mississippi, facility and its Clarksdale, Mississippi, facility copies of the attached notice marked "'Appendix.'"⁵ Copies of said notice, on

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.'"

forms provided by the Regional Director for Region 26, 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 26, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D.C. 26 August 1983

Howard Jenkins, Jr., Member

Don A. Zimmerman, Member

Robert P. Hunter, 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 International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 1196, 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:

Delivery merchandisers, unloaders,
warehousemen, vending mechanics, account
managers and sales trainers employed at the
Employer's Senatobia and Clarksdale,
Mississippi, facilities, excluding office
clericals, guards and supervisors as defined
by the Act.

PEPSI-COLA BOTTLING COMPANY OF COLUMBUS

(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, Mid-Memphis Tower Building, Suite 800, 1407 Union Avenue, P.O. Box 41559, Memphis, Tennessee 38104, Telephone 901--521--2687.