

268 NLRB No. 175

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D--1404
Hauppauge, NY

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

HAMILTON TEST SYSTEMS, NEW YORK, IN

and

Case 29--CA--10362

LOCAL 804, DELIVERY AND WAREHOUSE WORKERS

DECISION AND ORDER

Upon a charge filed on 23 March 1983 by Local 804, Delivery and Warehouse Workers, herein called the Union, and duly served on Hamilton Test Systems, New York, Inc., herein called the Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 29, issued a complaint on 27 April 1983 against the Respondent, alleging that the 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 26 January 1983, following a Board election in Case 29--RC--

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5632, the Union was duly certified as the exclusive collective-bargaining representative of the Respondent's employees in the unit found appropriate;¹ and that, commencing on or about 7 March 1983, and at all times thereafter, the 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 2 May 1983 the Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On 20 June 1983 counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on 29 June 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. The Respondent thereafter filed a response to the Notice to Show Cause and opposition to the Motion for Summary Judgment.

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:

¹ Official notice is taken of the record in the representation proceeding, Case 29--RC--5632, 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, 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.

Ruling on the Motion for Summary Judgment

In its answer to the complaint and its response to the Notice to Show Cause and opposition to Motion for Summary Judgment, the Respondent admits its refusal to recognize and bargain with the Union but attacks the Union's certification contending that because the Board modified the description of the unit subsequent to the election, and because all field service representatives and customer service supervisors were improperly excluded from the bargaining unit, the Board should reconsider its decision in Case 29--RC--5632. The Respondent also contends that the Board's modification of the unit in this case reflects a failure properly to apply Board precedent. In her Motion for Summary Judgment, counsel for the General Counsel alleges that the Respondent seeks to relitigate issues considered in the underlying representation case and that there are no factual issues warranting a hearing.

Our review of the record in this case, including the record in Case 29--RC--5632, reveals that after a hearing the Regional Director issued his Decision and Direction of Election on 12 March 1982, and erratum to that decision on 15 March 1982, in which he found that the appropriate unit consisted of all full-time and regular part-time crib attendants, truckdrivers, technicians, field service representatives, and field service supervisors, employed by the Respondent at its facility located at 360 Oser Avenue in Hauppauge, New York; excluding all other employees, office clerical employees, bookkeepers, secretaries, accountants, guards and supervisors as defined in the Act. On 26 March 1982 the Respondent filed with the Regional Director a petition for reconsideration of the Regional Director's Decision and Direction of Election and to reopen the record and filed with the Board a request for review of the Regional Director's Decision and Direction of Election. By a letter dated 6 April 1982 the Union filed a response to the

Respondent's petition. On 13 April 1982 the Regional Director issued an order reopening the record for further hearing and notice of hearing to address the issue of whether a single or multilocation unit would be appropriate for the employees.

After further hearing pursuant to the reopened record, the Regional Director issued a Supplemental Decision and Direction of Election on 28 May 1982, and an erratum to the supplemental decision on 4 June 1982, in which he again found the appropriate unit consisted of all full-time and regular part-time crib attendants, truckdrivers, technicians, field service representatives, and field service supervisors employed by the Respondent at its facility located at 360 Oser Avenue in Hauppauge, New York; excluding all other employees, office clerical employees, bookkeepers, secretaries, accountants, guards and supervisors as defined in the Act.

On 29 June 1982 the Respondent and the Union, independently, filed timely requests for review of the Regional Director's Supplemental Decision and Direction of Election. The Union's request for review was granted and the Respondent's request for review was denied on 25 June 1982. In accordance with the Supplemental Decision and Direction of Election, an election was conducted on 25 June 1982, and the ballots were impounded pending resolution of the Union's request for review. On 2 December 1982 the Board issued a Decision on Review and Direction² in which it reversed the Regional Director's Supplemental Decision and Direction of Election and found that the appropriate unit consisted of all full-time and regular part-time crib attendants, truckdrivers, and technicians employed by the Employer at its facility located at 360 Oser Avenue, in Hauppauge, New York; excluding all other employees,

² 265 NLRB No. 85. Chairman Dotson and Member Hunter were not members of the panel that issued the Decision on Review and Direction but accept the findings for institutional reasons.

office clerical employees, bookkeepers, secretaries, accountants, guards and supervisors as defined in the Act, and directed the Regional Director to open and count the impounded ballots in the appropriate unit. On 13 December 1982 the impounded ballots were opened and a revised tally of ballots furnished the parties showed six votes cast for, and four against, the Union. There were no challenged ballots.

The Respondent filed timely objections to the election arguing that the Board's order granting review of the Regional Director's Supplemental Decision and Direction of Election was not received by it until the day of the election and that this influenced the result of the election; and that the Board's Decision on Review and Direction which modified the description of the unit subsequent to the election misled the employees and affected the election to such a degree that it should be set aside.

On 27 January 1983 the Regional Director issued his Supplemental Decision and Certification of Representative in which he overruled the objections in their entirety. The Respondent filed a timely request for review of the Regional Director's Supplemental Decision and Certification of Representative reiterating the contentions it made in its objections to the election. The Union filed a reply to the Respondent's request for review. The request for review was denied on 28 February 1983 by telegraphic order of the Board.

On or about 2 March 1983 the Union, by letter, requested, and is continuing to request, the Respondent to bargain collectively with it as the exclusive collective-bargaining representative of the Respondent's employees in the unit described above. By letter dated 7 March 1983 the Respondent informed the Union that in order to obtain a review of the Board's action by an appellate court, the Respondent was refusing to bargain with the Union and

invited the Union to file an unfair labor practice charge against the Respondent.

In its answer to the complaint in this case, the Respondent admits that it has refused and is continuing to refuse to recognize and bargain with the Union for the purpose of collective bargaining, and denies that the Regional Director's certification of the Union as the exclusive collective-bargaining representative of its employees is valid. It further denies that the unit described above is an appropriate unit. Further, in its answer to the complaint the Respondent asserts as affirmative defenses the same claims it made in its objections to the election and request for review. It thus appears that the 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.³

All issues raised by the Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and the 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

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

representation proceeding.⁴ We therefore find that the 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 the Respondent

The Respondent is and has been at all times material herein a Delaware corporation with its principal office and place of business at 360 Oser Avenue, Hauppauge, New York, where it is engaged in the business of supplying and servicing computerized emissions analyzers to New York auto test service stations pursuant to contracts with nine counties in the State of New York. During the 12 months preceding 27 April 1983, a representative period, the Respondent purchased and received at its New York offices goods and material valued in excess of \$50,000, of which products valued in excess of \$50,000 were shipped to its New York offices in interstate commerce directly from States other than the State of New York.

We find, on the basis of the foregoing, that the 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.

⁴ The Respondent has requested oral argument. This request is denied as the record and the pleadings adequately present the issues and the positions of the parties.

II. The Labor Organization Involved

Local 804, Delivery and Warehouse Workers, 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 the 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 crib attendants, truckdrivers and technicians employed by Hamilton Test Systems, New York Inc. at its facility located at 360 Oser Avenue in Hauppauge, New York; excluding all other employees, office clerical employees, bookkeepers, secretaries, accountants, guards and supervisors as defined in the Act.

2. The certification

On 25 June 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 the Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on 26 January 1983 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 2 March 1983 and at all times thereafter, the Union has requested the 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 7 March 1983, and continuing at all times thereafter to date, the 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 the Respondent has, since 7 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, the 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 the 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 the 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.

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 the 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. Hamilton Test Systems, New York, Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. Local 804, Delivery and Warehouse Workers, is a labor organization within the meaning of Section 2(5) of the Act.
3. All full-time and regular part-time crib attendants, truckdrivers and technicians employed by Hamilton Test Systems, New York, Inc. at its facility located at 360 Oser Avenue in Hauppauge, New York; excluding all other employees, office clerical employees, bookkeepers, secretaries, accountants, 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 26 January 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 7 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 the Respondent in the appropriate unit, the 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 the 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

The National Labor Relations Board orders that the Respondent, Hamilton Test Systems, New York, Inc., 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 804, Delivery and Warehouse Workers, as the exclusive bargaining representative of its employees in the following appropriate unit:

All full-time and regular part-time crib attendants, truckdrivers and technicians employed by Hamilton Test Systems, New York Inc. at its facility located at 360 Oser Avenue in Hauppauge, New York; excluding all other employees, office clerical employees, bookkeepers, secretaries, accountants, 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) On request, bargain with the Union 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 Hauppauge, New York facility copies of the attached notice marked "'Appendix.'"⁵ Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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

Dated, Washington, D.C.

27 February 1984

Donald L. Dotson, Chairman

Don A. Zimmerman, Member

Robert P. Hunter, Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD

⁵ If 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 Local 804, Delivery and Warehouse Workers, 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 you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on 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 crib attendants, truckdrivers and technicians employed by Hamilton Test Systems, New York Inc. at its facility located at 360 Oser Avenue in Hauppauge, New York; excluding all other employees, office clerical employees, bookkeepers, secretaries, accountants, guards and supervisors as defined in the Act.

HAMILTON TEST SYSTEMS, NEW YORK, 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, 16 Court Street, Fourth Floor, Brooklyn, New York 11241, Telephone 212--330--2862.