

Newly Weds Foods, Inc. and Local 348, Bakery, Confectionery and Tobacco Workers International Union, AFL-CIO. Case 1-CA-21427

30 April 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS
ZIMMERMAN AND HUNTER

Upon a charge filed by the Union 29 September 1983, the General Counsel of the National Labor Relations Board issued a complaint 31 October 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 9 September 1983, following a Board election in Case 1-RC-17754, 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 14 September 1983 the Company has refused to bargain with the Union. On 14 November 1983 the Respondent filed its answer admitting in part and denying in part the allegations in the complaint.

On 16 December 1983 the General Counsel filed a Motion for Summary Judgment. On 22 December 1983 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 Respondent filed a response.

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

Ruling on Motion for Summary Judgment

In its answer to the complaint the Respondent admits the Union's request to bargain and the Respondent's refusal, but attacks the validity of the Union's certification on the basis of its continuing dispute of the eligibility of challenged voter Donald McPherson. In addition, the Respondent urges that a hearing is necessary to determine whether the employee turnover since the 2 December 1982 election presents special circumstances relieving the Respondent of its bargaining obligation.

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 Respondent were or could have been litigated in the prior representation proceeding. The Respondent 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 reexamine the decision made in the representation proceeding.¹ We therefore find that the Respondent has not raised any issue that is properly litigable in this unfair labor practice proceeding. Accordingly we grant the Motion for Summary Judgment.²

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a Delaware corporation which manufactures food coatings and related products at its facility in Watertown, Massachusetts, where it annually purchases goods valued in excess of \$50,000 directly from points located outside the Commonwealth of Massachusetts. We find that the Respondent 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 2 December 1982 the Union was certified 9 September 1983 as the collective-bargaining representative of the employees in the following appropriate unit:

All regular full-time and all regular part-time production and maintenance employees at the Employer's 80 Grove Street, Watertown, Massachusetts facility, including panko, blending, bread line, sanitation, janitors, shipping, receiving, and truck drivers, but excluding all other

¹ Employee turnover since the election does not affect the validity of the certification. *Gunton Co.*, 227 NLRB 1875, 1876 (1977). Member Hunter rejects the Respondent's contention that a hearing is warranted based on its assertion of employee turnover in the unit. In so doing, he finds that even accepting the Respondent's assertion as true, the turnover here would not constitute extraordinary circumstances sufficient to warrant the withholding of a bargaining order based on the Union's certification. See *Vitek Electronics*, 268 NLRB 522 fn. 4 (1984).

² Chairman Dotson did not participate in the underlying representation proceeding.

employees, including office clerical 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

Since 12 September 1983 the Union has requested the Respondent to bargain and since 14 September 1983 the Respondent has refused. We find that this refusal constitutes 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 14 September 1983 to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent 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.

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, Newly Weds Foods, Inc., Watertown, Massachusetts, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Local 348, Bakery, Confectionery and Tobacco Workers International Union of America, AFL-CIO, as the exclusive bargaining representative of the employees in the bargaining unit.

(b) 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:

All regular full-time and all regular part-time production and maintenance employees at the Employer's 80 Grove Street, Watertown, Massachusetts facility, including panko, blending, bread line, sanitation, janitors, shipping, receiving, and truck drivers, but excluding all other employees, including office clerical employees, guards and supervisors as defined in the Act.

(b) Post at its facility in Watertown, Massachusetts, copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 1, 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.

³ 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 Local 348, Bakery, Confectionery and Tobacco Workers International Union, AFL-CIO, as the exclusive representative of the employees in the bargaining unit.

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 regular full-time and all regular part-time production and maintenance employees at the Employer's 80 Grove Street, Watertown, Mas-

sachusetts facility, including panko, blending, bread line, sanitation, janitors, shipping, receiving, and truck drivers, but excluding all other employees, including office clerical employees, guards and supervisors as defined in the Act.

NEWLY WEDS FOODS, INC.