

JZH

267 NLRB No. 54

D--9921  
Terre Haute, IN

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

MODERN ALBUM OF INDIANA, INC.

and

Case 25--CA--15460

UNITED PAPERWORKERS INTERNATIONAL  
UNION, AFL--CIO, CLC

DECISION AND ORDER

Upon a charge filed on 18 April 1983 by United Paperworkers International Union, AFL--CIO, CLC, herein called the Union, and duly served on Modern Album of Indiana, Inc., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 25, issued a complaint on 20 April 1983 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 <sup>1</sup> and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

-----  
<sup>1</sup> In its answer to the complaint and Notice To Show Cause, Respondent claims that it is without knowledge of being served with a copy of the charge filed by the Union. In its Motion for Summary Judgment, counsel for the General Counsel asserts that Respondent's "'without knowledge'" answer is dilatory in nature. In support of this contention, counsel (continued)

With respect to the unfair labor practices, the complaint alleges that on 16 December 1982, following a Board election in Case 25--RC--7617, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;<sup>2</sup> and that, commencing on or about 31 March 1983, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive collective-bargaining representative of its employees, although the Union has requested and is requesting it to do so. Respondent timely filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On 9 May 1983 counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment with exhibits attached. Subsequently, on 11 May 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 should not be granted. Respondent thereafter filed a "Motion in Opposition to General Counsel's Motion for Summary Judgment."

-----  
<sup>1</sup> for the General Counsel attached a copy of a cover letter, affidavit of service, and signed certified mail receipt showing that Respondent received a copy of the Union's charge and other materials on 19 April 1983. As Respondent offers nothing in support of its bare assertion, we specifically find that Respondent was duly served a copy of the charge.

<sup>2</sup> Official notice is taken of the record in the representation proceeding, Case 25--RC--7617, 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.

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 "Motion in Opposition to the General Counsel's Motion for Summary Judgment," Respondent admits it refused the Union's request to bargain with it as the exclusive bargaining representative of a unit comprised of Respondent's production and maintenance employees. In defense of its conduct, Respondent contests the validity of the Union's certification as the employees' exclusive collective-bargaining representative issued by the National Labor Relations Board. Respondent contends that in Case 25--RC--7617 the Board erred by directing the Regional Director to open and count certain determinative challenged ballots. Respondent continues to assert that the challenged ballots were cast by employees on layoff status who had no reasonable expectancy of being recalled in the foreseeable future. Thus, Respondent contends, the employees were ineligible to vote in the election. The General Counsel asserts that Respondent improperly seeks to relitigate issues which were raised and decided in the underlying representation case. We agree with the General Counsel.

A review of the record, including the record in Case 25--RC

--7617, reveals that the Union filed a petition for an election on 18 February 1981. Pursuant to a Stipulation for Certification Upon Consent Election, an election by secret ballot was conducted on 8 April 1981 among the employees in the following appropriate unit:

All production and maintenance employees employed by the Employer at its Terre Haute, Indiana, facility, including all shipping employees, all receiving employees, all warehouse employees, all truck drivers, and all laid off employees from the above classifications who have a reasonable expectation of recall and reemployment; but excluding all office clerical employees, all professional employees and all guards and supervisors as defined in the Act.

The tally of ballots served on the parties at the conclusion of the election shows that of approximately 48 eligible voters, 46 cast ballots, of which 19 were cast for, and 19 were cast against, the Petitioner; there were 8 challenged ballots, a sufficient number to affect the results of the election. There were no void ballots.

After an investigation of the challenged ballots, the Regional Director issued a Report and Order directing a hearing on 10 July 1981 to resolve the challenged ballots. Prior to the hearing the parties resolved four of the challenged ballots; however, the four unresolved challenged ballots remained determinative. On 16 July 1982 the Hearing Officer issued a Report on Challenged Ballots and Recommendation to the Board recommending that the challenged ballots be opened and counted.

On 12 August 1982 Respondent timely filed exceptions to the Hearing Officer's report on challenged ballots. In its exceptions, Respondent argues that the Hearing Officer erred in

recommending that the challenges to the ballots at issue herein be overruled.

The Board, on 1 December 1982, issued a Decision and Direction in Case 25--RC--7617 in which it adopted the Hearing Officer's findings and recommendations, and directed that the Regional Director for Region 25 open and count the challenged ballots.<sup>3</sup> On 10 December 1982, pursuant to the above-mentioned Board Decision and Direction, the challenged ballots were opened and counted and a revised tally of ballots was duly served on the parties. The revised tally of ballots shows that, of 46 valid cast ballots, 25 were cast for, and 21 were cast against, the Union. On 16 December 1982 the Regional Director for Region 25 issued a Certification of Representative which certified the Union as the exclusive collective-bargaining representative of all employees in the appropriate unit described above.

Commencing on or about 4 March 1983, and continuing to date, the Union has requested, and is requesting, Respondent to bargain collectively with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment as the exclusive collective-bargaining representative of the employees of Respondent in the appropriate unit. By letter dated 31 March 1983 Respondent refused, and continues to refuse, to recognize and/or bargain with the Union. In its "Motion in Opposition to the General Counsel's Motion for Summary Judgment," Respondent stated that it "does not deny its continued refusal to bargain collectively" with the Union, but continues to contest the

---

<sup>3</sup> Not published in bound volumes of Board Decisions.

validity of the challenged ballots. It thus appears that Respondent is attempting to raise issues in the present case which were raised in the underlying representation case.

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.<sup>4</sup>

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

At all times material herein, Respondent, an Indiana corporation, with an office and place of business located in Terre Haute, Indiana, has been engaged in the manufacture and

---

<sup>4</sup> 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).

sale of record album covers. During the past year, which period is representative of its operation during all times material herein, Respondent, in the course and conduct of its business operations, has sold and distributed at its facility products valued in excess of \$50,000 which were shipped from said facility directly to States other than the State of Indiana.

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 Paper Workers International 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 employed by the Employer at its Terre Haute, Indiana, facility, including all shipping employees, all receiving employees, all warehouse employees, all truck drivers, and all laid off employees from the above classifications who have a reasonable expectation of recall and reemployment; but excluding all office clerical employees, all professional employees and all guards and supervisors as defined in the Act.

## 2. The certification

On 8 April 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 25 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 16 December 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 8 April 1981 and continuing to date, 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 31 March 1983 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 31 March 1983 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. Modern Album of Indiana, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. United Paperworkers International Union, AFL--CIO, CLC, is a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees employed by the Employer at its Terre Haute, Indiana, facility, including all shipping employees, all receiving employees, all warehouse employees, all truck drivers, and all laid off employees from the above classifications who have a reasonable expectation of recall and reemployment; but excluding all office clerical employees, all professional employees and all 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 16 December 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 31 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, Modern Album of Indiana, Inc., Terre Haute, Indiana, 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 Paperworkers International Union, AFL--CIO, CLC, as the exclusive bargaining representative of its employees in the following appropriate unit:

All production and maintenance employees employed by the Employer at its Terre Haute, Indiana, facility, including all shipping employees, all receiving employees, all warehouse employees, all truck drivers, and all laid off employees from the above classifications who have a reasonable expectation of recall and reemployment; but excluding all office clerical employees, all professional employees and all 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 Terre Haute, Indiana, facility copies of the attached notice marked "'Appendix.'"<sup>5</sup> Copies of said notice, on forms provided by the Regional Director for Region 25, 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.

-----  
<sup>5</sup> 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.

(c) Notify the Regional Director for Region 25, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D.C.

24 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

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The 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 United Paperworkers International Union, AFL--CIO, CLC, 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 the Employer at its Terre Haute, Indiana, facility, including all shipping employees, all receiving employees, all warehouse employees, all truck drivers, and all laid off employees from the above classifications who have a reasonable expectation of recall and reemployment; but excluding all office clerical employees, all professional employees and all guards and supervisors as defined in the Act.

MODERN ALBUM OF INDIANA, INC.

-----  
(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, Federal Building, Room 232, 575 North Pennsylvania Street, Indianapolis, Indiana 46204, Telephone 317--269--7413.