

Nabisco, Inc. and Union de Tronquistas de Puerto Rico, Local 901, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 24-CA-4752

26 August 1983

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS
JENKINS AND ZIMMERMAN

Upon a charge filed on 17 February 1983 by Union de Tronquistas de Puerto Rico, Local 901, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union, and duly served on Nabisco, Inc., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Acting Regional Director for Region 24, issued a complaint on 28 February 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 and the 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 15 December 1982, following a Board election in Case 24-RC-6744, 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 10 February 1983, 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 14 March 1983 Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On 22 March 1983 counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on 29 March 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 an opposition to granting summary judgment.

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 opposition to granting summary judgment, Respondent contends that it has no obligation to bargain because the Union's certification is invalid due to the Board's improper overruling of its objections in the underlying representation proceeding. It further argues that in affidavits it has raised substantial and material issues warranting a hearing on its Objections 1 and 3. In support of this contention, Respondent resubmits affidavits it had submitted to the Acting Regional Director and to the Board in the underlying representation case. It also cites, *inter alia*, *NLRB v. Claxton Mfg. Co.*, 613 F.2d 1364 (5th Cir. 1980), modified 618 F.2d 396, and argues that a hearing is required because these affidavits *prima facie* establish that the Union engaged in objectionable conduct; thus, the Acting Regional Director may not *ex parte* resolve conflicts between this evidence and evidence he discovered in his investigation. The General Counsel argues that Respondent is attempting to relitigate issues in the underlying representation case and that all material issues have been previously considered. We agree with the General Counsel.

Our review of the record herein, including the record in Case 24-RC-6744, establishes that pursuant to a Stipulation for Certification Upon Consent Election, an election was conducted on 30 July 1982. The tally was 21 for, and 17 against, the Union, with no challenged ballots. Respondent timely filed objections to the conduct affecting the results of the election, alleging: (1) violence and threats committed by employees, third parties, and agents of the Petitioner destroyed the laboratory conditions of the election; (2) the Petitioner circulated among the eligible voters handbills with false inflammatory statements and material factual misrepresentations with no adequate opportunity to reply; and (3) the Board agent conducting the election created confusion among the voters by permitting persons not wearing the prescribed identification to sit as observers. On 17 September 1982, after investigation, the Acting Regional Director for Region 24 issued a Report and Recommendations on Objections in which he recommended that Respondent's objections be overruled in their entirety and that the Union be certified. On 28 Sep-

¹ Official notice is taken of the record in the representation proceeding, Case 24-RC-6744, 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.

tember 1982 Respondent filed exceptions to the Acting Regional Director's report and on 15 December 1982 the Board issued its Decision and Certification of Representative, in which it adopted the Acting Regional Director's findings and recommendations, found no substantial or material issues warranting a hearing, and certified the Union.

In light of the above, we find no merit in Respondent's contention that *Claxton Mfg. Co.*, *supra*, and other decisions, require that a hearing be directed because it allegedly has presented evidence which *prima facie* establishes that the Union engaged in objectionable conduct. The Board considered not only Respondent's objections and exceptions (which included a request for a hearing), but also all the evidence which Respondent purports establishes the *prima facie* showing, namely, the affidavits it submitted to the Acting Regional Director and, appended to its exceptions, to the Board. The Board specifically found that no substantial or material issue had been raised.² Respondent does not offer to adduce any evidence beyond that submitted for the Board's earlier consideration, and we, therefore, conclude that Respondent's contention that a hearing is required has already been litigated and rejected.

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, 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.⁴ Accordingly, we grant the Motion for Summary Judgment.⁵

² Cf. *Erie Coke & Chemical Co.*, 261 NLRB 25 (1982), in which the Board replied to the criticism in *Claxton Mfg.*, *supra*, and directed a hearing on the basis of substantial and material factual issues.

³ See *Pittsburgh Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

⁴ Chairman Dotson did not participate in the underlying representation proceeding.

⁵ In its answer to the complaint, Respondent denies the allegations of the request and refusal to bargain. However, attached to the General Counsel's Motion for Summary Judgment are copies of correspondence between the Union and Respondent. By letter dated 21 December 1982 the Union requested commencement of negotiations. Respondent's letter of 10 February 1983 acknowledged receipt of the Union's request and stated that, with respect to the unit of salesmen, Respondent intended to legally question before the Federal courts the validity of the Union's certification. Respondent has submitted nothing to controvert these docu-

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

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent, a New Jersey corporation with a major office and place of business at State Road #2, Km. 16.9, Barrio Candelario, Hato Tejas, Toa Baja, Commonwealth of Puerto Rico, and other places of business located in Caguas and Mayaguez, Commonwealth of Puerto Rico, is engaged in the wholesale and distribution of food products. During the 12 months preceding issuance of the complaint herein, a representative period, Respondent, in the course and conduct of its business, purchased and caused to be transported and delivered to its Hato Tejas, Cajas, and Mayaguez, Puerto Rico, places of business food products and other goods and materials valued in excess of \$50,000, of which goods and materials valued in excess of \$50,000 were transported and delivered to its places of business in interstate commerce directly from points and places located outside the Commonwealth of Puerto Rico.

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

Union de Tronquistas de Puerto Rico, Local 901, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, 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 salesmen and salesmen trainees employed by the Employer at its facilities located in Hato Tejas, Caguas and Mayaguez, Puerto Rico; but excluding, all other employees,

ments or their contents. Accordingly, we deem these allegations of the complaint to be true. *The May Department Stores Co.*, 186 NLRB 86, fn. 3 (1970), enf. denied on other grounds 454 F.2d 148 (9th Cir. 1972); *Carl Simpson Buick*, 161 NLRB 1389, 1391 (1966), enf. 395 F.2d 191 (9th Cir. 1968).

office clerical employees, guards and supervisors as defined in the Act.

2. The certification

On 30 July 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 24, 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 15 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 21 December 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 10 February 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 10 February 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 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 Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), *enfd.* 328 F.2d 600 (5th Cir. 1964), *cert. denied* 379 U.S. 817; *Burnett Construction Co.*, 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. Nabisco, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Union de Tronquistas de Puerto Rico, Local 901, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. All salesmen and salesmen trainees employed by the Employer at its facilities located in Hato Tejas, Caguas and Mayaguez, Puerto Rico; but excluding all other employees, 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 15 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 10 February 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 en-

gaged 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, Nabisco, Inc., Hato Tejas, Caguas, and Mayaguez, Puerto Rico, 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 Union de Tronquistas de Puerto Rico, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive bargaining representative of its employees in the following appropriate unit:

All salesmen and salesmen trainees employed by the Employer at its facilities located in Hato Tejas, Caguas and Mayaguez, Puerto Rico; but excluding all other employees, 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 facilities in Hato Tejas, Caguas, and Mayaguez, Puerto Rico, copies of the attached notice marked "Appendix."⁶ Copies of said notice,

⁶ 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."

on forms provided by the Regional Director for Region 24, 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 24, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

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 Union de Tronquistas de Puerto Rico, Local 901, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, 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 salesmen and salesmen trainees employed by us at our facilities, located in Hato Tejas, Caguas and Mayaguez, Puerto Rico; but excluding all other employees, office clerical employees, guards and supervisors as defined in the Act.

NABISCO, INC.