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271 NLRB No. 163

D--2063
Cleveland, OH

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

FIRST UNION MANAGEMENT, INC.

and

Case 8--CA--16773

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 589, 589A, 589B, AND 589C, AFL-CIO

DECISION AND ORDER

Upon a charge filed by the Union 27 May 1983, the General Counsel of the National Labor Relations Board issued a complaint 7 July 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 11 May 1983, following a Board election in Case 8--RC--12810, 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 May 1983 the Company has refused to bargain with the Union. On 28 July 1983 and 9 April 1984 the Company filed an answer and an amended answer [1] admitting in part and denying in part the allegations in the complaint.

[1] The Company's amended answer was accompanied by a Motion for Leave to Amend Answer. The Board in its Notice to Show Cause acknowledged receipt of the amended answer without expressly ruling on the motion, which is hereby granted.

On 16 April 1984 the General Counsel filed a Motion for Summary Judgment. On 3 May 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 filed a consolidated brief in opposition to, and a motion to strike a portion of the General Counsel's brief in support of, the Motion for Summary Judgment.[2]

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

Ruling on Motion for Summary Judgment

The Company's amended answer admits that a majority of the unit employees selected the Union as their bargaining representative in the Board-conducted election held 15 April 1983, but denies both that the unit is appropriate and that the election is valid. It further admits that since about 23 May 1983 it has refused, by telephone, the Union's request for information about the unit employees and its request to recognize or bargain with the Union. 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 8--RC--12810, reveals that the Company filed a request for review of the Regional Director's Decision and Direction of Election of 18 March 1983 in which he found that two company locations constituted an appropriate unit and resolved a dispute involving the unit placement of four individuals by including them in the unit. On 14 April

[2] The Company moved to strike the General Counsel's allegation in his brief relating to a telephonic request for recognition and refusal as being unsubstantiated on the record. We find it unnecessary to rule on this motion as we have not relied on the General Counsel's allegation, but rather on the Company's amended answer to the complaint, in ruling on the Motion for Summary Judgment.

1983 the Board denied the Company's request for review except that it permitted one of the four individuals to cast a challenged ballot in the election. The tally of ballots of the election shows that, of approximately 13 eligible voters, 7 cast valid ballots for and 5 against the Union; there was 1 challenged ballot, which was not sufficient to affect the results of the election. Thereafter, the Company filed objections to the election, which the Regional Director overruled in his Supplemental Decision and Certification of Representative that issued 11 May 1983. The Company subsequently filed a request for review of the supplemental decision, which the Board denied 1 July 1983.

By letter dated 16 May 1983 the Union requested that the Company recognize and enter into bargaining negotiations with it as the certified bargaining representative and furnish it with certain information concerning classifications, seniority, and other terms and conditions of employment of the unit employees. The Company's amended answer shows that it refused the Union's requests on the grounds that the certification is invalid.

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 reexamine the decision made in the representation proceeding. We therefore find that the Company has not raised any issue that is properly litigable in this unfair

labor practice proceeding. Accordingly we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

Findings of Fact

I. Jurisdiction

The Company, a Delaware corporation, is engaged in the business of managing for its customers commercial real estate, including, inter alia, facilities located at 55 Public Square and 601 Rockwell Avenue, Cleveland, Ohio, and receives gross revenues in excess of $500,000 which includes revenue derived from a television station and other business directly engaged in interstate commerce. 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 15 April 1983, the Union was certified 11 May 1983 as the collective-bargaining representative of the employees in the following appropriate unit:

> All full-time operating engineers, building maintenance employees, maintenance mechanics and painters employed by the Employer at its 55 Public Square and 601 Rockwell Avenue facilities in Cleveland, Ohio, excluding all office clerical employees, and all 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

Since 16 May 1983 the Union has requested the Company to bargain and furnish relevant information for bargaining, and since 23 May 1983 the Company 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 23 May 1983 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, as well as 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, First Union Management, Inc., Cleveland, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with International Union of Operating Engineers, Local 589, 589A, 589B, and 589C, 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, and provide the Union, on request, information necessary for collective bargaining:

> All full-time operating engineers, building maintenance employees, maintenance mechanics and painters employed by the Employer at its 55 Public Square and 601 Rockwell Avenue facilities in Cleveland, Ohio, excluding all office clerical employees, and all professional employees, guards and supervisors as defined in the Act.

(b) Post at its facilities in Cleveland, Ohio, copies of the attached notice marked ''Appendix.''[3] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's autho-

[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.''

rized 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.

Dated, Washington, D.C. 15 August 1984

Donald L. Dotson, Chairman

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

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 Union of Operating Engineers, Local 589, 589A, 589B, and 589C, 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 full-time operating engineers, building maintenance employees, maintenance mechanics and painters employed by the Employer at its 55 Public Square and 601 Rockwell Avenue facilities in Cleveland, Ohio, excluding all office clerical employees, and all professional employees, guards and supervisors as defined in the Act.

WE WILL, on request, furnish the Union, as it requested in its 16 May 1983 letter, the information that is relevant and necessary to its role as the exclusive bargaining representative of the employees in the bargaining unit.

FIRST UNION MANAGEMENT, 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, Anthony J. Celebrezze Federal Building, 1240 East Ninth Street, Room 1695, Cleveland, Ohio 44199, Telephone 216--522--3733.