

**King Wholesale, Inc. and International Longshoremen's Association, AFL-CIO. Case 5-CA-15978**

30 April 1984

**DECISION AND ORDER**

BY CHAIRMAN DOTSON AND MEMBERS  
ZIMMERMAN AND HUNTER

Upon a charge filed by the Union 28 November 1983, the General Counsel of the National Labor Relations Board issued a complaint 5 December 1983 against the Company, the Respondent, alleging that it has violated Section 8(a)(5) and (1) of the National Labor Relations Act.

The complaint alleges that on 2 August 1983, following a Board election in Case 5-RC-11576, the Union was certified as the exclusive collective-bargaining representative of the Company's employees in the unit found appropriate. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g), amended Sept. 9, 1981, 46 Fed.Reg. 45922 (1981); *Frontier Hotel*, 265 NLRB 343 (1982).) The complaint further alleges that since 23 August 1983 and 16 November 1983 the Company has refused to furnish the Union with certain information necessary to the Union's performance as bargaining representative, and, since 16 November 1983, the Company has refused to bargain with the Union although the Union has requested and is requesting it to do so. On 15 December 1983 the Company filed its answer to the complaint and on 23 December 1983 filed an amended answer admitting in part and denying in part the allegations in the complaint.

On 3 January 1984 the General Counsel filed a Motion for Summary Judgment, with exhibits attached. The Company filed a response to the motion. On 11 January 1984 the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Company then filed an amended response and cross-motion for summary judgment and/or hearing. The General Counsel filed a response to the Company's cross-motion. The Union also filed a separate response to the Company's cross-motion.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

**Ruling on the General Counsel's Motion for Summary Judgment and the Company's Cross-Motion for Summary Judgment and/or Hearing**

The Company's amended answer admits its refusal to bargain but attacks the validity of the Union's certification on the basis of its Objections 1 and 2 to the election in the representation proceeding. Inter alia, it claims the Board erred in overruling its Objection 2 after a hearing and that it erred in overruling its Objection 1 without a hearing have been held. In its amended response, it further claims that certain recent Board and court decisions necessitate a hearing on that objection. It also argues that the Board should have considered an affidavit of a labor consultant to the Company which the Company had submitted in its exceptions to the Acting Regional Director's report. The Company further asserts a defense that, after the election, the employees directed a letter to the Board stating that they did not wish to be represented by the Union and that, therefore, it is questionable whether representation by the Union reflects the choice of the Company's current employees. The General Counsel argues that all material issues have been previously decided. We agree with the General Counsel.

The record, including the record in Case 5-RC-11576, reveals that an election was held 10 September 1981 pursuant to a Stipulated Election Agreement. The tally of ballots shows that, of approximately 18 eligible voters, 12 cast valid ballots for and 6 cast ballots against the Union; there were no challenged ballots. On 17 September 1981 the Company filed objections that (1) the Union threatened illegal secondary activity during a strike to put the Company out of business and indicated it could take economic reprisals against employees who did not support the Union and/or a strike; and (2) that a union representative promised at a meeting to waive initiation fees but only for those employees who signed authorization cards at that meeting.

On 4 November 1981 the Acting Regional Director issued a Report on Objections recommending that the Company's first objection be overruled and that the Company's second objection be set for hearing. Regarding the first objection, the Acting Regional Director found that, if the version of facts submitted by the Company were accepted as accurate, nonetheless those facts did not establish that the Union was threatening illegal secondary activity as alleged. The Company filed exceptions to the report. On 20 April 1982 the Board issued its Decision and Order Directing Hearing (not report-

ed in Board volumes) recommended by the Acting Regional Director on Objection 2 but it overruled Objection 1. Further, the Board refused to consider the affidavit and its attachment which the Company had appended to its exceptions regarding Objection 1 because the Company had not served a copy of the affidavit on the Union and therefore had not complied with Section 102.69(c) of the Board's Rules and Regulations.

Thereafter, the Company filed with the Board a motion for reconsideration regarding the exclusion of the affidavit and, on 10 May 1982, the Board denied the motion. Thereafter, a hearing was held on Objection 2 and, on 14 June 1982, the hearing officer issued his report recommending that the objection be overruled and that a Certification of Representative be issued. The Company then filed exceptions to this report and the Union filed a brief in opposition. On 30 September 1982 the Board issued a Supplemental Decision, Order and Direction of Second Election in which it rejected the hearing officer's recommendation and instead sustained the objection, and directed a second election.<sup>1</sup> The Union then filed a motion for reconsideration and the Company filed a brief in opposition. On 2 August 1983 the Board issued its Decision on Reconsideration, Order, and Certification of Representative in which it granted the motion for reconsideration; overruled the objection; and certified the Union as the collective-bargaining representative for the unit involved.<sup>2</sup> Subsequently, the Company filed a "Motion for Reconsideration En Banc" and requested oral argument. The Union filed a letter in opposition. The Board denied the motion on 27 October 1983.

By letters dated 11 August and 3 November 1983 the Union requested the Company to bargain about terms and conditions of employment and to furnish certain information to it. The information sought was an updated list of the names and addresses of employees in the unit. By letter dated 16 November 1983 the Company acknowledged receipt of the bargaining demand and stated that "we reject your demand and deny your request to bargain." Regarding the request for the employee list, the Company indicated that it would supply that list only if the Union would use it to verify that, on 4 February 1982, the Company had received a

letter from its employees saying they no longer wanted the Union as their representative.<sup>3</sup>

It is well settled that in the absence of newly discovered and 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 that were or could have been litigated in a prior representation proceeding. 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.

All issues raised by the Company were or could have been litigated in the prior representation proceeding. The Company does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to re-examine the decision made in the representation proceeding. Further, there are no factual issues regarding the Union's request for information because the Company's letter on 23 August 1983 did not supply this information and by its letter of 16 November 1983 the Company admitted that it refused to furnish the information insofar as the Union's request was for the purpose of commencing negotiations. We therefore find that the Company has not raised any issue that is properly litigable in this unfair labor practice proceeding.<sup>4</sup> Ac-

<sup>3</sup> In its answer to the complaint, the Company denied the allegations concerning the Union's sending of the August and November 1983 letters and the Company's responses to them. But the Company has not disputed the authenticity of the various letters appended to the General Counsel's Motion for Summary Judgment which detail the Union's various requests to bargain and the Company's refusals. Moreover, in its amended answer, the Company admits it has refused the Union's request to bargain in order to test the certification.

<sup>4</sup> As noted regarding Objection 1, the Company again urges the Board to consider an affidavit of a company representative submitted with the exceptions it filed to the Acting Regional Director's report. That affidavit is accompanied by another, unsigned and undated, affidavit allegedly of an employee who heard the union representatives make objectionable statements relating to Objection 1. We note that, although the Company's representative allegedly obtained the information averred in the affidavit on 16 September 1981 (which was prior to the issuance of the Acting Regional Director's report), it was not until after the Acting Regional Director's report issued that the Company prepared and submitted the company representative's document to the Board. Thus, the affidavit could not have been considered because neither it nor the employee statement was timely submitted to the Regional Director for due consideration. *Frontier Hotel*, supra. Further, in its Decision and Order Directing Hearing, the Board refused to consider the affidavit inasmuch as the Company refused to serve a copy on the Union in contravention of Sec. 102.69(c) of the Board's Rules and Regulations. We reaffirm that ruling.

The Company's reliance on certain recent Board and court decisions as dictating the need for a hearing on Objection 1 (see, e.g., *Home & Industrial Disposal Service*, 266 NLRB 100 (1983); *Holladay Corp.*, 266 NLRB 621 (1983); and *NLRB v. Triplex Mfg. Co.*, 701 F.2d 703 (7th Cir. 1983)) is misplaced. In *Home & Industrial Service*, the Board was concerned with union threats of unlawful activity to be taken during a strike. Here, as the Acting Regional Director noted, the evidence viewed in the light most favorable to the Employer showed no threat of unlawful activity. Thus, there was no need for a hearing. In *Holladay Corp.*, the Board reversed the regional director who had conducted no investigation despite formally being presented with a specific hearsay affidavit. Here, the Company's

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<sup>1</sup> 264 NLRB No. 118 (Sept. 30, 1982) [vacated by 266 NLRB 1163 (1983)].

<sup>2</sup> 266 NLRB 1163. The Board concluded that, read in context, the alleged unlawful statements by a union representative did not violate the rule announced by the Supreme Court in *NLRB v. Savair Mfg. Co.*, 414 U.S. 270 (1973).

cordingly we grant the General Counsel's Motion for Summary Judgment and deny the Company's Cross-Motion for Summary Judgment and/or Hearing.

On the entire record, the Board makes the following

## FINDINGS OF FACT

### I. JURISDICTION

The Company, a Virginia corporation, is engaged in the wholesale warehousing and distribution of beer and related products at its facility in Chantilly, Virginia, where in the year preceding issuance of the complaint it had gross revenues in excess of \$500,000 and purchased goods and products valued over \$50,000 directly from outside the State. We find that the Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

### II. ALLEGED UNFAIR LABOR PRACTICES

#### A. *The Certification*

Following the election held 10 September 1981 the Union was certified 2 August 1983 as the collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time driver-salesmen employed by the Company at its Chantilly, Virginia facility, but excluding all other employees, warehousemen, office clerical employees, professional employees, guards and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

#### B. *Refusal to Bargain*

On 11 August 1983 and 3 November 1983 the Union requested the Company to bargain and to supply it with information relevant to its collective-bargaining responsibilities. On 23 August 1983 the Company refused to supply the requested information and on and since 16 November 1983 the Com-

affidavit was not submitted to the Acting Regional Director although it could have been. Hence *Holladay Corp.* is inapposite. In *NLRB v. Triplex Mfg. Co.*, the court found that the employer had presented a prima facie case of election impropriety and that the regional director was in error in overruling the objections. Here, however, the Acting Regional Director found no prima facie showing of unlawful conduct had been made.

Lastly, we reject the conclusion that the alleged employee petition of 4 February 1982 warrants denial of the General Counsel's Motion for Summary Judgment. As we have found the election was valid, the alleged employee petition, filed only 5 months after the election, may not be considered. *Brooks v. NLRB*, 348 U.S. 96 (1954).

pany has refused to bargain generally and to supply the requested information. We find that the refusal to bargain and to supply the requested information constitute an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

## CONCLUSIONS OF LAW

By refusing on and after 23 August 1983 to supply relevant requested information, and from on and after 16 November 1983 to supply relevant requested information and to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Company has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

## REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement, and to provide the Union, on request, information necessary for collective bargaining.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *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 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

## ORDER

The National Labor Relations Board orders that the Respondent, King Wholesale, Inc., Chantilly, Virginia, its officers, agents, successors, and assigns, shall

### 1. Cease and desist from

(a) Refusing to bargain with International Longshoremen's Association, AFL-CIO, as the exclusive bargaining representative of the employees in the bargaining unit.

(b) Refusing to supply relevant requested information to the Union.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement, and provide the Union, on request, information necessary for collective bargaining:

All full-time and regular part-time driver-salesmen employed by the Company at its Chantilly, Virginia facility, but excluding all other employees, warehousemen, office clerical employees, professional employees, guards and supervisors as defined in the Act.

(b) Post at its facility in Chantilly, Virginia, copies of the attached notice marked "Appendix."<sup>5</sup> Copies of the notice, on forms provided by the Regional Director for Region 5, 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 the Respondent has taken to comply.

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<sup>5</sup> 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

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with International Longshoremens's Association, AFL-CIO, as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT refuse to supply relevant requested information to the Union.

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 Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

All full-time and regular part-time driver-salesmen employed by the Company at its Chantilly, Virginia facility, but excluding all other employees, warehousemen, office clerical employees, professional employees, guards and supervisors as defined in the Act.

WE WILL, on request, furnish the Union, as it requested in its 11 August and 3 November 1983 letters, the information that is relevant and necessary to its role as the exclusive bargaining representative of the employees in the bargaining unit.

KING WHOLESALE, INC.